No. 15-6

In The
Supreme Court of the United States

MEDYTOX SOLUTIONS, INC.,
SEAMUS LAGAN and WILLIAM G. FORHAN,

Petitioners,

vs.

INVESTORSHUB.COM, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. The Petition Raises an Important Issue of Federal Preemption Law That Has Been the Subject of Conflicting Decisions by Lower Courts.

The Respondent's Brief in Opposition (the "Response") confirms that the Petition raises an issue of federal preemption law: whether the Communications Decency Act, 47 U.S.C. § 230, preempts an action seeking an injunction for the removal of libelous postings from an interactive computer service provider (an internet website). *See* Response at i.

Respondent does not dispute that this is an important question of federal law that has not been decided by this Court. *See* Sup. Ct. R. 10(c). Indeed, Respondent does not take issue with the contention that "[t]he decisions of the Florida courts have in essence condemned Petitioners – and all the victims of libelous postings published in the internet – to perpetual embarrassment and humiliation." *See* Petition at 8. Nor does the Respondent dispute that this is purely an issue of law devoid of any "factual findings" or allegations of "the misapplication of a properly stated rule of law." *See* Sup. Ct. R. 10. Quite the contrary, Respondent agrees that the asserted error in the Petition is the interpretation made by the Florida courts of the preemptive scope of Section 230. *See* Response at 3; 7-10 (arguing that Florida courts correctly interpreted the preemptive scope of Section 230).

However, instead of stipulating that the Court should take this opportunity to settle "such an important area of internet law," (Petition at 17), Respondent argues that "[t]here is no conflict and no basis for this Court to exercise jurisdiction" under Rule 10(b) of the Rules of the Supreme Court. *See* Response at 3. This argument misconstrues the scope of this Court's jurisdiction and ignores the fact that (i) Petitioners have identified a conflict and that (ii) Petitioners have raised an important question of federal law that has not been settled by this Court.

As Rule 10 itself makes clear, the list of reasons warranting the exercise of jurisdiction by this Court set forth in Rule 10 is not exhaustive "nor fully measuring [of] the Court's discretion." Rather, Rule 10 is intended to "indicate the character of the reasons the Court considers" in evaluating a Petition for Writ of Certiorari. Further, Respondent ignores that among the reasons identified in Rule 10 as warranting the exercise of this Court's discretion are both, decisions of "a state court of last resort [that] has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals" as well as decisions of a state court deciding "an important question of federal law that has not been, but should be, settled by this Court[.]" *See* Sup. Ct. R. 10(b)-(c). Both of these reasons justifying the exercise of this Court's discretionary jurisdiction are implicated in this Petition.

In their complaint, Petitioners requested, as their sole remedy, an injunction seeking the removal of statements that were subsequently found to be defamatory. This action was not based on Respondent's exercise of its discretion to publish or not to publish the subject statements. Instead, the request for injunctive relief was based on Respondent's collateral conduct of failing to remove the postings after being informed that such statements were defamatory.

Barnes v. Yahoo!, Inc., 570 F.3d 1096 (9th Cir. 2009), *as amended* (Sept. 28, 2009) and *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010) make clear that claims based on collateral conduct, as opposed to claims based on the primary conduct of publishing, are outside of the preemptive scope of Section 230. This reasoning has been followed by a number of courts. *See, e.g.*, *Doe v. Franco Productions*, No. 99 C 7885, 2000 WL 816779 (N.D. Ill. Jun. 22, 2000), *aff'd sub nom. Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003); *Mainstream Loudon v. Bd. of Trustees of Loudon County Library*, 2 F. Supp. 2d 783, 790 (E.D. Va. 1998) ("[D]efendants cite no authority to suggest that the 'tort-based' immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief.").

However, Florida courts, and particularly the Fourth District Court of Appeal, have followed the line of cases holding that Section 230 provides interactive computer service providers with a blanket immunity. The Fourth District Court of Appeal cited and summarized the decisions of other courts that

have similarly construed the preemptive scope of Section 230(e)(3) as follows:

> *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983-86 (10th Cir. 2000) (holding that section 230 immunized a computer service provider from a suit for damages and injunctive relief); *Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 540 (E.D.Va. 2003) ("Indeed, given that the purpose of § 230 is to shield service providers from legal responsibility for the statements of third parties, § 230 should not be read to permit claims that request only injunctive relief."); *Kathleen R. v. City of Livermore*, 87 Cal. App. 4th 684, 104 Cal. Rptr. 2d 772 (Cal. Ct. App. 2001) (section 230 barred all the plaintiff's state law claims, including those for injunctive relief, arising out of a city library's failure to restrict her minor son's access to sexually explicit Internet materials); *Smith v. Intercosmos Media Grp., Inc.*, 2002 WL 31844907, at *5 (E.D. La. Dec. 17, 2002) (concluding that section 230 provides immunity from claims for injunctive relief).

See Petition at 15-16.

As such, there is a conflict as to whether a party can seek an injunction compelling the host of a website – an interactive computer service provider – to remove defamatory postings uploaded by a third-party. This is an important question of law that this Court should settle.

II. Petitioners Do Not Seek a Prior Restraint on Speech.

Respondent suggests that the injunction sought by Petitioners as their sole remedy is an impermissible prior restraint on speech. *See* Response at 9, n.2. This argument has no legal support. Petitioners requested as their sole remedy a limited permanent injunction for the removal of specific statements that have been: (i) posted on the internet; (ii) have already been found to be defamatory; and (iii) have been requested to be taken down by the third-party poster.

An injunction ordering the removal of statements found to be defamatory is not a prior restraint on speech. *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390-91 (1973) (finding that injunction at issue was not unconstitutional prior restraint as the illegality of the expression enjoined had been judicially determined prior to the injunction being issued); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 903 (1st Cir. 1993) ("An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint."); *Lothschuetz v. Carpenter*, 898 F.2d 1200 (6th Cir. 1990) (upholding injunction enjoining statements that had been found to be false and libelous); *see also*, *Baker v. Kuritzky*, No. CA 12-10434-MLW, 2015 WL 1379987, at *5 (D. Mass. Mar. 25, 2015) (stating that "an order to remove specific statements

that the court finds to be libelous would not violate the First Amendment" in ordering removal of internet poster's defamatory statements); *Wagner Equip. Co. v. Wood*, 893 F. Supp. 2d 1157, 1162 (D.N.M. 2012) (collecting cases and adopting the "modern approach" in holding that "[b]ecause an injunction prohibiting a defendant from repeating a statement determined to be defamatory does not constitute a prohibited prior restraint of speech under the First Amendment, Plaintiff's claim seeking injunctive relief is not prohibited as a matter of law."); *N. Am. Recycling, LLC v. Texamet Recycling, LLC*, No. 2:08-CV-579, 2012 WL 3283380, at *1 (S.D. Ohio Aug. 10, 2012) ("First of all, preventing prior restraints is not, by itself, a sufficient reason for refusing to grant injunctive relief to prevent defamatory speech . . . [t]he Sixth Circuit [in *Lothschuetz*] approved injunctive relief in a defamation case to stop repeated defamation."); *Saadi v. Maroun*, No. 8:07-cv-01976-T-24-MAP, 2009 WL 3617788 (M.D. Fla. Nov. 2, 2009) (holding that a permanent injunction was appropriate for the removal of specific publications that had been found by the jury to be defamatory); *Balboa Island Vill. Inn, Inc. v. Lemen*, 156 P.3d 339 (Cal. 2007) (concluding that an injunction prohibiting speech already found defamatory by the trial court was not an invalid prior restraint).

In determining whether an injunction restraining defamation may be issued under the First Amendment, there is a significant distinction between

requests for preventive injunctive relief prior to trial and post-trial remedies to prevent repetition of statements judicially determined to be defamatory. *Id.* The constitutional problems of a prior restraint disappear once there has been a determination that the publication at issue is defamatory.

CONCLUSION

The Petition raises an important issue of federal preemption law, an issue that is certain to become more prevalent with each passing day as the number of defamatory postings in the internet continues to increase. The availability of injunctive relief to have such statements removed is unsettled and has been the subject of conflicting decisions about the preemptive scope of Section 230.

The Court should take the opportunity presented by this case to bring uniformity to the law and to make clear that the Communications Decency Act, 47 U.S.C. § 230, does not preempt an action seeking an injunction against an interactive computer service

provider for the removal of defamatory or libelous postings.

Respectfully submitted,

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