THE FLORIDA SUPREME COURT

S. Ct. Case No.: SC15-1
District Court Case No.: 4D-13-3469

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

Petitioners,

v.

INVESTORSHUB.COM, INC.,

Respondent.

PETITIONERS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Investorshub is a website maintained by Respondent Investorshub.com, Inc., purportedly designed to serve as a forum for investors to gather and share market insights about public companies and their officers through discussion platforms. However, Investorshub routinely allows the posting of libelous statements about public companies and their officers.

Between May 19 and May 20, 2012, Investorshub allowed a third party, Christopher Hawley, to post numerous libelous statements about the Petitioners, including statements suggesting that the Petitioners were being investigated by the FBI for fraud and for depleting a company's retirement plan. These statements were all false, and a jury ultimately found Mr. Hawley liable for defamation in a separate action.

The Petitioners filed this case against Respondent Investorshub.com, Inc. seeking the removal of the libelous and defamatory statements posted by Mr. Hawley in Investorshub's site. The Petitioners did not seek to hold Investorshub liable for any monetary damages caused by the posting of the statements.

Respondent moved to dismiss, arguing that the action was barred by 47 U.S.C. § 230(c). The Circuit Court dismissed the complaint based upon this Court's decision in *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fla. 2001) and *Giordano v. Romeo,* 76 So.3d 1100 (Fla. 3d DCA 2011).

Petitioners appealed, and, on December 3, 2014, the Fourth District Court of Appeal issued an opinion affirming the order of dismissal. (App. 1) The Fourth District relied on the decision of this Court in *Doe v American Online* and agreed with the decision of the Third District in *Giordano*.

Petitioners filed a notice to invoke the jurisdiction of this Court on January 2, 2014.

SUMMARY OF THE ARGUMENT

This Petition seeks to correct the misapplication of this Court's decision in *Doe v. America Online*, which was first espoused by the Third District and has now been adopted by the Fourth District in this case.

The Fourth District joined the Third District in expanding the civil liability immunity that this Court recognized in *Doe v. America Online* to bar an action seeking solely the removal of defamatory and libelous statements. This misapplication of *Doe v. America Online* has in essence condemned Petitioners to suffer defamation in perpetuity, without any viable remedy or redress.

This unfair result is not required by § 230 nor by this Court's decision in *Doe v. American Online*. As this Court explained in *Doe v. American Online*, § 230 requires the dismissal of actions for monetary damages against internet service

providers for content posted by third parties. But § 230 does not bar - or say anything – regarding the availability of injunctive relief.

The decision of the Fourth District turns the civil liability immunity afforded by § 230 into an unfettered license that allows defamation in perpetuity. This result goes far beyond the immunity recognized in *Doe v. American Online.*

ARGUMENT

I. THE FOURTH DISTRICT'S DECISION MISAPPLIES THIS COURT'S PRECEDENT.

The Fourth District's Decision expressly and directly conflicts with the decision of this Court in *Doe v. America Online,* as the Fourth District followed the reasoning of the Third District in *Giordano,* holding that this Court's broad interpretation of the immunity granted by § 230 barred an action against an internet or interactive service provider for the removal of libelous statements posted by third-parties.

This Court's decision in *Doe v. America Online* does not require this draconian result, which leaves defamed parties without any real remedy other than a monetary action for damages in perpetuity against the third party posters.

The plaintiff in *Doe v. America Online* sued for the alleged emotional injuries suffered by her son, John Doe as a result of the posting in an internet chat room hosted by America Online of pictures of John Doe, who was then eleven

years old, and two other minor males engaging in sexual activity with each other and an adult male. This Court held that these claims were barred by § 230.

But this Court did not discuss the availability of injunctive relief under § 230. This distinction is critical because the Petitioners do not seek to hold Investorshub liable for any tort-based claim. This action has been filed to seek the removal of libelous per se statements, nothing more than that.

The Fourth District acknowledged that *Doe v. American Online* did not bar actions for injunctive relief, but then it affirmed the dismissal following the decision of the Third District in *Giordano* – a decision that construes *Doe v. American Online* to bar injunctive relief. *See* Decision [App. A.] at 4. Indeed, in *Giordano*, the Third District concluded that this Court had decided this issue and that its hands were tied:

> The Florida Supreme Court has held that the CDA provides **absolute immunity** to interactive computer services like Xcentric.

76 So.3d at 1101 (emphasis added).

This reasoning - which is the basis of the decision of the Fourth District in this case - is a misapplication of this Court's decision in *Doe v. American Online*. The immunity that this Court recognized in *Doe v. American Online* does not extend to injunctive relief.

As such, this Court has jurisdiction to review the Fourth District's decision.[1]

II. THE COURT SHOULD EXERCISE ITS DISCRETION TO REVIEW THIS CASE.

District courts have struggled with the application of this Court's decision in *Doe v. American Online* and the scope of the immunity afforded by the Communications Decency Act. This Court should accept jurisdiction and hold that § 230 does not bar actions for injunctive relief.

Section 230(c) is titled "Protection for 'Good Samaritan' blocking and screening of offensive material." Section 230(c)(1) states in relevant part that:

> **(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.

Section 230(e)(3) then states that "[n]othing 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

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1. This Court has jurisdiction under Art. V, § 3(b)(3) of the Florida Constitution to review a decision of a district court that misapplies its precedent. *See Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1246 (Fla. 2006).

with this section." As such, the seminal question in this case is whether an action for injunctive relief against an interactive service provider is inconsistent with Section 230(c)(1). The answer is no.

The Congressional Conference Report on Section 230 confirms that the purpose of Section 230(c)(1) is to protect internet service providers that restrict access to objectionable material:

> [T]his section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to restrict or enable restriction of access to objectionable online material. [O]ne of the specific purposes of [section 230] is to overrule Stratton-Oakmont [Stratton Oakmont] v. Prodigy and any other similar decisions which have treated such providers and users as Publishers or speakers of content that is not their own because they have restricted access to objectionable material.

S. Conf. Rep. No. 104-230, at 435 (1996)).

Congress enacted § 230(c) – and part (1) in particular - to remove the disincentives to self-regulation. Congress was concerned that the specter of liability would deter service providers from blocking and screening offensive material.

This Court held in *Doe v. American Online* that Section 230 had a second purpose. That is, "to encourage the unfettered and unregulated development of free speech on the Internet ...." by eliminating civil liability for the distribution of

offensive material posted by a third-party. *See Doe v. America Online*, 783 So.2d at 1013-14. This Court relied and agreed with the decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), where the court explained that:

> Section 230 was enacted, in part, to maintain the robust nature of Internet communication, and accordingly, to keep government interference in the medium to a minimum ....
> **The specter of tort liability** in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. **Faced with potential liability** for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Zeran, 129 F.3d at 330 (emphasis added).

As such, Section 230(c) bars all actions (i) treating interactive service providers as publishers (ii) subjecting an interactive service provider to civil liability for the content posted by a third-party. Nothing more and nothing less.

An action for injunctive relief does not implicate any of these concerns. First, an action for injunctive relief does not "treat" an interactive service provider as a publisher. There is no risk of liability for publishing content in an action for injunctive relief. The only redress implicated in an action for injunctive relief is an order mandating the removal of the offensive speech.

The distinction between civil liability and injunctive relief has been recognized in other areas of immunity, such as state sovereign immunity under the Eleventh Amendment of the Constitution of the United States. *See Ex parte Young*, 209 U.S. 123 (1908) (state sovereign immunity not violated by an action for injunctive relief against government officer). Just as states can be sued – through their officials – for injunctive relief without offending the sovereign immunity established in the Eleventh Amendment, interactive service providers can be sued for an injunction without violating the civil liability immunity recognized by this Court in *Doe v. American Online.*

Injunctive relief does not have the "chilling effect" on free speech of "the specter of tort liability" that concerned the court in *Zeran*. *See* 129 F.3d at 330. An action for injunctive relief does not implicate monetary damages or civil liability. It simply mandates the removal of statements found to be defamatory. The robust nature of internet communication is not enhanced by having libelous statements in perpetuity. That was not what Congress intended and it is not consistent with the holding of this Court in *Doe v. American Online.*

Investorshub seeks to turn Section 230 on its head and argue that this section allows internet service providers to maintain offensive materials on their websites with impunity. Nothing in Section 230 supports this argument. In rejecting a

similar argument the court in *Mainstream Loudon v. Board of Trustees of the Loudon Country Library,* 2 F.Supp.2d 783, 790 (E.D.Va. 1998) noted that "[D]efendants cite no authority to suggest that the tort-based immunity to 'civil liability' described by § 230 would bar the instant action, which is for declaratory and injunctive relief." The same conclusion was reached by the Northern District of Illinois in *Doe v. Franco Productions*, No. 99 C 7885, 2000 WL 816779 (N.D.Ill. June 22, 2000) in concluding that the plaintiff's claims for injunctive relief were not preempted by Section 230.[2]

There is no statutory authority that can be construed to bar the availability of injunctive relief in this case.

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2 The case was ultimately dismissed as moot because the offending postings had in fact been removed. But, the holding of the court about the availability of injunctive relief to remove a defamatory posting stands.

CONCLUSION

For these reasons, this Court should grant jurisdiction to review the Fourth District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed this 12th day of January, 2015 to : **Deanna K. Shullman, Esq.**, Thomas & LoCicero PL, dshullman@tlolawfirm.com, 401 SE 12th Street, Suite 300, Ft. Lauderdale, FL 33316.

/s/Francisco A. Rodriguez
Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this petition is printed in Times New Roman 14-point font in compliance with the requirements of the Florida Rules of Appellate Procedure.

/s/Francisco A. Rodriguez
Attorney