No. 19-

IN THE

Supreme Court of the United States

YASMEEN DANIEL, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ZINA DANIEL HAUGHTON,

Petitioner,

v.

ARMSLIST, LLC, AN OKLAHOMA LIMITED LIABILITY COMPANY, BRIAN MANCINI AND JONATHAN GIBBON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Communications Decency Act, 47 U.S.C. § 230's prohibition on treating providers of interactive computer services as publishers or speakers of third-party information posted on their sites, bar states from imposing civil liability on website owners or operators for their own design, content and conduct intended to facilitate and profit from tortious or criminal activity (as the Wisconsin Supreme Court, the First Circuit, and other courts have held), or does it bar only those claims that seek to impose liability on website owners or operators for third-party posts (like the Washington Supreme Court, and the Seventh and Ninth Circuits have held)?

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner Yasmeen Daniel, Individually, and as Special Administrator of the Estate of Zina Daniel Haughton, was the Plaintiff in the trial court, Appellant in the Wisconsin Court of Appeals, and the Respondent in the Wisconsin Supreme Court.

Travelers Indemnity Company of Connecticut, as Subrogee for Jalisco's LLC was an Intervening Plaintiff in the trial court.

Armslist, LLC, Brian Mancini and Jonathan Gibbon were the Defendants in the trial court, Respondents in the Wisconsin Court of Appeals, and the Petitioners in the Wisconsin Supreme Court.

Devin Linn, Broc Elmore, ABC Insurance Co., DEF Insurance Co., and Special Administrator Jennifer Valenti on behalf of the Estate of Radcliffe Haughton were Defendants in the trial court.

Progressive Universal Insurance Company was an Intervening Defendant in the trial court.

Daniel v. Armslist, LLC et al., Case No. 15-CV-8710, Wisconsin Circuit Court for Milwaukee County. Order entered November 28, 2016.

Daniel v. Armslist, LLC et al., Appeal No. 2017AP344, Court of Appeals of the State of Wisconsin. Decision filed April 19, 2018.

Daniel v. Armslist, LLC et al., No. 2017AP344,
Supreme Court of Wisconsin. Decision filed April 30, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yasmeen Daniel, Individually, and as Special Administrator of the Estate of Zina Daniel Haughton (collectively, "Petitioner" or "Yasmeen"), respectfully petitions for a writ of certiorari to review a final judgment of the Supreme Court of Wisconsin in this case.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 386 Wis.2d 449, 926 N.W.2d 710, and is included in the Appendix ("App.") A at 1a–42a. The opinion of the Wisconsin Court of Appeals is reported at 382 Wis.2d 241, 913 N.W.2d 211, and included at App. B at 43a-69a. The Wisconsin Circuit Court for Milwaukee County ruled on the motion to dismiss at issue here from the bench. *See* App. D at 73a-97a.

JURISDICTION

The Wisconsin Supreme Court entered judgment on April 30, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT STATUTORY PROVISIONS

The relevant statute is the Communications Decency Act of 1996 (CDA), 47 U.S.C. § 230, which appears in full at App. E at 98a-104a.

STATEMENT OF THE CASE

A. Facts

On October 18, 2012, after years of threats and violent abuse, Zina Daniel Haughton ("Zina") obtained a domestic abuse restraining order against her estranged husband, Radcliffe Haughton ("Haughton"). App. A at 3a, 32a. The order, issued by the Milwaukee County Circuit Court to protect Zina, prohibited Haughton from possessing a gun, and made him a "prohibited" firearms purchaser under federal and state criminal laws. *Id*; App. B at 47a, 51a-52a. But Haughton knew how to easily circumvent the law and the order. He went on the Internet and visited Armslist.com. App. A at 4a. Armslist.com is an online gun marketplace specifically designed to facilitate the illegal purchase of firearms by people like Haughton, who the law forbids from buying guns. App. A at 4a-6a. As intended by Armslist.com's negligent and intentional design features, Haughton found a person willing to sell him a gun, Devin Linn ("Linn"), and quickly and easily obtained a handgun and three high-capacity magazines in an all cash deal consummated in a McDonald's parking lot three days after the restraining order was issued. App. A at 4a-6a. The next day, Haughton used the gun he purchased via Armslist.com to murder Zina and two of her coworkers and wound four others before killing himself. App. A at 4a, 33a, 35a. Yasmeen Daniel is Zina's daughter, who was present when Haughton murdered her mother and was traumatized by the carnage she witnessed. App. A at 4a.

As alleged in the Complaint, Armslist[1] entered the online gun business to cater to the criminal gun market when companies like eBay and Craigslist stopped allowing online firearms sales, after recognizing that they were inconsistent with their obligation to follow federal law. App. A at 4a-6a, 34a-36a, App. B at 48a-51a. Armslist intentionally designed its site to facilitate the breaking and circumvention of gun laws, laws intended to prevent tragedies like those that killed Yasmeen Daniel's mother. *Id.* Intentionally creating a massive 24/7 online gun marketplace to supply and profit from gun sales to felons, domestic violence abusers, and others prohibited by federal law from buying or possessing guns, Armslist created and designed features, drafted its own terms posted on the site and engaged in other conduct specifically to attract prohibited persons and facilitate illegal sales and purchases. *Id.* Armslist did this by, *inter alia*, precluding the flagging of illegal sales (while allowing flagging for other reasons); allowing people to anonymously purchase guns without a background check; assuring users in its own posting that it would not check the legality of a sale; enabling prohibited purchasers to search only for sellers that did not check criminal backgrounds or keep records; and enabling sellers to identify themselves as "private sellers" (who do not check criminal records). *Id.* Armslist also affirmatively chose to design its site without features used by other sites that require users to register an account and to be transferred guns only by licensed dealers who submit purchasers to background checks. App. B at 50a-51a. Armslist's design features, *content it created*, enabled illegal gun buyers to buy guns without detection, and to evade federal and state laws, including

1. Defendants Armslist, LLC, Jonathan Gibbon and Brian Mancini are referred to collectively herein as "Armslist."

those requiring background checks, waiting periods, and restricting interstate and assault weapons sales. App. A at 4a-6a, 34a-36a; App. B at 47a-51a. Armslist is well aware that its website is a haven for illegal gun buyers and sellers that has resulted in death, but it has chosen to continue its anything-goes, guns-for-all (including criminals and domestic abusers) business model. *Id.*

B. Proceedings Below

Yasmeen commenced this personal injury and wrongful death case asserting eleven claims under Wisconsin tort law, including, *inter alia*, negligence, negligence *per se* – based on the violation of firearms laws – negligent infliction of emotional distress, civil conspiracy, aiding and abetting tortious conduct, public nuisance and wrongful death against Armslist. App. A at 6a. Yasmeen sought to impose liability on the owners and operators of Armslist.com for their own negligent and intentional creation of website features and content to facilitate illegal gun possession and sales, which foreseeably caused a person prohibited from buying guns to buy a gun and kill Yasmeen Daniel's mother. App. A at 34a-36a; App. B at 45a-52a, 60a-61a. Petitioner pointedly did not claim that Armslist should be liable for publishing Linn's ad, or be treated as a publisher or speaker of information provided by a third party. App. A at 37a-38a; App. B at 60a-61a, 63a. Indeed, Armslist could be liable even if, after creating its website, someone else had maintained or owned the website and published Linn's ad.

Armslist moved to dismiss for failure to state a claim, mostly contending that even if it could be liable under Wisconsin tort law, the Communications Decency Act, 47

U.S.C. § 230 (the "CDA"), barred Wisconsin courts from applying its tort law to grant Yasmeen a remedy.[2] App. A at 36a. The Milwaukee County Circuit Court granted Armslist's motion, holding that because Yasmeen's claims were "based on the website design," the CDA shielded Armslist, LLC and its owners Jonathan Gibbon and Brian Mancini from liability for their own conduct. App. D at 84a-96a; App. C at 72a (Order). Yasmeen timely appealed to the Wisconsin Court of Appeals.

The Wisconsin Court of Appeals reversed. App. B at 45a-46a. The Court held that the claims against Armslist are not barred because the CDA only protects website operators from being treated as a publisher or speaker of another's content, but does not prohibit liability for the website's own design and content or conduct. *Id.* As the Wisconsin Court of Appeals explained, "the allegations in the complaint, which are that Armslist used website design features to facilitate illegal firearms purchases, do not seek to hold Armslist liable on a theory prohibited by the Act." App. B at 46a. The Court of Appeals held that "the Act does not protect a website operator from liability that arises from its own conduct in facilitating user activity, as is the case here." *Id.* Using a plain language interpretation of the Act and applying federalism principles applicable to construing federal laws, the Court noted that "Armslist effectively ignores the Act's phrase 'publisher or speaker of any information provided by another.'" App. B at 45a-46a, 56a-59a, 61a-63a, 67a-68a.

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2. The Wisconsin Supreme Court did not address whether Armslist could be held liable under Wisconsin state tort law irrespective of the CDA. App. A. The trial court ruled that Yasmeen did not state a negligence *per se* claim against Armslist under Wisconsin law, but the Wisconsin Court of Appeals reversed and Armslist did not appeal that decision. App. B 45a-46a; App. A.

Largely without addressing the rationale of the Court of Appeals, including not mentioning federalism principles, the Wisconsin Supreme Court held that, as a matter of law, the CDA barred Wisconsin courts from holding Armslist liable for its own conduct and website design and content it created, regardless of whether Armslist intended its website to facilitate illegal gun sales. App. A at 9a-31a. The Court held (1) Yasmeen's claims "treated" Armslist as a "publisher" of third party content – that is, Linn's ad – because the duty underlying the claims derived from Armslist's "role as a publisher of firearm advertisements;" and (2) Armslist could not be deemed an "information content provider" because its design features were "neutral tools" that did not "materially contribute" to the illegality of Linn's advertisement. *Id.*

REASONS FOR GRANTING THE PETITION

The CDA is a critical statute that governs liability on the Internet, today's hub of commerce and communications. By its language, Section 230 would appear to do nothing to restrict tort liability for creating dangerous website design or content. Yet, according to the Supreme Court of Wisconsin, and several federal appeals courts, the CDA provides sweeping civil immunity. Under this reading of the CDA, a business (gunsforkillersandkids.com or illegaldrugs.com, say) that was intentionally created, designed and marketed to cause and profit from crime (from terrorism to drug trafficking to gun crimes) cannot be subjected to civil liability for its wrongful conduct so long as one of its acts was publication of a third-party post.

But Congress never enacted, or intended, such immunity. The relevant CDA provision merely states that: "[n]o provider or user of an interactive computer

service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id*. The CDA was enacted to promote "decency" on the Internet, mostly by shielding website providers from liability when they take responsible measures to prevent access to offensive or detrimental material online. Nothing in the CDA shields bad actors from liability for bad acts *other than publishing third party information*, such as intentionally or negligently designing a website with the purpose of facilitating illegal gun sales or creating their own content intended to facilitate crimes.

The Supreme Court of Wisconsin, and several federal appellate courts have read the CDA wholly at odds with its language and intent. According to these courts, the CDA bars states from subjecting internet providers to liability for their own conduct, website design and content, even if they intentionally circumvent laws and facilitate crimes that states have a strong interest in preventing. It thereby creates a haven, beyond the reach of state tort law, for websites that intentionally facilitate and profit from the most dangerous activities and commerce that take place in the dark reaches of the Internet.

But other courts, like the Washington Supreme Court, the Seventh Circuit, and several other federal appellate courts read the CDA closer to its text, as providing far more limited protection, or no immunity at all. Thus, the CDA has been applied in wildly inconsistent ways by both state and federal courts, resulting in a patchwork of conflicting decisions and a minefield for Internet providers and victims of online misconduct who seek civil justice. The Wisconsin Supreme Court's overbroad reading of the CDA is yet another example of confusion regarding this statute.

The decision below is also the latest example of courts defying this Court's federalist principles of the "clear statement rule" and the presumption against preemption. Precedent such as *Bond v. United States*, 134 S. Ct. 2077 (2014), *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), require that state authority be preserved absent a clear statement of Congressional intent to limit it. Because "the States are independent sovereigns in our federal system," "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated…in a field which the States have traditionally occupied,' [courts] 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). If those federalism principles are applied, as they must be and as the Wisconsin Court of Appeals did, the CDA must be construed to allow state tort law liability for negligent conduct or website design or content creation, given the lack of a clear statement of Congressional intent to bar such liability.

Those core principles of federalism are absent from CDA analysis by the Wisconsin Supreme Court, as well as several federal circuits. Even though the state court of appeals relied on these principles, the Wisconsin Supreme Court eschewed them in holding that the CDA barred state tort liability for Armslist's "*own actions*" in facilitating and encouraging illegal gun sales, even though the CDA does not state that such liability is barred. App. A at 7a, 24a, 38a, 41a; App. B at 51a, 58a-61a, 68a (emphasis added). It is no exaggeration to say that much of this Court's federalism precedent appears to be a dead

letter in Wisconsin – and other courts as well. Accordingly, this case also presents an important opportunity to re-establish that this Court's federalism precedents provide a limiting principle for construction of federal laws that might infringe on state authority, including the CDA. Only review by this Court can ensure that federal statutes are construed in accord with the federalism principles articulated by this Court.

Review is also needed because, if the CDA is read to immunize website owners and operators from liability for their own acts in intentionally designing and operating websites with the purpose of facilitating illegal conduct, the dangerous implications for society at large cannot be overstated given the ubiquitous nature of the Internet, and its potential for mischief.

I. A Uniform Construction Of The CDA In Accord With Its Text And Congressional Intent Presents An Important Issue Of National Concern In Today's Internet-Driven Economy

According to the Commerce Department's Bureau of Economic Analysis, from 1998 to 2017, E-commerce grew at an annual rate of over 4 times the growth in the overall economy and "accounted for 6.9 percent ($1,351.3 billion) of current-dollar gross domestic product" in 2017.[3] Familiar businesses, such as Amazon.com and Walmart.com, derive enormous revenue from Internet sales. But others use the

3. Bureau of Econ. Analysis, U.S. Dep't of Commerce, Measuring the Digital Economy: An Update Incorporating Data from the 2018 Comprehensive Update of the Industry Economic Accounts (Apr. 2019), available at https://www.bea.gov/system/files/2019-04/digital-economy-report-update-april-2019_1.pdf.

Internet "to sell tainted, fake, and poor quality drugs to anyone with a credit card and the willingness to pay,"[4] and engage in all manner of nefarious activities, from facilitating terrorism to the illegal firearm sales at issue here. The growing importance and use of the Internet in commerce and communications requires that the web not become an anything-goes haven, exempt from traditional rules of liability and accountability. Those hurt by illegal sales through E-Commerce should not have lesser recourse to compensation than they would against a brick-and-mortar store – and the CDA provides no warrant to create a difference. That some courts have established the CDA as a bar to a remedy presents an issue of great national importance that merits this Court's attention. After all, "[i]t is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312 (1994).

A. Many Courts Have Construed The CDA To Provide Sweeping Immunity For Websites' Own Wrongful Conduct That Is Wholly At Odds With The CDA's Text and Purpose

The courts that have construed the CDA as a barrier to civil recourse have eschewed this Court's instruction that the interpretive enterprise in construing a federal statute is not "to assess the consequences of each approach and adopt the one that produces the least mischief," but "to

4. Bryan A. Liang & Tim Mackey, *Searching for Safety: Addressing Search Engine, Website, and Provider Accountability for Illicit Online Drug Sales*, 35 Am. J.L. & Med. 125, 126 (2009).

give effect to the law Congress enacted." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Plainly, Congress enacted Section 230 to serve a dual purpose: (1) to shield websites and internet service providers ("ISPs") from liability for displaying offensive and defamatory content posted by others, which it accomplishes by stating that websites and ISPs shall not "be treated as the publisher or speaker of any information provided by another information content provider," and (2) to encourage websites and ISPs to take proactive steps to limit or eliminate access to offensive or pornographic content, which it addresses by prohibiting civil liability against websites and ISPs for voluntary, good faith actions to restrict access to objectionable material. 47 U.S.C. § 230(c)(1), (2); *see also* H.R. Rep. No. 104-458, at 194 (1996).

A court's job "is to follow the text." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015). Courts that have narrowly construed CDA protections have been faithful to that principle. They agree that "the plain language of the [CDA] creates a defense when there is (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker of information (3) that is provided by another information content provider." *J.S. v. Village Voice Media Holdings, LLC*, 184 Wash.2d 95, 104 (2015) (concurring). They agree that nothing in the language of the CDA's bar on "treat[ing]" website providers as publishers or speakers of third party information shields websites from liability for their own conduct or content, or from liability that does not "treat" them as a publisher or speaker of third-party content.

Nothing in the CDA's text prevents holding a business liable for negligently or intentionally creating an unreasonably dangerous website marketplace, or negligently designing a website, or creating dangerous content like Armslist's warning and search functions, as none of those theories seek to treat the website as a publisher or speaker of third party content. Yet that is what the Supreme Court of Wisconsin and several other courts have held, construing the CDA as immunizing online businesses from any wrongdoing so long as one causal factor of the harm was publication of a third party post. That is not what the CDA says.

It is never appropriate to read a federal statute to provide greater immunity than its language or purpose warrants, but such an overreach is especially inappropriate given the history of the CDA. When Congress enacted the CDA in 1996, the Internet was in its infancy, "a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses." *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1164 n. 15 (9th Cir. 2008) ("Roommates.com"). Today, internet companies are some of the largest in the world, more than capable of withstanding tort liability for their own wrongful conduct that every other industry must endure.

B. Courts Are Construing The CDA Contrary To Congressional Intent

Statements by sponsors of the CDA show that the Wisconsin Supreme Court's interpretation of Section 230 is contrary to Congressional intent. Christopher Cox,

a former Congressman who co-sponsored Section 230, observed "how many Section 230 rulings have cited other rulings instead of the actual statute, stretching the law," and that "websites that are 'involved in soliciting' unlawful materials or 'connected to unlawful activity' should not be immune under Section 230.'"[5] Senator Ron Wyden, the other co-sponsor of Section 230, has similarly emphasized that "[t]he real key to Section 230 . . . was making sure that companies in return for that protection—that they wouldn't be sued indiscriminately—were being responsible in terms of policing their platforms." *Id.* Explaining his goals for Section 230, Senator Wyden said, "I wanted to guarantee that bad actors would still be subject to federal law. Whether the criminals were operating on a street corner or online wasn't going to make a difference."[6] Moreover, Senator Richard Blumenthal recently confirmed that he "disagree[s] with the courts that have held that the Communications Decency Act immunizes online firearm sales—like Armslist—for facilitating illegal gun sales. *** [N]obody should infer that Congress believes they were rightly decided." Cong. Record Volume 164, Number 49 (Wednesday, March 21, 2018) at p. S1852.

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5. Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018), available at http://www/npr/org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change.

6. Ron Wyden, Floor Remarks: CDA 230 and SESTA, Medium (Mar. 21, 2018), available at http://medium.com/@RonWyden/floor-remarks-cda-230-and-sesta-32355d669a6e.

The Wisconsin Supreme Court's decision directly contradicts Congressional intent behind Section 230.

II. Review Is Needed To Resolve Sharp Disagreement Over CDA Protections Between Federal Courts Of Appeal, As Well As State Courts Of Last Resort

State courts of last resort and federal courts of appeal disagree over virtually every aspect of what the CDA means, and what, if any, immunity it provides. As these conflicting views form the basis of rulings that the CDA provides sweeping immunity, they have and will continue to produce disparate and inconsistent rulings across courts. A website accessible nationwide may find itself subject to liability in Washington, but immune in Wisconsin – on the basis of a federal law with a supposedly uniform meaning. This Court's review is needed to resolve the inconsistencies, and provide an authoritative construction of the CDA that does not rewrite its language, subvert Congressional intent, or excessively infringe on state authority.

A. Courts Disagree Over Whether the CDA Creates Immunity.

Courts disagree over whether the CDA creates sweeping immunity or no immunity at all. Many courts have relied on the Fourth Circuit, which has historically taken a broad approach to the CDA,[7] especially its holding in *Zeran v. America Online, Inc.* that "[b]y its plain language, § 230 creates a federal immunity to *any*

7. As noted in Section II.C. *infra*, the Fourth Circuit's approach appears to have narrowed recently.

cause of action that would make service providers liable for information originating with a third party user of the service." 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added). The Wisconsin Supreme Court similarly held that Section 230(c)(1) "immuniz[es] interactive computer service providers from liability for publishing third-party content." App. A at 10a.

Directly contradicting the Fourth Circuit's conclusion that the CDA creates immunity "by its plain language[,]" 129 F.3d at 330, others courts have accurately observed that "immunity" appears nowhere in the statute. *J.S.*, 184 Wash. 2d at 104 (concurring); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009). The Seventh Circuit, which has taken a narrow approach to the CDA, held that "subsection (c)(1) does not create an 'immunity' of any kind[,]" but rather "limits who may be called the publisher of information that appears online." *City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010).

B. Courts Disagree Over What Is An "Information Content Provider"

As the CDA only precludes treatment as a publisher or speaker "of any information provided by another information content provider," who is an information content provider is critical in determining the law's reach. Section 230(f)(3) of the CDA defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any interactive computer service." However, there is stark

disagreement concerning what qualifies as content, what it means to "develop" information, and whether and how a party's intent factors into the analysis.

1. Courts Disagree Over What Constitutes "Development"

In *Roommates.com*, the Ninth Circuit recognized that websites that display content of others can also be content providers who are subject to liability permissible under the CDA:

> [a] website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

521 F.3d at 1162-63. According to the Ninth Circuit, to determine if a service provider "developed" unlawful content, courts should apply a "material contribution test," under which a service provider "falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." 521 F.3d at 1167-68. The Ninth Circuit elaborated that "providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to 'development' for purposes of the immunity exception." *Id.* at 1169. But "material contribution" and

"neutral tools" appear nowhere in the CDA, and these tests or standards, invented by the Ninth Circuit, have taken on a life of their own as they have been applied haphazardly across jurisdictions.

Many courts have expressly adopted the material contribution test in one form or another, including the Wisconsin Supreme Court (App. A at 14a-23a), the Washington Supreme Court (*J.S.*, 184 Wash. 2d at 103), the Second Circuit (*F.T.C. v. Leadclick Media, LLC*, 838 F.3d 158, 176 (2d Cir. 2016)), the Sixth Circuit (*Jones*, 755 F.3d at 413) and the Tenth Circuit (*F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1200-01 (10th Cir. 2009)). Others have not done so. *See, e.g., Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); *Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016); *Stubhub!*, 624 F.3d at 366; *Johnson v. Arden*, 614 F.3d 785, 790-92 (8th Cir. 2010). Still others have declined to determine whether to apply it. *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y.3d 281, 289-90 (2011).

Moreover, even among those expressly adopting the material contribution test, there is disagreement regarding when it applies. *Compare J.S.*, 184 Wash. 2d at 103; App. A at 39a fn.4. As the Court of Appeals of New York recognized, "[i]t may be difficult in certain cases to determine whether a service provider is also a content provider, particularly since the definition of 'content provider' is so elastic, and no consensus has emerged concerning what conduct constitutes 'development.'" *Shiamilli*, 17 N.Y.3d at 289-90.

2. Courts Disagree Over Whether Website Design Is "Content"

State courts of last resort and federal courts of appeal have taken different, inconsistent positions regarding whether website design itself can qualify as content. As the Wisconsin Supreme Court's dissent and the Wisconsin Court of Appeals recognized, Yasmeen Daniel does not seek to hold Armslist liable for any content created by a third party. App. A at 38a; App. B at 60a-61a. Rather, the complaint "alleges that Armslist is liable for its *own* content, i.e., the design and search functionality of its website." App. A at 38a. The Wisconsin Supreme Court rejected this position. In doing so, the Court reached a conclusion that appears contrary to those of the Washington Supreme Court and the Seventh Circuit.[8]

In *J.S.*, 184 Wash. 2d 95, the Washington Supreme Court, sitting en banc, recognized that an ISP can be liable for its own website design and content, even if one cause of the harm was a third-party post, holding that the CDA did not bar as a matter of law claims against a website operator alleged to have specifically designed its website posting rules to induce sex trafficking. 184 Wash. 2d at 101-103. Similarly, the Seventh Circuit has held that a website's business practices or design can be the basis for a claim not barred by the CDA. *See Stubhub!,* 624 F.3d at 364-66 (website's decision to not include tax collection function on website not entitled to CDA immunity).

8. The Wisconsin Supreme Court did acknowledge that the Wisconsin Court of Appeals held that Armslist.com's "design features could be characterized as 'content' created by Armslist, so Daniel's claims did not require the court to treat Armslist as the publisher of third-party content." App. A at 7a.

However, the D.C. Circuit recently implied the opposite holding that "[t]he decision to present this third-party data in a particular format…and the choice of presentation does not itself convert the search engine into an information content provider." *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019).

Other Circuit Courts have addressed allegations regarding website design by focusing on whether the design helps develop third party content, without deciding whether that website design constitutes actionable content. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009); *Jane Doe No. 1 v. Backpage.com*, 817 F.3d 12, 21 (1st Cir. 2016).

3. Courts Disagree Over Whether Intent Can Support CDA Liability

The Supreme Courts of Wisconsin and Washington, and federal circuits, also disagree over whether a website creator's or operator's intent is relevant in deciding whether the CDA bars claims as a matter of law.

The Washington Supreme Court indicated that intent is relevant, holding that "[i]t [was] important to ascertain whether in fact [the website operator] designed its posting rules to induce sex trafficking to determine whether [the website operator] is subject to suit under the CDA because 'a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.'" *J.S.*, 184 Wash. 2d at 103 (citing *Roommates.com*, 521 F.3d at 1168).

Yet the Wisconsin Supreme Court expressly rejected this decision, holding that "the Washington Supreme Court ignored the text of the CDA, and the overwhelming majority of the cases interpreting it, by inserting an intent exception into § 230(c)(1)." App. A at 27a. According to the Wisconsin Supreme Court, "[u]nderlying this statement is the implicit assumption that a website operator's subjective knowledge or intent may transform what would otherwise be a neutral tool into a 'material contribution' to the unlawfulness of third-party content[,]" which is an assumption that "has no basis in the text of § 230(c)(1)." *Id.* In direct conflict with the Washington Supreme Court, the Wisconsin Supreme Court determined "[t]hat Armslist may have known that its site could facilitate illegal gun sales does not change the result. Because § 230(c)(1) contains no good faith requirement, courts do not allow allegations of intent or knowledge to defeat a motion to dismiss." App. A at 28a.

Federal courts of appeal are similarly divided. According to the First Circuit's holding in *Jane Doe No. 1*, on which the Wisconsin Supreme Court relied, allegations regarding a website creator's intent are "a distinction without a difference." 817 F.3d at 21; App. A at 21a-22a. But the First Circuit's discussion of intent appears to concern whether the claims treated the website operator as a publisher of third party content, not whether it qualified as an information content provider. The Sixth Circuit has also questioned whether intent is relevant. *Jones*, 755 F.3d at 413–14.

Other Circuits have taken a contrary position, indicating that intent is relevant to the analysis of whether a party developed content so as to qualify as an information

content provider. For example, in *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), the Tenth Circuit rejected Accusearch's "attempts to portray itself as a provider of neutral tools," holding that "Accusearch's actions were not 'neutral' with respect to generating offensive content; on the contrary, *its actions were intended to generate such content.*" 570 F.3d at 1200-01 (emphasis added). According to the 10th Circuit, "the offensive postings were Accusearch's *raison d'etre* and it affirmatively solicited them." 570 F.3d at 1200.

The Second Circuit has also indicated that intent is relevant. *F.T.C. v. Leadclick Media, LLC*, held that Leadclick was "not entitled to immunity because it participated in the development of the deceptive content posted on fake news pages" where it paid affiliates to advertise "'knowing that false news sites were common in the industry.'" 838 F.3d at 176.

The Eighth Circuit has also acknowledged that intent may be relevant to the CDA analysis, and recognized that courts, including the Seventh Circuit, take intent into account when determining whether the CDA bars particular claims. *Johnson*, 614 F.3d at 791-92 (noting that the Seventh Circuit permits liability under § 230(c)(1) for "ISPs that intentionally designed their systems to facilitate illegal acts, such as stealing music.").

Furthermore, while the Wisconsin Supreme Court purported to adopt the "material contribution" test set forth by the Ninth Circuit in *Roommates.com*, as well as that court's related "neutral tools" analysis, it reached an outcome that cannot be harmonized with the Ninth Circuit's decision. In holding that Armslist's intent in

designing and operating its site was irrelevant to the CDA analysis, the Wisconsin Supreme Court reached the opposite conclusion of the Ninth Circuit, which held that websites "designed to achieve illegal ends[,]" would *not* be protected by the CDA. *Roommates.com*, 521 F.3d at 1167.

C. Courts Disagree Over What Is Meant By "Treating" A Website Operator As The Publisher Of Third Party Content

State courts of last resort and the federal circuit courts of appeal disagree over what it means to "treat[] [a website] as the publisher or speaker of any information provided by another information content provider," § 230, which results in contrary conclusions regarding what claims the CDA allows.

The Fourth Circuit created an "editorial functions" test for CDA analysis, holding that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also Nemet*, 591 F.3d at 258.

Yet not all courts have adopted the "traditional editorial functions" standard. *See Huon*, 841 F.3d at 743. And even those that do, do not always agree when it applies. *See, e.g., Jones*, 755 F.3d at 410 ("***some state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities."); *Jane Doe No. 1*, 817 F.3d at 21 ("Features *** which reflect choices about what content can appear on the website

and in what form, are editorial choices that fall within the purview of traditional publisher functions."); *Universal Communication Sys., Inc. v. Lycos*, 478 F.3d 413, 422 (1st Cir. 2007) (disagreeing with argument "that the prohibition against treating Lycos 'as the publisher' only immunizes Lycos's 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content,' and not its decisions regarding the 'construct and operation' of its web sites") (internal citation omitted); *F.T.C. v. LeadClick Media, LLC*, 838 F.3d at 176 (holding that CDA did not apply where LeadClick was "being held accountable for its own deceptive acts or practices" (emphasis in original); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3rd Cir. 2003) (Section 230 proscribes liability for a claim "that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network"); *Ben Ezra, Weinstein & Company, Inc. v. America Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.").

In this respect, the Wisconsin Supreme Court's decision conflicts with decisions by the California and Washington Supreme Courts. In *Hassell v. Bird*, 5 Cal. 5th 522 (2018), the California Supreme Court held that while a court order directing Yelp to remove certain consumer reviews posted on its website was invalid under the CDA, "not all legal duties owed by Internet intermediaries necessarily treat them as the publishers of third party content, even when these obligations are in some way associated with their publication of this material." 5 Cal. 5th at 526, 543.

The Washington Supreme Court took a narrower approach. The concurrence explained that allegations that a website "deliberately designed its posting rules in a manner that would enable pimps to engage in sex trafficking, including in the trafficking of minors, and to avoid law enforcement…do not suggest that [it] is being treated as a 'publisher or speaker.'" *J.S.*, 184 Wash. 2d. at 113 (concurring). *Hassell*, 5 Cal. 5th at 543, suggests that the California Supreme Court could reach a similar conclusion.

The Wisconsin Supreme Court's opinion is to the contrary. It held that Yasmeen's claims were barred because the "duty Armslist is alleged to have violated derives from its role as a publisher of firearms advertisements[.]" App. A at 28a. According to the Wisconsin Supreme Court, a website cannot be liable, even when its own conduct is alleged to have caused harm, "when the underlying basis for liability is unlawful third party content published by the defendant." App. A at 24a. The Wisconsin Supreme Court read the CDA far more broadly than the California and Washington Supreme Courts.

Like the Wisconsin Supreme Court, the First Circuit has taken an overbroad approach to what it means to treat an ISP as the publisher of third party content under the CDA. In *Lycos*, the First Circuit, applying the "traditional editorial functions" standard, held that "[i]f the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider's decisions with respect to that posting, but also for its inherent decisions about how to treat postings generally." 478 F.3d at 422 (rejecting argument that ISP is not immunized for "its decisions

regarding the 'construct and operation' of its websites"). In *Jane Doe No. 1*, 817 F.3d 12, the First Circuit held that the CDA broadly shielded a website from claims brought by victims of sex trafficking even if the website's design and operations induced illegal postings, because "[f]eatures such as these, which reflect choices about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions," and are precluded by the CDA. 817 F.3d at 21-22.

In contrast to the First Circuit and the Wisconsin Supreme Court, other federal courts of appeal have taken a more narrow approach to whether a claim treats an ISP as the publisher of third party content, holding that the CDA does not protect website operators from liability for their own conduct, even where the claims involve the publication of third party content. For example, the Seventh Circuit, without applying the traditional editorial functions test, held that Section 230(c)(1) was "irrelevant" to a claim that Stubhub!, an online marketplace for tickets, failed to collect a city amusement tax because, unlike claims "for defamation, obscenity or copyright infringement," the amusement tax law "does not depend on who 'publishes' any information or is a 'speaker.'" *StubHub!*, 624 F.3d at 366. The CDA did not bar liability even though it was based on StubHub!'s failure to collect taxes on tickets posted for sale by third parties.[9] Thus, in contrast to

9. Notably, while the First Circuit in *Jane Doe No. 1*, 817 F.3d at 21 n.5, rejected the Washington Supreme Court's decision in *J.S.*, the Seventh Circuit has rejected the First Circuit's broad interpretation of the CDA as outlined in *Lycos*, 478 F.3d at 413. *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-70 (7th Cir. 2008).

the First Circuit, the Seventh Circuit concluded that business decisions concerning the operation of an online marketplace are not necessarily, or inherently, publisher functions protected by the CDA.

The Ninth Circuit also narrowly construed CDA immunity in *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016), which held that the CDA did not bar a failure to warn claim against a website that published third-party posts, as the liability theory was not based on its publishing of third party content. As the Ninth Circuit explained, "Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 853. The Ninth Circuit reached that conclusion despite the fact that "[p]ublishing activity [was] a but-for cause of just about everything [the website] [was] involved in" and even where the website "[was] an internet publishing business" which "[w]ithout publishing user content…would not exist." *Id.* at 853. This ruling was consistent with the Ninth Circuit's earlier ruling in *Barnes v. Yahoo!, Inc.*, 570 F.3d at 1103, 1109, holding that the CDA barred plaintiff's negligent undertaking claim but not its promissory estoppel claim.

Most recently, in *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019), the Ninth Circuit again took a narrow view of what it means to treat a party as a publisher or speaker of third party content. 918 F.3d at 682. In holding that an ordinance prohibiting short-term housing rentals was not preempted by the CDA, the Ninth Circuit explained that courts should decide CDA protection by examining the duty at issue

in the case, not simply whether a website publisher is involved:

> We do not read *Internet Brands* to suggest that CDA immunity attaches any time a legal duty might lead a company to respond with monitoring or other publication activities. It is not enough that third-party content is involved; *Internet Brands* rejected use of a "but-for" test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content. We look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content.

HomeAway.com, 918 F.3d at 682. The Ninth Circuit recognized that websites could be liable for failing to screen persons who interact with the website so long as it did not require monitoring public posts:

> the Ordinance does not require the Platforms to monitor third-party content and thus falls outside of the CDA's immunity. *** Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic. As in *Internet Brands*, it is not enough that the third-party listings are a "but-for" cause of such internal monitoring.

Id.

This language from the Ninth Circuit suggests that Armslist could be held liable for allowing illegal buyers and sellers who had no legitimate business on the site. Directly contrary to the Ninth Circuit's decision in *Homeaway*, the Wisconsin Supreme Court held that the CDA barred Yasmeen's negligence claim because "[r]estated, it alleges that Armslist provided an online forum for third-party content and failed to adequately monitor that content." App. A at 28a. But under the Ninth Circuit's decision, Armslist would only be protected if Armslist would necessarily be required to monitor third-party content, which is not the case. *HomeAway.com*, 918 F.3d at 682.[10]

As more evidence of the confusion in CDA case law, the Wisconsin Supreme Court relied on a Ninth Circuit decision – *Barnes v. Yahoo!, Inc.* – in holding that "courts must ask whether the duty that plaintiff alleges defendant violated derives from the defendant's status or conduct as a 'publisher or speaker'" and "[i]f it does, section 230(c)(1) precludes liability." App. A at 24a (citing 570 F.3d at 1102). However, the broad scope of Wisconsin Supreme Court's ruling conflicts with the Ninth Circuit's narrower conclusion that "[l]ooking at the text, it appears clear that neither [230(c)(1)] nor any other [subsection] declares a general immunity from liability deriving from third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d at 1100.

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10. Armslist would not be required to monitor third-party content if, for example, it required users to register before buying a gun and to take delivery of firearms only through a federally licensed firearms dealer as Yasmeen alleges Gunbroker.com does. App. B at 50a-51a.

Moreover, what the CDA means in the Fourth Circuit is confusing. While the court previously took a broader approach to the CDA than the Seventh and Ninth Circuits, recently the Fourth Circuit held that "to implicate the immunity of § 230(c)(1), a claim must be based on the interactive computer service provider's publication of a third party's speech." *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139 (4th Cir. 2019). Using that standard, the Fourth Circuit held that the CDA did not bar product liability claims asserted against Amazon because the claims were "not based on the publication of another's speech." *Id.*

More conflict comes from a Third Circuit decision this month that held the CDA did not bar negligence and strict liability claims against Amazon, holding that while "Amazon exercises online editorial functions," the claims did not "seek to treat Amazon as the publisher or speaker of information provided by another information content provider." *Oberdorf v. Amazon.com Inc.*, No. 18-1041, 2019 WL 2849153, at *11-12 (3d Cir. Jul 3, 2019). That is precisely what Petitioner argues here and what the Wisconsin Supreme Court rejected.

III. Review Is Warranted To Ensure That This Court's Federalism Precedent Is Followed

A. This Court's Federalism Precedent Requires Reading The CDA Narrowly To Minimize The Degree To Which Federal Law Overrides State Law

This Court has made clear that "[i]t is incumbent upon the [] courts to be certain of Congress' intent before

finding that federal law overrides [the usual constitutional balance of federal and state powers]" by supplanting state law. *Gregory*, 501 U.S. at 460 (internal quotations omitted); *see also Bond,* 134 S. Ct. at 2088. Even when a statute's "express language" mandates some degree of preemption, the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption. *Cipollone,* 505 U.S. at 517-18; *Medtronic,* 518 U.S. at 485. This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic,* 518 U.S. at 485.

Gregory and *Bond* show how federal laws must be read to preserve state authority. *Gregory* applied the clear statement rule to find that a federal anti-age discrimination law allowed Missouri's mandatory retirement for judges, holding that judges were excluded from the law because they were "'appointee[s] on the policymaking level.'" 501 U.S. at 464-65. Even though this was "an odd way for Congress to exclude judges," "particularly in the context of the other exceptions that surround [the exclusion applicable to judges]," the Court could not be "absolutely certain" about Congress' intent to include judges within the federal statute. *See id.* at 467.

In *Bond*, "it was clear beyond doubt" that a defendant violated a federal law, 134 S.Ct. at 2094 (Scalia J., concurrence), but because a plain reading would lead to the federal government "'dramatically intrud[ing] upon traditional state criminal jurisdiction,'" the Court found that "ambiguity derives from the improbably broad reach of the key statutory definition" and did not apply it. *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350), 2090. The Court

rejected a reading that "would 'alter sensitive federal-state relationships ***.'" 134 S. Ct. at 2091-92 (quoting earlier *Bond* decision).

The Wisconsin Court of Appeals cited *Medtronic* and *Gregory* in finding that the presumption against preemption and clear statement rules support interpreting the CDA as not barring Petitioner's claims. App. B at 58a-68a. The Court found it significant that in the CDA "Congress limited immunity to a single circumstance: when a theory of liability treats the website creator or operator 'as the publisher or speaker of any information provided by another information content provider.'" App. B at 63a (quoting 47 U.S.C. § 230(c)(1)).

As the Wisconsin Court of Appeals correctly recognized, the CDA comes nowhere close to clearly stating that claims like Petitioner's are barred. App. B at 58a-68a. The CDA states that ISPs may not be treated "as the publisher or speaker of any information provided by another information content provider" (§ 230(c)(1) (emphasis added)), not that websites cannot be held liable if "treat[ed]" as a website designer or creator of content that causes harm. Honing in on this critical distinction, the Wisconsin Court of Appeals observed that Plaintiff's "claims and the supporting allegations do not seek to hold Armslist liable for publishing another's information content. Instead, the claims seek to hold Armslist liable for *its own alleged actions in designing and operating its website in ways that caused injuries*." App. B at 68a (emphasis added). Applying *Bond, Gregory, Cipollone*, and *Medtronic*, the CDA allows Petitioner's claims to proceed.

B. The Supreme Court Of Wisconsin Refused To Apply The Federalism Principles Mandated By This Court

Petitioner and the Court of Appeals of Wisconsin squarely presented the necessity of applying this Court's federalism lens to the interpretation of the CDA. App. B at 58a-59a; Brief of Plaintiff-Appellant at 13, 19-20 (Sup. Ct. Wis., Jan. 8, 2019). Nonetheless, the Supreme Court of Wisconsin ignored this Court's teachings and ***failed to even reference any of these cases***. Effectively, this Court's federalism precedent is null and void in Wisconsin, at least when the CDA is considered. Indeed, virtually all courts construing the CDA have similarly ignored and failed to apply the clear statement rule or any federalism principles.

Such defiance of this Court's precedent should not stand, especially when core principles of federalism and state sovereignty are at stake. State and federal courts should not feel entitled to simply disregard this Court's teachings and adopt their own approaches to statutory interpretation – even when faced with this Court's plainly applicable precedent, and core principles of federalism are subverted. Federalism is not a permissive principle. This Court's precedent cannot be disregarded when courts find it inconvenient.

IV. Review Is Warranted Because The Wisconsin Supreme Court's Interpretation Of The CDA Creates A "Lawless No Man's Land" On The Internet

The CDA was not intended "to create a lawless no-man's-land on the internet." *Roommates.com*, 521 F.3d

at 1164; *see also United States v. Ulbricht*, 31 F. Supp. 3d 540, 568 (S.D.N.Y. 2014) ("Even a quick reading of the statute makes it clear that it is not intended to apply to … intentional and criminal acts."). Yet the Wisconsin Supreme Court's decision opens the door to exactly that, immunizing dangerous conduct that would be subject to liability if it occurred in real space. According to the Wisconsin Supreme Court, people could intentionally facilitate crimes from drug trafficking to terrorism to gun trafficking, for profit, and so long as one of the causal factors of the harm they created was an online posting by a third party, states would be powerless to subject them to civil liability for their misconduct. Indeed, under the Wisconsin Supreme Court's decision, even the creator of the website "Silk Road," who was convicted of seven criminal charges, including narcotics and money laundering conspiracies, for designing a "sophisticated and extensive [Internet] criminal marketplace" that enabled thousands of individuals to anonymously transact in illegal drugs without detection, would be immunized from liability to any individual harmed by its illegal acts. *See United States v. Ulbricht*, 31 F. Supp. 3d 540, 549 (S.D.N.Y. 2014); Jury Verdict, *Ulbricht*, 31 F. Supp. 3d 540 (Feb. 5, 2015).

Congress enacted the CDA in the early days of the Internet to allow it to grow while keeping objectionable materials from children. 141 Cong. Rec. S8087 (daily ed. June 9, 1995); 47 U.S.C. § 230(a); 141 Cong. Rec. H4869-70 (daily ed. Aug. 4, 1995); 47 U.S.C. § 230(b). A desire to nurture online commerce may have led to some of the early expansive readings of the CDA.[11] But even over a

11. *See* Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the*

decade ago the Ninth Circuit observed that "[t]he Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted." *Roommates.com*, 521 F.3d at 1164, n. 15. That is only more true today.

Given the pervasiveness of the Internet, and the extent to which it reaches into our everyday lives, extending Section 230 to immunize websites that intentionally profit from tortious or criminal conduct, as Armslist does, has dangerous and far reaching implications. As the Ninth Circuit explained in refusing to exempt websites from the obligation to "comply with laws of general applicability," the Internet's "vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Id.* The Ninth Circuit recently reiterated that "allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would… 'create a lawless no-man's-land on the Internet.'" *HomeAway.com, Inc.* 918 F.3d at 683 (citing *Roommates.com*, 521 F.3d at 1164).

Nonetheless, the Wisconsin Supreme Court's decision, which protects a website owner and operator from civil liability for its own negligent and intentional actions in

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Communications Decency Act, 33 Harv. J.L. & Pub. Pol'y 863, 873-74 (2010).

designing and operating its website to encourage and facilitate illegal and tortious activity, and those like it, threatens to create a lawless no-man's-land on the Internet in which conduct that could be subject to liability – and potential criminal prosecution – in real space, would be immune in cyberspace. Such a decision sends a message to criminal and other dangerous enterprises to set up shop online. Congress had no such intention, nor did it express any in the CDA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE SUPREME COURT OF WISCONSIN, FILED APRIL 30, 2019

SUPREME COURT OF WISCONSIN

No. 2017AP344

YASMEEN DANIEL, Individually, and as Special Administrator of the Estate of Zina Daniel Haughton,

Plaintiff-Appellant,

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, as Subrogee for Jalisco's LLC,

Intervening-Plaintiff,

v.

ARMSLIST, LLC, an Oklahoma Limited Liability Company, BRIAN MANCINI and JONATHAN GIBBON,

Defendants-Respondents-Petitioners,

BROC ELMORE, ABC INSURANCE CO., the fictitious name for an unknown insurance company, DEF INSURANCE CO., the fictitious name for an unknown insurance company and ESTATE OF RADCLIFFE HAUGHTON, by his Special Administrator JENNIFER VALENTI,

Defendants,

Appendix A

PROGRESSIVE UNIVERSAL INSURANCE COMPANY,

Intervening-Defendant.

April 30, 2019, Filed

REVIEW OF DECISION OF THE COURT OF APPEALS. *Reversed.*

¶1 PATIENCE DRAKE ROGGENSACK, C.J. We review a decision of the court of appeals[1] reversing the circuit court's[2] dismissal of Yasmeen Daniel's complaint against Brian Mancini, Jonathan Gibbon, and Armslist, LLC (collectively "Armslist"). Daniel's tort action arose from a mass shooting in a Brookfield, Wisconsin spa that killed four people, including Daniel's mother Zina Daniel Haughton. Daniel alleged that the shooter, Radcliffe Haughton, illegally purchased the firearm after responding to private seller Devin Linn's post on Armslist's firearm advertising website, armslist.com. The court of appeals held that 47 U.S.C. § 230 (2018),[3] the federal Communications Decency Act of 1996 (CDA), did not bar Daniel's claims against Armslist for facilitating Radcliffe's illegal purchase.

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1. *Daniel v. Armslist, LLC*, 2018 WI App 32, 382 Wis. 2d 241, 913 N.W.2d 211.

2. The Honorable Glenn H. Yamahiro of Milwaukee County presided.

3. All references to federal statutes are to the 2018 version unless otherwise noted.

¶2 We disagree, and conclude that § 230(c)(1) requires us to dismiss Daniel's complaint against Armslist. Section 230(c)(1) prohibits claims that treat Armslist, an interactive computer service provider,[4] as the publisher or speaker of information posted by a third party on its website. Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1). Accordingly, we reverse the decision of the court of appeals, and affirm the circuit court's dismissal of Daniel's complaint.

I. Background[5]

¶3 In October 2012, a Wisconsin court granted Zina Daniel Haughton a restraining order against her husband, Radcliffe Haughton, after he had assaulted her and threatened to kill her. Pursuant to the restraining order, Radcliffe was prohibited by law from possessing a firearm for four years. *See* Wis. Stat. § 941.29(1m)(f)

4. An "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2). It is uncontested that Armslist is an interactive computer service provider.

5. Because we review defendant Armslist, LLC's motion to dismiss, we accept all of the factual allegations in Daniel's complaint as true. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693.

(2017-18).[6] Despite this court order, Radcliffe posted a "want to buy" advertisement on armslist.com and stated that he was seeking to buy a handgun with a high-capacity magazine "asap." He then viewed an offer of sale posted by Devin Linn on armslist.com for a semiautomatic handgun. Using armslist.com's "contact" function, he emailed Linn to arrange to purchase the handgun. The two exchanged phone numbers and set up a meeting by phone. On October 20, they met in a McDonald's parking lot in Germantown, Wisconsin. Linn sold Radcliffe the gun, along with ammunition, for $500.

¶4 On October 21, one day after Radcliffe had purchased the handgun from Linn, he carried it into the Azana Spa and Salon in Brookfield, Wisconsin, where Zina worked. He fatally shot Zina and two other people, injured four others, and shot and killed himself. Yasmeen Daniel was inside the building at the time and witnessed the shooting.

¶5 Armslist.com is a classified advertising website similar to Craigslist. Prospective sellers may post advertisements for firearms and firearm-related products they wish to sell, prospective buyers may post "want advertisements" describing the firearms they wish to buy. Buyers and sellers may contact one another either through personal contact information they provide on the website, or by using armslist.com's "contact" tool. According to the complaint, Armslist receives revenue through advertising

6. All subsequent references to the Wisconsin Statutes are to the 2017-18 version unless otherwise indicated.

on armslist.com; there is no allegation that Armslist itself participates in the purchase and sale of firearms beyond allowing users to post and view advertisements and contact information on armslist.com.

¶6 According to Daniel's allegations, Radcliffe shopped for the murder weapon exclusively on armslist.com because he recognized that the website's design features made it easier for prohibited purchasers like him to illegally purchase firearms. Armslist.com allows potential buyers to use a "seller" search filter to specify that they want to buy firearms only from private sellers, rather than from federally licensed dealers. Private sellers, as opposed to federally licensed gun dealers, are not required to conduct background checks in Wisconsin. The website also does not require buyers or sellers to create accounts, which encourages anonymity, and displays next to each advertisement whether the account is registered or unregistered.

¶7 Armslist.com allows users to flag content for a number of different reasons, including "scam," "miscategorized," and "overpriced," and uses these flags to delete certain posts. However, it does not allow users to flag content as "criminal" or "illegal" and does not take action to delete illegal content. The website contains no restrictions on who may create an account, or who may view or publish firearm advertisements using its website. The website's lack of restrictions allows buyers to avoid state-mandated waiting periods and other requirements. Armslist does not provide private sellers with legal guidance as to federal and state laws governing the sale of firearms.

¶8 Daniel's complaint also suggests several simple measures Armslist could have taken in order to reduce the known risk of illegal firearm sales to dangerous prohibited purchasers. Daniel alleges that Armslist could have required buyers to create accounts and provide information such as their name, address, and phone number. In states similar to Wisconsin, where there is online access to an individual's criminal history, Armslist could have required potential buyers to upload their criminal history before their accounts were approved. She alleges Armslist could have allowed users to flag potentially illegal firearm sales. It could have prohibited users from obtaining one another's contact information until Armslist confirmed their legal eligibility to buy and sell firearms. According to the complaint, all these measures would have reduced the risk of firearm sales to persons prohibited from owning a firearm.

¶9 Based on all these features and omissions, Daniel's complaint alleges that Armslist knew or should have known that its website would put firearms in the hands of dangerous, prohibited purchasers, and that Armslist specifically designed its website to facilitate illegal transactions. The causes of action asserted against Armslist are negligence, negligence per se, negligent infliction of emotional distress, civil conspiracy, aiding and abetting tortious conduct, public nuisance, and wrongful death.[7] Armslist argued that the CDA immunizes it from liability for the information posted by third parties on

7. The complaint also asserts causes of action against Devin Linn and the Radcliffe Haughton Estate that are not at issue here.

armslist.com, and moved to dismiss Daniel's complaint for failure to state a claim upon which relief can be granted pursuant to Wis. Stat. § 802.06(2)(a)6.

¶10 The circuit court granted Armslist's motion and dismissed the complaint. The circuit court explained that the relevant question under the CDA is not whether the complaint calls the defendant a publisher, but whether the cause of action requires the court to treat the defendant as the publisher of third-party content. The CDA immunizes an interactive computer service provider from liability for passively displaying content created by third parties, even when the operator exercises "traditional publisher functions" by deciding "what content can appear on the website and in what form." Armslist.com's design features "reflect choices about what content can appear on the website and in what form," and are therefore "editorial choices that fall within the purview of traditional publisher functions." For this reason, the circuit court concluded that the CDA bars all of Daniel's claims against Armslist.

¶11 The court of appeals reversed. *Daniel v. Armslist, LLC*, 2018 WI App 32, ¶5, 382 Wis. 2d 241, 913 N.W.2d 211. The court of appeals held that the CDA does not protect a website operator from liability for its own actions in designing and operating its website. *Id.*, ¶42. According to the court of appeals, armslist.com's design features could be characterized as "content" created by Armslist, so Daniel's claims did not require the court to treat Armslist as the publisher of third-party content. *Id.*, ¶44. Additionally, holding Armslist liable for its own operation of its website did not require treating it as a publisher or speaker of third-party content. *Id.*, ¶42.

¶12 The court of appeals acknowledged that a large body of federal case law has interpreted the CDA as providing immunity when an interactive computer service provider exercises a publisher's "traditional editorial functions," such as providing a forum for third parties to post content. *Id.*, ¶¶48-49. However, the court of appeals concluded that all of these cases "read[] into the Act language that is not present" and rejected them all as unpersuasive. *Id.* ¶¶48-50. We granted Armslist's petition for review, and now reverse the decision of the court of appeals.

II. DISCUSSION

A. Standard of Review

¶13 We review a motion to dismiss for failure to state a claim upon which relief may be granted, and in so doing we must interpret and apply a statute. "Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review; however, we benefit from discussions of the court of appeals and circuit court." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). "When we review a motion to dismiss, factual allegations in the complaint are accepted as true for purposes of our review. However, legal conclusions asserted in a complaint are not accepted, and legal conclusions are insufficient to withstand a motion to dismiss." *Id.*, ¶18 (citations omitted). "Statutory interpretation and the application of a statute to a given set of facts are questions of law that we review independently," while benefiting from the interpretations

and applications of other Wisconsin court decisions. *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 2005 WI 159, ¶19, 286 Wis. 2d 252, 706 N.W.2d 110.

B. The Communications Decency Act

¶14 The CDA is set out in 47 U.S.C. § 230. The CDA was enacted in large part to "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." § 230(b)(2). Congress found that the internet had "flourished, to the benefit of all Americans, with a minimum of government regulation." § 230(a)(4). For this reason, Congress sought to prevent state and federal laws from interfering with the free exchange of information over the internet.

¶15 Limiting interference from federal and state laws includes protecting interactive computer service providers who operate forums for third-party speech from the "specter of tort liability" for hosting third-party content. *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)). The imposition of tort liability for hosting third-party content would have an "obvious chilling effect" on the free exchange of information over the internet, *Jones*, 755 F.3d at 407 (citing *Zeran*, 129 F.3d at 331), as it would deter interactive computer service providers from hosting third-party content. This would significantly impede the free exchange of information over the internet. *See Jones*, 755 F.3d at 408.

¶16 Section 230(c)(1) addresses this problem by immunizing interactive computer service providers from liability for publishing third-party content. The subsection states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." § 230(c)(1). The act also preempts any state tort claims: "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." § 230(e)(3). Section 230(c)(1) therefore prevents the specter of tort liability from undermining an interactive computer service provider's willingness to host third-party content.

¶17 At the same time, however, Congress did not want to discourage interactive computer service providers from voluntarily screening obscene or unlawful third-party content, as some state courts had done. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 229, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished) (holding that an interactive computer service provider could be treated as the publisher of some defamatory statements posted by third parties on its site because it had voluntarily deleted other offensive third-party posts). Section 230(c)(2) addresses this concern by shielding an interactive computer service provider from liability for "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected." Section 230(c) ensures that

as a "Good Samaritan," an interactive computer service provider may remove some objectionable third-party content from its website without fear of subjecting itself to liability for objectionable content it does not remove. *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-70 (7th Cir. 2008).

¶18 Therefore, rather than force interactive computer service providers to screen objectionable content, Congress chose to simply remove disincentives for screening such content voluntarily. *See, e.g., id.* at 670 (explaining that Congress chose to deal with the problem of liability for hosting third-party content "not with a sword but with a safety net."); *see also Zeran*, 129 F.3d at 331. Together, § 230(c)(1) & (2) allow interactive computer service providers to be "indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law." *Chi. Lawyers' Comm.*, 519 F.3d at 670.

¶19 Section 230(c)(1) is the subsection central to this case. The text of subsection (c)(1) supplies three criteria that must be satisfied before the CDA bars a plaintiff's claims: (1) the defendant "is a 'provider or user of an interactive computer service'; (2) the claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of" the information. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (citations omitted); *see also Klayman v. Zuckerberg*, 753 F.3d 1354, 1357, 410 U.S. App. D.C. 187 (D.C. Cir. 2014).

¶20 Daniel does not dispute that Armslist, LLC, as the operator of armslist.com, is an interactive computer service provider. Her arguments involve the second and third criteria of § 230(c)(1). She challenges the second criterion by arguing that Armslist, through the design and operation of its website, helped to develop the content of the firearm advertisement such that the information was not exclusively provided by Linn. This would make Armslist an information content provider with respect to the advertisement; and therefore, place it outside of the CDA's protection. She challenges the third criterion by arguing that her claims are not based on Armslist's publication of content at all, but are instead based on Armslist's facilitation and encouragement of illegal firearm sales by third parties. If Daniel's claims do not require Armslist to be treated as the publisher or speaker of Linn's advertisement, then the CDA does not bar her claims.

C. Information Content Provider

¶21 Regarding the second criterion of Section 230(c)(1), CDA immunity exists only when the plaintiff's claims are based on content provided by another information content provider. If a defendant is an "information content provider" for the content at issue, then the defendant is not entitled to CDA immunity. § 230(c)(1); *Jones*, 755 F.3d at 408. An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3). "A website operator can simultaneously act

as both a service provider and content provider." *Jones*, 755 F.3d at 408; *see also Fair Hous. Council of San Fernandino Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008). In short, an interactive computer service provider, such as Armslist, is not liable for publishing a third party's content, but may be liable for publishing its own content.

¶22 A defendant is an information content provider with regard to content published on the internet only if the defendant is "responsible, in whole or in part, for the creation or development[8]" of the content. Section 230(f)(3). Courts have recognized that the word "development" cannot be read too broadly or too narrowly. On one hand, an overly broad reading could render an interactive service provider "responsible for the development of content created by a third party merely by displaying or allowing access to it." *Jones*, 755 F.3d at 409. This would "swallow[] up every bit of the immunity that the section otherwise provides," effectively writing § 230(c)(1)'s immunity provision out of the statute. *Roommates.com*, 521 F.3d at 1167.

¶23 On the other hand, an overly narrow reading of the word "development" risks ignoring the phrase "in whole or in part." *See* § 230(f)(3). It cannot be the case that an interactive computer service provider is categorically immune from liability for any exercise of its publishing, editorial, and screening functions; a website operator who

8. Linn, not Armslist, created the firearm advertisement. The issue in this case is whether Armslist helped to "develop" the content of the advertisement.

removes the word "not" from a third party's post stating that "[Name] did *not* steal the artwork" is responsible for developing potentially defamatory content. *Roommates.com*, 521 F.3d at 1169. For this reason, courts recognize that "despite the CDA, *some* state tort claims will lie against website operators acting in their publishing, editorial, or screening capacities." *Jones*, 755 F.3d at 410.

¶24 In order to avoid these two extremes and to remain faithful to the text and purpose of § 230, courts use the "material contribution" test to determine whether a website operator is responsible for the "development" of content. "[A] website helps to develop unlawful content, and thus falls within [Section 230(f)(3)], if it contributes materially to the alleged illegality of the conduct." *Roommates.com*, 521 F.3d at 1168. A material contribution "does not mean merely taking action that is necessary to the display of allegedly illegal content," such as providing a forum for third-party posts. *Jones*, 755 F.3d at 410. "Rather, it means being responsible for what makes the displayed content allegedly unlawful." *Id.*

¶25 The Ninth Circuit's decision in *Roommates.com*, 521 F.3d 1157, demonstrates how the material contribution test operates. Housing website Roommates.com required users to disclose their sex, race, sexual orientation, and whether they will bring children to the household in order to use the site. *Id.* at 1161. It also required renters to list their roommate preferences regarding these characteristics. *Id.* It was illegal under the Fair Housing Act and California anti-discrimination law for renters to request this information. *Id.* at 1161-

62. After selecting their preferences, users could access the "Additional Comments" section, a blank text box for users to "describe [themselves] and what [they] are looking for in a roommate." *Id.* at 1173. Some renters posted discriminatory preferences in this text box, such as "prefer white Male roommates" or "NOT looking for black [M]uslims." *Id.* The Fair Housing Council sued Roomates.com for violating the Fair Housing Act and state anti-discrimination laws. *Id.* at 1162.

¶26 The Ninth Circuit concluded that the CDA immunized Roommates.com from liability for the content of the "Additional Comments" section, but not for the required disclosures of characteristics like race and sex. *Id.* at 1165-67. The information posted in the "Additional Comments" section "comes entirely from subscribers and is passively displayed by Roommate." *Id.* at 1174. Roommates.com did not contribute to the unlawfulness of this content, but merely provided a place for the content to be posted. In contrast, the required disclosures of protected characteristics did amount to the development of content, making Roommates.com an information content provider with respect to these disclosures. *Id.* at 1167-68. By requiring users to enter characteristics and preferences such as age, race, sex, and sexual orientation as a condition of using the website, and by designing its website to hide listings from certain users based on these protected characteristics, Roommates.com materially contributed to the illegality of the content itself. *Id.* at 1169.

¶27 Decisions from other federal courts interpreting the CDA are helpful in distinguishing when a defendant

has materially contributed to the illegality of third-party content from when a defendant has merely published content created by someone else. In *Chi. Lawyers' Comm.*, owners of apartment buildings posted discriminatory advertisements on Craigslist's housing section in violation of the Fair Housing Act. *Chi. Lawyers' Comm.*, 519 F.3d at 668. Plaintiffs sued Craigslist for allegedly "causing" these Fair Housing Act violations. *Id.* at 671. The Seventh Circuit held that the CDA barred the plaintiffs' claims, explaining that "[o]ne might as well say that people who save money 'cause' bank robbery." *Id.* While Craigslist was responsible for the illegal content "in the sense that no one could post a discriminatory ad if [C]raigslist did not offer a forum," *id.*, Craigslist did not materially contribute to the illegality of the content.

¶28 Similarly, in *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193 (N.D. Cal. 2009), a class of plaintiffs alleged that Google materially contributed to the illegality of fraudulent advertisements posted by Google's advertising customers. The claims were based on Google's "Keyword Tool," which suggested specific keywords to Google's advertising customers. If an advertiser entered the word "ringtone," for example, the tool suggested the phrase "free ringtone." *Id.* at 1197. Some advertisers using this tool falsely advertised their ringtones as "free," resulting in unauthorized charges to consumers. *Id.* The plaintiffs argued that Keyword Tool's suggestion made Google a "developer" of the third-party advertisers' fraudulent content. *Id.*

¶ 29 The district court rejected this argument. Even assuming that Google was aware its Keyword Tool was being used to create illegal content, the Keycite Tool was a "neutral tool" much like the additional comments section in Roommates.com: it "merely provide[d] a framework that that could be utilized for proper or improper purposes." *Id.* (quoting *Roommates.com*, 521 F.3d at 1172). Additionally, there is no good faith requirement in § 230(c)(1). Therefore, an interactive computer service provider will not be liable for providing neutral tools "even if a service provider *knows* that third parties are using such tools to create illegal content." *Id.* at 1198 (citations omitted).

¶30 In contrast to these cases, in which the interactive computer service provider merely made illegal content more easily available, courts have denied CDA immunity when an interactive computer service provider materially contributes to the illegality of the content itself. *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2nd Cir. 2016), provides an example of a material contribution. LeadClick was an affiliate-marketing business that connected its clients to third-party publishers (affiliates), who then published the clients' advertisements on the internet. Some of LeadClick's affiliates used fake news websites to advertise a LeadClick client's weight loss products, and included false and misleading information such as fake customer reviews. *Id.* at 164-65. LeadClick's employees directed affiliates to make specific edits to advertisements in order to avoid being "crazy [misleading]." For example, a LeadClick employee told an affiliate to make a false advertisement appear "more 'realistic'" by lowering the amount of falsely claimed weight loss. *Id.* at 176.

¶31 The Federal Trade Commission brought an action for deceptive trade practices, and the Second Circuit held that the CDA did not immunize LeadClick. *Id.* LeadClick "developed" the unlawful advertisements by materially contributing to the illegality of the deceptive content, making it an information content provider of the content at issue. *Id.* For this reason, the claim was not based on content provided by another information content provider, and accordingly, there was no CDA immunity. *Id.*

¶32 The concept of "neutral tools" provides a helpful analytical framework for figuring out whether a website's design features materially contribute to the unlawfulness of third-party content. A "neutral tool" in the CDA context is a feature provided by an interactive computer service provider that can "be utilized for proper or improper purposes." *Goddard*, 640 F. Sup. 2d at 1197 (citing *Roommates.com*, 521 F.3d at 1172). A defendant who provides a neutral tool that is subsequently used by a third party to create unlawful content will generally not be considered to have contributed to the content's unlawfulness. *See Roommates.com*, 521 F.3d at 1169. *See also Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 589 (S.D.N.Y. 2018) ("An [interactive computer service provider] may not be held liable for so-called 'neutral assistance,' or tools and functionality that are available equally to bad actors and the app's intended users") (citations omitted).

¶33 Examples of such neutral tools include a blank text box for users to describe what they are looking for in a roommate, *Roommates.com*, 521 F.3d at 1173, a

rating system that allows consumers to award businesses between one and five stars and write reviews, *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016), and a social media website that allows groups to create profile pages and invite members. *Klayman v. Zuckerberg*, 753 F.3d at 1358. All of these features can be used for lawful purposes, so the CDA immunizes interactive computer service providers from liability when these neutral tools are used for unlawful purposes. *See* § 230(c)(1).

¶34 This is true even when an interactive computer service provider knows, or should know, that its neutral tools are being used for illegal purposes. In *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), for example, an actress sued a dating website after a third party created a dating profile in her name and posted her address. *Id.* at 1121. She asked the website operator to remove the post and the operator initially refused, although it was later taken down. *Id.* at 1122. Despite the operator's awareness of the unlawful content, the operator was immune under the CDA because it was not responsible for developing the content. *Id.* at 1125. Instead, it merely provided a neutral tool that could be used for lawful or unlawful purposes. *Id.; see also Roommates.com*, 521 F.3d at 1171 (explaining that in *Carafano*, "the website provided neutral tools, which the anonymous dastard used to publish the libel").

¶35 Finally, the Ninth Circuit clarified in *Roommates.com* that the difference between a neutral design feature and the development of unlawful content is the potential for lawful use. If a dating website had required users to

enter their race, sex, and sexual orientation through the same drop-down menus as used by Roommates.com, and filtered results based on those characteristics, the dating website would retain its CDA immunity. *Id.* at 1169. This is because "[i]t is perfectly legal to discriminate along those lines in dating." *Id.* at 1169 n.23. In contrast, filters based on these characteristics have no lawful use in the housing context, so they are not "neutral tools" in the housing context. Stated otherwise, the filters can be used only for unlawful purposes in a housing context. Therefore, if a website's design features can be used for lawful purposes, the CDA immunizes the website operator from liability when third parties use them for unlawful purposes.

¶36 In this case, Armslist did not develop the content of Linn's firearm advertisement, so Armslist is not an information content provider with respect to the advertisement.[9] Daniel's argument is based primarily on the assertion that Armslist's design features make it easier for prohibited purchasers to illegally obtain firearms. She asserts that Armslist should have known, actually knew, or even intended that its website would facilitate illegal firearm sales to dangerous persons.

¶37 One obvious problem with Daniel's argument is that § 230(c)(1) contains no good faith requirement. Therefore, the issue is not whether Armslist knew, or should have known, that its site would be used by third parties for illegal purposes. Instead, the issue is whether

9. To the extent Daniel argues that some of her claims are not based on the content of the advertisement at all, this argument is addressed in Section II. D.

Armslist was an information content provider with respect to Linn's advertisement. Armslist.com's provision of an advertising forum and the related search functions are all "neutral tools" that can be used for lawful purposes. Sales of firearms by private sellers are lawful in Wisconsin. Further, private sellers in Wisconsin are not required to conduct background checks, and private sales are not subject to any mandatory waiting period. Accordingly, the option to search for offers from private sellers is a tool that may be used for lawful purposes.

¶38 The remainder of the design features referenced in Daniel's complaint—lack of a "flag" option for illegal activity, failing to require users to create an account, failure to create restrictions on who may post or view advertisements, and failing to provide sufficient legal guidance to sellers—are voluntary precautions that the CDA permits but does not require. *See, e.g., Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 158 (E.D.N.Y. 2017) (suit against Facebook for failure to adequately screen terrorist activity was barred by the CDA); *Chi. Lawyers' Comm.*, 519 F.3d at 670 (explaining that the CDA allows an interactive computer service provider to be "indifferent" to the content of third-party posts). Whether or not Armslist knew illegal content was being posted on its site, it did not materially contribute to the content's illegality.

¶39 Daniel attempts to evade the CDA by asserting that creators of armslist.com intended for the website to make illegal firearm sales easier. This is an attempt to distinguish this case from the litany of cases dismissing suits against website operators who failed to screen

unlawful content. As the First Circuit has recognized, however, the allegation of intent is "a distinction without a difference" and does not affect CDA immunity. *Backpage.com*, 817 F.3d at 21.

¶40 The Ninth Circuit in *Roommates.com* explained the dangers of allowing allegations of intent or implied encouragement to defeat motions to dismiss in CDA cases:

> [T]here will always be close cases where a clever lawyer could argue that *something* the website operator did encouraged the illegality. Such close cases, we believe, must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties. Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost. But in cases of enhancement by implication or development by inference . . . section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.

Roommates.com, 521 F.3d at 1174-75. Therefore, allowing plaintiffs to escape the CDA by arguing that an interactive computer service provider intended its neutral tools to be used for unlawful purposes would significantly diminish the protections offered by § 230(c)(1).

¶41 The text and purpose of the CDA require us to reject Daniel's intent argument. Again, § 230(c)(1) contains no good faith requirement; we analyze only whether Armslist materially contributed to the unlawfulness of third-party content such that it "developed" the content as provided in § 230(f)(3). Because it did not, it is not an information content provider with respect to the content; therefore, Daniel's claims depend on content provided only by third parties.

D. Treatment as Publisher or Speaker

¶42 Section 230(c)(1) of the CDA prohibits only those claims that would treat the interactive computer service provider as the "publisher or speaker" of third-party content. *See, e.g., Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (concluding that the CDA did not bar a plaintiff's promissory estoppel claim against an interactive computer service provider who had promised to remove unlawful third-party content and then failed to do so, as the claim was not based on its publication of unlawful content, but on a promise that induced reliance and was not kept). If a plaintiff's claims do not require the interactive computer service provider to be treated as a publisher or speaker, then the CDA does not immunize the interactive computer service provider from suit.

¶43 However, courts do not merely ask whether the plaintiff's complaint calls the defendant a "publisher" or "speaker." "[W]hat matters is not the name of the cause of action . . . what matters is whether the cause of action inherently requires the court to treat the defendant as

the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1101-02. In other words, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Id.* at 1102. This rule prevents plaintiffs from using "artful pleading" to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *see also Kimzey*, 836 F.3d at 1266 ("[w]e decline to open the door to such artful skirting of the CDA's safe harbor provision.").

¶44 In *Doe v. Myspace*, Inc., 528 F.3d 413 (5th Cir. 2008), for example, a child was sexually assaulted after creating a profile on social media website myspace.com and using the site to arrange a meeting with her assailant. *Id.* at 416. The plaintiffs sued Myspace, asserting that their claims were not based on Myspace's publication of third-party content, but only on its "failure to implement basic safety measures to protect minors." *Id.* at 419. The Fifth Circuit rejected the plaintiffs' attempt to artfully plead their claims only in terms of Myspace's own actions: "[t]heir allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content." *Id.* at 420. Stated otherwise, the duty that MySpace allegedly violated—the duty to implement safety measures to protect minors—derived from the defendant's status as the publisher or speaker of content provided by another.

¶45 The First Circuit came to a similar conclusion in *Backpage.com, LLC*, 817 F.3d 12. Backpage.com was a classified advertising website similar to Craigslist, allowing third-party users to post goods or services for sale in different categories. *Id.* at 16. Three minors became victims of sex trafficking after third parties advertised them on backpage.com's "Adult Entertainment" section. *Id.* at 17. The plaintiffs sued Backpage.com for "a course of conduct that allegedly amounts to participation in sex trafficking," in violation of the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). *Id.* at 18. The claims were based on the design features of backpage.com, such as the lack of phone or email verification, the stripping of metadata from uploaded photographs, and the failure of the website's automated filtering system to sufficiently block prohibited terms. *Id.* at 17, 20. The plaintiffs attempted to distinguish cases such as *Myspace* by alleging that Backpage.com deliberately designed its website to make sex trafficking easier. *Backpage.com, LLC*, 817 F.3d at 17, 21.

¶46 The First Circuit held that the CDA barred the plaintiffs' claims as a matter of law. *Id.* at 24. Despite the plaintiffs' efforts to plead their claims only in terms of Backpage.com's acts, third-party content was "an essential component of each and all of the appellants' TVPRA claims." *Id.* at 22. In other words, the duty Backpage.com allegedly violated derived from its role as a publisher. It did not affect the First Circuit's analysis that Backpage.com was alleged to have deliberately designed its website to facilitate sex trafficking. As mentioned earlier, § 230(c)(1) contains no good faith requirement, so

"[s]howing that a website operates through a meretricious business model is not enough to strip away [the CDA's] protections." *Id.* at 29.

¶47 The court of appeals relied heavily on *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 359 P.3d 714 (Wash. 2015). In J.S., which involved claims against the operator of backpage.com on substantially the same facts as in *Jane Doe No. 1 v. Backpage.com, LLC*, the plaintiffs made the same argument as the *Jane Doe No. 1* plaintiffs, asserting that backpage.com was deliberately designed to facilitate sex trafficking. The Washington Supreme Court concluded that the plaintiffs' allegation of intent was enough to escape the reach of the CDA. J.S., 359 P.3d at 718.

¶48 *J.S.* is unpersuasive for two reasons. First, Washington's pleading standard is much different than Wisconsin's. Under Washington law, a complaint may be dismissed for failure to state a claim "only if it appears beyond a reasonable doubt that no facts exist that would justify recovery." *Id.* at 716 (citation omitted). Washington courts may consider "hypothetical facts" that were not pled. Therefore, a complaint may not be dismissed "if *any* set of facts could exist that would justify recovery," whether such facts were pled in the complaint or not. *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781, 785 (Wash. 1988). For this reason, Washington courts may grant motions to dismiss "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *J.S.*, 359 P.3d at 716. This pleading standard is inconsistent

with Wisconsin's pleading standard. *See Data Key Partners*, 356 Wis. 2d. 665, ¶21 ("a complaint must plead facts, which if true, would entitle the plaintiff to relief.").

¶49 More importantly, the Washington Supreme Court ignored the text of the CDA, and the overwhelming majority of cases interpreting it, by inserting an intent exception into § 230(c)(1). The Washington Supreme Court opined that "[i]t is important to ascertain whether in fact Backpage designed its posting rules to induce sex trafficking . . . because 'a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.'" *J.S.*, 359 P.3d at 718 (citing *Roommates.com*, 521 F.3d at 1168). Underlying this statement is the implicit assumption that a website operator's subjective knowledge or intent may transform what would otherwise be a neutral tool into a "material contribution" to the unlawfulness of third-party content. As explained in Section II. C., however, this assumption has no basis in the text of § 230(c)(1). The relevant inquiry, regardless of foreseeability or intent, is "whether the cause of action necessarily requires that the defendant be treated as the publisher or speaker of content provided by another." *Backpage.com, LLC*, 817 F.3d at 19 (citing *Barnes*, 570 F.3d at 1101-02).

¶50 In this case, all of Daniel's claims against Armslist require the court to treat Armslist as the publisher or speaker of third-party content. Daniel's negligence claim asserts that Armslist had a duty to exercise "reasonable care" in "facilitating" the sale of guns, and had a duty to employ "sufficient questioning and screening" to reduce

the risk of foreseeable injury to others. The complaint alleges that Armslist breached this duty by designing armslist.com to "facilitate" illegal gun sales, as well as by failing to implement sufficient safety measures to prevent the unlawful use of its website.

¶51 Daniel's negligence claim is simply another way of claiming that Armslist is liable for publishing third-party firearm advertisements and for failing to properly screen who may access this content. The complaint alleges that Armslist breached its duty of care by designing a website that could be used to facilitate illegal sales, failing to provide proper legal guidance to users, and failing to adequately screen unlawful content. Restated, it alleges that Armslist provided an online forum for third-party content and failed to adequately monitor that content. The duty Armslist is alleged to have violated derives from its role as a publisher of firearm advertisements. This is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled.

¶52 That Armslist may have known that its site could facilitate illegal gun sales does not change the result. Because § 230(c)(1) contains no good faith requirement, courts do not allow allegations of intent or knowledge to defeat a motion to dismiss. *See, e.g., Roommates.com*, 521 F.3d at 1174-75. Regardless of Armslist's knowledge or intent, the relevant question is whether Daniel's claim necessarily requires Armslist to be treated as the publisher or speaker of third-party content. Because it does, the negligence claim must be dismissed.

¶53 The negligence per se claim is dismissed for the same reason. Daniel alleges that Armslist "violated federal, state, and local statutes, regulations, and ordinances" by facilitating Haughton's purchase of a firearm. It is true that in Wisconsin, "'one who violates a criminal statute must be held negligent *per se* in a civil action for damages based on such violation.'" *Bennett v. Larsen Co.*, 118 Wis. 2d 681, 692-93, 348 N.W.2d 540 (1984). As with the negligence claim, however, Daniel's only basis for alleging that Armslist violated any statute, regulation, or ordinance requires Armslist to be treated as the publisher or speaker of Linn's post.

¶54 Similarly, the aiding and abetting tortious conduct claim asserts that Armslist "aided, abetted, encouraged, urged, and acquiesced in" Linn's illegal sale to Radcliffe by "brokering" the transaction. However, there is no allegation that Armslist's participation in the transaction went beyond creating a forum for Linn's advertisement and failing to prohibit Radcliffe from viewing the advertisement. This claim would therefore require Armslist to be treated as the publisher of the advertisement and must be dismissed.

¶55 The public nuisance claim is dismissed for the same reason. Daniel asserts that Armslist "negligently, recklessly, and/or intentionally facilitate[ed] the sale of vast quantities of guns" to prohibited purchasers, resulting in a "substantial and unreasonable interference with the public's health, safety, convenience, comfort, peace, and use of public property and/or private property." The act or omission alleged to have created the nuisance

is Armslist's provision of a forum for third parties to post and view firearms advertisements. In other words, the duty Armslist is alleged to have violated derives from its role as a publisher of third-party content. Accordingly, the public nuisance claim is dismissed.

¶56 Daniel's civil conspiracy claim does not allege that Armslist conspired with Linn to sell a firearm to a known prohibited purchaser; rather, it alleges that Armslist, LLC's members conspired with one another to create a marketplace for illegal firearm sales, and "advised, encouraged, or assisted" Armslist, LLC in facilitating unlawful firearm sales. Again, the complaint does not allege that Armslist's role in facilitating these illegal transactions went beyond creating a forum on which third parties could post and view firearm advertisements. As with the claims discussed above, the civil conspiracy claim is another way of stating that Armslist is liable for publishing third-party content. The civil conspiracy claim is therefore dismissed.

¶57 All of Daniel's remaining claims—negligent infliction of emotional distress, wrongful death and piercing the corporate veil—are dependent on the claims we have discussed above. Because all of those claims have been dismissed, Daniel's claims for negligent infliction of emotional distress, wrongful death and piercing the corporate veil are dismissed as well. Accordingly, the circuit court did not err when it granted Armslist's motion to dismiss

III. CONCLUSION

¶58 We conclude that 47 U.S.C. § 230(c)(1) requires us to dismiss Daniel's complaint against Armslist. Section 230(c)(1) prohibits claims that treat Armslist, an interactive computer service provider, as the publisher or speaker of information posted by a third party on its website. Because all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties on armslist.com, her claims are barred by § 230(c)(1). Accordingly, we reverse the decision of the court of appeals and affirm the circuit court's dismissal of Daniel's complaint.

By the Court.—The decision of the court of appeals is reversed.

¶59 SHIRLEY S. ABRAHAMSON, J., withdrew from participation before oral argument.

¶60 ANN WALSH BRADLEY, J. (*dissenting*). The majority views Daniel's complaint as merely "artful pleading," disguising her true claims against Armslist. By using the phrase "artful pleading," the majority implicitly acknowledges that the language of the complaint states a claim. In essence, it posits, "I know that's what it says, but that's not what it really means."

¶61 What the majority would call "artful pleading," I would instead call the plain language of the complaint—which at this stage of the proceedings, the law mandates we accept as true.[1]

¶62 The complaint alleges that Zina Daniel Haughton sought and received a restraining order against her husband, Radcliffe Haughton, after he assaulted her and threatened her life. Majority op., ¶3. Pursuant to the restraining order, Radcliffe was prohibited from owning a firearm for a period of four years. *Id.; see* Wis. Stat. § 941.29(1m)(f).[2]

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1. For purposes of our review, we must accept the allegations of Daniel's complaint as true. *PRN Assocs. LLC v. State, DOA*, 2009 WI 53, ¶27, 317 Wis. 2d 656, 766 N.W.2d 559; *see Meyers v. Bayer AG, Bayer Corp.*, 2007 WI 99, ¶81, 303 Wis. 2d 295, 735 N.W.2d 448 (Roggensack, J., dissenting) (citation omitted).

2. Wis. Stat. § 941.29(1m)(f) provides that a person who possesses a firearm is guilty of a Class G felony if "[t]he person is subject to an injunction issued under s. 813.12 or 813.122 . . . that includes notice to the respondent that he or she is subject to the requirements and penalties under this section and that has been filed under s. 813.128(3g)."

¶63 Within two days Radcliffe had a gun in his hands. *See* Majority op., ¶3. And within three days, Radcliffe went to Zina's place of employment, and in front of her daughter, shot and killed Zina. He also murdered two other people, injured four others, and then shot and killed himself. *Id.*, ¶4.

¶64 Radcliffe quickly and easily, without undergoing the inconvenience of a federal background check, procured a gun using a website designed by Armslist. The complaint avers that Armslist designed its website with the specific purpose of skirting federal gun laws.

¶65 Nevertheless, the majority allows Armslist to hide behind the Communications Decency Act (CDA), which affords immunity to websites if a plaintiff's claims treat the website "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The allegations here, however, assert liability for Armslist not based on content provided by another. Rather, the allegations assert liability based on design content Armslist alone created.

¶66 In my view, the majority errs in its interpretation of the CDA by basing its decision not on the actual claims pled in the complaint but on its own manufactured interpretation of those claims. As a result, it fails to recognize that here the design itself is the creation of content.[3] Accordingly, I respectfully dissent.

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3. Examples of design content are ubiquitous. One need look no further than the design content of algorithms, used to influence

Appendix A

I

¶67 The complaint alleges that Radcliffe was hastily able to procure this gun by using Armslist.com, a website that serves as an online marketplace for firearms. *Majority op.*, ¶¶1, 3. He focused his search for a gun exclusively on Armslist "because he knew that he could not acquire a firearm from a licensed dealer or from a private seller in his community who knew him, and that any contact with a legitimate seller could result in his plan of illegally purchasing a firearm being revealed to law enforcement authorities."

¶68 Importantly, unlicensed private sellers are not required under federal law to conduct background checks on individuals attempting to purchase firearms. *See* 18 U.S.C. §§ 922(t); 18 U.S.C. § 923(a). Allowing and encouraging prohibited purchasers like Radcliffe to circumvent the laws governing licensed firearm dealers, Armslist incorporated a search function that allows potential gun buyers to exclude licensed dealers from their queries.

¶69 The day after the issuance of the restraining order against him, Radcliffe took action to accomplish his goal. After seeing on Armslist an advertisement for an FNP-40 semiautomatic handgun and three high-capacity magazines of ammunition, Radcliffe contacted the seller of

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everything from where we shop to the sentencing of criminals. *See State v. Loomis*, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749. The parameters of "content" extend beyond simply words on a page.

the items, Devin Linn, using Armslist's "contact" function. The gun was listed for $500, a cost higher than what would have been paid by a legitimate buyer for the same weapon and ammunition. Radcliffe advised Linn in a phone call that "he needed the firearm as soon as possible."

¶70 Consistent with Radcliffe's desire for a fast transaction, he and Linn met the following morning. Linn handed over the gun and ammunition, no questions asked. Despite erratic behavior on Radcliffe's part, Linn sold Radcliffe the weapon without determining whether he was a felon, whether he was subject to a restraining order or whether he had been adjudicated mentally ill. He made no inquiry whatsoever.

¶71 After Radcliffe took the weapon he purchased from Linn and used it to kill Zina and two other people, Zina's daughter Yasmeen Daniel brought this lawsuit. The theory of liability advanced focused on Armslist's conduct: "the Armslist Defendants designed Armslist.com specifically to exploit and profit from the background check exception for private sellers, to enable the sale of firearms to prohibited and otherwise dangerous people, and to enable illegal firearm sales, including sales that avoid federal restrictions on interstate transfers, state-imposed waiting periods, and state-specific assault weapon restrictions."

¶72 Daniel further alleged that "[t]he Armslist Defendants knew, or should have known, that the design and architecture of Armslist.com creates a near-certainty that prohibited purchasers will use the marketplace to buy

firearms, and that the marketplace will be used for illegal gun sales, including by unlicensed individuals that are engaged in the business of selling firearms." In Daniel's estimation, Armslist breached its duty to the public by "[d]esigning Armslist.com to facilitate sales to prohibited purchasers, such as Radcliffe Haughton."

¶73 Armslist moved to dismiss the claims against it based on CDA immunity. The circuit court granted the motion to dismiss and the court of appeals unanimously reversed.

¶74 Now reversing the court of appeals, the majority determines that Armslist is immune from Daniel's claims pursuant to the CDA. Majority op., ¶2. In the majority's view, "all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties . . . ," entitling it to CDA immunity. *Id.* It further opines that "Daniel's negligence claim is simply another way of claiming that Armslist is liable for publishing third-party firearm advertisements and for failing to properly screen who may access this content." *Id.*, ¶51.

II

¶75 This case presents a discrete question of statutory interpretation. As the court of appeals in this case correctly stated, "[t]he sole and limited issue is whether the complaint seeks to hold Armslist liable on a basis prohibited by the Act." *Daniel v. Armslist, LLC*, 2018 WI App 32, ¶28, 382 Wis. 2d 241, 913 N.W.2d 211.

¶76 The statute at issue is the CDA, 47 U.S.C. § 230(c)(1), which provides: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

¶77 Another nearby provision states the preemptive effect of the CDA: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3). The CDA is a purveyor of immunity, but it "was not meant to create a lawless no-man's-land on the Internet." Fair Hous. *Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008).

¶78 Our inquiry is limited to whether the plaintiff's theory of liability (that Armslist designed its website to facilitate illegal gun purchases) treats Armslist as the speaker or publisher of Linn's and Radcliffe's posted advertisements. The court of appeals, subscribing to a plain language interpretation of the CDA, concluded that "Congress limited immunity to a single circumstance: when a theory of liability treats the website creator or operator 'as the publisher or speaker of any information provided by another information content provider.' Nothing in this language speaks more generally to website design and operation." *Daniel*, 382 Wis. 2d 241, ¶42.

¶79 In the court of appeals' view, the content for which Daniel seeks liability "is not 'information provided by

another information content provider.' Rather, it is content created by Armslist, and there is no language in the Act immunizing Armslist from liability based on content that it creates." *Id.*, ¶44.

¶80 I agree with the court of appeals' unanimous determination. A close reading of Daniel's complaint indicates that the complaint is not seeking to hold Armslist liable for any content created by a third party. The complaint does not allege that Armslist is liable due to the advertisements posted by Radcliffe and Linn. Instead, it alleges that Armslist is liable for its *own* content, i.e. the design and search functionality of its website.

¶81 "Where it is very clear that the website directly participates in developing the alleged illegality . . . immunity will be lost." *Fair Hous. Council*, 521 F.3d at 1174. Such is the allegation here.

¶82 As the court of appeals observed, this conclusion is supported by the Washington Supreme Court's interpretation of the CDA in *J.S. v. Village Voice Media Holdings, LLC*, 184 Wn.2d 95, 359 P.3d 714 (Wash. 2015). In *J.S.*, a victim of sex trafficking filed suit against Backpage, a website that allowed hosted advertisements offering sexual services. *Id.*, ¶¶2-3. She alleged that the website "is not immune from suit in part because its advertisement posting rules were 'designed to help pimps develop advertisements that can evade the unwanted attention of law enforcement, while still conveying the illegal message." *Id.*, ¶3.

¶83 The *J.S.* court observed that its determination "turns on whether Backpage merely hosted the advertisements that featured J.S., in which case Backpage is protected by CDA immunity, or whether Backpage also helped develop the content of those advertisements, in which case Backpage is not protected by CDA immunity." *Id.*, ¶11. Backpage moved to dismiss, claiming CDA immunity, but the court allowed J.S.'s claims to proceed.

¶84 In doing so, the *J.S.* court examined the allegations of the complaint, and taking them as true, determined that they "would show Backpage did more than simply maintain neutral policies prohibiting or limiting certain content." *Id.*, ¶12.[4] Following the same mode of analysis here, Armslist is not entitled to CDA immunity.

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4. The majority's attempt to distinguish and dismiss *J.S.* is unpersuasive. *See* majority op., ¶¶48-49. First, the majority fails to explain how using Wisconsin's pleading standard instead of Washington's would change the result. Contrary to the majority's assertion, the *J.S.* court did not base its determination on any "hypothetical facts." Rather, it took the allegations of the complaint as true, just as we do in Wisconsin. *See J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714, ¶12 (Wash. 2015) ("Viewing J.S.'s allegations in the light most favorable to J.S., as we must at this stage, J.S. alleged facts that, if proved true . . . "); *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693 ("When we review a motion to dismiss, factual allegations in the complaint are accepted as true for purposes of our review.").

Second, the *J.S.* court did not establish an "intent exception" to CDA immunity as the majority claims, but merely recognized a distinction that is manifest in the CDA's text: the distinction between first-party created content and third-party created content. *See* majority op., ¶49.

¶85 Specifically, Daniel alleges in her complaint that "[o]ne of the most prominent features of Armslist's search function is the ability to search for only private sellers, thereby eliminating from search results any sellers required to perform a background check." No one but Armslist is alleged to be responsible for this feature.

¶86 Daniel further asserts that this feature was intentionally created "specifically to exploit and profit from the background check exception for private sellers, to enable the sale of firearms to prohibited and otherwise dangerous people, and to enable illegal firearm sales, including sales that avoid federal restrictions on interstate transfers, state-imposed waiting periods, and state-specific assault weapon restrictions." Again, no one but Armslist is alleged to be responsible for this design.[5]

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5. Justice Wiggins's concurrence in *J.S.* is particularly insightful in examining the facts alleged in Daniel's complaint in this case. Narrowly interpreting the CDA, Justice Wiggins wrote:

> Plaintiffs do not argue that Backpage.com necessarily induces the posting of unlawful content by merely providing an escort services category. Instead, plaintiffs allege that Backpage.com deliberately designed its posting rules in a manner that would enable pimps to engage in sex trafficking, including in the trafficking of minors, and to avoid law enforcement. These factual allegations do not suggest that Backpage.com is being treated as a "publisher or speaker."

J.S. v. Village Voice Media Holdings, 359 P.3d 714, ¶30 (Wash. 2015) (Wiggins, J., concurring); *see also* Mary Graw Leary, The Indecency and Injustice of Section 230 of the Communications Decency Act, 41 Harv. J. of Law & Pub. Pol'y 553, 587-591 (2018).

¶87 The majority contends that "all of Daniel's claims for relief require Armslist to be treated as the publisher or speaker of information posted by third parties . . . ." Majority op., ¶2. Further, the majority claims that its decision "prevents plaintiffs from using 'artful pleading' to state their claims only in terms of the interactive computer service provider's own actions, when the underlying basis for liability is unlawful third-party content published by the defendant." Majority op., ¶43.

¶88 But the majority's approach requires the court to ignore the literal words used in the complaint. In its endeavor to brand Daniel's complaint as "artful pleading," it ties itself in knots to avoid the actual claims Daniel makes.

¶89 Such an approach deviates from established practice that plaintiffs are the masters of their complaints. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987). Rather than applying the complaint's plain language, the majority manufactures an interpretation. Embarking upon a legally unsupportable approach, it fails to recognize that here the design itself is content and ignores the distinction between first-party created content and third-party created content.

¶90 The complaint sets forth that Daniel is seeking liability against Armslist for Armslist's conduct only. We

should take the complaint at face value.[6] Accordingly, Armslist is not entitled to CDA immunity.

¶91 For the foregoing reasons, I respectfully dissent.

6. Further, I observe that my conclusion is not at odds with the bulk of CDA jurisprudence. For example, in *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), a seminal CDA case, the Fourth Circuit determined that "§ 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."

Zeran and its progeny are not disturbed by my conclusion. My analysis and *Zeran* peacefully coexist because they deal with different factual allegations—liability for third party content vs. liability for first party content.

APPENDIX B — DECISION OF THE COURT OF APPEALS OF THE STATE OF WISCONSIN, FILED APRIL 19, 2018

COURT OF APPEALS OF
THE STATE OF WISCONSIN

Appeal No. 2017AP344
Cir. Ct. No. 2015CV8710

YASMEEN DANIEL, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ZINA DANIEL HAUGHTON,

Plaintiff-Appellant,

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT, AS SUBROGEE FOR JALISCO'S LLC,

Intervening Plaintiff,

v.

ARMSLIST, LLC, AN OKLAHOMA LIMITED LIABILITY COMPANY, BRIAN MANCINI AND JONATHAN GIBBON,

Defendants-Respondents,

BROC ELMORE, ABC INSURANCE CO., THE FICTITIOUS NAME FOR AN UNKNOWN INSURANCE COMPANY, DEF INSURANCE CO., THE FICTITIOUS NAME FOR AN UNKNOWN INSURANCE COMPANY AND ESTATE OF RADCLIFFE HAUGHTON, BY HIS SPECIAL ADMINISTRATOR JENNIFER VALENTI,

Defendants,

Appendix B

PROGRESSIVE UNIVERSAL
INSURANCE COMPANY,

Intervening Defendant.

November 13, 2017, Submitted on Briefs;
April 19, 2018, Decided;
April 19, 2018, Filed

APPEAL from an order of the circuit court for Milwaukee County: GLENN H. YAMAHIRO, Judge. *Reversed.*

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

¶1 BLANCHARD, J. This is a tort action arising from a mass casualty shooting at a salon in Brookfield, Wisconsin. It is alleged that the shooter, Radcliffe Haughton, bought the firearm and ammunition he used in the shooting after responding to a "for sale" post that appeared on a website, Armslist.com. Yasmeen Daniel, the daughter of shooting victim Zina Daniel Haughton and the administrator of her mother's estate, has filed multiple tort claims against Armslist, LLC, which created and operated Armslist.com.[1] Significant to Daniel's claims,

1. Yasmeen Daniel brought this action both individually and as administrator of the estate of Zina Daniel Haughton. We refer to her in both capacities as "Daniel." Daniel also brought claims against Radcliffe's estate and the person who sold the gun and ammunition to Radcliffe. We do not address those claims in this appeal.

Separately, we note that Daniel has also sued two members of Armslist, LLC. We will refer to the LLC and its two members as

when Radcliffe purchased the firearm and ammunition, he was prohibited by a state court domestic violence injunction from possessing a firearm.[2]

¶2 The circuit court dismissed Daniel's complaint against Armslist in its entirety, based on the federal Communications Decency Act of 1996 ("the Act"). *See* 47 U.S.C. § 230(c)(1) and (e)(3) (October, 1998). As pertinent here, the Act creates what Armslist argues is immunity from any "liability" that "may be imposed under any State or local law" for a "provider" of "an interactive computer service" under a theory of liability that "treat[s]" the provider "as the publisher or speaker of any information provided by another information content provider." *See id.* The court concluded that Armslist has immunity under this provision of the Act because Daniel alleges only that Armslist "passively displays content that [was] created entirely by third parties" and "simply maintain[ed] neutral policies prohibiting or eliminating certain content," and because Daniel "fails to allege facts which establish ... that Armslist [was] materially engaged in creating or developing the illegal content on its page."

¶3 We reverse the order dismissing the complaint as to the Armslist defendants. Applying a plain language

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"Armslist" or the "Armslist defendants." For purposes of this appeal neither side suggests that there is any potential difference in liability among Armslist defendants, and we generally treat them in an identical manner. Our decision reversing dismissal of the complaint applies to all Armslist defendants.

2. We refer to Radcliffe and Zina by their first names because they shared a last name.

interpretation to the Act, we agree with Daniel that the allegations in the complaint, which are that Armslist used website design features to facilitate illegal firearms purchases, do not seek to hold Armslist liable on a theory prohibited by the Act. Stated in the terms used in the Act, we conclude that the allegations do not seek to hold Armslist liable under a theory of liability that "treat[s]" Armslist "as the publisher or speaker of any information provided by another information content provider," which is the protection at issue here that the Act provides. We reject Armslist's argument because the Act provides immunity to website operators, such as Armslist, only when the allegations treat the website as the publisher or speaker of third-party content, and the Act does not protect a website operator from liability that arises from its own conduct in facilitating user activity, as is the case here.

¶4 There is a separate issue, which does not involve immunity under the Act, namely, the court's dismissal of a claim of negligence per se. On this issue, we agree with Daniel that, as Armslist effectively concedes, the circuit court erred in dismissing this claim.

¶5 Accordingly, we reverse dismissal of the complaint as to the Armslist defendants, including the dismissal of the negligence per se claim, and remand.

BACKGROUND

¶6 The following are facts that are alleged or which reasonably can be inferred from the complaint in favor of

Daniel. As discussed below, we must accept the facts and reasonable inferences as true for purposes of this appeal.

Allegations Relating To Firearms Sales In General

¶7 Federally licensed firearms dealers are required to access and consider certain background information regarding potential buyers in order to prevent sales to individuals prohibited by law from possessing firearms. *See* WIS. STAT. § 175.35(2) (2015-16); 18 U.S.C. § 922(t)(1).[3] It is unlawful to sell a firearm to certain persons, including those who have domestic abuse injunctions entered against them. *See* WIS. STAT. § 941.29(4); 18 U.S.C. § 922(d). We will sometimes refer to firearms sales to persons who are legally prohibited from possessing them as "prohibited sales," and to the purchasers as "prohibited purchasers."

¶8 In contrast to federally licensed dealers, unlicensed "private sellers"—meaning persons not "engaged in the business of selling firearms"—are not required under federal law to conduct background checks. We follow the lead of the parties here, consistent with many authorities, in using the phrases "private sellers" and "private sales" to refer to firearms sales by persons who are not engaged in the business of selling firearms and not licensed by the federal government as firearms dealers. Private sales are attractive to potential buyers who fear that they will fail a background check.

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3. All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted. All references to the United States Code are to the current version unless otherwise noted.

Appendix B

¶9 To summarize the basics of the allegations, then, private sales without background checks are not per se unlawful but are attractive to prohibited persons, and prohibited persons violate the law by obtaining firearms from anyone.

¶10 The complaint further alleges that statistics show that firearms sold through private sales are more frequently transferred to prohibited persons than are firearms transferred in federally licensed sales. Specifically, the complaint alleges that published studies prove that private sellers and prohibited purchasers are attracted to use Armslist.com by its permitted anonymity and its various filtering features, which make it easier for buyers to avoid having to submit to a background check and to minimize the collection of evidence that could be used to hold them accountable for later unlawful acts committed with an identified firearm.

¶11 In addition, the complaint alleges that private sales facilitated by online communications have been linked to illegal firearms trafficking, to firearms sales to minors, and to mass casualty shootings. As a result, the complaint alleges, major classified advertising websites, such as eBay, Craigslist, and Amazon.com, prohibit posts seeking to buy or sell firearms.

Allegations Relating To The Armslist.com Website

¶12 After several major websites prohibited users from using posts to facilitate firearms transactions, Armslist saw a commercial opening in this area and created

Armslist.com. Through the website, potential buyers and sellers contacted one another, either by clicking on a link within the website or by using the contact information provided by the other party through the website.

¶13 The complaint alleges that design and operational features of Armslist.com, which we now summarize, affirmatively "encouraged" transactions in which prohibited purchasers acquired firearms:

- *Made private sales easy; ability to limit searches*. Sellers could indicate on the website whether they were "premium vendors" (*i.e.*, federally licensed firearms dealers) or instead "private sellers." Potential buyers were allowed to identify preferences for private sellers and to limit their search results to private sellers.

- *No flagging of "criminal" or "illegal" content*. Users were allowed to "flag" ads to invite "review and policing" by Armslist, and Armslist used these "flags" to delete certain posts and to prohibit certain users from posting on Armslist.com. However, the website expressly prevented users from flagging content as purportedly criminal or illegal.

- *Warning against illegality, but no specific legal guidance*. Armslist.com contained a warning that users must obey the law and

asked users to certify that they would not use the website for "any illegal purpose." However, it provided no guidance on specific laws governing firearm sales or the care that should be used in conducting such sales.

- *No registration requirement; flagging of registered accounts.* Users were not required to "register" an account with Armslist.com, "thereby encouraging anonymity." Armslist prominently displayed a statement on each post indicating whether the poster had a "registered" or "unregistered" account.

- *No buyer restrictions; no waiting period for private sales.* "Armslist does not contain any restrictions for prospective buyers, and its website is designed to enable buyers to evade state waiting period and other legal requirements." This "waiting period" reference is based on a Wisconsin law, in place at the time of the Linn-Radcliffe transaction, that required federally licensed firearms dealers to wait 48 hours after receiving a "proceed" response from the background check system before transferring the firearm, while private sales were not subject to this requirement.

¶14 In contrast, the complaint alleges, a different website for firearms transactions requires its users to register before buying a firearm and to take delivery

only through a licensed dealer, which greatly minimizes the chances of firearms transfers to prohibited persons.

¶15 The complaint includes the allegation that "the average number of want ads specifically asking to buy from a private seller on Armslist[.com] is 240% higher in states that do not require background checks on those sales as compared to states that require [background] checks on private, stranger-to-stranger sales." In particular Wisconsin, which did not require a background check for a private sale, "had the fifth highest number of Armslist [.com] want ads seeking to buy from private sellers."

¶16 The complaint cites a report that allegedly concludes that 54 percent of Armslist.com users selling firearms are willing to sell to a person they believe could not pass a background check, and 67 percent of private online sellers in Wisconsin are willing to sell to a person they believe could not pass a background check.

¶17 In sum, Daniel's theory of liability is that, through its design and operation of website features, Armslist's actions were a cause of the injuries to Daniel.

Allegations Relating To The Firearm Sale To Radcliffe

¶18 The complaint alleges that police arrested Radcliffe after he assaulted Zina in their home, then confronted her with a knife in the parking lot of the salon where she worked, and slashed the tires of her car. Zina successfully sought an injunction from a circuit court that prohibited Radcliffe from contacting Zina and from

possessing a firearm for four years. This made Radcliffe a prohibited person under state and federal law. *See* WIS. STAT. § 941.29(1m)(f); 18 U.S.C. § 922(g)(8).

¶19 Thereafter, Radcliffe searched for a firearm to buy, exclusively using Armslist.com. Radcliffe used an Armslist.com function that allowed him to exclude licensed dealers in his search. Radcliffe found a post by private seller Devin Linn that offered a semiautomatic handgun and three high-capacity magazines for sale. Radcliffe arranged, through communications with Linn on the website, to buy the firearm and ammunition in an all-cash transaction with Linn in a fast food restaurant parking lot. The next day, Radcliffe used this firearm and ammunition to fatally shoot four people, including Zina and himself, and to wound four others.

¶20 Daniel alleges multiple state law causes of action against the Armslist defendants, each arising from the allegations summarized above.[4] The circuit court granted

4. Briefly in the text and in the second paragraph of this footnote we address two specific claims. We address a negligence per se claim later in the text and we address a claim based on alter-ego liability in the next paragraph of this footnote. Otherwise, however, we need not separately address the tort claims in Daniel's complaint, because Armslist does not argue that we should distinguish among the claims in resolving the primary issue involving potential immunity under the Act.

Regarding Daniel's request to pierce the corporate veil of Armslist, LLC, through a claim based on alter-ego liability, we interpret the circuit court to have responded to Armslist's request to dismiss this claim by indicating that the request was premature. The

a motion to dismiss filed by the Armslist defendants on the ground that the Act bars Daniel's claims against the Armslist defendants. Separately, the circuit court dismissed the negligence per se claim based on a 1979 decision of this court. Daniel appeals.

DISCUSSION

¶21 The primary issue presented is whether Daniel's claims fail on Armslist's motion to dismiss because the Armslist defendants are immune from liability for state law claims under the federal Communications Decency Act. Before addressing the primary issue, we briefly address a separate circuit court decision, namely, to dismiss one cause of action, negligence per se, which we conclude was an error resulting from a misapplication of case law. *See State v. Walker*, 2008 WI 34, ¶13, 308 Wis.

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court noted that there could be no grounds to pierce the corporate veil before Daniel first obtains a judgment against Armslist, LLC, in this case, which may not come to pass. At least based on the limited briefing with which we have been provided, this issue does not appear ripe, and we do not address this topic further.

One additional note on the status of claims and parties. Our holding that there is no immunity under the Act based on the allegations in the complaint reverses the circuit court's ruling, if it was intended as such, that individual defendants Mancini and Gibbon must be dismissed from the complaint. However, we interpret the court to have stated only that the individual defendants should be dismissed for the same reason that the complaint should be dismissed, based on immunity under the Act, and Armslist takes a position consistent with this interpretation. Because we hold that the Act does not apply, Mancini and Gibbon remain in the case at this juncture.

2d 666, 747 N.W.2d 673 (applications of case law present questions of law that are reviewed de novo on appeal).

¶22 The circuit court applied a 1979 decision of this court to dismiss the negligence per se claim. That case, *Olson v. Ratzel*, 89 Wis. 2d 227, 238, 244-250, 278 N.W.2d 238 (Ct. App. 1979), arguably supports the circuit court's decision, because it explains that, while the general rule is that a violation of a criminal statute is negligence per se, various factors created reasonable doubt that criminal statutes involving firearms handling or possession could constitute negligence per se. Regardless whether *Olson* supports the circuit court's decision, Daniel correctly points out that the portion of the opinion that the circuit court relied on is no longer the law, if it ever was. Our supreme court, in 1951 and again in 1984, has stated unambiguously that the following is the "rule" in Wisconsin: "'one who violates a criminal statute must be held negligent *per se* in a civil action for damages based on such violation.'" *See Bennett v. Larsen Co.*, 118 Wis. 2d 681, 692-93, 348 N.W.2d 540 (1984) (quoting *McAleavy v. Lowe*, 259 Wis. 463, 475, 49 N.W.2d 487 (1951)). Discussion in both *McAleavy* and *Bennett* leave no doubt that the court, in each opinion, intended to adopt this broad unqualified rule. And, as Daniel also points out, when a decision of this court conflicts with a decision of the supreme court, the latter controls. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Moreover, Armslist does not address this *Bennett*-based argument in its response brief, effectively conceding the point. Accordingly, we reverse the circuit court's decision dismissing the negligence per se claim.

Appendix B

¶23 We now turn to the primary issue, immunity under the Act.

Legal Standards

¶24 A complaint "fails to state a claim upon which relief may be granted if the defendant is immune from liability for the activity alleged in the complaint." *See Energy Complexes, Inc. v. Eau Claire Cty.*, 152 Wis. 2d 453, 463, 449 N.W.2d 35 (1989) (citation omitted).[5] Preemption of state law tort liability under the Act can "support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint." *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015).

¶25 Our standard of review and the substantive standard for consideration of a motion to dismiss for failure to state a claim for which relief may be granted are well established:

> Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review; ....

5. At least one court has questioned whether it is appropriate to use the term "immunity" in connection with the Act. *See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-70 (7th Cir. 2008). But Armslist has raised the affirmative defense of "immunity" in support of its motion to dismiss, and both parties on appeal use the term without qualification. We see no problem in using the term "immunity" to describe the result that Armslist seeks under the Act, so long as the term is correctly limited to the narrow scope of immunity dictated by the language of the Act.

Appendix B

> When we review a motion to dismiss, factual allegations in the complaint are accepted as true for purposes of our review....
>
> ....
>
> "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." Upon a motion to dismiss, we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom.

Data Key Partners v. Permira Advisers LLC, 2014 WI 86, ¶¶17-19, 356 Wis. 2d 665, 849 N.W.2d 693 (citations omitted). Thus, here we must accept all allegations of the complaint as true, and we look to the face of the complaint to determine whether a motion to dismiss is warranted based on the pertinent provisions of the Act.

¶26 "[S]tatutory interpretation 'begins with the language of the statute.'" *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110 (quoted source omitted). "If the meaning of the statute is plain, we ordinarily stop the inquiry." *Id.* We interpret a statute "in the context in which it is used; not in isolation but as part of a whole." *Id.*, ¶46.

Analysis

¶27 We begin with two general observations. First, our task has been complicated, as we think was also the case for the circuit court, by the fact that the parties fail to

provide us with developed arguments directly addressing the language of the Act. While both sides reference statutory language and Daniel makes brief attempts to analyze it, both sides primarily base their arguments on their interpretations of case law from other jurisdictions addressing the Act. Because this case presents an issue of first impression in Wisconsin and there is no guidance from the United States Supreme Court, our focus is on the language of the Act as it applies to Daniel's specific allegations. As explained below, we apply a plain meaning interpretation. While our interpretation of the Act is consistent with some of the authority the parties discuss, the case law that Armslist relies on does not significantly aid in the analysis, as discussed below.[6]

¶28 Our second observation is that the issue here is not whether Daniel sufficiently alleges negligence or any other claim in the complaint. The sole and limited issue is whether the complaint seeks to hold Armslist liable on a basis prohibited by the Act. As we explain, the pertinent language in the Act prohibits only theories of liability that treat Armslist as the publisher or speaker of the content of Linn's or Radcliffe's posts on the website, and we conclude that the complaint here relies on no such theory.

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6. Because there appears to be no United States Supreme Court or Supreme Court of Wisconsin interpretation of the pertinent provisions of the Act, we consider the persuasive value of authority from various federal and state courts, some of which we summarize below, which have interpreted the Act's pertinent provisions in other cases involving similar allegations. *See Klein v. Board of Regents, Univ. of Wisconsin Sys.*, 2003 WI App 118, ¶13, 265 Wis. 2d 543, 666 N.W.2d 67 ("we are bound only by the opinions of the United States Supreme Court on questions of federal law") (citation omitted).

¶29 Having provided those general observations, we now briefly quote the key provisions of the Act, then summarize the arguments of the parties, before turning to the details of the Act, including our interpretation of the Act's pertinent provisions and our conclusion that, with respect to the allegations in the complaint, the Act does not apply to confer immunity.

¶30 The following are the key provisions of the Act: (1) "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1); and (2) "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with [§ 230]." 47 U.S.C. § 230(e)(3). We will sometimes call the first clause the shall-not-be-treated clause and the second the immunity clause, while generally using the term "the Act" to refer to their combined meaning.

¶31 We begin, briefly, with the meaning of the immunity clause. Its wording is unambiguous for current purposes and provides for immunity ("no cause of action may be brought and no liability may be imposed") if the conditions of the shall-not-be-treated clause are met. Daniel does not argue to the contrary.

¶32 We turn to the shall-not-be-treated clause, beginning with the topic of interpretative rules that we are to use to determine the scope of the immunity it provides. Daniel makes an argument, to which Armslist does not respond, based on a presumption against preemption

doctrine. We agree with Daniel that this doctrine applies here to create an exacting standard in determining the scope of immunity.

¶33 Explaining further, even where, as here, Congress has expressly provided for some degree of preemption of state law, when courts seek to "identify the domain expressly pre-empted," we are to apply a "presumption against preemption." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484, 494, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). In other words, the existence of an express federal preemption provision (as reflected in the immunity clause here) "does not immediately end the inquiry because the question of the substance and scope of Congress'[s] displacement of state law still remains." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76, 129 S. Ct. 538, 172 L. Ed. 2d 398 (2008). Moreover, when Congress legislates in a field traditionally occupied by the states (as here, by creating immunity from state tort actions under a specified circumstance), courts are to assume that powers historically exercised by the states are "'not to be superseded by the Federal Act unless that [was] the clear and manifest purpose of Congress.'" *Id.*, at 77 (quoted source omitted); *see also Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991) ("[I]t is incumbent upon the [] courts to be certain of Congress'[s] intent before finding that federal law overrides" the usual constitutional balance of federal and state powers.) (quoted source omitted). After Daniel asks us to apply this doctrine, Armslist has no response. Indeed, the word preemption does not appear in Armslist's briefing. Thus, we proceed with our analysis bearing in mind the presumption against preemption.

¶34 Armslist relies on case law that effectively construes the Act to provide "broad immunity" for claims that rest on allegations of activities by creators and operators of websites that those courts deem to be "publishing" activities. Armslist contends that, under the construction of the Act found in this case law, protected publishing activities include the allegations here involving design and operation of Armslist's website. As we discuss more fully below, Armslist quotes case law that employs terminology not found in the Act and interprets the Act to provide immunity to websites whenever they act as "platforms" for the speech of third parties or whenever they exercise "editorial functions." Based on this case law authority, Armslist argues, the complaint must be dismissed, because it seeks to hold Armslist liable for the publishing activities of using design and operation features of its website to encourage the type of third-party information content that caused the harm at issue.

¶35 For her part, Daniel points to case law that more narrowly construes the Act. She contends that her theory of liability against Armslist does not treat Armslist as the speaker or publisher of information content provided by Linn and Radcliffe through Armslist.com, but instead is based on a separate theory of liability. To repeat, Daniel argues, and the complaint alleges, that Armslist is liable for designing and operating its website in a way that encouraged prohibited sales, which she contends was a substantial factor in causing the shootings. These design and operational features allegedly encouraged "private, anonymous, illegal gun purchases," such as Radcliffe's purchase from Linn, which "enabled [Radcliffe] to

circumvent" a then-operative Wisconsin law mandating a 48-hour waiting period for federally licensed sales. The theory of liability, then, is that Armslist designed and operated Armslist.com so as to be a cause of the injuries alleged in the complaint.

¶36 We do not consider Armslist's case-law-based arguments to be persuasive, because the cases Armslist relies on do not, in our view, come to grips with the plain language in the Act. Rather, we agree with Daniel's argument that her theory of liability is not covered by the shall-not-be-treated clause in the Act, because her liability theory is not based on treating Armslist as the publisher or speaker of information content created by third parties.

¶37 In order to explain that conclusion, we now walk through in more detail the provisions in the shall-not-be-treated clause: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *See* 47 U.S.C. § 230(c)(1).

¶38 There is no dispute that Armslist.com was an "interactive computer service" provider. The Act defines the phrase "interactive computer service" expansively: "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2).

¶39 The Act does not define the phrase, "shall be treated as the publisher or speaker of any information provided by another information content provider." 47

U.S.C. § 230(c)(1). The terms "publisher" and "speaker" do not appear to have any specialized or technical meaning, but they are without doubt directly linked with the phrase "of any information." For this reason, we conclude that the only reasonable interpretation of this language is that it is a reference to the specific act of publishing or speaking particular information, namely, information provided by another information content provider. We do not see any distinction that could matter, at least in the context of this case, between being treated as "the publisher" of information and being treated as "the speaker" of information. It appears that the terms publisher and speaker are both used simply to convey the notion that liability may not be based on treating a provider as the disseminator or propagator of the described information.

¶40 This brings us to the last pertinent phrase in the shall-not-be-treated clause: "provided by another information content provider." 47 U.S.C. § 230(c)(1). The Act defines "information content provider" broadly as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3). We perceive no dispute that Linn and Radcliffe, when they allegedly used the website to initiate and conduct portions of their transaction, were each "another information content provider."

¶41 Pulling together these observations, we can see that, in order to prevail, Armslist must show that the claims here treat Armslist as liable because it is an entity that published or spoke information provided

by Linn or Radcliffe, and Armslist must overcome the presumption against preemption.[7] Armslist makes no such showing. Armslist points to nothing in the complaint that attempts to hold Armslist liable as a publisher or speaker of the content provided by Radcliffe and Linn. Instead, Armslist contends that the Act protects the activity of designing and operating a website, but without tying this interpretation to language in the Act. Stated differently, Armslist effectively ignores the Act's phrase "publisher or speaker of any information provided by another."

¶42 If the goal of Congress were to establish the sort of broad immunity urged by Armslist, that is, immunity for all actions of websites that could be characterized as publishing activities or editorial functions, Congress could have used any number of formulations to that end. Instead, Congress limited immunity to a single circumstance: when a theory of liability treats the website creator or operator "as the publisher or speaker of any information provided by another information content provider." Nothing in this language speaks more generally to website design and operation.

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7. At least at a general level, this formulation is consistent with one used by federal circuit courts of appeal, namely, that the Act provides immunity if the following criteria are met: (1) the defendant "is a 'provider or user of an interactive computer service'; (2) the plaintiff's claim is based on 'information provided by another information content provider'; and (3) the claim would treat [the defendant] 'as the publisher or speaker' of that information." *See, e.g., Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) (quoting 47 U.S.C. § 230(c)(1)).

¶43 As noted above, Armslist's argument consists almost entirely of strings of references to authority that it considers persuasive. We address case law below. But first, we address what we understand to be the minimal argument Armslist makes that is not tied to case law.

¶44 Armslist contends that "all of [the] ... alleged website defects are content-based, related either to the way information is presented on the site or to who is allowed to use it." It may be fair to characterize all of the operational and design features alleged by Daniel to be in some sense "content-based." However, in this respect, the content is not "information provided by *another* information content provider." Rather, it is content created by Armslist, and there is no language in the Act immunizing Armslist from liability based on content that it creates.

¶45 Our interpretation of the Act is consistent with authority that we consider to be persuasive. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100, 1105 (9th Cir. 2009) ("[l]ooking at the text [of the Act], it appears clear that [it does not] declare[] a general immunity from liability deriving from third-party content .... It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language."); *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (cautioning against applying the Act "beyond its narrow language and its purpose." "Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet" even when a claim "might have a marginal chilling effect

on internet publishing businesses."). As *Barnes* explains, courts are to consider "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102.

¶46 We note in particular the opinion of the Washington Supreme Court in *J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 359 P.3d 714 (Wash. 2015). In *J.S.*, the majority concluded that allegations that the website at issue developed and posted guidelines and content rules that facilitated child prostitution were sufficient to withstand a motion to dismiss based on the Act. 359 P.3d at 717-18. In a concurring opinion, Justice Wiggins summarizes the position of courts that have "specifically rejected the subsection 230(c)(1) defense when the underlying cause of action does not treat the information content provider as a 'publisher or speaker' of another's information." *Id.* at 723-24 (Wiggins, J., concurring). Opinions cited by J. Wiggins include *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 365, 366 (7th Cir. 2010) (online broker could be liable for unpaid taxes on sales of tickets listed by users because liability did not depend on who "'publishes' any information or is a 'speaker'" unlike claims "for defamation, obscenity, or copyright infringement."), and *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) ("'The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet.'").

¶47 We note that our interpretation of the Act does not deprive it of value to defendants in tort cases, but

instead provides concrete, if narrow, immunity. For example, websites cannot be held liable under the Act merely because they allow the posting of third-party defamatory comments, because that would treat the websites as the publishers or speakers of the comments. *See Internet Brands, Inc.*, 824 F.3d at 851 (defamation provides a "clear illustration" of the intent of the shall-not-be-treated clause).

¶48 It follows from what we have said that we do not consider persuasive case law, cited by Armslist, that has interpreted the Act in arguably analogous situations to this case to confer immunity based on "publishing" activities of website operators.[8] We believe that the cases cited by Armslist are effectively reading into the Act language that is not present, to the effect that the Act provides general immunity for all activities that consist of designing or operating a website that includes content from others. *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016) (Act conferred immunity on Backpage.com against liability for sex trafficking-related claims, because the allegations relied on the website's actions as designer and operator of a website providing a forum for publishing information content posted by third parties, rather than as an information content provider itself or as an encourager of prohibited activity); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d. 579, 2018 U.S. Dist.

8. Armslist incorrectly asserts that the circuit court's ruling here was consistent with "virtually every court in the United States." Having said that, we recognize that there is divided authority on how to interpret the pertinent language of the Act, which addresses activities in the context of relatively new and evolving technologies.

LEXIS 12346, 2018 WL 566457, at *5 (S.D.N.Y. Jan. 25, 2018) (Act conferred immunity on interactive computer service because it "may not be held liable for so-called 'neutral assistance,' [which involves providing] tools and functionality that are available equally to bad actors"; explaining that design and "[c]ategorization features," such as a drop-down menu, "constitute quintessential 'neutral assistance.'") (quoted sources omitted).

¶49 Some such courts have interpreted the Act to provide immunity for each activity of website creators or operators that could be characterized as being one of "a publisher's traditional editorial functions." *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997); *see also Backpage.com,* 817 F.3d at 21. This is sometimes stated in terms of immunity for activity involving mere "neutral means" of allowing users to post on websites, and sometimes in terms of protection for "passive" conduct by the website. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1358, 410 U.S. App. D.C. 187 (D.C. Cir. 2014) (interpreting the Act to hold that "a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online" and has immunity from liability for providing this "neutral means"); *Roommates.com,* 521 F.3d at 1173-74 (online marketplace provider "is not responsible, in whole or in part, for the development of ... content[ ] which comes entirely from subscribers and is passively displayed by" the website).

¶50 Simply put, we are unable to tie these case-law applications to the Act's specific language and, for that reason, do not find the cases Armslist relies on helpful.

¶51 Moreover, the weakness of Armslist's argument is all the more glaring in light of the presumption against preemption that we address at ¶¶32-33 *supra*. To repeat, the Act uses the narrow terms we have addressed, while the cases cited by Armslist effectively ignore the terms of the Act. Instead, these opinions essentially collapse the entire analysis into a broad and unsupported definition of "publisher." The Act does not, for example, provide lists of website features that do or do not represent traditional editorial functions, nor does it use the terms "neutral" or "passive" or any similar terms. This leaves courts without principled and consistent ways to define "traditional editorial functions," "neutral means," or "passive display." We cannot lightly presume that Congress would intend that the highly consequential immunity determination could turn on how courts might choose to characterize website features as being more or less like traditional editorial functions, or more or less neutral or passive, especially without reasonably specific statutory direction or guidelines.

¶52 In sum, the Act, and in particular the shall-not-be-treated clause, does not immunize Armslist from claims in the complaint because the claims and the supporting allegations do not seek to hold Armslist liable for publishing another's information content. Instead, the claims seek to hold Armslist liable for its own alleged actions in designing and operating its website in ways that caused injuries to Daniel.

Appendix B

CONCLUSION

¶53 For all of these reasons, we conclude that the circuit court erred in dismissing the negligence per se claim and separately conclude that the Act does not preempt state law to provide immunity to the defendants. Accordingly, we reverse the circuit court order dismissing the complaint against the Armslist defendants and remand the cause.

By the Court.—Order reversed.

Recommended for publication in the official reports.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF THE STATE OF WISCONSIN CIVIL DIVISION MILWAUKEE **COUNTY FILED NOVEMBER 28, 2016**

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

Case No. 2015-cv-8710

YASMEEN DANIEL, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ZINA DANIEL HAUGHTON,

Plaintiffs,

v.

ARMSLIST, LLC, BRIAN MANCINI, BROC ELMORE, JONATHAN GIBBON, DEVIN LINN, ABC INS. CO., DEF INS. CO., ESTATE OF RADCLIFFE HAUGHTON, BY HIS SPECIAL ADMINISTRATOR JENNIFER F. VALENTI,

Defendants,

and

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Intervening Plaintiff.

Appendix C

ORDER ON THE NOVEMBER 1, 2016 HEARING

Defendant Devin Linn's ("Linn") motion to dismiss as to the claim of negligence per se asserted by Plaintiffs Yasmeen Daniel, individually and as Special Administrator of the Estate of Zina Daniel Haughton (collectively, "Plaintiffs"), Defendant Armslist, LLC's ("Armslist") motion to dismiss as to the claims of negligence, negligence per se, negligent infliction of emotional distress, civil conspiracy, aiding and abetting tortious conduct, public nuisance and wrongful death asserted by Plaintiffs, and Defendants Brian Mancini's and Jonathan Gibbon's (collectively, the "Individual Defendants") motion to dismiss as to the claims of negligence, negligence per se, negligent infliction of emotional distress, civil conspiracy, aiding and abetting tortious conduct, public nuisance, wrongful death, and piercing the corporate veil asserted by Plaintiffs, came to be heard before the Honorable Judge Glenn H. Yamahiro on November 1, 2016.

Plaintiffs appeared by Attorneys Patrick O. Dunphy of the law firm Cannon & Dunphy, S.C., Jonathan E. Lowy of the Brady Center to Prevent Gun Violence Legal Action Project, and Jacqueline C. Wolff and Samantha J. Katze of the law firm Manatt, Phelps & Phillips, LLP. Armslist and the Individual Defendants appeared by Attorneys Michael D. McClintock of the law firm McAfee & Taft and Eric J. Van Schyndle of the law firm Quarles & Brady LLP. Linn appeared by Attorney Dillon Ambrose of the law firm Davis & Kuelthau, S.C. And, Defendant the Estate of Radcliffe Haughton appeared by Attorney Colette Reinke of the law firm Fuchs & Boyle, S.C.

IT IS SO ORDERED, for the reasons set forth on the record on November 1, 2016, that the negligence per se claim asserted by Plaintiffs is dismissed as to Linn with prejudice and without costs; and that all claims asserted by Plaintiffs against Armslist, Brian Mancini and Jonathan Gibbon are dismissed with prejudice and without costs.

IT IS SO ORDERED that this is a final order for purposes of appeal.

Dated this __ day of ____, 2016.

_____

The Honorable Glenn H. Yamahiro

Dated this 28th day of November, 2016

BY THE COURT:
Electronically signed by
Glenn H Yamahiro-34, Judge
Glenn H Yamahiro-34, Judge

APPENDIX D — MOTION HEARING OF THE COURT OF APPEALS OF WISCONSIN DATED NOVEMBER 1, 2016

[1]STATE OF WISCONSIN, CIRCUIT COURT,
BRANCH 34, MILWAUKEE COUNTY

Case No. 15-CV-8710

YASMEEN DANIEL, INDIVIDUALLY, AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ZINA DANIEL HAUGHTON,

Plaintiffs,

v.

ARMSLIST, LLC, BRIAN MANCINI, BROC ELMORE, JONATHAN GIBBON, DEVIN LINN, ABC INS. CO., DEF INS. CO., ESTATE OF RADCLIFFE HAUGHTON, BY HIS SPECIAL ADMINISTRATOR JENNIFER F. VALENTI,

Defendants,

and

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Intervening Plaintiff.

Appendix D

MOTION HEARING

HONORABLE GLENN H. YAMAHIRO
Circuit Judge, Presiding

[3]TRANSCRIPT OF PROCEEDINGS

THE CLERK: 15-CV-8710, Yasmeen Daniel versus ARMSLIST, LLC. Appearances.

MR. DUNPHY: Your Honor, the plaintiffs are appearing by Patrick Dunphy, John Lowy, Jacqueline Wolff, and Samantha Katze.

The bulk of the argument on plaintiff's side this morning will be done by Mr. Lowy and may be augmented by Ms. Katze depending on the questions the Court may have.

THE COURT: Okay.

MR. McCLINTOCK: Good morning, Michael McClintock, firm of McAfee & Taft, on behalf of defendants ARMSLIST, LLC, Brian Mancini, Jonathan Gibbon and Broc Elmore. Also with me is Eric Van Schyndle from Quarles and Brady.

MS. REINKE: Colette Reinke, the law firm of Fuchs and Boyle. I'm here on behalf of John Fuchs and the Estate of Radcliffe Haughton.

MR. AMBROSE: Dillon Ambrose of the law firm of Davis & Kuelthau on behalf of Defendant Devin Linn.

Appendix D

THE COURT: Good morning. Times Square, right? Was just there last month. I can't fathom trying to get in and out of there to go to work every [4]day. Anybody else from out of town?

MR. McCLINTOCK: I am, Your Honor.

THE COURT: Where are you from?

MR. McCLINTOCK: From Oklahoma.

THE COURT: Okay. I anticipate that there are some that would like to supplement the record orally based on Mr. Dunphy's statement. I don't have any specific questions at this time, but I will afford an opportunity for anybody that wants to orally supplement the record starting with the moving party.

I'll just ask you to, whoever is speaking, to make sure the microphone is in front of you so the court reporter can get everything.

MR. McCLINTOCK: Thank you, Your Honor, may it please the Court, it is our motion.

As I said, I represent ARMSLIST, LLC, and the individual owners. Of note, for the record, discovery -- jurisdictional discovery is granted by the Court and conducted by the parties. As a result of that, the defendant, Broc Elmore, was voluntarily dismissed; and so for a matter of housekeeping and to just make sure the court record is clear and the Court is aware, if it wasn't

otherwise in the filings, Mr. Elmore has been dismissed -- voluntarily dismissed from the case.

***

[43]and they said specifically that Congress did not intend to protect websites such as ARMSLIST with allegations such as these; and again, those allegations are focused not on Mr. Linn's posting but on this prohibited purchaser's access. Thank you.

THE COURT: Okay. Thank you. While any failures on the part of the Court here will not be based upon the lack of input or the quality of the briefing that's been done here, which was very, very good.

I think the facts of the situation, I believe the next couple days we are approaching the unfortunate anniversary of the deceased in this case; and the Court certainly, and I think the parties agree, is not unsympathetic to the deceased, family of the deceased.

The issues of domestic violence, not only in this case but throughout the country, and the interplay between firearms and the killing of victims of domestic violence, which is a long standing and continuing problem, which despite many people's best efforts have yet to be effectively addressed. The Court is not unfamiliar with those dynamics having been a long-term faculty member of the National Judicial Institute of Domestic Violence teaching [44]judges across the country as to the dynamics of domestic violence as well as it's lethality.

Appendix D

The Court is also not unfamiliar as a person that reads the news as to the issues regarding firearms in this country and firearm violence, and the conflict between those who support the Second Amendment, and in the context of this case, the First Amendment, and those that would like to see some reasonable parameters put upon the sales and distribution of firearms, especially as it relates to those persons who really are legally ineligible to possess them.

And probably the ultimate tragedy here is that, based upon the state of the law, as people were on notice prior to Ms. Zina Haughton's murder, but basically the same thing occurred under similar circumstances in 2011. I think it's almost a certainty this will not be the last. And to that extent, it's a tragedy of the extent that Ms. Haughton's death may be in vain based upon the history of the legislative branch in addressing or not addressing the issues that are brought to bear based upon the facts of this case.

I will begin by addressing the negligence per se claim. I think the facts here are not really in [45]dispute.

The case arises out of Mr. Haughton's purchase of a firearm by the ARMSLIST or with the assistance of the ARMSLIST.com website that he was, in fact, subject to a domestic violence restraining order when he used the website to locate a private seller, in this case Mr. Linn, who ultimately sold him the firearm.

The gun was a semi-automatic handgun, three high capacity magazines, for $500.

Based on the pleadings, it appears that Mr. Linn did not question Mr. Haughton as to his need for the firearm or attempt to engage in any formal or informal background check to ascertain whether or not this buyer would be legally ineligible. There's no allegation, I believe, that Mr. Linn searched CCAP; and it was the following day that Mr. Haughton went to the Azana Spa and Salon and killed Ms. Haughton and two of her co-workers.

And I think it's clear that Ms. Daniel was also affected by the trauma of these killings, and so she also has claims before the Court.

The legal standard on a motion to dismiss is to test the legal sufficiency of the complaint. Under *Evans versus Cameron* at 212 Wis. 2d 421. On the [46]context of this motion, although to a certain extent it's a hybrid, there have been facts interwoven with these briefs that almost make this a hybrid between a motion to dismiss and summary judgment. But the Court is treating this as a motion to dismiss. And in that context, well-pleaded facts are accepted as true. Legal conclusions alone stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss under *Data Key Partners versus Permira Advisors, LLC*, 356 Wis. 2d 665.

In 2014, the Wisconsin Supreme Court adopted the plausibility pleading standard set forth in *Bell Atlantic Corporation versus Twombly* at 550 U.S. 544 and *Data Key Partners* at 2014 Wis. 86. That standard requires plaintiffs to allege facts that suggest more than a possibility of a claim as a threshold requirement under Wisconsin Statute 802.02 sub (1) sub (a).

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To satisfy the statute, a complaint must plead facts, which if true, would entitle the plaintiff to relief. Bare legal conclusions set out in the complaint provide no assistance in warding off a motion to dismiss, and plaintiffs must allege facts that, if true, plausibly suggest a violation of [47]applicable law.

Under the *Twombly* plausibility pleading standard, a claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Under *Ashcroft versus Iqbal,* 556 U.S. 662. At this point there is little other guidance as to what plausibility means in Wisconsin.

In terms of the negligence per se claim, plaintiff has alleged that Mr. Linn violated, quote, violated federal, state and local statutes, regulations and ordinances, including without limitation 18 U.S.C. sub (2) 18 U.S.C. -- I should say Section 2. 18 U.S.C. Section 922 sub (g) and Wisconsin Statute 941.20 sub (1).

The above statutes impose criminal liability but are silent on whether civil liability should also attach.

Plaintiffs also attempt to argue violation of 18 U.S.C. Section 922 sub (d) sub (8). Although the complaints fails to identify Linn as an aider and abettor.

Regardless of this failure, none of the statutes cited by the plaintiffs provide a clear,

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[53]suitability of the federal criminal and regulatory standard for use as a reasonable person standard in negligence cases.

The *Olson* court analyzed the statutory enforcement mechanisms and found that, quote, no reference to the imposition of civil liability for violation of the criminal standards set forth by the Act appears in the legislative history, at page 250.

The Court held, and this Court is bound to accept, the violations of 18 U.S.C. Section 922 are not negligence per se. The Supreme Court was presented with an opportunity to review the *Olson* decision, but the Court declined to hear the case.

Therefore, because the holdings -- the Court finds that the holding of *Olson* is still good law and binding on the Court. The Court finds the plaintiff's negligence per se claimed against Mr. Linn fails as a matter of law.

As to the broader range of claims, ARMSLIST, LLC formed in 2007 to be a, quote, firearms marketplace. Other private sale websites, including Amazon, Ebay, Craigslist, and others, no longer sell firearms.

ARMSLIST does not require users to register in order to post on its website.

[54]The website has a number of features that enable a user to filter out vendors. ARMSLIST does a party --

ARMSLIST directs users to contact their local sheriff's office and/or ATF Branch if they have questions about safe and legal gun transfers.

Yasmeen Daniel brought multiple claims against ARMSLIST, LLC, it's members, and Mr. Linn. Her claims against ARMSLIST, LLC and its members, Mr. Mancini, Mr. Gibbon are the subjects of the motion to dismiss.

The defendants advance a number of grounds in support of their motion to dismiss.

First, they assert the Communications Decency Act, referred to as the CDA, precludes all the plaintiff's claims because such claims attempt to hold the defendants liable for materials posted by third parties. Alternatively, they have argued the plaintiff's negligence claims must fail because ARMSLIST did not have a special relationship as that term is understood in the law with Ms. Haughton.

ARMSLIST defendants have asserted that the CDA at Section 230 sub (c) prevents all the plaintiff's claims. The applicability of the CDA is essentially an argument that plaintiff's claims are precluded by federal statute.

[55]Defendants have made their motion under Section 802.06 sub (2) sub (a) sub 6, which is failure to state a claim upon which relief can be granted. A codification of federal rule 12 (b) (6). The CDA is an affirmative defense which does not justify dismissal under Rule 12 (b) (6), under *Doe versus GTE Corporation,* 347 F. 3d 655, and plaintiff has referenced the inappropriate forum of defendant's motion in the footnote.

After the footnote, plaintiff has argued the applicability of the CDA. The defendant may raise the affirmative defense of claim preclusion either by motion before filing the answer or as an affirmative defense in the answer under 802.06 sub (2) of the Wisconsin Statutes.

Here the defendants have filed their motion before filing the answer, and the motion to dismiss on statutory grounds should be supported by the applicable statute under which the claim preclusion defense is based, and that brings us to what the Court has referenced with regard to this being a little bit of a hybrid between a motion to dismiss and summary judgment.

Certainly, there has been more than adequate briefing as to the substantive issues before the [56]Court. Judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there's no genuine issue as to any material fact pertinent to whether the plaintiff can recover under the applicable law under 802.08 sub (2).

In this case, the original motion was filed in March of 2016. I believe that was followed by the interlude at federal court before that matter was returned to this court. Nevertheless, there has been a reasonable amount of time to produce any relevant material pertinent to this Court's determination on the motion.

So to that extent, it's treated as a motion for summary judgment.

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Although perhaps not as absolute as the defendant has argued, the Court does believe that the CDA preempts civil liability in this case. It provides under sub (1), treatment of publisher or speaker. No provider or user of an interactive computer device shall be treated as the publisher or speaker of any information provided by another information content provider.

And under sub (2), civil liability. No provider or user of an interactive computer service [57]shall be held liable on account of, A, any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or, B, any action taken to enable or make available to information content providers or others the technical means to restrict access to materials described in paragraph (1).

The CDA is not a general prohibition of civil liability for website operators. Under *Chicago Lawyers Committee for Civil Rights Under the Law, Incorporated versus Craigslist, Incorporated*, at 519 F. 3d 666. Instead, the CDA provides a safety net to a web host that does filter out offensive material by proclaiming that such provider is not liable to the censored consumer. The 7th Circuit noted CDA plays a limited role, using as an example that, in quote, information content provider may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright. At page 670.

And in this case, the Court believes that ARMSLIST has taken a passive approach to monitoring [58]content where the users may not flag material if the user believes the post is for illegal gun sale. In addition, ARMSLIST mandates the users accept its terms of service, which include one provision declaring that the user will not use the site illegally. Further, the terms of service explicitly tell users that ARMSLIST will not investigate or monitor postings or sales to insure compliance with local laws.

It's really based on the website design that the plaintiff has alleged negligence, negligent infliction of emotional distress, public nuisance, wrongful death, and aiding and abetting of tortious conduct; and, obviously, plaintiff has also brought the alter ego and civil conspiracy claims.

The CDA declares that an online information system may not be treated as a publisher or speaker of information or postings by a third party. This immunity only applies, quote, if the interactive computer service provider is not also an information content provider, which is defined as someone who is responsible in whole or in part with the creation or development of the offending content under the *Fair Housing Council of San Fernando Valley* case at 521 F.3d at page 1162.

Based on that, the Court believes this case [59]turns on whether ARMSLIST merely hosts advertisements, in which case they are protected by CDA immunity, or whether they also help develop the content of those advertisements, in which case they are not protected by CDA immunity.

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A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is responsible in whole or in part for creating or developing, the website is also a content provider. Thus, a website may be immune from civil liability for some of the content it displays to the public but be subject to liability for other content.

Again, under the *Fair Housing Council case versus Roommates.com*, 521 F. 3d 1157. A website operator, however, does not develop content by simply maintaining neutral policies prohibiting or eliminating certain content. Under *Dart versus Craigslist*, 665 F.Supp 2d 961.

Viewing the plaintiff's allegations in the light most favorable to her, plaintiff has alleged that ARMSLIST's design induces buyers and sellers to [60]engage in conduct contrary to state and federal law. As a service provider, ARMSLIST is an intermediary and indifferent to the content of ads made by third parties under *Doe versus GTE Corporation*, 347 F. 3d 655.

Certainly, the Court appreciates plaintiff's arguments that ARMSLIST is inherently engaged in dangerous business with foreseeable injuries. The plaintiff fails to allege facts which establish or dispute that ARMSLIST is materially engaged in creating or developing the illegal content on its page. The 7th Circuit has articulated ARMSLIST's services and subsequent potential for liability as follows:

That web hosting services likewise may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked. The user did not demand a quantity or type of service that is specialized to unlawful activities, nor do plaintiffs allege that the bandwidth or other services required were themselves tip offs so that the web host, like the seller of sugar to a bootlegger, must have known that the customer had no legitimate use for the service. Just as the telephone company is not liable as an aider and [61]abettor for tapes or narcotics sold by phone, and the Postal Service is not liable for tapes sold and delivered by mail, so a web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet. Under *Doe versus GTE Corporation*.

In this case, as it stands right now and at the time of the tragedies that are subject to this lawsuit, ARMSLIST does provide a lawful service. Plaintiff has alleged that the ability to filter ads so that only private sellers can be seen is an inducement for prohibited purchasers.

The Court believes that the language in *Doe versus GTE Corporation* disposes of that argument. Why? Because intrastate private sales of firearms are lawful. Plaintiff has not alleged that anything was inherently unlawful about Mr. Linn or Mr. Haughton's posts. Plaintiff's allegations in the complaint seek to hold ARMSLIST liable for creating a space where consumers can post advertisements and also failing to police or edit those postings for illegal activity.

These claims appear on their face to be an attempt to artfully plead ARMSLIST is a publisher without actually calling it that; and, obviously, treating an Internet service provider as a publisher [62]is expressly barred by the CDA.

In the *Chicago Lawyers* case, the plaintiffs tried to argue Craigslist could be liable as the one who caused to be made printed or published any illegal notice, statement or advertisement. Such an argument is similar to plaintiff's argument here that ARMSLIST effectively caused prohibited purchasers to use the website to obtain firearms.

The 7th Circuit found that, quote, nothing in the service Craigslist offers induces anyone to post any particular listing or express a preference for illegal conduct, at page 671.

Given this finding, the Court stated that a plaintiff, quote, cannot sue the messenger just because the message deals with third party's plan to engage in unlawful discrimination, close quote, at page 672. The Court believes the facts in this case are similar to those in the *Chicago Lawyers* case.

Plaintiff has alleged that ARMSLIST induces illegal and unsafe transfers by providing no means to report illegal or unsafe postings, refusing to make users register so that either a cooling off period or background check can be completed and allowing users to limit their search to private individuals as opposed to licensed dealers.

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[63]Plaintiffs imply that ARMSLIST is really a gun show doing on line what it could not do lawfully off line. However, unlike the case in the *Fair Housing Council* case, the tools provided by ARMSLIST have a neutral and legal purpose. *Roommates.com* was found to be exempt from the immunity granted by the CDA because the website required users to enter their race, sex, sexual orientation and preferred characteristics of any potential roommate in order to even utilize the site. The Court found that content, mandated and provided by the website, only had an improper purpose, which was to provide a basis for people to discriminate in housing.

In this case, wanting to buy a firearm from a private seller as opposed to a dealer does have a lawful purpose because intrastate private sales without a waiting period or background are lawful in Wisconsin. This Court is unable to find that ARMSLIST materially participates in development or content of its advertisements. As such, the Court believes ARMSLIST is entitled to immunity under the CDA Section 230 sub (c).

Defendants have argued the First Circuit's reasoning in *Jane Doe No. 1 versus Backpages.com, LLC* 817 F. 3d page 12 is applicable to this case, and the [64]Court agrees.

In 2010, the Backpage.com competitor, Craigslist, closed its adult advertising section due to concerns about sex trafficking. Seeing an opportunity, Backpages expanded its marketing footprint in the adult advertising arena; and appellants in *Jane Doe No. 1* asserted Backpages designed its website to make sex trafficking easier.

Specifically, the appellants argued Backpages', quote, rules and processes governing the content of advertisements were designed to encourage illegal activity. In addition, Backpages did not require users to register or verify their contact information.

These are the same, if not substantially similar, allegations to what we have before us today. Plaintiffs allege that ARMSLIST fills a void left by other online retailers, including Ebay, Craigslist, Amazon, who refuse to facilitate the sale of firearms. Plaintiff also cites ARMSLIST's failure to require users to register or verify that they are aware of gun laws, and also the company's failure to review postings for legality or unsafe conditions.

The appellants in *Jane Doe No. 1* also attempted to frame their claims against the web host [65]as claims regarding a design and operation of the website as opposed to a publisher or speaker.

The First Circuit provided the following response to that:

Without exception, the appellants' well-pleaded claims address the structure and operation of the Backpage website; that is, Backpages decision about how to treat postings. Those claims challenge features that are part and parcel of the overall design and operation of the website, such as the lack of phone number verification, the rules about whether a person may post after attempting to enter a forbidden term, and the procedure for uploading photographs. Features such as these, which reflect choices

about what content can appear on the website and in what form, are editorial choices that fall within the purview of traditional publisher functions. The Court believes the same is true here.

Without exception, the plaintiff's claims all incorporate the structure and operation of ARMSLIST as the cause of Mr. Haughton's access to a firearm. These claims assert that the features of ARMSLIST, such as the ability to search for private sales, and lack of user registration, are negligent. These features reflect choices about what content can appear [66]on the website and in what form, and are editorial choices that fall within the purview of traditional publisher functions.

So even though the Court finds that the CDA does preclude plaintiff's claims, the Court is clearly aware of the dangers posed by a website like ARMSLIST. Obviously, steps could be taken to make the weapons traceable, the sales traceable. Obviously, there's been a lot of discussion in a number of cases about the concept of policing websites, which in many cases is almost impossible based on the volume of postings and the number of employees that typically work at most of these sites. But again, certainly the legislature could require more than what it currently does.

And naive as it may be, there is always the possibility of actors deciding that they want to do what is morally correct. God forbid to raise that in a courtroom. But I don't think it's only based upon liability that almost every other website that engages in sales of just about anything

has decided to bail out of weapon sales. Because certainly there would be grounds, as there are in this case, for Ebay, Craigslist, or anybody else, to take refuge behind the CDA and continue to sell firearms.

[67]So the Court is certainly not unsympathetic to the claims and the uphill battle of the plaintiffs in this case given the current legislative or statutory landscape as it relates to the CDA and what is, I think, well-documented impotence on the part of legislative branch at this time to take any reasonable measures to police the distribution of firearms, and in particular the private sale of firearms, which continue to lawfully allow people to circumvent any meaningful background checking of those who might be statutorily ineligible to possess a firearm.

Based on the statements of the Court and notwithstanding the Court's personal views, the Court is granting ARMSLIST's motions; and those will include motions under the negligence claim based upon the Court's previous statements that it attempts to treat ARMSLIST and its member owners as publisher and speaker under the CDA, and the Court finds that ARMSLIST, at least under the laws of passive web host that does not participate in whole or part in the creation of its content, and the fact that the design features of the website can serve a legal purpose.

The Court finds that the appropriate negligence standard are moot given this Court's interpretation of the CDA. The Court also has [68]previously ruled and extends the ruling regarding negligence per se to all

plaintiffs based on the fact the Court finds *Olson versus Ratzel* controlling, and so the negligence per se claims will be ordered dismissed as to all parties.

The Court finds the negligence infliction of emotional distress claim, that again inherent in the claim, is a design of the website, and the allegation ARMSLIST had a duty to employ sufficient questioning and screening of customers, as well as design a website that complied with existing laws, as set forth in paragraph 154 of the complaint, claiming ARMSLIST had a duty to screen users attempts to treat ARMSLIST as a publisher of content. In the Court's opinion, users and their posts are not directed by ARMSLIST, and ARMSLIST does not mandate responses or information which is unlawful. The CDA bars such treatment under *Fair Housing Council of San Fernando Valley versus Roommates* and really, I think, the distinction between that case and the *Chicago Lawyers* case and this case, draw significant and dispositive lines as to when a website crosses a line into publishing and speaking.

The civil conspiracy. I think the defendant -- plaintiff's claim under that part of the complaint is that Mr. Mancini and Mr. Olson (sic) [69]conspired to create a website to serve the illegal gun market. In Wisconsin, civil conspiracy has been defined as a combination of two or more persons by some concerted action to accomplish some unlawful purpose or to accomplish by unlawful means some purpose not in itself unlawful. Under *Mendelson versus Blatz Brewing Company,* 9 Wis. 2d 487.

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In this case, plaintiffs have alleged that the defendant conspired to circumvent federal gun laws through ARMSLIST.com. The law of civil conspiracy is further characterized under *Singer versus Singer*, 245 Wis. 2d 191.

As quote, it is established law of this state that there is no such thing as a civil act for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone. In a civil action for damages for an executed conspiracy, the gist of the action is the damages.

In this case, plaintiff has alleged damages insofar as defendant's civil conspiracy resulted in the death of Ms. Haughton.

Court finds the plaintiff's civil conspiracy claim is also barred by the CDA. The 7th Circuit has found that where, quote, nothing in the service [70]offered induces anyone to post any particular listing or express a preference for illegal conduct. The service provider is protected by the CDA under the *Chicago Lawyers* case.

Given this finding, the Court stated a plaintiff cannot sue the messenger just because the message reveals a third-party's plan to engage in unlawful discrimination. The plaintiff's civil conspiracy claim attempts to accomplish the goal disallowed by the *Chicago lawyers* case. ARMSLIST's service has a legal purpose, and the content provided by ARMSLIST is neutral and does not suggest or require illegal content. ARMSLIST and

its individual members cannot be liable for conduct and content posted by third parties. Such liability would require the Court to treat ARMSLIST and its members as speakers or publishers of the content. Because plaintiff's civil conspiracy claim attempts to treat ARMSLIST as a publisher of the illegal content in ARMSLIST.com, the CDA bars liability.

In addition, the *Jane Doe No. 1* case that's been referenced also supports a finding that the civil conspiracy claim is barred by the CDA. The civil conspiracy complaint addresses the, quote, structure and operation of the service provider's website. [71]Individual owners are entitled to protection under the CDA unless they have been personally involved in or responsible for the website's illegal conduct. Under *Klayman versus Zuckerberg,* 753 F. 3d 1354.

Here nothing in the complaint alleges that Mr. Mancini or Mr. Gibbon were personally involved in illegal conduct. Instead the complaint alleges the owners designed the website to induce illegal conduct, which is a publishing function under cases like the *Fair Housing Council* and *Jane Doe No. 1.*

Absent allegations or facts demonstrating that either member was materially involved in illegal sale or posting, the CDA bars liability. Based on that, the Court finds that the civil conspiracy claim is barred by the CDA.

Plaintiff's claim with regard to abetting -- aiding and abetting tortious conduct, the Court also finds it is barred

by the CDA. Plaintiff's claim that ARMSLIST, quote, aided, encouraged, urged and acquiesced in Mr. Linn's sale to Mr. Haughton. This claim attempts to treat ARMSLIST as the speaker and publisher of the advertisement made by Mr. Linn. The claim further states that ARMSLIST, quote, brokered the transaction between a dangerous, prohibited purchaser and Linn. However, such claims again treat [72]ARMSLIST as the speaker and publisher of content. ARMSLIST did not participate in the sales or advertisements beyond creating a forum for the posting.

Because plaintiff's aiding and abetting claim is based on ARMSLIST's failure to take affirmative steps to censor its users or manage its content, the claim attempts to hold ARMSLIST liable as a publisher and is precluded by the CDA.

The Court believes that the public nuisance and wrongful death claims are moot based upon the Court's ruling on negligence and the CDA. I don't disagree with the alter ego position taken by ARMSLIST in this case. But again, that requires a judgment before the piercing claim before there's grounds to pierce a corporate veil.

Court also believes the claim from Travelers for repayment of worker's compensation payments is moot as related to ARMSLIST, Mr. Mancini and Mr. Gibbon, given the Court findings regarding negligence and the CDA.

As to personal jurisdiction, the Court is not making any findings in that regard at this time because, as its set forth, plaintiffs would be entitled to an evidentiary hearing on that question.

[73]So in summary, the Court has found the CDA bars plaintiff's claims against ARMSLIST as a matter of law. Because the plaintiff's claims seek to treat ARMSLIST and it's members as a publisher of web content, I will ask plaintiffs for -- ARMSLIST to file orders under the five-day rule. Is there anything further at this time?

MR. McCLINTOCK: Nothing further, Your Honor.

MR. LOWY: No, Your Honor.

MR. AMBROSE: No.

THE COURT: I know we have claims remaining, especially as relates to Mr. Linn. I don't know if parties want some time to reflect, obtain transcript, make a decision regarding appellate review.

I would propose scheduling a telephone status hearing at a reasonable time interval, whether it's 30, 45 days -- can probably do 60 if that's what everybody needs -- and just to find out then just where everyone is at based upon today's hearing.

MR. DUNPHY: Your Honor, I'll speak with counsel for other parties and get back to the Court within the Court's guidelines for follow-up and telephone conference date.

THE COURT: Heads are in the affirmative.

MR. McCLINTOCK: Yes.

[74]MR. AMBROSE: Yes.

MR. McCLINTOCK: We agree.

THE COURT: Is 30 days enough or you want some more time?

MR. DUNPHY: I'd like to discuss it first with other counsel to see. 30 days may well be enough. We may need 45.

THE COURT: We can work that out off the record, and let the clerk know what works for you; and as I say, I think, you're welcome to come down. But I think it's sufficient to appear by telephone for that purpose. Thank you.

MR. LOWY: Thank you very much, Your Honor.

MR. AMBROSE: Thank you.

(Proceedings concluded)

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[75]STATE OF WISCONSIN

MILWAUKEE COUNTY

I, Joanna Koepp, do hereby certify that I am a Registered Professional Reporter, that as such I reported the foregoing proceedings, later transcribed by me, and that it is true and correct to the best of my abilities.

(Electronically signed by Joanna Koepp)
Joanna Koepp - Official Reporter.

APPENDIX E — 47 USCA § 230

47 U.S.C.A. § 230

TITLE 47. TELECOMMUNICATIONS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER II. COMMON CARRIERS
PART I. COMMON CARRIER REGULATION

§ 230. PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL

Effective: April 11, 2018
Currentness

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural

development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that

empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the

technical means to restrict access to material described in paragraph (1)[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

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1. So in original. Probably should be "subparagraph (A)".

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit--

(A) any claim in a civil action brought under section 1595 of Title 18, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the

charge would constitute a violation of section 1591 of Title 18; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of Title 18, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

CREDIT(S)

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; amended Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739; Pub.L. 115-164, § 4(a), Apr. 11, 2018, 132 Stat. 1254.)