

No. 21-1333

---

---

In The  
**Supreme Court of the United States**

—◆—  
REYNALDO GONZALEZ, *et al.*,

*Petitioners,*

v.

GOOGLE LLC,

*Respondent.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF FOR PETITIONERS**  
—◆—

ERIC SCHNAPPER  
*Counsel of Record*  
University of Washington  
School of Law  
Box 353020  
Seattle, WA 98195  
(206) 660-8845  
schnapp@uw.edu

ROBERT J. TOLCHIN  
THE BERKMAN LAW  
OFFICE, LLC  
829 East 15th St.  
Brooklyn, NY 11230  
(718) 855-3627  
rtolchin@berkmanlaw.com

KEITH L. ALTMAN  
THE LAW OFFICE OF  
KEITH ALTMAN  
33228 West 12 Mile Rd.  
Suite 375  
Farmington Hills, MI 48334  
(516) 456-5885  
keithaltman@  
kaltmanlaw.com

*Counsel for Petitioners*

**QUESTION PRESENTED**

Under what circumstances does the defense created by section 230(c)(1) apply to recommendations of third-party content?

**PARTIES**

The plaintiffs are Reynaldo Gonzalez, the estate of Nohemi Gonzalez, Beatriz Gonzalez, individually and as administrator of the estate of Nohemi Gonzalez, Jose Hernandez, Rey Gonzalez, and Paul Gonzalez. The defendant is Google LLC.

## TABLE OF CONTENTS

	Page
Opinions Below .....	1
Jurisdiction .....	1
Statutory Provision Involved.....	1
Statement of the Case .....	2
Legal Background.....	2
Proceedings Below .....	8
District Court.....	8
Court of Appeals .....	11
Summary of Argument .....	13
Argument.....	16
I. The Section 230(c)(1) Defense Does Not Apply to a Recommendation of Third-Party Content if the Plaintiff’s Claim Does Not “Treat[]” the Defendant as the “Publisher or Speaker” of That Third-Party Content .....	18
A. “Publisher” in Section 230(c)(1) Means “Publisher” as That Term Is Used in Defamation Law .....	19
B. Even if “Publisher” Is Given the Everyday Meaning, Many Claims Based on Recommendations do not Treat the Defendant as the “Publisher” of Third-Party Content .....	29

## TABLE OF CONTENTS—Continued

	Page
II. The Section 230(c)(1) Defense Does Not Apply to a Recommendation Insofar as it Contains Information Provided by the Defendant Itself .....	33
A. URLs and Notifications Are “Information” Under Section 230(c)(1) .....	34
(i) URLs .....	35
(ii) Notifications .....	40
B. Neutrally-Created Information Is “Information” Under Section 230(c)(1).....	40
III. The Section 230(c)(1) Defense Does Not Apply to Recommendations Made by a Defendant Not Acting as a “Provider..of an Interactive Computer Service .....	42
IV. Section 230 Should Be Neither Broadly Nor Narrowly Construed.....	47
Conclusion.....	52

## TABLE OF AUTHORITIES

	Page
CASES	
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009).....	18
<i>Barr v. Matteo</i> , 360 U.S. 564 (1959).....	20
<i>Blue Ridge Bank v. Veribanc, Inc.</i> , 866 F.2d 681 (4th Cir. 1989).....	23
<i>Board of Governors, FRS v. Dimension Financial Corp.</i> , 474 U.S. 361 (1986).....	51
<i>Carafano v. Metrosplash.com, Inc.</i> , 339 F.3d 1119 (9th Cir. 2003).....	48
<i>Casteel v. News-Record, Inc.</i> , 875 P.2d 21 (Wyo. 1994).....	23
<i>Cipollone v. Liggett Corp., Inc.</i> , 505 U.S. 504 (1992).....	48
<i>CTS Corporation v. Waldburger</i> , 573 U.S. 1 (2014).....	48
<i>Cubby, Inc. v. CompuServe, Inc.</i> , 776 F.Supp. 135 (S.D.N.Y. 1991).....	4, 5
<i>Doe v. Internet Brands</i> , 824 F.3d 846 (9th Cir. 2016).....	25
<i>Dyroff v. Ultimate Software Group, Inc.</i> , 934 F.3d 1093 (9th Cir. 2019), <i>cert. denied</i> , 140 S.Ct. 2761 (2020).....	<i>passim</i>
<i>Erie Insurance Co. v. Amazon.com, Inc.</i> , 925 F.3d 135 (4th Cir. 2019).....	24

## TABLE OF AUTHORITIES—Continued

	Page
<i>Fair Housing Council of San Fernando Valley v. Rommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008) .....	47
<i>Federal Trade Commission v. Match Group, Inc.</i> , 2022 WL 877107 (N.D. Tex. March 24, 2022) .....	35
<i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 2019), <i>cert. denied</i> , 140 S.Ct. 2761 (2020) .....	<i>passim</i>
<i>Gaetano v. Sharon Herald Co.</i> , 426 Pa. 179, 231 A.2d 753 (1967) .....	21
<i>Hall v. Hall</i> , 138 S.Ct. 1118 (2018).....	22
<i>Henderson v. Source for Public Data, L.P.</i> , 2022 WL 16643916 (Nov. 3, 2022) .....	3, 24, 26
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	20
<i>Hoppe v. Hearst Corp.</i> , 53 Wash. App. 668, 770 P.2d 203 (Wash. Ct. App. 1989).....	23
<i>Hutchinson v. Proxmire</i> , 443 U.S. 111 (1979).....	20
<i>In re Apple Inc. App Store Simulated Casino-Style Games Litigation</i> , 2022 WL 4009918 (N.D. Cal. Sept. 2, 2022) .....	35
<i>Introini v. Richland County</i> , 1993 WL 73570 (D.S.C. Dec. 28, 1993) .....	23
<i>Jones v. Dirty World Entertainment Recordings, LLC</i> , 755 F.3d 398 (6th Cir. 2014) .....	48
<i>Lemmon v. Snap, Inc.</i> , 995 F.3d 1085 (9th Cir. 2021) .....	25, 26
<i>M.L. v. Craigslist, Inc.</i> , 2021 WL 5217115 (W.D. Wash. Sept. 16, 2021) .....	41

## TABLE OF AUTHORITIES—Continued

	Page
<i>Malwarebytes, Inc. v. Enigma Software Group USA, LLC</i> , 141 S.Ct. 13 (2020) .....	7
<i>New Prime, Inc. v. Oliviera</i> , 139 S.Ct. 532 (2019).....	16, 51
<i>New York Times v. Sullivan</i> , 376 U.S. 254 (1964) .....	21
<i>Nodar v. Galbreath</i> , 462 So.2d 803 (Fla. 1984).....	23
<i>Peck v. Tribune Co.</i> , 214 U.S. 185 (1909) .....	21
<i>Stratton Oakmont, Inc. v. Prodigy Services Co.</i> , 1995 WL 323710 (Sup. Ct. N.Y. Cnty. May 24, 1995) .....	<i>passim</i>
<i>Sunshine Sports Wear and Electronics, Inc. v. WSC Television Inc.</i> , 738 F.Supp. 1499 (D.S.C. 1989) .....	23
<i>White v. Nichols</i> , 44 U.S. 266 (1845) .....	21
<i>Williams v. Trust Co. of Ga.</i> , 140 Ga. App. 45 (Ct. App. 1976).....	23
<i>Yates v. United States</i> , 574 U.S. 528 (2015).....	24
 CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I .....	29
 STATUTES	
18 U.S.C. § 1591 .....	50
18 U.S.C. § 2333 .....	9
18 U.S.C. § 2421A.....	50

## TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1331 .....	1
47 U.S.C. § 230 .....	<i>passim</i>
47 U.S.C. § 230(a).....	47
47 U.S.C. § 230(b).....	46, 47
47 U.S.C. § 230(c)(1).....	<i>passim</i>
47 U.S.C. § 230(c)(2).....	7
47 U.S.C. § 230(e).....	50
47 U.S.C. § 230(e)(1).....	47
47 U.S.C. § 230(e)(2).....	50
47 U.S.C. § 230(e)(3).....	48, 50, 51
47 U.S.C. § 230(e)(4).....	50
47 U.S.C. § 230(e)(5)(B).....	50
47 U.S.C. § 230(e)(5)(C).....	50
47 U.S.C. § 230(f)(2).....	<i>passim</i>
Justice Against Sponsors of Terrorism Act, 18 U.S.C. § 2333(d)(2).....	48
The Antiterrorism Act, 18 U.S.C. § 2331.....	48
 OTHER AUTHORITIES	
141 Cong. Rec 22045.....	5
“About Twitter’s Account Suggestions,” availa- ble at <a href="https://help.twitter.com/en/using-twitter/account-suggestions">https://help.twitter.com/en/using-twitter/ account-suggestions</a> , visited Nov. 15, 2022 .....	17

## TABLE OF AUTHORITIES—Continued

	Page
C. Goodrow, “On YouTube’s Recommendation System,” available at <a href="https://blog.youtube/inside-youtube/on-youtubes-recommendation-system/">https://blog.youtube/inside-youtube/on-youtubes-recommendation-system/</a> , visited Nov. 15, 2022 .....	17
“How To Receive Recommendations from Twitter,” available at <a href="https://help.twitter.com/en/managing-your-account/how-to-receive-twitter-recommendations">https://help.twitter.com/en/managing-your-account/how-to-receive-twitter-recommendations</a> , visited Nov. 15, 2022 .....	17
<a href="https://tinyurl.com/2ytjfmah">https://tinyurl.com/2ytjfmah</a> , visited Nov. 7, 2022.....	19
L. Eldredge, <i>The Law of Defamation</i> (1978) .....	3, 21
Petition for Writ of Certiorari, <i>Dyroff v. Ultimate Software Group, Inc.</i> , available at 2020 WL 92187.....	27
Prosser & Keeton, <i>Torts</i> (1984) .....	20
Restatement (Second) of Torts (1977) .....	20
Restatement (Second) of Torts (1979) .....	3
S. Rep. 104-230.....	7, 22
Webster’s Third New International Dictionary 1837 (1986).....	20
“What Are Recommendations on Facebook?,” available at <a href="http://www.facebook.com/help/1257205004624246">www.facebook.com/help/1257205004624246</a> , visited Nov. 15, 2022 .....	17
<a href="http://www.dictionary.com/browse/publisher">www.dictionary.com/browse/publisher</a> , visited Nov. 7, 2022.....	19
“YouTube’s Recommendations Drive 70% of What We Watch,” available at <a href="http://qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch">qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch</a> , visited Nov. 16, 2022 .....	18

## **OPINIONS BELOW**

The June 22, 2021 opinion of the court of appeals, which is reported at 2 F.4th 871, is set out at pp. 1a-169a of the Petition Appendix. The October 23, 2017, decision of the district court, which is reported at 282 F.Supp.3d 1150, is set out at pp. 217a-259a of the Petition Appendix. The August 15, 2018, decision of the district court, which is reported at 335 F.Supp.3d 1156, is set out at pp. 170a-216a of the Petition Appendix. The January 3, 2022, order denying rehearing en banc is set out at pp. 260a-262a of the Petition Appendix.



## **JURISDICTION**

The decision of the court of appeals was entered on June 22, 2021. A timely petition for rehearing en banc was denied on January 3, 2022. The petition for a writ of certiorari was filed on April 4, 2022, and certiorari was granted on October 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.



## **STATUTORY PROVISION INVOLVED**

Section 230(c)(1) provides:

### **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.

47 U.S.C. § 230(c)(1). The full text of section 230 is set out in the Appendix to the Petition. Pet. App. 263a-268a.

---

◆

## STATEMENT OF THE CASE

### *Legal Background*

Section 230(c)(1) was adopted in 1996, the dawn of the Internet age, when private individuals accessed the Internet primarily through subscription services, like Prodigy, CompuServe, and America Online. Those services provided subscribers with games, an early form of email, and (of particular relevance here) chat rooms and bulletin boards. Chat rooms and bulletin boards allowed subscribers to post content they had created (at that time, primarily text); other subscribers could download that content, and perhaps respond to it. Chat rooms and bulletin boards were often organized by topic, and uploaded material was typically displayed in reverse chronological order. Other online companies, such as Dow Jones News/Retrieval, primarily provided files which paying subscribers could access, search and download. Today's major Internet companies, such as YouTube, its owner Google, Facebook, and Twitter did not yet exist.

Section 230(c)(1) was a congressional response to a serious problem created by a New York state court defamation decision, *Stratton Oakmont, Inc. v. Prodigy*

*Services Co.*, 1995 WL 323710 (Sup. Ct. N.Y. Cnty. May 24, 1995). New York defamation law, like defamation law in at least most other states, treated publishers of books, magazines, and newspapers differently than bookstores, newsstands, and libraries. Book, magazine and newspaper publishers, as well as certain others, were strictly liable for defamatory content they communicated to third parties. Because publication is an element of a defamation claim, the entities subject to that strict liability standard were referred to as “publishers.”<sup>1</sup> But because bookstores, newsstands, and libraries would not usually know the content of the materials they were providing, those entities were only liable for defamation if there was a showing of fault, such as that a defendant actually knew of the particular defamatory content at issue.<sup>2</sup> In New York and some other states, defamation defendants as to whom proof of fault was required were referred to as “distributors.” See *Henderson v. Source for Public Data, L.P.*, 2022 WL 16643916, at \*3 n.12 (Nov. 3, 2022) (“[d]efamation at common law distinguished between publisher and distributor liability.”).

Before 1995, Internet companies that allowed users to post information had been held to be distributors in defamation cases, a determination that usually

---

<sup>1</sup> Restatement (Second) of Torts, §§ 558, 577 (1979); L. Eldredge, *The Law of Defamation*, 205-07 (1978).

<sup>2</sup> Restatement (Second) of Torts, § 581 (1979); L. Eldredge, *The Law of Defamation*, 236-39. The states may apply different standards (e.g., negligence, or recklessness), in determining the degree of fault needed to impose liability.

insulated them from liability for materials created by third parties. *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 139-42 (S.D.N.Y. 1991). The district court in *Cubby*, for example, concluded that CompuServe, in allowing users to post information on its online bulletin boards, had acted as a distributor. CompuServe therefore was not liable for allegedly defamatory statements posted on its site, because the plaintiffs had failed to prove that CompuServe “knew or had reason to know” of the allegedly inaccurate statement. 776 F.Supp. at 141.

The state court in *Stratton Oakmont* reached a different conclusion. The defendant in that case operated a “financial computer bulletin board,...where members c[ould] post statements regarding stocks, investments and other financial matters.” 1995 WL 323710, at \*1. Prodigy exercised a degree of control over what users posted on the bulletin board. It had “content guidelines,” implemented by a “Board Leader,” which prohibited a variety of materials, including statements “in bad taste or grossly repugnant to community standards.” *Id.*, at \*2. In addition, “a software screening program...automatically prescreen[ed] all bulletin board posting for offensive language.” *Id.* The plaintiffs, including a securities investment firm, contended they had been injured by false statements about them posted on the Prodigy bulletin board by an “unidentified party.” Prodigy contended that it should be treated as a distributor, which would have greatly reduced the likelihood of liability.

The court noted that under state law

distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.... A distributor, or deliverer of defamatory material is considered a passive conduit and will not be found liable in the absence of fault.

*Id.*, at \*3. The court, however, concluded that Prodigy had acted as a publisher (and thus was strictly liable for false statements its users posted) because it “exercised sufficient editorial control over its computer bulletin boards”—that is, because it removed offensive content and automatically screened for offensive language. *Id.* Prodigy’s attempt to protect users from inappropriate material, the court reasoned, “opened it up to a greater liability than CompuServe and other computer networks that make no such choice.” *Id.*, at \*5.

Congress promptly acted to overturn *Stratton Oakmont*. Less than three months after that decision, an amendment containing what was to become section 230 was added to a bill then being considered by the House. One of the sponsors of that amendment, Representative Cox, expressed agreement with the decision in *Cubby*, which he described as having held that CompuServe “would not be liable in a defamation case because it was not the publisher or editor of the material.” 141 Cong. Rec 22045. Representative Cox criticized *Stratton Oakmont* for having imposed a stricter standard of liability on Prodigy because it had attempted to protect users from offensive materials.

He described the decision in that case as having reasoned:

You employ screening and blocking software that keeps obscenity off of your network... You don't permit nudity on your system. You have content guidelines. You, therefore, are going to face stricter liability because you tried to exercise some control over offensive material.

*Id. Stratton Oakmont*, Cox argued, had created “a massive disincentive for [Internet companies]” to attempt to keep such material off the internet. *Id.* He explained the amendment would “protect [Internet companies] from taking on liability such as occurred in the Prodigy case...for helping us solve this problem.” *Id.* Representative Goodlatte explained that the amendment was needed because “[t]here is no way that any of these entities, like Prodigy, can take the responsibility to edit out information that is going to be coming in to them from all manner of sources onto their bulletin boards.” *Id.*, at 22046. Because of the *Stratton Oakmont* decision, he noted, providers “face the risk of increased liability where they take reasonable steps to police their systems.” *Id.*, at 22047. Representative Lofgren argued that for the federal government to hold websites responsible for materials posted on them “is like saying that the mailman is going to be liable when he delivers a plain brown envelope for what is inside it.” *Id.*, at 22046. The House approved the amendment.

The Senate agreed to House language. The Senate Conference Report explained that

[o]ne of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users [of interactive computer services] as publishers or speakers of content that is not their own because they have restricted access to objectionable material.

S. Rep. 104-230, 194.

Section 230 overturned *Stratton Oakmont* in two complementary ways. First, section 230(c)(1) provides that “provider[s] or user[s] of an interactive computer service” could not be “treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). That directly precluded strict liability<sup>3</sup> on the ground at issue in *Stratton Oakmont*, in which Prodigy faced strict liability as a “publisher” based on a false statement posted by an unidentified third party. Second, section 230(c)(2) prohibits the imposition of liability based on a defendant’s good faith efforts to remove objectionable material, thus precluding such efforts from resulting

---

<sup>3</sup> In *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020) (statement of Justice Thomas respecting denial of certiorari), Justice Thomas noted that the Court had not decided whether section 230(c)(1), in addition to precluding publisher liability under certain circumstances, also precluded fault-based distributor liability. That issue is not within the scope of the question presented.

in a stricter standard of liability, as had occurred in *Stratton Oakmont*.

To establish the affirmative defense provided by section 230(c)(1), a defendant must demonstrate three elements. First, the claim asserted by the plaintiff must “treat[] [the defendant] as the publisher or speaker of” other-party information. Second, the content at issue must be “information provided by another information content provider,”<sup>4</sup> not information provided in whole or part by the defendant itself. Third, when the defendant engaged in the action at issue, it must have been acting as a “provider...or user of an interactive computer service.”<sup>5</sup>

### ***Proceedings Below***

#### ***District Court***

In November 2015 Nohemi Gonzalez, a 23-year-old U.S. citizen studying in Paris, France, was murdered when three ISIS terrorists fired into a crowd of diners at La Belle Équipe bistro in Paris. This tragic event was part of a broader series of attacks perpetrated by ISIS in Paris, which included several suicide

---

<sup>4</sup> The lower courts have generally treated “content” and “information” as interchangeable under section 230. Whether that is correct is not at issue in this case.

<sup>5</sup> Section 230(c)(1) also applies to certain “user[s]” of an interactive computer service. When that term, rather than “provider,” might apply is not at issue in this case, and has not been raised with any frequency in the lower courts.

bombings and mass shootings. Ms. Gonzalez was one of 129 people killed during the murderous rampage.

Ms. Gonzalez's estate and several family members subsequently brought this action against Google, which owns YouTube, a global online service on which users can directly post videos. Plaintiffs alleged that Google, through YouTube, had aided and abetted ISIS, conduct forbidden and made actionable by the Antiterrorism Act. 18 U.S.C. § 2333; Pet. App. 3a-4a, 14a-16a.

Plaintiffs asserted that YouTube had knowingly permitted ISIS to post on YouTube hundreds of radicalizing videos inciting violence and recruiting potential supporters to join the ISIS forces then terrorizing a large area of the Middle East, and to conduct terrorist attacks in their home countries. Additionally, and central to the question presented, the complaint alleged that YouTube affirmatively "recommended ISIS videos to users." Third Amended Complaint, ¶ 535; J.A. 169. Those recommendations were one of the services that YouTube provided to ISIS. YouTube selected the users to whom it would recommend ISIS videos based on what YouTube knew about each of the millions of YouTube viewers, targeting users whose characteristics suggested they would be interested in ISIS videos. *Id.*, ¶¶ 535, 549, 550; J.A. 169, 173. The selection of the users to whom ISIS videos were recommended was determined by computer algorithms created and implemented by YouTube. Because of those recommendations, users "[we]re able to locate other videos and accounts related to ISIS even if they did not know the

correct identifier or if the original YouTube account had been replaced....” *Id.* ¶ 549; J.A. 173.

The complaint also asserted that the services that YouTube provided to ISIS, including recommendations, were critical to the growth and activity of ISIS. “[B]y recommend[ing] ISIS videos to users, Google assists ISIS in spreading its message and thus provides material support to ISIS...” *Id.*, ¶ 535; J.A. 169. “Google’s services have played a uniquely essential role in the development of ISIS’s image, its success in recruiting members from around the world, and its ability to carry out attacks...” *Id.*, ¶ 14; J.A. 17. A single ISIS video on YouTube, for example, had been viewed 56,998 times in a 24-hour period. *Id.* ¶ 231; J.A. 74. Videos that users viewed on YouTube were the central manner in which ISIS enlisted support and recruits from areas outside the portions of Syria and Iraq which it controlled. *Id.*, ¶¶ 207-223; J.A. 67-72.

The complaint alleged YouTube officials were well aware that the company’s services were assisting ISIS. The complaint asserted that “[d]espite extensive media coverage, complaints, legal warnings, congressional hearings, and other attention for providing online social media platform and communications services to ISIS, prior to the Paris attacks YouTube continued to provide those resources and services to ISIS and its affiliates, refusing to actively identify ISIS YouTube accounts and only reviewing accounts reported by other YouTube users.” *Id.*, ¶ 20; J.A. 18. The complaint alleged that the assistance provided to ISIS by YouTube

was a contributing cause of the 2015 attack that killed Ms. Gonzalez.

Google moved to dismiss the complaint on the ground that the section 230(c)(1) defense applied to all of the plaintiffs' claims. Pet. App. 224a. The district court agreed, and dismissed the complaint. Pet. App. 170a-259a. With regard to the plaintiffs' claim regarding YouTube's recommendations, the district court concluded that Google was protected by section 230(c)(1) because the videos it was recommending had been produced by ISIS, not by YouTube itself. Pet. App. 198a-203a.

### ***Court of Appeals***

While the appeal was pending, the Second and Ninth Circuits handed down decisions which directly addressed the status of recommendations under section 230(c)(1), and which largely framed the panel's analysis of that question. In *Force v. Facebook, Inc.*, the Second Circuit held that the section 230(c)(1) defense applied to Facebook's recommendations of content, individuals, and events. 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2761 (2020). The late Chief Judge Katzmann wrote a lengthy dissenting opinion in *Force*. In *Dyroff v. Ultimate Software Group, Inc.*, the Ninth Circuit held that the use of an email to recommend third-party material was protected by section 230(c)(1). 934 F.3d 1093 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 2761 (2020).

Those decisions shifted the legal landscape, and shaped the opinions of all three panel members in

this case. The subsequent proceedings focused on whether to follow the majority opinion or Chief Judge Katzmann's dissenting opinion in *Force*, and on whether *Dyroff* had been correctly decided or could be distinguished.

In the instant case, the Ninth Circuit affirmed the district court's dismissal of plaintiffs' recommendation-based claims, with each member of the panel writing separately. Judge Christen authored the majority opinion for two members of the court. Pet. App. 1a-80a. Judge Berzon wrote a concurring opinion (Pet. App. 81a-92a), and Judge Gould wrote a separate opinion concurring in part and dissenting in part. Pet. App. 92a-169a. The three judges differed primarily about whether recommendations are within the scope of the protections of section 230(c)(1).

Judge Christen's majority opinion noted that "[t]he Gonzalez Plaintiffs' theory of liability generally arises from Google's recommendations of content to users." Pet. App. 7a. It concluded that under the Ninth Circuit precedent in *Dyroff* recommendations are protected by the 230(c)(1) defense, at least where the defendant's method for making recommendations did not treat harmful third-party content "differently than any other third-party created content." Pet. App. 36a-44a.

Judge Berzon, in a concurring opinion, strongly criticized *Dyroff*, and agreed with the dissenting opinion of Chief Judge Katzmann in *Force*. Pet. App. 81a-92a. Judge Berzon concluded, however, that the panel

was bound by *Dyroff*. Judge Berzon therefore joined Judge Christen’s majority opinion, but called on the Ninth Circuit to grant rehearing en banc to reconsider the issue. *Id.*

Judge Gould dissented regarding the majority’s holding that the section 230(c)(1) defense applies to recommendations made by a website. Pet. App. 96a-110a. He distinguished between YouTube’s action in merely permitting ISIS to upload its videos to the YouTube server, and YouTube’s use of recommendations to encourage viewing of ISIS videos by “those already determined to be most susceptible to the ISIS cause.” Pet. App. 102a. Judge Gould expressly endorsed the reasoning of Chief Judge Katzmann’s dissent in *Force*. Pet. App. 139a-169a. He sought to distinguish the decision in *Dyroff* (Pet. App. 102), and urged that *Dyroff* be reconsidered en banc.

Plaintiffs filed a timely petition for rehearing en banc. A majority of the court of appeals voted to deny rehearing en banc, over the dissents of Judges Berzon and Gould. Pet. App. 261a-262a.

---

◆

## SUMMARY OF ARGUMENT

The majority opinions in the instant case and *Force*, and the opinion in *Dyroff*, hold that the section 230(c)(1) defense applies to recommendations of third-party created material. The text of section 230(c)(1) itself does not establish a distinct legal standard for recommendations. The determination of whether recommendations are protected by section 230(c)(1)

turns on the application of the general legal standard governing each of the three elements of the section 230(c)(1) defense.

First, a defendant must show that the claim in question “treat[s]” the defendant as “the publisher” of third-party content. The lower courts have mistakenly interpreted “publisher” to have its everyday meaning, referring to an entity or person in the business of publishing, and have at times compounded that error by insisting that section 230(c)(1) applies to virtually any activity in which such a publisher might engage, including making recommendations. But “publisher” in section 230(c)(1) is used in the narrow sense drawn from defamation law. If section 230(c)(1) is properly so understood, the imposition of liability based on a recommendation would not in every instance treat the defendant as a publisher within the meaning of that provision.

Second, the content at issue must have been provided by “another information content provider,” not by the defendant itself. Recommendations may contain information from the defendant, such as a hyperlink with the URL of material the defendant hopes the user will download, or notifications of new postings the defendant hopes the user will find interesting. The Ninth Circuit erred in holding that URLs and notifications are not information within the meaning of section 230(c)(1). It also erred in holding that recommendations are outside the scope of section 230(c)(1) so long as they are made in a “neutral” manner which does not, for example, favor harmful or unlawful third-party material.

Third, the Ninth and Second Circuits erred in holding that section 230(c)(1) protects a defendant if it sends to a user content which the user did not actually request. A defendant is acting as the provider of an “interactive computer service,” and thus within the scope of section 230(c)(1), when it is providing “access...to a computer server.” A computer functions as a “server,” as that term is used in section 230, only when it is providing to a user a file (such as text, or a video), which the user has actually requested, or is performing other tasks (such as a search) at the request of the user.

Thus, although some practices that might be characterized as recommendations could satisfy all three elements of the section 230(c)(1) defense, others would not. The courts below therefore erred in holding that section 230(c)(1) required the dismissal of the complaint’s allegation that YouTube had recommended ISIS material, in the absence of a showing by YouTube that any recommendations it had made would satisfy all three elements of the section 230(c)(1) defense.

Search engines are in two important respects different from social media sites. First, search engines only provide users with materials in response to requests from the users themselves, and thus necessarily function as providers of interactive computer services. Second, although search engines provide users with hyperlinks embedded with URLs, those URLs are created by the website where the material at issue is located, not by the search engine itself. On the other hand, in the case of a social media site, the URLs in the

hyperlinks provided by that site are usually created by the site itself, and thus are not information from “another” provider.

The approach of some lower courts to this and other issues arising under section 230(c)(1) has been shaped by a belief that section 230(c)(1) must be broadly construed. But this Court has made clear the interpretation of statutes should not be shaped by judicial efforts to advance unstated policy goals. *New Prime, Inc. v. Oliviera*, 139 S.Ct. 532, 543 (2019). A presumption in favor of broadly construing section 230(c)(1) would be particularly inappropriate, because section 230(c)(1) when applicable preempts state law, and there is ordinarily a presumption in favor of the narrow construction of such preemptive measures.

---

◆

## ARGUMENT

The complaint in this action alleged that the defendant had recommended ISIS videos to its users. The courts below dismissed the complaint, concluding that allegation did not state a claim on which relief could be granted because of the defense in section 230(c)(1). Section 230(c)(1) would necessarily bar claims alleging recommendation of third-party content only if any recommendation-based claim would inherently satisfy all three elements of the section 230(c)(1) defense.

Lower courts use the term recommendations to refer to the practices of social media sites engaged in to induce users to download or stream materials on their

websites. YouTube, like other social media sites, refers to certain of its practices as recommendations. YouTube,<sup>6</sup> Facebook,<sup>7</sup> Twitter<sup>8</sup> and other Internet companies have created complex automated recommendation systems—often called recommendation algorithms—using artificial intelligence to determine what material to recommend to each user. Those companies collect detailed information about users—their interactions with the platform, the content of the information that the user has chosen to view, and other information—then use that information to try to determine what that user would like to view. In 2016 YouTube’s Vice President of Engineering explained that the company utilized 80 billion pieces of information about its users in making recommendations.<sup>9</sup> These Internet companies are constantly adjusting their recommendation systems to improve their effectiveness in inducing viewers to spend more time on the site looking at materials there, what YouTube refers to as “watch time.” These recommendation systems have been highly effective at increasing usage, and thus the profitability, of the sites. According to YouTube’s Chief

---

<sup>6</sup> C. Goodrow, “On YouTube’s Recommendation System,” available at <https://blog.youtube/inside-youtube/on-youtubes-recommendation-system/>, visited Nov. 15, 2022.

<sup>7</sup> “What Are Recommendations on Facebook?,” available at [www.facebook.com/help/1257205004624246](http://www.facebook.com/help/1257205004624246), visited Nov. 15, 2022.

<sup>8</sup> “About Twitter’s Account Suggestions,” available at <https://help.twitter.com/en/using-twitter/account-suggestions>, visited Nov. 15, 2022; “How To Receive Recommendations from Twitter,” available at <https://help.twitter.com/en/managing-your-account/how-to-receive-twitter-recommendations>, visited Nov. 15, 2022.

<sup>9</sup> “On YouTube’s Recommendation System,” *supra*.

Product Officer, 70% of the time users were looking at videos from YouTube was a result of YouTube’s recommendation system.<sup>10</sup>

Section 230(c)(1) does not contain specific language regarding recommendations, and does not provide a distinct legal standard governing recommendations. Determination of whether recommendations are protected by the section 230(c)(1) defense turns on the application of the general legal standard governing each element of that defense. The majority opinions below and in *Force*, and the Ninth Circuit in *Dyroff*, set out four reasons for concluding that section 230(c)(1) applied to recommendations of third-party content.

**I. THE SECTION 230(c)(1) DEFENSE DOES NOT APPLY TO A RECOMMENDATION OF THIRD-PARTY CONTENT IF THE PLAINTIFF’S CLAIM DOES NOT “TREAT[ ]” THE DEFENDANT AS THE “PUBLISHER OR SPEAKER” OF THAT THIRD-PARTY CONTENT**

The section 230(c)(1) defense requires a showing that a claim would “treat[] [the defendant] as the publisher or speaker” of content created by a third party. The Ninth Circuit previously held that section 230(c)(1) uses “publisher” in its everyday sense. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). The

---

<sup>10</sup> “YouTube’s Recommendations Drive 70% of What We Watch,” available at [qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch](https://qz.com/1178125/youtubes-recommendations-drive-70-of-what-we-watch), visited Nov. 16, 2022.

Second Circuit in *Force* interpreted “publisher” in the same way, adopting a “capacious understanding of what it means to treat a website operator as the publisher.” 934 F.3d at 65. But “publisher” is used in section 230(c)(1) with the narrower and distinct meaning which that term has in defamation law. And even if “publisher” were construed as having its everyday meaning, claims based on recommendations would not invariably treat the defendant as a publisher. Judges Berzon and Gould in the instant case, and Chief Judge Katzmann in *Force*, concluded that claims based on recommendations of third-party content do not treat the defendant as the publisher of that content. Pet. App. 83a-85a, 87a, 90a-91a, 99a, 101a-102a; *Force*, 934 F.3d at 82-83.

**A. “Publisher” in Section 230(c)(1) Means “Publisher” as That Term Is Used in Defamation Law**

(1) The term “publisher” has two meanings. In everyday usage it refers to an entity or person generally engaging in the activity of publishing. Dictionary.com defines “publisher” in that manner as “a person or company whose business is the publishing of books, periodicals, engravings, computer software.”<sup>11</sup> Google Dictionary defines the term as “a person or company that prepares and issues books, journals, music, or other works for sale, *‘the publishers of Vogue.’*”<sup>12</sup>

---

<sup>11</sup> [www.dictionary.com/browse/publisher](http://www.dictionary.com/browse/publisher), visited Nov. 7, 2022.

<sup>12</sup> <https://tinyurl.com/2ytjfmah>, visited Nov. 7, 2022.

A statement like “Random House is a publisher” uses “publisher” with this everyday meaning. The majority opinion in *Force* expressly interpreted “publisher” in section 230(c)(1) in that way. 934 F.3d at 65 (“one whose business is publication”) (quoting Webster’s Third New International Dictionary 1837 (1986)).

But “publisher” (and “publish”) has a different meaning in the law, which derives from the law of defamation. A defamatory writing or oral statement is only actionable if the defendant has actually communicated the writing or statement to a person other than the defamed individual. That necessary element of a defamation claim is referred to as “publication,” and a defendant who in this sense published a defamatory statement is referred to as the “publisher” of that statement. “Since the interest protected is that of reputation, it is essential to tort liability for either libel or slander that the defamation be communicated to someone other than the person defamed. This element of communication is given the technical name ‘publication....’” Prosser & Keeton, *Torts*, § 113 p. 797 (1984) (footnote omitted). “A publication of the defamatory matter is essential to liability... Any act by which the defamatory matter is intentionally or negligently communicated to a third person is a publication.” Restatement (Second) of *Torts* § 577, comment a (1977). This Court uses “publish” with that legal meaning in opinions discussing defamation claims.<sup>13</sup>

---

<sup>13</sup> *Hutchinson v. Proxmire*, 443 U.S. 111, 128-30 (1979); *Herbert v. Lando*, 441 U.S. 153, 160 (1979); *Barr v. Matteo*, 360 U.S.

The everyday and legal meanings of “publish” and “publisher” are different.<sup>14</sup> If a defendant makes a defamatory statement in a remark overheard by even a single person (other than the individual defamed), the defendant has published (and is the publisher of) a slander, even though no one could refer to that defendant as a publisher in the everyday sense. Conversely, if the *New York Times* includes a defamatory statement in a part of an article that not a single person actually read, that would constitute publication in the everyday sense, but not in the legal sense. A libelous newspaper is published, in the everyday sense, where and when it is printed, but is published, in the defamation sense, where and when it is read.<sup>15</sup>

(2) Section 230(c)(1) uses “publisher” in the legal sense. A key purpose of that provision was “to overrule *Stratton-Oakmont v. Prodigy* and any other similar

---

564, 574 (1959); *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909); *White v. Nichols*, 44 U.S. 266, 274, 286 (1845).

<sup>14</sup> *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 182, 231 A.2d 753 (1967):

When one speaks of the “publication” of a newspaper, we think of the actual plant where it is physically printed and “published.” But this in itself has nothing to do with “publication” of a defamatory statement contained in the newspaper. The word “publication” in this sense has a different connotation.

<sup>15</sup> L. H. Eldredge, *The Law of Defamation*, § 37, pp. 207-08; *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967). In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the newspaper was published, in the everyday sense, in New York (because it was printed there), but was published, in the defamation sense, (and thus actionable) in Alabama (because it was read there).

decisions which have treated such providers and users [of interactive computer services] as publishers or speakers of content that is not their own because they have restricted access to objectionable material.” S. Rep. 104-230, p. 194. *Stratton Oakmont* was a defamation case, and that decision repeatedly used “publisher” in the legal sense.<sup>16</sup> The holding in *Stratton Oakmont* to which Congress objected was that under New York defamation law Prodigy had acted as a publisher (and was thus subject to strict liability for a false statement on its electronic bulletin board) rather than acting as a distributor (which would have required a showing of fault). *See* 1995 WL 323710, at \*3-\*4.

The text of section 230(c)(1) confirms that “publisher” refers to the meaning of that term in defamation cases. The requirement that interactive computer services not “be treated as” a publisher or speaker makes sense if “publisher” is being used in the legal sense, but not otherwise. A court would only have occasion to decide whether to “treat” a defendant as a publisher if the plaintiff were asserting a claim under which it matters whether the defendant *is* a publisher—the precise issue that would arise in a defamation case. In a defamation case, the defendant would not be liable unless it had published (in the defamation sense), and in that sense was the publisher of, the alleged defamatory statement. Whether the defendant

---

<sup>16</sup> “[I]f word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.” *Hall v. Hall*, 138 S.Ct. 1118, 1128 (2018). “Publisher” is just such a transplanted word.

acted as a publisher was the central issue in *Stratton Oakmont*, which is why the *Stratton Oakmont* court explained that the question was “whether PRODIGY may be considered a ‘publisher.’” 1995 WL at 323710, at \*1. “[B]e considered” in *Stratton Oakmont* is the equivalent of “be treated as” in section 230(c)(1).

This interpretation of “publisher” is supported by the decision of Congress to use “publisher” in the phrase “publisher or speaker.” When lower courts use the phrase “publisher or speaker,” they usually do so in the context of describing who might be a defendant in a defamation case, a case in which “publisher” would be used with its legal meaning. To be sure to encompass both written and oral defamation, courts sometimes refer in the alternative to publisher (which might suggest a written defamation) or speaker (which could mean an oral defamation).<sup>17</sup> That is done because judicial opinions and academics often refer to written defamation as libel, and to spoken defamation as slander. The fact that in section 230(c)(1) “publisher” appears with “speaker,” rather than in a phrase such as “publisher or investment banker,” indicates that

---

<sup>17</sup> *Sunshine Sports Wear and Electronics, Inc. v. WSC Television Inc.*, 738 F.Supp. 1499, 1506 (D.S.C. 1989) (defamation); *Introini v. Richland County*, 1993 WL 73570, at \*6 (D.S.C. Dec. 28, 1993) (defamation); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 686 (4th Cir. 1989) (libel); *Casteel v. News-Record, Inc.*, 875 P.2d 21, 23 (Wyo. 1994) (defamation); *Nodar v. Galbreath*, 462 So.2d 803, 808 (Fla. 1984) (slander); *Williams v. Trust Co. of Ga.*, 140 Ga. App. 45 (Ct. App. 1976) (defamation); *Hoppe v. Hearst Corp.*, 53 Wash. App. 668, 676, 770 P.2d 203, 208 (Wash. Ct. App. 1989) (defamation).

Congress was referring to possible defamation defendants, rather than, for example, to major businesses. In this instance the principle of *noscitur a sociis* applies. “[A] word [publisher] is known by the company it keeps [speaker].” *Yates v. United States*, 574 U.S. 528, 543 (2015).

The Fourth Circuit correctly interpreted “publisher” in this narrower manner in *Henderson v. Source for Public Data, L.P.*, 2022 WL 16643916, at \*5 (4th Cir. Nov. 3, 2022). The Fourth Circuit held that a claim does not treat the defendant as the publisher of third-party content unless the dissemination of harmful third-party content is the gravamen of the claim. “[A] claim only treats the defendant ‘as the publisher or speaker of any [third party] information’ under § 230 if it (1) bases the defendant’s liability on the disseminating of information to third parties and (2) imposes liability based on the information’s improper content.” 2022 WL 16643916, at \*6. *Henderson* explained that those are the circumstances in which a defendant would be liable as a publisher in a common law defamation case. *Id.*, at \*5-\*6. The plaintiff’s claims in *Henderson* did not treat the defendant as a publisher of third-party content because the claims in that case enforced certain statutory obligations to provide specific reports and statements of rights, not a duty to avoid disseminating adverse information about the plaintiff. *See Erie Insurance Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019) (holding section 230(c)(1) does not bar claim “based on” violation by defendant of its duty not to sell defective products).

The Ninth Circuit itself in other cases has interpreted section 230(c)(1) in this manner. In *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021), the Ninth Circuit held that a claim does not treat the defendant as a publisher if it seeks to enforce a “duty to exercise due care in supplying products that do not present an unreasonable risk of injury...” 995 F.3d at 1092. “The duty underlying such a claim differs markedly from the duties of publishers as defined in [section 230(c)(1)].” *Id.* That the claim in *Lemmon* did not treat the defendant as a publisher was demonstrated by the fact that the defendant could have satisfied its “alleged obligation,” and avoided liability for the asserted claim, “without altering the content that [its] users generate.” *Id.* Similarly in *Doe v. Internet Brands*, 824 F.3d 846, 850-51 (9th Cir. 2016), the Ninth Circuit held that a claim which asserted that the defendant had violated a “duty to warn” the plaintiff about certain risks associated with use of its website did not treat the defendant as the publisher of third-party content. The plaintiff’s claim “d[id] not seek to hold [the defendant] liable...for [its] failure to remove content posted on the website.” 824 F.3d at 850. “The duty to warn allegedly imposed by California law would not require [the defendant] to remove any user content...[or] change[...]...the content posted by the website’s users....” *Id.* Both circuits recognize that a claim does not treat a defendant as the publisher of third-party content merely because such content was disseminated from its website; rather, the dissemination of that content

must be the gravamen of the claim at issue. *Henderson*, 2022 WL 16643916, at \*6; *Lemmon*, 995 F.3d at 1093.<sup>18</sup>

(3) Under section 230(c)(1) so construed, some recommendation-based claims would treat the defendant as the publisher of third-party content, but others would not. Internet companies sometimes send third-party materials to users, hoping that the materials will interest the user, a practice which those companies themselves refer to as recommendations. If the gravamen of a plaintiff’s claim was that he or she was injured by the content of that disseminated third-party material, that claim would treat the defendant as the publisher of the third-party material. But a claim seeking to impose liability for a recommendation would not treat the defendant as a publisher if that recommendation did not involve merely disseminating third-party material, or if the claim asserted that the recommendation itself was a cause of the injury to the claimant. The phrase “treated as the publisher or speaker of [third-party] information” thus distinguishes between a claim seeking to hold a defendant liable for sending a user harmful content posted by a third party, which is publication of that third-party content, and a claim seeking to hold a defendant liable for other actions, such as sending a user information (e.g. a recommendation) *about* that third-party

---

<sup>18</sup> If the claim at issue would not impose liability on the original author of the third-party content, the obligation being enforced would necessarily be something other than the duty to which section 230(c)(1) can apply, to avoid disseminating harmful material.

content, which is not publication of the third-party content itself.

The circumstances of *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019), *cert. denied* 140 S.Ct. 2761 (2020), illustrate this distinction. The complaint in *Dyroff* alleged that the defendant had sent a user the following email:

Someone posted a new update to the question “where can i [sic] score heroin in Jacksonville, fl” If your email client won’t let you go straight to the link, it can be found here [URL]...If you cannot visit this link, please go to [different URL].<sup>19</sup>

Sending that email constituted publication of the email itself, but it did not constitute publication of whatever content was in the “new update.” If that update itself had contained a defamatory statement, the defamed individual could not have established the requisite publication based on the email, because the email did not contain that defamatory statement. By sending the email the defendant was the publisher of the email, but not ipso facto the publisher of the update. Only when and if the defendant sent a user that “new update” itself would publication of the new update occur, and only a claim imposing liability for that action—not for sending the recommendation email—

---

<sup>19</sup> Petition for Writ of Certiorari, *Dyroff v. Ultimate Software Group, Inc.*, 3, available at 2020 WL 92187, quoting Complaint, Ex. 3 (underlining in original email). Both URLs appear to be hyperlinks.

would constitute treating the defendant as a publisher of third-party content.

That distinction is complicated, but not fundamentally altered, if part of a recommendation is material created by a third party. The controlling issue in such a situation would be whether the plaintiff's claim sought to impose liability solely because of harm caused by that included other-party content. In the instance of the *Dyroff* email, the eight words "where can i [sic] score heroin in Jacksonville, fl" apparently were written by a third party. But the gravamen of the complaint was not that the user, or the plaintiff, were injured by those eight words,<sup>20</sup> but that those individuals were harmed by the email insofar as it invited the user to download the "new update" (and told the user how to do so) and as a consequence learn where to buy heroin, an invitation that led to the death of the user. That invitation was not third-party content; it was the sender's own speech. The inclusion of excerpted third-party material does not render the entire recommendation third-party content.

The unavailability of the section 230(c)(1) defense does not, without more, mean that the defendant is liable for having made a recommendation. A plaintiff still bears the burden of establishing that the Internet company's conduct is actionable. But whether the defendant's conduct is actionable is not a question about

---

<sup>20</sup> That situation might be presented if the email had referred to a new posting to the question "what is the latest proof that John Doe is a shoplifter?"

the meaning of section 230(c)(1); rather, it concerns the scope of the substantive state or federal claim which a plaintiff is asserting. The degree of culpability required to establish such a claim would be governed by the relevant state or federal substantive law, subject in at least some circumstances to limitations mandated by the First Amendment. Even when the referenced third-party content would have been actionable in and of itself (but for the section 230(c)(1) defense), recommendation of that material might well not be. At common law, for example, it was not a tort to recommend a defamatory book. In the instant case, however, the plaintiffs allege that YouTube's recommendations aided and abetted ISIS, conduct which they assert does violate federal law; such claims, Chief Judge Katzmann correctly noted, "are atypical." *Force*, 934 F.3d at 83.

**B. Even if "Publisher" Is Given the Everyday Meaning, Many Claims Based on Recommendations do not Treat the Defendant as the "Publisher" of Third-Party Content**

Even if "publisher" were given its everyday meaning, rather than its legal meaning, recommendations would often fall outside the scope of section 230(c)(1). As Chief Judge Katzmann pointed out in *Force*, "it strains the English language to say that in...recommending...writings to users...[an entity] is acting as 'the *publisher* of...information provided by another information content provider.'" 934 F.3d at 76-77

(quoting 47 U.S.C. § 230(c)(1)) (emphasis in opinion). Countless organizations and individuals recommend books or videos which no one would describe as the “publisher” (in any sense) of those materials: the New York Review of Books, private book clubs, Rotten Tomatoes, and millions of users of TikTok, to name but a few. If YouTube were to write and post on user home pages a favorable review of Carl Bernstein’s latest book, YouTube could not on that account claim to be the publisher of that book, or expect to be paid royalties.

Suppose, for example, that YouTube recommended content that was on only the website of a *different* social media company, such as by writing and posting a glowing review of an ISIS video on Vimeo. The review would not itself constitute publishing the ISIS video. That YouTube-prepared recommendation would not turn into “publication” of the video if, after the review had been disseminated to YouTube users, ISIS also posted the video in question on YouTube itself. If in this case YouTube, in addition to making the alleged recommendations of ISIS videos, *also* permitted the posting and downloading of ISIS videos on and from its website, that would not somehow immunize recommendations that would otherwise fall outside the scope of section 230.

Of course publishers do at times recommend their own publications, such as when book publishers advertise their books. But that does not mean that imposing liability for recommending content treats the recommender as the publisher of that content. As Chief Judge Katzmann explained, “[b]y its plain terms, § 230

does not apply whenever a claim would treat the defendant as ‘a publisher’ in the abstract, immunizing defendants from liability stemming from any activity in which one thinks publishing companies commonly engage.” 934 F.3d at 80-81. “§ 230 does not necessarily immunize defendants from claims based on promoting content..., even if those activities might be common among publishing companies nowadays.” 934 F.3d at 81. Recommending books is not an inherently publisher function because, although only whoever prints a book is (in the colloquial sense) its publisher, anyone can recommend a book.

*Dyroff* reasoned that the recommendation in that case of the “new update” was protected by section 230(c)(1) because “[b]y recommending user groups and sending email notifications, [the defendant]...was acting as a publisher of others’ content.” 943 F.3d at 109. But one who recommends or sends notification about material created by another is not by so doing ipso facto “acting as publisher” of that material, at least as the everyday meaning of “publisher” is ordinarily understood. If a member of this Court were to comment “John Grisham’s latest novel is terrific,” or send an email announcing that “Maria Yovanovitch’s new book is in stock at Politics and Prose,” he or she would not by so doing be acting as the publisher of either book. Recommending something (such as a book) is different from being the creator of that thing (which is what a publisher, in the everyday sense, does); a favorable restaurant review is not a chef, and an academy award is not a movie director.

The majority in *Force* reasoned that recommendations are protected by section 230 because the type of *consequence* of the recommendations<sup>21</sup> about which the plaintiffs in that case complained—connecting users to individuals, organizations or materials—was also a consequence of publishing.

[A]rranging and distributing third-party information inherently forms “connections” and “matches” among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential *result* of publishing. Accepting plaintiffs’ argument would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties.

934 F.3d at 66 (footnote omitted; emphasis added). But the text of section 230 applies only to claims that seek to treat an interactive computer service “as a publisher” of third-party content, not far more broadly to claims that seek to treat an interactive computer service as an entity which brings about “an essential result of publishing.” There are many individuals and organizations which bring about such results whom no one would call a publisher. A skilled librarian brings about a connection between a patron and a writer; a

---

<sup>21</sup> The complaint in *Force* alleged that Facebook had made several types of recommendations. Facebook recommended content, recommended “friends” (who could be individuals or groups), and even recommended events. 934 F.3d at 55, 58, 77, 81.

mutual friend who suggests a blind date brings about a connection between the two parties. But neither the librarian nor the mutual friend is a “publisher.”

On the other hand, as noted above (pp. 16-17), website operators sometimes characterize as “recommendations” the practice of sending users third-party material selected by the website itself. If a claim asserted that the plaintiff was injured by harmful content disseminated in that manner, it would be treating the defendant website as a publisher. *See* p. 26, *supra*.

## **II. THE SECTION 230(c)(1) DEFENSE DOES NOT APPLY TO A RECOMMENDATION INsofar AS IT CONTAINS INFORMATION PROVIDED BY THE DEFENDANT ITSELF**

Section 230(c)(1) precludes liability only to the extent that an interactive computer service is treated as the publisher or speaker of “information provided by another information content provider.” The section 230(c)(1) defense is not available for material that the website itself created. If YouTube were to write on its home page, or on the home page of a user, “YouTube strongly recommends that you watch this video,” that obviously would not be “information provided by *another* information content provider.” More often, website-created recommendations take various forms of encouragement: words and phrases, written by the website operator, that encourage the user to look at linked material, such as “suggested,” “recommended,” “trending,” or “you might like.” A website might add

some specific information likely to interest the user in looking at related third-party created content, such as the date a video was posted or the number of times it had been viewed, or the number of likes, shares, and comments. Or the website might seek to induce a user to look at some material by providing the URL of material of possible interest, or by notifying a user that something new is available on the website.

The Ninth and Second Circuits construe section 230(c)(1) to mean that such website-created recommendations are generally not to be treated as “information,” and thus do not fall outside the scope of the section 230(c)(1) defense. But the text of section 230(c)(1) cannot plausibly be construed in that manner. Judges Berzon and Gould in the instant case, and Chief Judge Katzmann in *Force*, concluded that recommendations are content provided by the defendant itself. Pet. App. 84a, 85a, 90a, 104a-105a; *Force*, 934 F.3d at 82.

#### **A. URLs and Notifications Are “Information” Under Section 230(c)(1)**

The recommendation in *Dyroff* was an email from the website itself. The 38 words of the email, quoted above, were (with the apparent exception of the underlined question) written by the website operator. The website (not whichever third party had posted the “new update”) was the source of the spelled-out URLs, because the website’s own server would have created those URLs. The website (by means of some algorithm)

created the links, and included the links in its email. And the website was doubtless the source of the information that a new update had been posted.

The Ninth Circuit in *Dyroff* nonetheless reasoned that this email recommendation did not contain content or information provided by the defendant, because it had no “content” at all. “[R]ecommendations and notifications are tools meant to facilitate the communication and content of others. They are not content in and of themselves.” 934 F.3d at 1098.<sup>22</sup> But the text of section 230(c)(1) does not use “information” or “content” in such a strange and crabbed manner.

(i) *URLs*

A URL is information, the location of a file on the Internet and in the server where it is stored. For a file to be accessible over the Internet, it must have an address, commonly referred to as a URL.<sup>23</sup> Conceptually a URL is no different than a phone number, the Dewey Decimal System classification of a particular book, or a street address. Information about where on the internet a particular document, video, or other matter is to

---

<sup>22</sup> The *Dyroff* standard was recently applied by the district courts in *Federal Trade Commission v. Match Group, Inc.*, 2022 WL 877107 (N.D. Tex. March 24, 2022) (holding section 230(c)(1) protects website recommendations of individuals of possible romantic interest that defendant knew were likely to be scams) and *In re Apple Inc. App Store Simulated Casino-Style Games Litigation*, 2022 WL 4009918 (N.D. Cal. Sept. 2, 2022) (holding section 230(c)(1) protects website recommendation of and assisting unlawful on-line casinos).

<sup>23</sup> Uniform Resource Locator.

be found can be quite important. Google has become a multi-billion-dollar business by providing this very type of information (usually in the form of hyperlinks) to users of Google's highly sophisticated search engine.

A URL is created by the server within which the file at issue is located. The server itself usually selects the name of the particular file. The combination of words, numbers, and symbols in a URL contains several types of information from the website: the name of the domain<sup>24</sup> where the file is found (in or accessible by the server), the specific name (often a descriptive word) assigned to the particular file, and sometimes other information, such as the name of a subdomain involved, or directions to the server as to how to locate the particular file.<sup>25</sup>

Requiring users to type out an actual URL would be inconvenient and cumbersome, and a technique known as a hyperlink (or just "link") has been devised to avoid the need to do so. A hyperlink is text or a picture that appears on a user's screen, within which is

---

<sup>24</sup> The domain name that a user sees is not the actual domain name. Technically the location of a server actually is a combination of numbers and periods. In a URL, words are instead utilized for the convenience of the user. A separate function on the Internet converts that word-based domain designation to the actual address of the server.

<sup>25</sup> The URL for the petition in this case begins with "https://www.supremecourt.gov/DocketPDF/21/21-1333" (the last six digits being the number of this case) and ends with "GonzalezPetPDF.pdf." In between are 17 digits, presumably of significance to the Court's server.

embedded (not visible to the user<sup>26</sup>) the URL for the file at issue. (Text that is a hyperlink may be underlined, or in color).<sup>27</sup> The server on which the file is found is the original source for the URL, because the server creates the internal address of the file in question. The hyperlink might be contained in a document provided by the server (such as on a home page, or in a list of the results of a search within the server). A hyperlink attached to text is referred to as hypertext, and a hyperlink attached to a picture (e.g. a still from a video) is referred to as a hyperimage. The text or picture to which the link (and URL) is attached might be created by the server, or it could be third-party content, such as a frame from a video, or a few words excerpted from an article.

Websites today usually provide users the URL for a file they contain by embedding it in hypertext or a hyperimage. Although the website server sends the URL to the user's computing device, the URL is not apparent to the user, because it is embedded in the hyperlink. But it is information nonetheless, and it comes from the website, not from another party. This more sophisticated and user-friendly manner in which a website provides URL information to users about the Internet location of document, video, or other file does not convert that information into "information provided by another," or (as the Ninth Circuit mistakenly

---

<sup>26</sup> When you download a home page or other file that contains a hyperlink, what you see is not all that you are getting.

<sup>27</sup> Sometimes, to make matters clear, a web page will say something like "To see this document, click *here*."

suggested in *Dyroff*) turn it into non-information. The standard in section 230(c)(1) concerns the source of the information, and is not limited to the source of information visible to the user. Utilization of a hyperimage or a hyperlink does not have a different legal consequence than a message from a defendant reading “to download or stream this file, type [written out URL] into your browser.”

If a URL were not “information” within the meaning of section 230 when provided by a defendant, a URL also would not be information when it was created by a third party. It would necessarily follow that a defendant sued for providing a URL from a third party would not be providing “information” at all, and thus if held liable could not be described as being treated as “the publisher...of any *information* provided by another information content provider.” (Emphasis added). That would mean that the core of Google’s search engine business—transmitting URLs provided by third parties—would fall outside the protections of section 230, because its search results, since not information at all, would not be *third-party* created information.

Section 230(c)(1) provides a defense only for “information provided by another.” The statute does not also create, as the Ninth Circuit suggested, an additional defense for information provided by a defendant itself whenever that information is “intended to facilitate the communication and content of others.” 934 F.3d at 1098. The source of the information, not the website operator’s subjective reason for providing the

information, is the statutory standard. If subjective motive, not objective content, were the legal standard, many cases in which section 230(c)(1) is raised would require a trial to determine whether a defendant's purpose was really "to facilitate the communication and content of others," or was instead to increase viewing time and thus make more money. The Ninth Circuit in *Dyroff* may have thought that the type of information in the defendant's email recommendation, the existence of (and how to access) a new update about where to purchase heroin in Jacksonville, was less immediately dangerous than the referenced "new update" itself. But section 230(c)(1) does not define "information" or "content" to exclude whatever a court might think is of comparatively lesser importance.

The source of the URLs being provided (whether expressly or embedded in hyperlinks) is what distinguishes YouTube's promotions of videos on its own servers from the functions of a general search engine, such as Google. A YouTube thumbnail (typically a video still combined with a hyperlink) provides a user the URL that YouTube itself created for the video, which is not content "created by another." By contrast, a general search engine provides the user with URLs created by the third-party websites where those files are located. If a user does a search on YouTube for "funny cat videos," the URLs provided (in hyperlinks) would have been created by YouTube. If a user utilizes Google to search for "funny cat videos," the URLs would have been created, and provided, by "another" party.

(ii) *Notifications*

A website-created notification is clearly information. “Pat has posted a new entry on her Facebook page” is information, no less so than other everyday notifications, such as “your table is ready” or “the doctor will see you now.” The fact that the notification is *about* a third party does not convert it into information “*provided by*” another party. If a notification were not “information” within the meaning of section 230, then notifications from a third party would not be information, and thus not “information provided by another information content provider,” meaning that the dissemination of third-party notifications would be outside the protection of section 230(c)(1).

**B. Neutrally-Created Information Is “Information” Under Section 230(c)(1)**

The court below advanced a different justification for disregarding website-created information in a recommendation. The majority opinion acknowledged Chief Judge Katzmann’s point that recommendations “communicate[] their own message—i.e.,...[that] the user would likely be interested in certain additional content.” Pet. App. 40a. But, the majority reasoned, a website-created communication would not provide a basis for imposing liability on the website if the communication was made by “content-neutral algorithms,” not with any special intent to recommend ISIS material. Pet. App. 41a. The court pointed out that the complaint did not “allege that Google’s algorithms treated

ISIS-created content differently than any other third-party created content.” *Id.*<sup>28</sup> Where such recommendations were neutrally made, the majority held, they would not expose a defendant to liability. Pet. App. 41a-42a. The majority in *Force* made the same point, stressing that Facebook’s “algorithms [were] based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers.” 934 F.3d at 24 (footnote omitted). Judge Gould objected to this distinction. Pet. App. 104a-106a.

But the section 230(c)(1) defense is inapplicable to *all* information provided by the defendant itself, not merely to information created by the defendant in some non-neutral or non-objective manner. Defendant-created information, albeit even-handedly fashioned and distributed, is still “information” within the meaning of section 230, as it is in ordinary English. And it obviously is not information that was “provided by *another* information content provider.” If a defendant in some manner recommends ISIS videos, the legal significance of that action under section 230(c)(1) would not be altered by evidence that the defendant also

---

<sup>28</sup> *M.L. v. Craigslist, Inc.*, 2021 WL 5217115 (W.D. Wash. Sept. 16, 2021). applied this holding of the decision below. The plaintiffs alleged that Craigslist included on its website sections which Craigslist labeled “erotic services” and “adult services.” 2021 WL at 5217115, at \*5. The creation and labeling of those sections, the plaintiffs alleged, promoted sex trafficking. Even though Craigslist itself had created and labeled those sections, the district court held that this claim was barred by the decision in *Gonzalez*, because those advertisements were “neutral tools” that did not “specifically target the sex trafficking ads” that appeared in those sections. *Id.*

recommended, to an equal or greater degree, videos from the United States Department of Defense.

To the extent that a recommendation (or portions of it) contains defendant-provided information, and is thus outside the scope of the section 230(c)(1) defense, whether that recommendation (or the unprotected portions of it) is actionable is governed, not by section 230(c)(1), but by the substantive state or federal law on which the plaintiff's claim is based. On the other hand, the text of section 230(c)(1) distinguishes between dissemination of defendant-provided information, as to which the defense is unavailable, and dissemination of harmful related third-party material, as to which the defense may apply. Even where a recommendation itself is unprotected, that (at least ordinarily) would not affect the status under section 230(c)(1) of the recommended material itself. For example, although in *Dyroff* the defendant website was not entitled to a section 230(c)(1) defense for the email it wrote and sent, the website could still have asserted that defense with regard to whatever had been posted by a third party about buying heroin in Jacksonville, Florida.

### **III. THE SECTION 230(c)(1) DEFENSE DOES NOT APPLY TO RECOMMENDATIONS MADE BY A DEFENDANT NOT ACTING AS A “PROVIDER...OF AN INTERACTIVE COMPUTER SERVICE”**

A website might recommend third-party content is to send that content, or excerpts from it, to a user who

has not requested it, hoping that the user will find it interesting and view (or download the rest of the) material. The majority opinions in the Second and Ninth Circuits hold that section 230(c)(1) applies to the dissemination of third-party material even in the absence of a user request. But a website that disseminates materials in that manner is not covered by section 230(c)(1) as the provider of an interactive computer service, because a computer which is programmed to do that would not be operating as a server within the meaning of section 230(f)(2).

The majority opinion in *Force* and the majority opinion below insisted that section 230(c)(1) applies if a website sends a user third-party material which the recipient had not requested. The majority in *Force* held that the section 230(c)(1) defense is available to a website that “display[s] others’ content to users...even if the content is not actively sought by those users.” 934 F.3d at 70.

In the instant case, Judge Gould objected that YouTube was streaming to users videos that the users had not requested, but which YouTube itself had selected. Pet. App. 100a-101a. The majority below held that such a practice is protected by section 230(c)(1), arguing that that practice is similar to the function of a search engine:

Google recommends content...to users based upon users’ viewing histories and what is known about the users....This system is certainly more sophisticated than a traditional search engine, which requires users to type in

textual questions, but the core principle is the same: Google’s algorithms select the particular content provided to a user based on the user’s inputs....[S]earch engines are immune under § 230 because they provide content in response to user’s queries.

Pet. App. 38a.<sup>29</sup> But the practice described by the Ninth Circuit differs in one critical respect from a traditional search engine. YouTube provides content to users, not in response to a specific request *from the user*, but “based upon” *what YouTube thinks* the user would be interested in. In the case of a search engine, the “user’s inputs” are “textual questions” or “queries” from the user. Under the described recommendation system, the “user’s inputs” could be merely the choices that a viewer had made in the past about which videos to watch. Sending an individual something that he or she has not requested is not a “more sophisticated” way of sending the recipient something he or she did actually request.

Whether disseminated material was requested by the recipient affects the availability of the section 230(c)(1) defense. To invoke that defense, a defendant must establish that in taking the action on which a plaintiff’s claim was based, it was acting as a “provider...of an interactive computer service.” Section 230(f)(2) defines interactive computer service, in relevant part, as “any information system [or] system...that provides or enables *access* by multiple users

---

<sup>29</sup> See Br. Opp. 1 (describing “YouTube’s selection and arrangement of third-party content to *display* to others”) (emphasis added).

to a computer *server*....” 47 U.S.C. § 230(f)(2) (emphasis added).

“Server” generally denotes a computer which is running software<sup>30</sup> that enables multiple users to access the files (e.g., a home page, documents, photographs, videos or music) that the computer contains or can retrieve from some form of storage,<sup>31</sup> or to direct the computer to take other action at the behest of the user. A user accesses the server from a computing device, such as a desktop or laptop computer, a tablet, a smart phone or smart watch, by requesting a particular file. To access a particular file, the user typically clicks on a hyperlink related to that file. The user’s computing device sends the URL for that file onto the Internet, where a series of devices forward that request to the appropriate server. The server determines if it contains a file that matches the request. If the server finds that file, it then sends the file back through the Internet to the computing device that has requested it, either in a single download or by streaming. The role of a server is essentially responsive; this situation is thus sometimes referred to as a client-server relationship.

---

<sup>30</sup> A server is not a machine, like a typewriter, that can only perform one function. It is a powerful computer that happens to be running server software, and which at least usually could be programmed, through other software, to also do other things, depending on the choices of the server’s operator.

<sup>31</sup> In recent years files that a server could access might be stored on computers, including what has become known as “the cloud.”

A website's computer is not acting as a server within the meaning of section 230(f)(2) to the extent that the computer performs functions, not in response to a request from a user, but at the behest of the server's operator. For example, in *Dyroff* the defendant's computer sent the user an email effectively recommending that the recipient download a recent post to obtain information about buying heroin. The computer was not acting as a server because it was not responding to a URL-based request, and because it disseminated the notification by email, not by means of the link that would be established by such a request.

If a website's computer sends a user (by whatever method) material that the user has not requested, that computer is not operating as a "server" within the meaning of section 230(f)(2). The essence of the client-server relationship is that the client, not the server (or anyone or anything else) decides what files the server is to send to the client. As the word "access" indicates, section 230(f)(2) envisages the user making the relevant determination about what to receive.

The term "server" in section 230(f)(2) should be construed in light of the purposes of section 230 set out in the statute itself. The text of section 230 makes clear that the overall intent of the law is to enable the user to determine what information he or she will receive from the website, not vice versa. Section 230(b) states that "[i]t is the policy of the United States...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 computer services.” 47 U.S.C. § 230(b) (emphasis added). Congress found that “[t]he developing array of Internet and other interactive computer services...offers users a greater degree of *control* over the information that they receive, as well as the potential for even greater control in the future as technology develops.” 47 U.S.C. § 230(a) (emphasis added).

A search engine does function as a server within the meaning of section 230(f)(2), because the basic function of a search engine is to enable a user to select the information to be received. On the other hand, a website that sends unrequested material to a user is not a “more sophisticated” type of search engine; it is a sophisticated way to induce the user to send a URL seeking to download something the user had *not* previously requested. The Second and Ninth Circuit majorities thus erred in holding that section 230(c)(1) applies to recommendations that disseminate material that the recipient has not “actively sought.” *Force*, 934 F.3d at 70.

#### **IV. SECTION 230 SHOULD BE NEITHER BROADLY NOR NARROWLY CONSTRUED**

The Second Circuit in *Force*, holding that the recommendations in that case were protected by section 230(c)(1), relied on an assumption that section 230(c)(1) is to be “broadly construed.” 934 F.3d at 64, 68.<sup>32</sup> The Ninth Circuit applies a similar rule. *Fair*

---

<sup>32</sup> *Force*, on the other hand, rejected a broad construction of section 230(e)(1), on which plaintiff was relying.

*Housing Council of San Fernando Valley v. Rommates.Com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).<sup>33</sup>

But applying to section 230(c)(1) a presumption in favor of broad construction would conflict with the usual presumption in favor of narrowly construing federal statutes that preempt state laws. Although the substantive claim asserted in this case arises under federal law,<sup>34</sup> in many, if not most, cases in which a defendant raises a defense under section 230(c)(1), the plaintiff's claim is based on state law. The section 230(c)(1) defense governs such state law claims because section 230(e)(3) expressly preempts state actions that are "inconsistent with" section 230(c)(1). The Court has long held that when a dispute arises as to whether a federal law preempts state law, the federal statute is narrowly construed. *CTS Corporation v. Waldburger*, 573 U.S. 1, 19 (2014); *Cipollone v. Liggett Corp., Inc.*, 505 U.S. 504, 523 (1992). That presumption in favor of a narrow construction of a federal statute that might preempt state law is consistent with federalism concerns and with the historic primacy of state

---

<sup>33</sup> Other circuits have done so as well. *E.g.*, *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014).

<sup>34</sup> The Antiterrorism Act, 18 U.S.C. § 2331, as amended by the Justice Against Sponsors of Terrorism Act. 18 U.S.C. § 2333(d)(2).

regulation of tort claims.<sup>35</sup> Although Congress could by express language direct a presumption in favor of an expansive scope of preemption with regard to a particular statute, nothing in section 230(c)(1) commands such a result. So, at the least, a rule favoring broad construction should not be applied to the section 230(c)(1) defense when it would preempt state law.

On the other hand, applying to section 230(c)(1) a presumption in favor of a narrow construction of statutes with a preemptive effect would lead to vexing problems, because the affirmative defense created by section 230(c)(1) also applies to federal claims. It would make no sense to construe section 230(c)(1) one way (narrowly) when a state claim happens to be at issue, and a different way (broadly, or not-narrowly) when a federal claim is involved. If courts did that, the text of section 230(c)(1) as to certain issues (regarding which the provision was capable of more than one interpretation) would have two different meanings, depending on whether the plaintiff was asserting a state claim or a federal claim. If a plaintiff asserted both federal and state claims in the same case, the court would have to apply different section 230(c)(1) interpretations in that case. That problem could be avoided by construing section 230(c)(1) narrowly even when being applied to a federal claim, but it would be at least odd if (to avoid that inconsistency) an otherwise inapposite presumption of narrow interpretation were applied to a federal

---

<sup>35</sup> Those federalism concerns and state interests are of particular moment here, because the section 230(c)(1) defense preempts state criminal laws as well as state civil claims.

claim, merely because Congress had preempted certain state claims in the same statute that applied to that federal claim.

The interpretation of section 230 should not be based on a presumption of either narrow or broad construction. Eschewing either presumption not only avoids the dilemma described above, but also is consistent with the care in which section 230(c)(1) is framed. The terms of section 230 represent a deliberate effort by Congress to strike a balance between limiting the liability of covered entities and preserving the traditional state authority over civil and criminal matters. The text of section 230 may to some degree be ambiguous, but that statutory language reflects the compromise that Congress adopted with regard to those competing concerns.<sup>36</sup>

Section 230(e)(3) specifically reflects Congress's recognition and balancing of the competing national and state interests at stake.<sup>37</sup> The first sentence in

---

<sup>36</sup> Where Congress thought the terms of section 230(c)(1) did not accord sufficient play for state law, it included in section 230(e) several express exclusions from the affirmative defense created by the statute. 47 U.S.C. §§ 230(e)(2) (state laws pertaining to intellectual property), 230(e)(4) (state laws "similar" to the Electronic Communications Privacy Act of 1986), 230(e)(5)(B) (state criminal prosecution for conduct that would constitute a violation of 18 U.S.C. § 1591), 230(e)(5)(C) (state criminal prosecution for conduct that would constitute a violation of 18 U.S.C. § 2421A).

<sup>37</sup> "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

section 230(e)(3) expressly provides that section 230 should not “be construed to prevent any State from enforcing any state law” so long as the state law is “consistent with this section.” The second sentence, on the other hand, expressly states that where a state law is “inconsistent with this section,” no cause of action may be brought under and no liability may be imposed by that state law. A presumption in favor of broadly construing section 230 (thus increasing instances of inconsistency) would reduce the scope of the first sentence of section 230(e)(3), and expand the scope of the second. Conversely, a presumption in favor of narrowly construing section 230 (thus decreasing instances of inconsistency) would expand the scope of the scope of the first sentence of section 230(e)(3), and decrease the scope of the second. Neither presumption should be utilized in construing section 230.

If courts felt free to pave over bumpy statutory texts in the name of more expeditiously advancing a policy goal, we would risk failing to “tak[e]...account of” legislative compromises essential to a law’s passage and, in that way, thwart rather than honor “the effectuation of congressional intent.”

*New Prime, Inc. v. Oliveira*, 139 S.Ct. 532, 543 (2019) (quoting *Board of Governors, FRS v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986)). To the extent there are ambiguities in section 230, they should be resolved by applying traditional methods of statutory

---

be imposed under any State or local law that is inconsistent with this section.”

construction, not by favoring one or the other of the important interests at issue.



### CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

ERIC SCHNAPPER  
*Counsel of Record*  
University of Washington  
School of Law  
Box 353020  
Seattle, WA 98195  
(206) 660-8845  
schnapp@uw.edu

Respectfully submitted,

ROBERT J. TOLCHIN  
THE BERKMAN LAW  
OFFICE, LLC  
829 East 15th St.  
Brooklyn, NY 11230  
(718) 855-3627  
rtolchin@berkmanlaw.com

KEITH L. ALTMAN  
THE LAW OFFICE OF  
KEITH ALTMAN  
33228 West 12 Mile Rd.  
Suite 375  
Farmington Hills, MI 48334  
(516) 456-5885  
keithaltman@  
kaltmanlaw.com

*Counsel for Petitioners*