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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JASON FYK, *Plaintiff*, v. FACEBOOK, INC., *Defendant*.	Case No. 4:18-cv-05159-JSW **SECOND MOTION FOR RELIEF PURSUANT TO FED.R.CIV.P. 60(b) TO VACATE AND SET ASIDE ENTRY OF JUDGMENT** **BEFORE: HON. JEFFREY S. WHITE** **LOCATION: OAKLAND, CT. 5, FL. 2**

Plaintiff, Jason Fyk ("Fyk"), moves this Court to reconsider and reverse its June 2019 dismissal of the Verified Complaint [D.E. 1] following Fyk's appeal to the Ninth Circuit (twice) and Supreme Court of the United States ("SCOTUS") (twice).

I. PRELIMINARY STATEMENT

Fyk returns to this Court on his second motion for reconsideration shortly after SCOTUS denied his petition for writ of certiorari in mid-April 2023 and immediately after SCOTUS rendered its decision declining to address CDA §230[1] in the *Gonzalez v. Google, LLC*, S.Ct. No. 21-1333.

II. RELEVANT PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On June 18, 2019, this Court dismissed on written motion, *see* [D.E. 38], the August 22, 2018, Verified Complaint sans hearing and entered judgment of equal date. *See* [D.E. 39]. One day later, Fyk commenced an appeal with the Ninth Circuit. On June 12, 2020, the Ninth Circuit affirmed dismissal. *See* [D.E. 42]. Fyk promptly moved for rehearing *en banc*, which was denied on July 21, 2020. On November 2, 2020, Fyk petitioned SCOTUS for a writ of certiorari, divesting the California courts of jurisdiction during the pendency of the SCOTUS petition. On January 11, 2021, SCOTUS denied writ. On March 22, 2021, Fyk timely filed his first 60(b) motion with this Court. *See* [D.E. 46].

On November 1, 2021, this Court denied Fyk's reconsideration motion. *See* [D.E. 51]. Fyk accordingly timely filed another appeal with the Ninth Circuit, with an opening brief filing date of March 3, 2022. By October 19, 2022 memorandum [D.E. 54], the Ninth Circuit stated that Fyk's 60(b) motion filed with this Court was tardy. On November 2, 2022, Fyk timely moved the Ninth Circuit for reconsideration/rehearing, *see* [D.E. 37], and the Ninth Circuit denied same, culminating with a November 17, 2022, mandate. *See* [D.E. 40]. On February 7, 2023, therefore, Fyk petitioned SCOTUS (again) for a writ of certiorari. On April 17, 2023, SCOTUS denied Fyk's petition again, sans explanation. This second motion for reconsideration follows, and factual background is now discussed.

Fyk is "the publisher" of Where's The Fun ("WTF") Magazine. Fyk used Facebook's purportedly "free" "platform for all ideas" (Mark Zuckerberg) to publish humorous content. Fyk's business pages, at one time, had more than 25,000,000 documented followers. Fyk's large online presence resulted in his

[1] *Gonzalez* oral argument was on February 21, 2023, but SCOTUS' recent *Gonalez* decision did not address §230 immunity.

pages becoming income generating advertising and marketing business tools, generating hundreds of thousands of dollars a month (*i.e.,* Fyk's real intellectual or physical property).

Facebook began selling the same reach and distribution "Newsfeed" space to Fyk's straight-line advertising competitors, space previously offered for free. In so doing, Facebook itself became a direct advertising competitor (*i.e.,* a dominant party partnered with Fyk's straight-line competitors; *i.e.,* in a group boycott) of all interactive computer service ("ICS") users, like Fyk. This business model, "create[d] a misalignment of interests between [Facebook] and people who use [Facebook's] services." This pecuniary "misalignment" incentivizes(d) Facebook to tortiously restrict lower valued ICS users, in favor of developing Facebook's higher valued advertising "partners" who benefit Facebook.

In October 2016, after reducing Fyk's competitive reach to almost nothing (for Facebook's own financial interests), Facebook deactivated several of Fyk's pages/businesses, totaling over 14,000,000 fans cumulatively, under the *fraudulent* aegis of "otherwise objectionable" – purportedly improper content restriction (factually applicable to §230(c)(2)(A) protection, if any, certainly not §230(c)(1)).

In February/March 2017, Fyk contacted a prior business colleague (and now a straight-line competitor) who was more favored by Facebook, having paid Facebook over $22,000,000.00 in advertised content development. Fyk's competitor was offered exclusive service(s) and community standards (*i.e.,* "rules") exemptions unavailable to Fyk. Fyk asked his competitor to see if their Facebook representative would restore Fyk's deleted pages for Fyk. Fyk's competitor approached Facebook with Fyk's request, and Facebook declined the request unless Fyk's competitor would take over ownership (*i.e.,* Facebook solicited a new owner) of Fyk's information/property.

Facing no equitable solution, Fyk fire sold/transferred his (previously published) property to his competitor at an extremely reduced amount. Thereafter, Facebook "re-published" Fyk's information (*i.e.,* Facebook substantively contributed to the conscious alteration/development of Fyk's information) for Fyk's competitor and not for Fyk.[2]

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[2] To put substantive contribution in the context of information development (at issue in *Gonzalez v. Google*), we use the extreme example of *Henderson v. Public Data* to analogize Fyk's situation:

> An extreme example helps illustrate this point. Take a writer of a ransom note, for example, who cuts letters out of a magazine [developing] to list his demands [intent]. That writer might be said to be 'altering' content [knowingly/consciously selecting

Fyk is undeniably "the publisher" and speaker of his information, and Facebook undeniably contributed substantively to the harms caused to Fyk. "But for" Facebook's conduct, the illegalities espoused in the Verified Complaint would not have occurred. Here, Facebook's anti-competitive actions to de-publish and republish the exact same content (*i.e.,* a change in function, not form) is *prima facie* evidence there was never any improper content legitimately at issue.[3] Fyk's case was never about treating Facebook as the original author or speaker of Fyk's purportedly improper content, it has always been about Facebook's own unlawful conduct.

III. INTRODUCTION – IN REALITY RATHER THAN JUDICIAL MISCONCEPTION

Now realized by at least the Fourth Circuit, §230(c)(1) of the CDA is not a license to do whatever one wants online, because it does not provide any immunity, for any conduct, at all. Page one of Fyk's Verified Complaint makes clear: "This case asks whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices" (*i.e.,* ***conscious conduct***). [D.E. 1] at ¶ 1.

"Intent generally refers to the mental objective behind an action. The concept of intent is often the focal point of Criminal Law and is generally shown by circumstantial evidence such as the acts or *knowledge* of the defendant."[4] Facebook had both knowledge and intent behind what it was doing to Fyk. Intent and knowledge play key roles in understanding the correct application of §230 protection.

The gravamen of Fyk's §230(c)(1) dismissal rested on this Court's erroneous determination "if the duty that the plaintiff alleges was violated by defendant derives from the defendant's status or *conduct* as

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> letters]. Yet, the note's writer [Facebook] is hardly acting as an 'editor' of [Fyk's] magazine [information]. Instead, [Facebook] has *substantively changed* [Fyk's] magazine's content and transformed it from benign [less valued/unpublished] information into [higher value/republished] information [for a different purpose] …

Henderson, *et al. v. Source for Public Data, L.P. Data at footnote 25*

[3] A claim treats the defendant "'as the publisher or speaker of any information' when it (1) makes the defendant liable for publishing certain information to third-parties [not for third-parties], and (2) seeks to impose liability based on that information's *improper content*." *Henderson* at 120-121; *see also id*. at 122-124 (*The Source for Public Data, L.P., et al.*, 53 F.4th 110, n.5 (4th Cir. 2022) (emphasis added) regarding "but for" causation).

[4] https://www.law.cornell.edu/wex/intent

a *'published or speaker,'* . . . §230(c)(1) precludes liability."[5] *Fyk v. Facebook, Inc.* No. 18-cv-05159-JSW, 2019 WL 11288576 at *2 (N.D. Cal. June 18, 2019) (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009), a decision entirely undermined by *Henderson*, as *Barnes* rests on the Fourth Circuit's approximate 26-year-old *Zeran v. American Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) decision that *Henderson* unwound) (emphasis added)). The Ninth Circuit erroneously advanced the same sloppy draftsmanship (*i.e.,* using "a publisher" instead of "the publisher"): "In any event, it is clear that Fyk seeks to hold Facebook liable as ***a*** *publisher* for its decisions (*i.e.,* a conscious alteration/material contribution) to de-publish and re-publish the pages." [D.E. 42] (emphasis added).

Both California *Fyk* Courts fell prey to the same sloppy draftsmanship. Courts have mistakenly converted *"the" specific publisher or speaker* (*i.e.,* "another") into "a" *unspecified publisher or speaker*; *i.e.,* in the *indefinite general* sense; *i.e.,* including themselves. §230(c)(1) went from not being treated as another publisher (*i.e.,* someone else) to not being treated as themselves. Under such "reasoning," this Court absurdly concluded that §230(c)(1) precludes Fyk from "treating" Facebook as Facebook its own illegal conduct. Naturally, §230(c)(1) only applies when a plaintiff seeks to treat the defendant as someone else, whereas the plaintiff seeks to hold the defendant responsible for the conduct and content of another. Here, Fyk did not allege that there was any improper content spoken by Facebook. Here, Fyk did not attempt to treat Facebook as anyone else other than Facebook.

While this Court has previously rendered decisions as to the purported "§230(c)(1) immunity" of Facebook's anti-competitive misconduct (*e.g.,* the June 18, 2019, dismissal order [D.E. 38] and the November 1, 2021, first motion for reconsideration order [D.E. 51] revolving largely, if not entirely, around *Enigma*), these decisions cannot possibly be reconciled with new case law that has come about since those decisions. For examples, and as discussed in greater detail below: (a) *Henderson*, (b) *Rumble, Inc. v. Google, LLC*, No. 21-cv-00229-HSG (N.D. Cal. July 29, 2022), (c) *Jarkesy v. SEC,* No. 20-61007 (5th Cir. May 18, 2022), (d) *Doe v. Facebook, Inc.*, 595 U.S. ____, 2022 WL 660628 (Mar. 7, 2022), and (d) *DZ Reserve v. Meta Platforms, Inc.* No. 3-18:cv-04978 (N.D. Cal.) (which is an unfair competition

[5] An example of sloppy drafting. The statute accurately reads "**<u>the</u>** publisher or speaker."

case, just like this case, that has properly withstood dismissal unlike this case.)[6, 7] Not only has the law substantively changed since this Court made its premature, unfounded dispositive determinations here, but equitable considerations also militate towards vacating the judgment. If the Court does not vacate its judgment, it will continue to allow social media platforms to illegally prevent any sort of competition, like Fyk, predicated on their own "anti-competitive animus," rather than "blocking and screening of offensive materials," in good faith, as a "Good Samaritan."

On November 3, 2022, *Henderson*, a case deciding two of the very issues at the heart of this matter (the scope of §230(c)(1) protections, and the interplay of "publisher" and "content provider"), successfully overcame a 12(b)(6) motion to dismiss. *Henderson* shed new light on the unanswered question that has plagued courts, (*i.e.,* because the answer is arbitrary, capricious); where do the courts draw the line between "traditional editorial function" and "information content provision?" In *Gonzalez,* SCOTUS raised that same question, but ultimately declined to answer it, in its final opinion.

> Justice Kagan: … I can imagine a world where you're right that none of this stuff [*i.e.,* content provision] gets protection. And, you know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear.
>
> On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet.
>
> … I don't have to accept all Ms. Blatt's 'the sky is falling' stuff to accept [that], there is a lot of uncertainty about going the way you would have us go, in part, just because of the difficulty of *drawing lines* in this area and just because of the fact that, once we go with you, all of a sudden, we're finding that Google isn't protected.
>
> Mr. Schnapper (attorney for Gonzalez): Well, [] I think [] the *line-drawing* problems are real. No one minimizes that. *I think that the task for this Court is to apply the statute the way it was written …* .

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[6] The then new case *Enigma* was the subject matter of the first motion for reconsideration [D.E. 51]. The *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021) case during the first motion for reconsideration proceedings, *see* [D.E. 49] was not addressed in this Court's reconsideration order [D.E. 51], and this Court should now pay attention to it.

[7] *Henderson*, *Rumble*, *Jarkesy*, and *Doe* were supplemented into the most recent Ninth Circuit appeal record, but the Ninth Circuit did not address the cases on the merits of Fyk's appeal. These cases, along with *DZ Reserve* and *Lemmon* and Professor Adam Candeub's §230 treatise, any of which warrants this Court's overturning its dismissal/judgment are attached hereto as **Exhibit 1** and incorporated fully herein by reference.

Gonzalez Feb. 21, 2023, SCOTUS Oral Argument, Ex. 3 at 45:11 – 46:12 (emphasis added).[8]

We agree, this Court should apply the statute *"the way it was written."* And, just because the content provision "line" is difficult to draw, it does not mean "the tech industry gets a pass" for all its conduct. But, the "line" can also not be arbitrary, whereby Facebook's conscious alterations, here, fell short of the *material contribution* line (*i.e.,* this Court arbitrarily disagreed with Fyk), and Public Data's conscious conduct in *Henderson* surpassed the line (*i.e.,* the Fourth Circuit agreed with Plaintiff(s), contrary to this Court's decision). Different protections within different jurisdictions, applying the same statute, resulting in different outcomes, is juridically intolerable. Compared to Fyk's decision, *Rumble*, *Jarkesy*, *Doe*, *Enigma, Lemmon*, and now *Henderson* and *DZ Reserve, see* Ex. 1, comport with even-handed statutory construction and reflect the opinions of over a dozen Congressmen, Attorneys General, the DOJ, and SCOTUS Justices (at least the wise Justice Thomas), *see* Ex. 2.

> Section 230(c)(1) of the Communications Decency Act protects some parties operating online from specific claims that would lead to liability for conduct done offline. ***But it is not a license to do whatever one wants online.*** Protection under §230(c)(1) extends only to bar *certain claims* imposing liability for *specific information* that another party provided.

Henderson, 53 F.4th at 117 (emphasis added).

To understand Congress' original intent, we must look to the legislature and statutory text for guidance. Senator Cruz and sixteen other members of Congress posit: ***"§230(c)(1) does not immunize any conduct at all"*** (Facebook's conduct being at the heart of Fyk's case). Cruz, Senator Ted, et al., No. 21-1333, 2022 WL 17669645 at *13 (Dec. 7, 2022) (emphasis added), Ex. 2 (*see* n. 12, *infra*).

> **[§]230(c)(1) does not provide any immunity**. Rather, it states a definition: no [ICS provider] 'shall be treated as the publisher or speaker of any information provided by another information content provider ["ICP"].' 47 U.S.C §230(c)(1). Although this requirement can *indirectly* affect liability, it (1) **does not directly confer immunity**, and (2) applies only in limited circumstances where the elements of a claim turn on treating an Internet platform as **the speaker or publisher** of others' words. Outside of this limited realm, §230(c)(1) plays no role whatsoever, and **the lower courts – including the Ninth Circuit [] – have erred by turning §230(c)(1) into a super-immunity provision**.

Id. at *7 (original emphasis in italics, added emphasis in bold).

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[8] For ease of reference, the *Gonzalez* transcript is attached hereto as **Exhibit 3** and incorporated fully herein by reference.

Here too, this Court erred by "turning §230(c)(1) into a super immunity provision." More specifically, if courts are somehow correct (they are not) that "[s]ubsection (c)(1), by itself, shields from liability all publication decisions [*i.e.,* all conduct],"[9] and also correct that "nothing in §230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider of an interactive computer service,"[10] then §230(c)(1) is, "by itself," absolute, unlimited "super-immunity," which such "super-immunity" eviscerates §230(c)'s "Good Samaritan" general provision, §230(c)(2)'s (limited conduct) civil liability protections, §230(f)(3)'s definition of an ICP, and even §502 (codified at 47 U.S.C. §223(d)) of the very same act (whereby §502 makes it a crime to "*knowingly* . . . display" obscene material to children (*i.e.,* conscious intent), even if a third-party created that content).

The overbroad, unconstitutional application of §230(c)(1) "super-immunity" derives from erroneous judicial construction, not from age, vagueness, or from the legislation. The text of the statute simply does not support §230(c)(1)'s absurd "super-immunity" (*i.e.,* §230(c)(1) "does not insulate [Facebook] from liability for all conduct that happens to be transmitted through the internet").

For the reasons set forth more fully herein, the previous judgment dismissing this case should be vacated by this Court, thereby correcting the injustice Fyk has suffered and finally live up to (in this case at least, five years into the Twilight Zone that has been this case) the "honor" in "Your Honor."

IV. MEMORANDUM OF LAW

A. Legal Standard

Rule 60(b) motions allow the Court the opportunity to revisit cases and correct injustice. Rule 60(b) motions are addressed to the sound discretion of this Court. *See, e.g., Martella v. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir. 1971). When faced with a Rule 60(b) motion, a court should balance the competing principles of finality and relief from unjust judgments giving a "liberal construction to (60b)." *Id.* quoting 7 Moore's Federal Practice P.60.18[8] P.60-138.

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[9] *See* [D.E 17] at 14-15, Facebook's November 18, 2019, Ninth Circuit Answering Brief (citing, inter alia, *Barnes*, 570 F.3d at 1105 and *Zeran*, 129 F.3d 327). Of note, the bulk (if not all) of the anti-Fyk points made by Facebook, this Court, and the Ninth Circuit throughout the history of this case have the Fourth Circuit's *Zeran* decision at their root/foundation. And, again, the Fourth Circuit's *Henderson* decision completely undermined *Zeran* and its progeny (*e.g.*, *Barnes* and *Fyk*).

[10] *See* [D.E. 42] at 4, the Ninth Circuit's June 12, 2020, Memorandum.

Rule 60(b)(5) specifically provides parties with relief from a judgment or order when "a prior judgment upon which it is based has been reversed or otherwise vacated [*e.g., Zeran*], or it is no longer equitable that the judgment should have prospective application." *See id.*[11] Relief under Rule 60(b) is appropriate where there has been a subsequent change in the law. *See, e.g., Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715 (9th Cir. 1990) (A court "properly exercises its discretion to reconsider an issue previously decided" when "a change in the law has occurred"); *see also, e.g., Kirkbride v. Continental Cas. Co.,* 933 F.2d 729, 732 (9th Cir. 1991) ("[t]he district court was entitled to reconsider its position" in light of new law). Notably, the Ninth Circuit has expressly embraced the "flexible standard" for Rule 60(b)(5) adopted by the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992). *See, e.g., Bellevue Manor Assocs. v. United States*, 165 F.3d 1249, 1255-56 (9th Cir. 1999); *Hook v. Arizona*, 120 F.3d 921, 924 (9th Cir. 1997). Under this standard, a party seeking a modification of a court order need only establish that a "significant change in facts or law warrants a revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." *Rufo*, 502 U.S. at 393; *SEC v. Coldicutt*, 258 F.3d 939, 942 (9th Cir. 2002). A significant change in law has occurred that warrants a revision of the decree.

Moreover, SCOTUS has repeatedly confirmed that a district court always possesses the inherent authority to modify a judgment in-light-of significant changed circumstances, including changes in law or fact. *See, e.g., System Federation v. Wright,* 364 U.S. 642, 647 (1961). "[T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong.'" *Agostini v. Felton,* 521 U.S. 203, 215 (1997) (citing *System Federation*, 364 U.S. at 647, quoting *United States v. Swift & Co., 286 U.S.* 106, 114-15 (1932)). Rule 60(b)(6) compels reconsideration of this new case authority.

B. Rule 60(b)(5) – Law Change Warrants Reversal Of The Antiquated Dismissal Order

This Court should vacate/set aside dismissal, as the Fourth Circuit's *Henderson* decision unraveled its prior *Zeran* decision, which this Court relied on (substantially; more actually, foundationally) to

[11] **Again,** the root foundation of this Court's prior rulings was the Fourth Circuit's *Zeran* decision, and the Fourth Circuit nuked its 26-year-old *Zeran* decision (when the Internet was a mystery) with its few-months-old *Henderson* decision.

dismiss Fyk's case, constituting a substantial change in law that warrants reconsideration and reversal of Fyk's decision. Whether directly (*e.g., Zeran*) or indirectly (*e.g., Barnes* (with conclusions flowing from gross misinterpretation of *Zeran*), this Court and the Ninth Circuit relied on superseded case law (changed by *Henderson)* to dismiss Fyk's case. The *Henderson* decision serves as new legal precedent that undermines this Court's previous findings and conclusions. Alternatively, Fyk should be granted leave to amend his Verified Complaint, since this case is certainly no longer "futile, in the instance."

After this Court granted Facebook's 12(b)(6) motion and after Fyk had filed his appeal in the Ninth Circuit, and after this Court denied Fyk's first 60(b) motion and after Fyk filed his second appeal in the Ninth Circuit, the Fourth Circuit issued its opinion in *Henderson,* "explaining that a defendant is an information content provider if they ***"contribute[d] materially to the alleged illegality of the <u>conduct</u>"*** (*i.e.,* an opinion that cannot be reconciled with Fyk's case) (citing *Fair. Hous. Council of San Fernando Valley v. Roommates.com, LLC,* 521 F.3d 1157, 1168 (9th Cir. 2008), emphasis added), solidifying new precedent that was unavailable to Fyk, which, had it been applied to Fyk's case (which such case could not more specifically allege Facebook's anti-competitive misconduct), would have resulted in the unraveling of this Court's dismissal of Fyk's Verified Complaint. This Court should re-examine the dismissal honorably under the Fourth Circuit's new seminal *Henderson* decision (which, once again, undermined *Zeran* and *Barnes*, which, once again, were decisions this Court relied upon heavily, if not entirely in kicking, Fyk to the curb in deprivation of "day in court"/Due Process), as well as under *Rumble* (from this Court), *Jarkesy* (from the Fifth Circuit), *Doe* (from J. Thomas), and even *DZ Reserve* (from this Court). This Court should also revisit *Lemmon* (from the Ninth Circuit) since it did not consider it in the first reconsideration motion. The conflicting decisions of *Henderson, Rumble*, *Jarkesy*, *Doe,* and *etc.*, *see* Ex. 1., underscore the importance of addressing court conflicts as to the application of the CDA immunity in pure business tort cases, which such cases we now briefly discuss.

The *Rumble* decision (this Court's decision) addresses whether a complaint involving unfair competition/antitrust allegations (Sherman Act in the *Rumble* case, California Business & Professions Code §§17200-17210 (Unfair Competition) in Fyk's case) is subject to dismissal. The *Rumble* Court held, in pertinent part, as follows: (a) "the Supreme Court's direction [is] that Sherman Act plaintiffs 'should be given the full benefit of their proof without compartmentalizing the various factual components and wiping the slate clean after scrutiny of each,'" *id.* at 6 (internal citations omitted); (b) "This is especially true given the Ninth Circuit's holding that 'even though [a] restraint effected may be reasonable under section 1, it may constitute an attempt to monopolize forbidden by section 2 if a specific intent to monopolize may be shown,'" *id.* (internal citations omitted). These holdings are much like that of *Enigma* and *Fyk*. That is, actions underlain by anti-competitive animus (as specifically alleged by Fyk against Facebook, and as alleged by Rumble against Google) are not subject to dismissal at the CDA "Good Samaritan" immunity threshold. Just as Rumble was permitted to engage in discovery (*i.e.*, was "given the full benefit of their proof") vis-à-vis the District Court's denial of Google's motion to dismiss in a Sherman Act context (*i.e.*, federal anti-competition context), Fyk should have been given the benefit of engaging in discovery (*i.e.*, "given the full benefit of [his] proof") vis-à-vis this Court's denial of Facebook's motion to dismiss in the California Business & Professions Code §§17200-17210 context (*i.e.*, state anti-competition context).

The *Jarkesy* (Fifth Circuit) case deals with the mandate that Congress supply an "intelligible principle"/general provision, where (as here) delegating administrative enforcement authority of a law. As *Jarkesy* concludes, if Congress does not supply an "intelligible principle" under such a delegation setting, then the law is unconstitutional. So, either all of §230(c) is governed by the overarching "Good Samaritan" "intelligible principle" (as Fyk's briefings have consistently argued) or §230(c) is unconstitutional authority. Either way, Facebook cannot enjoy *carte blanche* §230(c)(1) super-immunity sans a "Good Samaritan" threshold requirement (*i.e.*, the anti-competitive animus espoused in *Enigma*, *Rumble, Henderson*, and in *Fyk)*. Furthermore, the facts of Fyk's case more aptly fit the §230(c)(2) paradigm (if any part of §230), certainly not §230(c)(1). If this Court's view that the "Good Samaritan" *general* provision is not applied *generally* (*i.e.*, somehow applies to only §230(c)(2)), then, per *Jarkesy* and per an elementary understanding of what a general provision/"intelligible principle" is, §230 is unconstitutional. Again, ither way, Facebook cannot enjoy §230(c)(1) *carte blanche* super-immunity in this unfair competition/anti-competitive animus case.

In *Doe*, Justice Thomas put forth another spot-on Statement in the denial of certiorari mirroring the spot-on Statement that Justice Thomas put forth in *Enigma*, "It is hard to see why the protection §230(c)(1) grants publishers against being held strictly liable for third parties' content should protect

Facebook from liability for its *own* 'acts and omissions,'" *id.* at *1 (emphasis in original), with the subject *Fyk* case being one that seeks to hold Facebook accountable for Facebook's "own" actions, namely actions of an anti-competitive animus.

In *Henderson*, whether relying directly on the Fourth Circuit's *Zeran* decision or *Zeran's* progeny (*i.e., Barnes)*, courts (*e.g.*, this Court and the Ninth Circuit) who relied on *Zeran* to build their questionable foundation were undermined by the Fourth Circuit's *Henderson* decision. The Fourth Circuit's reformation of its 1997 *Zeran* decision undermined the precedent this Court and the Ninth Circuit relied on when deciding Facebook's §230(c)(1) "immunity." *Henderson*'s rearticulation of *Zeran,* and the changes it caused to *Barnes* (stemming from *Zeran*) represents a substantial change of "the law" that this Court specifically relied on in its dismissal order, which clearly warrants this Court's reconsideration and immediate reversal of its antiquated dismissal order. Notably, the *Henderson* decision relied heavily on a treatise written by Professor Adam Candeub, who (not-so-coincidentally) read all Fyk's prior briefs before memorializing same in: *READING SECTION 230 AS WRITTEN*.[12]

Fyk's Verified Complaint (filed in August 2018) asked this Court "…whether Facebook can, without consequence, engage in brazen tortious, unfair and anti-competitive, extortionate, and/or fraudulent practices… ." [D.E. 1] at 1. *Fyk's allegations were based entirely on Facebook's illegal anti-competitive <u>conduct</u>* (*i.e.,* a UCL claim), *not based on the <u>impropriety</u> of any <u>content</u> or treating Facebook as "the publisher or speaker" of said content.*

> We have interpreted 'publisher' in §230(c)(1) in line with th[e] common-law understanding. Thus for §230(c)(1) protection to apply, we require that liability attach to the defendant on account of some *improper content* within their publication. See Erie Ins. Co., 925 F.3d at 139–40 ('There is no claim made based on the content of speech published by [Defendant] – such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.').

Henderson, 53 F.4th at 122 (emphasis added). "This improper-content requirement helps dispel [Defendant's] notion that a claim holds a defendant liable as a publisher anytime there is a 'but-for'

[12] Again *Henderson*, *Rumble*, *Jarkesy*, *Doe, DZ Reserve, Lemmon*, and Mr. Candeub's treatise are attached as Ex. 1. And, mentioned elsewhere in this brief, courtesy copies of the amicus curiae briefs submitted in *Gonzalez* (all of which such amicus curiae briefs may as well have been cut and pasted from Fyk's briefing in this case) by Senator Cruz and myriad other congressmen, Texas Attorney General Paxton and others, and the DOJ are attached hereto as composite **Exhibit 2** and incorporated fully herein by reference.

causal relationship between the act of publication and liability." *Id.*[13]

> Section 230(c)(1) provides protection to interactive computer services. *Zeran*, 129 F.3d at 331. But it does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under §230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties. Here, the district court erred by finding that §230(c)(1) barred all counts asserted against Public Data. To the contrary, on the facts as alleged, it does not apply to any of them.

Id. at 129.

Here too, this Court "erred by finding that §230(c)(1) barred all [Fyk's] counts." "There [wa]s no claim made [by Fyk] based on the content of speech published by [Fyk or Facebook]." For §230(c)(1) to apply here, Fyk's "claims (must) demand the information's content be *improper* before imposing liability." Fyk's allegations were undeniably about Facebook's conduct, not about the substance of any "improper content" alleged to have been authored or spoken by Facebook. The only reason to identify content at all (*i.e.,* in the general sense), was to show the impropriety of Facebook's conduct (*i.e.,* disparate treatment; *e.g.,* disproportionate "rules"), in "treating Fyk's page content differently for Fyk than for the competitor to whom Fyk's content was redistributed." [D.E. 1] at n. 2.

While certain editorial conduct may be immune in certain circumstances (*e.g.,* §230(c)(2)(A)), §230(c)(1) does not protect "all conduct that happens to be transmitted through the internet." It certainly does not immunize "all publication decisions," including disparate/anti-competitive treatment. In reality, *"§230(c)(1) does not immunize any conduct at all."* Cruz, Senator Ted, et al., 2022 WL 17669645 at *13 (emphasis added), Ex. 2. This Court also concluded that "granting leave to amend would be futile in this instance as Plaintiff's claims are barred as a matter of law." [D.E. 38] at 4. In finding that Fyk's claims could not be amended for purportedly being "futile in this instance," this Court falls into the minority of the current evaluation of §230 case authority addressing the limitations of CDA immunity. *See, e.g.,* Exs. 1-2. The Fourth Circuit definitively ruled in *Henderson,* that §230(c)(1) immunity is not absolute (*i.e.*, not "futile in this instance"); *i.e.,* §230(c)(1) "does not insulate a company from liability for

[13] At a peak (prior to Facebook's interference), Fyk earned ~ $300,000.00 in one month in advertising and/or web trafficking monies, for example. There was no realistic end in sight to Fyk's economic gain before Facebook's interference; rather, all signs pointed towards Fyk earning even more advertising money "but for" Facebook's interference. [D.E. 1] at ¶ 55.

all conduct that happens to be transmitted through the internet," *Henderson*, 53 F.4th at 129, a determination directly at odds with this Court's prior decision(s) finding that §230(c)(1) "shields from liability all publication decisions," absent intent (*i.e.,* unconstitutional "super-immunity"). This Court cannot disregard significant changes in law or facts if it is "satisfied that what it has been doing has been turned through chang[ed] circumstances into an instrument of wrong." *Swift & Co.,* 286 U.S. at 114-115.

Fyk's erroneous §230(c)(1) dismissal hinged on the application of both the second and third requirements of the so-called[14] §230(c)(1) immunity test. The Ninth Circuit held in pertinent part:

> The first and second requirements for §230(c)(1) immunity are not in dispute. Fyk focuses on the third requirement. He contends that Facebook is not entitled to §230(c)(1) immunity because it acted as a content developer by allegedly de-publishing pages that he created and then re-publishing them for another third party after he sold them to a competitor. *We disagree.*

[D.E. 42] at 2-3 (emphasis added).

Here, the Ninth Circuit erred in two respects. First, the "second requirement" of the test was, *in fact,* disputed to the extent that the courts used an inaccurate three-part test to determine immunity (*i.e., the test itself was wrong)* (further discussed in §B.1 below). And, second, while this Court, and the Ninth Circuit may not necessarily have agreed at the time, the "third requirement" of the test was, in retrospect, met because Facebook's actions to de-publish and re-publish Fyk's content are content provision decisions (*i.e.,* development conduct) (further discussed in §B.2 below). The Court's nonsense about their needing to be a *substantial contribution* to be considered content development (*i.e.,* the arbitrary responsibility line) is entirely made up, because the necessity of the contribution being "substantial" is directly contradicted by §230(f)(3)'s actual text: "in part."

While *Henderson* agreed that Plaintiff's allegations (like Fyk's here), met the material contribution line, this Court and the Ninth Circuit disagreed (in antiquated fashion), whereby *Fyk's* allegations fell short of this Court's arbitrary (*i.e.,* different) material contribution line.

> Public Data sought §230(c)(1) protection against four claims brought against it for violating the Fair Credit Reporting Act ('FCRA'). The district court agreed that the claims were precluded by §230(c)(1). Plaintiffs appealed, arguing that §230(c)(1) does

[14] "So-called" because §230(c)(1) does not technically provide any civil liability immunity for any conduct, at all.

> not apply. ***We agree.***[15] Plaintiffs have alleged facts that, if true, render §230(c)(1) inapplicable to their four claims. So we reverse the district court and remand for further proceedings.

Henderson, 53 F.4th at 117 (emphasis added). The Court's "material contribution" "line" cannot be arbitrary or capricious. Different protections, within different jurisdictions for a federal statute relating to internet communications, is untenable.

1. §230(c)(1) Does Not Confer Any Immunity For Any Conduct At All

The second requirement of the *Barnes* three-part §230(c)(1) immunity test, is *textually flawed* (*i.e.,* sloppy draftsmanship). In contrast, the Fourth Circuit's *Henderson* three-part immunity test is textually accurate (*i.e.,* it correctly cites §230(c)(1)). The *Henderson* test and the *Barnes* test differ by one word, but that one word completely changes the results of the test. This Court was flat wrong in using the textually inaccurate *Barnes* test. This Court should have instead used the textually accurate *Henderson* test to determine Facebook's §230(c)(1) protection – this Court now needs to remedy same.

Why have courts been using the textually inaccurate *Barnes* test to consider §230(c)(1) protection? Defendants (*e.g.,* Facebook, Yelp!, *etc.*) cite "questionable precedent" (*e.g. Barnes, Zeran, Kimzey*) out-of-context to set up defendants' proof-text of isolated snippets from bad case law to advance their own presuppositions, agendas, or biases (*e.g.,* §230(c)(1): "seeks to treat as ***a*** *publisher* or speaker," or "shields from liability ***all*** *publication decisions*…"), and to distort the statutory language and/or intent of §230.

So as not to distort the statutory language and/or intent of §230, we must look to the text itself, rather than rely on case precedent snippets. §230(c)(1) does not describe what "a publisher" does (*i.e.,* what conduct is "immune"); rather, it specifically identifies *who* "the publisher" is (*i.e.,* "another" ICP). Changing "the" (of "the publisher") into "a" (of "a publisher") changes *who* "the (particular) publisher" is, that the ICS provider or ICS user cannot be treated as (*i.e.,* distorts the intent of §230(c)(1)). This subtle word substitution significantly impacts the proper (*i.e.,* textual) application of §230(c)(1).

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[15] Facebook sought §230(c)(1) protections against Fyk's four claims for unfair competition, tortious interference, fraud, and extortion. This Court determined §230(c)(1) precluded Fyk's illegal conduct related claims. Fyk appealed, arguing that §230(c)(1) does not apply. The Ninth Circuit *disagreed* (*i.e.,* although Fyk alleged similar facts as *Henderson*, the Ninth Circuit drew a different "material contribution" line than that of the Fourth Circuit in *Henderson*).

§230(c)(1) *specifically* reads: "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." *Id.* (emphasis added). James Madison once argued that the most important word in "The Right To Free Speech" is the word "the" because it denotes "the right" *preexisted* any potential abridgement. In the English language, a definite article such as the word "the," in "the publisher," is used to "denote [a] particular, [or] specified persons or things."[16] "The publisher," in the context of §230(c)(1), specifies "the (*particular* or *specified*) publisher" who created and/or developed the information entirely – *"another"* ICP (here Fyk). In other words, "the publisher" is not just *any unspecified publisher* (which includes the ICS provider or user), "the publisher" is specifically the *known publisher*. "The" *known* publisher is "another [ICP]" (*i.e.,* anyone other than the ICS provider or user). In the context of §230(c)(1), Facebook cannot possibly be "the publisher" in Fyk's case, because Fyk is "the (known) publisher," and Fyk's publishing preexisted Facebook's involvement.

This subtle, yet critical drafting mistake – using "a" and "the" interchangeably in "the publisher or speaker" (as this Court has) – is the genesis of the misinterpretation of §230(c)(1) and the origin of the confusion surrounding §230's proper application. Once "the publisher" is identified for the purposes of §230(c)(1), the rest of the statute's intended purpose is clear.

"Pursuant to §230(c)(1) of the CDA, 47 U.S.C. §230(c)(1), '[i]mmunity from liability exists for: … (1) a[n] [ICSP] or [ICSU] of an [ICS] (2) whom a plaintiff seeks to treat, under a state law cause of action, as ***a publisher*** or speaker (3) of information provided by another [ICP].'" *Fyk v. Facebook, Inc.*, 808 Fed. Appx. 597 (9th Cir. 2020) (citing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

§230(c)(1) explicitly reads: "the publisher," not "a publisher." The *Barnes* three-part "immunity" test (employing "*a publisher*") is inconsistent with the text of the statute (*i.e.,* an example of sloppy draftsmanship). Compare that to the three-part test used in *Henderson*, which accurately quotes and applies §230(c)(1): "The defendant is a '[ICSP] or [ICSU] of an [ICS]'; (2) the plaintiff's claim holds the defendant 'responsible 'as ***the publisher*** or speaker of any information'; and (3) the relevant information

[16] https://www.wordnik.com/words/the

was 'provided by another [ICP].'" *Henderson*, 53 F.4th at 119 (citing *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting §230(c)(1)).

As a result of conflating "the" and "a," correct courts (*e.g.,* the Fourth Circuit in *Henderson via* "the") properly read §230(c)(1) to not protect any publishing conduct, while other incorrect courts (*e.g.,* this Court in *Fyk via* "a") improperly read §230(c)(1) to protect all publishing conduct in "super-immunity" fashion.[17] §230(c)(1) is judicially righted by, for example, giving the word "the" proper effect, thereby restoring the meaningful difference between §230(c)(1) and §230(c)(2), while simultaneously reconciling the inconsistency between §502 and §230 (*i.e.,* §230 would no longer be absurd "super-immunity"). This Court simply needs to apply §230(c)(1) *as written*.

"§230(c)(1) prevents suits that 'cast [the defendant] in the same position as the party who originally posted the offensive messages.'" *Henderson* at n. 26. "… §230(c)(1) applies only when the claim depends on the content's impropriety." *Id.* at 125. "In other words, for protection to apply, the claim must turn on some 'information,' and must treat the defendant as the 'publisher or speaker' of that information." *Id.* at 120. Fyk posted his original messages and has never cast Facebook in the same position as himself. Fyk has made clear, on more than one occasion throughout the lifespan of this case, that "*this case is not about objectionable content.* … This case is about Facebook's fraud, extortion, unfair competition, and tortious interference with Fyk's business." *Fyk v. Facebook, Inc.*, No. 19-16232, 2020 WL 709442 at * (9th Cir.) No. 19-16232; *see also* Ver. Compl. [D.E. 1] at ¶ 1.

This Court and Ninth Circuit, relying on *Zeran/Barnes* (now eviscerated by *Henderson*), imaginary policy and purpose, and not the law itself, erroneously dismissed all four of Fyk's anti-competitive *conduc*t claims under §230(c)(1)'s purported "super-immunity," because Fyk was precluded from treating Facebook as "a publisher" in the general sense (*i.e.,* treating Facebook as Facebook for Facebook's own conduct), which runs afoul of the Absurdity Doctrine (as well as several other constitutional doctrines and canons of statutory construction). This Court's determination that §230(c)(1) insulates all Facebook's conduct was proven wrong (though wrong at all times prior) by the Fourth Circuit *Henderson* decision.

[17] There is no real textual "correction" required here; rather, it is as simple as this Court giving the current text the correct effect (*i.e.,* apply the law as written). Subsequently, this Court should vacate or set aside its prior judgment because the *Barnes* test, used by this Court, is textually inaccurate. It should reconsider immunity under the new correct *Henderson* test.

Not only does §230(c)(1) not insulate Facebook from liability for all conduct that happens to be transmitted through the Internet, it does not protect any conduct, at all.

This Court should be "satisfied that what it has been doing [*e.g.,* falling prey to proof-texting, sloppy thinking and draftsmanship, and textual mistakes] has been turned through chang[ed] circumstances [*e.g., Henderson, etc.*, Exs. 1-2] into an instrument of wrong." *Agostini*, 521 U.S. at 215.

2. Any Editorial Conduct With Intent Or Knowledge Is Information Content Provision

In his prior briefs, Fyk argued §230(c)(1) cannot protect "all publication decisions," because if "all publication decisions" are immune under §230(c)(1), then that would include restricting materials (*i.e.,* the purpose of §230(c)(2)(A)). Rejecting Fyk's argument, and again relying heavily on *Barnes* (eviscerated by *Henderson,* as *Barnes* stemmed from *Zeran*), the Ninth Circuit held in pertinent part:

> We reject Fyk's argument that granting §230(c)(1) immunity to Facebook renders §230(c)(2)(A) mere surplusage. As we have explained, §230(c)(2)(a) 'provides an additional shield from liability.' *Barnes,* 570 F.3d at 1105 '[T]he persons who can take advantage of this liability shield are not merely those whom subsection (c)(1) already protects,[18] but any provider of an interactive computer service. ***Thus, even those who cannot take advantage of subsection (c)(1), perhaps because they developed, even in part, the content at issue can take advantage of subsection (c)(2).'***

[D.E. 42] at 4-5 (emphasis added).

Here, the Ninth Circuit misbelieves §230(c)(1) and §230(c)(2)(A) are *not redundant* because content development decisions are somehow not included in "all publication decisions." Wrong all six ways to Sunday – content development decisions are entirely publication decisions. The statute remained redundant. The Ninth Circuit (and this Court) resolved absolutely nothing here, much less reconciled the surplusage issue – *i.e.,* the redundancy between §230(c)(1) and §230(c)(2)(A).

Per §230(f)(3), an ICP "means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* Courts, like this Court, have relied on "non-textual arguments" in interpreting §230, narrowly interpreting "development" to preserve §230(c)(1)'s absurd "super-immunity." Per Justice Thomas*:*

> Courts have [] departed from the most natural reading of the text by giving Internet companies immunity for their own content [*i.e.,* content development/content provision

[18] Which is "no provider or user;" *i.e.,* "any provider or user" of an ICS; *i.e.,* the same persons in §230(c)(1) and §230(c)(2).

> conduct]. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by *another* information content provider.' (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider. See *Fair Housing Council of San Fernando Valley* v. *Roommates.Com, LLC*, 521 F. 3d 1157, 1165 (CA9 2008). And *an information content provider is not just the primary author or creator* [Fyk]; it is anyone 'responsible, in whole or in part, for the creation or development' of the content [Facebook]. §230(f)(3) (emphasis added).
>
> But from the beginning [*e.g., Zeran, Barnes*], courts have held that §230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or *alter content*.' *E.g., Zeran*, 129 F. 3d, at 330 (emphasis added); cf. *id.,* at 332 (stating also that §230(c)(1) protects the decision to 'edit'). *Only later did courts wrestle with the language in §230(f)(3)* suggesting providers are liable for content they help develop 'in part.' *To harmonize that text with the interpretation that §230(c)(1) protects 'traditional editorial functions,'* [*i.e.,* to reconcile the actual text with the court's mistaken interpretation] *courts relied on policy arguments* [*i.e.,* not the text itself] *to narrowly construe §230(f)(3) to cover only substantial or material edits and additions* [*i.e.,* made it up]. *E.g., Batzel* v. *Smith*, 333 F. 3d 1018, 1031, and n. 18 (CA9 2003) ('[A] central purpose of the Act was to protect from liability service providers and users who take some *affirmative steps*[19] to edit the material posted') [i.e., "edit" in the restrictive sense, pursuant to §230(c)(2)].
>
> Under this interpretation [*i.e.,* misinterpretation], a company can solicit[20] thousands of potentially defamatory statements, 'selec[t] and edi[t] . . . for publication' several of those statements, add commentary, and then feature the final product prominently over other submissions[21]—all while enjoying immunity [*i.e.,* act as a content provider]. *Jones* v. *Dirty World Entertainment Recordings LLC*, 755 F. 3d 398, 403, 410, 416 (CA6 2014) (*interpreting "development" narrowly to "preserv[e] the broad [i.e., make-believe] immunity th[at §230] provides for website operators' exercise of traditional publisher functions"*). *To say that editing a statement and adding commentary in this context does not "creat[e] or develo[p]" the final product, even in part, is dubious* (emphasis added).

Malwarebytes, Inc. v. Enigma Software Group USA, LLC, 141 S.Ct. 13, 16 (2020) (emphasis added).

As stated previously, defendants typically cite out-of-context precedent to proof-text their own presuppositions, agendas, or biases (*i.e.,* like Facebook did in this case). As a result, courts have mistakenly accepted out of context proof and misunderstood the original intent of the case precedent, like *Zeran*. *Barnes* is a great example of the mistaken interpretation of *Zeran's* contextual intent. In *Zeran*, the Fourth Circuit held §230(c)(1) protects the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Barnes* interpreted *Zeran* such that

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[19] The ICS provider only consciously ("considers") engages in editorial conduct under §230(c)(2)(A).

[20] Here, Facebook solicited a new owner of Fyk's property (*i.e.,* conduct that is anti-competitive).

[21] "Featur[ing] the final product prominently over other submissions" is content prioritization/development/provision.

an ICS provider should have protection from all of its own publishing conduct (*i.e.,* how this Court applied §230(c)(1)), but that is not the case. The ICS provider's own publishing conduct only relates to §230(c)(2)'s limited protections.

Context is utmost when reading case precedent. The Fourth Circuit cited Professor Adam Candeub's: *Reading Section §230 As Written,* extensively. Regarding the context surrounding *Zeran's* intended use of the phrase "traditional editorial function," he wrote:

> Some courts have taken a different approach, holding that [§] 230 bars 'lawsuits seeking to hold a [ICSP] liable for its exercise of a publisher's *traditional editorial functions* – such as *deciding whether to publish, withdraw, postpone or alter content.'* [*Zeran*, 129 F.3d at 330 (4th Cir. 1997)]. That language has been quoted extensively [*i.e.,* used as proof-text].

Candeub, Prof. Adam, *Reading Section §230 As Written* at 148 (Mich. St. U. 2021) (emphasis added) (footnote omitted), Ex. 1.

> The language comes from the influential *Zeran* case, but *many courts forget the immediately preceding language* [*i.e.,* it's used out of context]. To quote *Zeran* fully, section 230
>
> > creates a federal immunity to any cause of action that would make [ICSPs] *liable for information originating with a third-party user of the service*. Specifically, §230 precludes courts from entertaining claims that would place a[n] [ICSP] in a publisher's role. Thus, lawsuits seeking to hold a[n] [ICSP] liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred. [FN: Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (quoting Zeran, 129 F.3d at 330) (emphasis added)]
>
> **The 'traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content,' id., are examples of third-party content decisions [i.e., third-party conduct] that §230 protects. It does not protect platform as to their *own editorial decisions or judgments*** [*i.e., first-party conduct*].
>
> When quoted out of context [*e.g.*, "proof-texting," and textual mistakes], the 'its' would seem to suggest that [§]230 immunizes the platform's publisher role. But this is an example of **sloppy drafting** and an imprecise pronoun antecedent, as the sentence prior speaks of 'information originating with a third-party user of the service.'

Id. at 148-149 (italicized emphasis in original, bold emphasis added).

Logically, when an ICS provider makes a conscious "publication decision" to "allow" (*i.e., knowingly* provide) content, it automatically transforms itself into an ICP, as it becomes responsible for providing that content, at least "in part." It has done *something more* than providing the interactive computer publication service (*i.e.,* the platform). The ICS provider is now involved in the provision of that content at least in part. So, we raise the question again; where does "responsibility" "in part" cross the line from inconsequential publication - interactive computer service provision, into substantively contributing to content provision (the question at the heart of Fyk's case)? The Fourth Circuit explains:

> This Court has never fully defined the terms 'creation' or 'development' as they are used in the statute. But we have explained that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; see also Nemet, 591 F.3d at 258 *('creation' or 'development' of information requires 'something more than [what] a website operator performs as part of its traditional editorial function' [i.e., publication services]).*
>
> Other circuits have put more flesh onto these definitions, determining that an [ICS] provider or user is responsible for the development of the information at issue in the case if *they 'directly and 'materially' contributed to* [*i.e.,* knowingly, divisibly, consciously, and with intent] what made the content itself 'unlawful.'' Force v. Facebook, 934 F.3d 53, 68 (2d Cir. 2019) (quoting LeadClick, 838 F.3d at 174); see Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008) *(explaining that a defendant is an information content provider if they 'contribute[d] materially to the alleged illegality of the conduct')*; …

Henderson, 53 F.4th at 127.

> When Zeran proclaimed that §230(c)(1) barred claims based on a defendant's exercise of traditional editorial functions, it also provided a suggestive list including "deciding whether to publish, withdraw, postpone or alter content." Zeran, 129 …
>
> Yet, Zeran's list of protected functions must be read *in its context*, and that context cabins that list to merely "editorial" functions. *It cannot be stretched to include actions that go beyond formatting or procedural alterations [i.e., interactive computer service functions] and change the substance of the content altered. An interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful.*

Id. at 129.

Facebook did *"something more"* than standard "formatting or procedural alterations" here (*i.e.,* more than provider interactive computer publication services), it directly, affirmatively, and knowingly ***"contribute[d] materially to the alleged illegality of the conduct"*** (*i.e.,* it consciously got involved in the provision of Fyk's content). Accordingly, Facebook is responsible for the *illegality of their own conduct*, consistent with *Henderson* (and all other decisions in Ex. 1) and the opinions of dozens of other notable officials (*see* Ex. 2). This Court's decision to immunize Facebook under §230(c)(1) does not comport with the majority of courts addressing ICS provider's own unlawful or tortious conduct.

> Numerous courts mischaracterize the *Zeran* language and **interpret §230 as immunizing platforms'** *own editorial decisions.* To take a typical example, in *Levitt* the plaintiff alleged that Yelp! 'manipulate[d] … review pages—by removing certain reviews and publishing others or changing their order of appearance.' [*Levitt v. Yelp! Inc.*, Nos. C-10-1321 EMC, C-10-2351 EMC, 2011 WL 5079526 at *6 (N.D. Cal. Oct. 26, 2011)]. The *Levitt* plaintiffs argued that Yelp!'s [illegal] behavior constituted ***unfair or fraudulent business*** **under Cal. Bus. & Prof. Code §17200. But the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content.** Rather, they ask whether Yelp! engaged in an **'unlawful, unfair or fraudulent business act or practice' or an 'unfair, deceptive, untrue or misleading advertising and any act.'**
>
> **Ignoring this straightforward analysis,** the court ruled that §230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the 'traditional editorial functions' language of *Zeran*. But notice the court's confusion here: **Yelp! allegedly made changes and conscious re-arrangements [i.e., substantive alterations without any creation] to reviews in violation of its representations to users and customers – plaintiffs sought to make Yelp! accountable for *its own* editorial decisions and false representations.**

Candeub Treatise, Ex. 1 at 149 (italicized emphasis in original, bold emphasis added).

What Facebook did with Fyk's content was not a traditional "formatting or procedural alteration," it was "conscious rearrangements" done by intent (*i.e.,* for monetary gain). The deliberate de-publishing and re-publishing of Fyk's content (*i.e.,* with knowledge and intent) are ***"conscious rearrangements."*** Knowingly soliciting a new owner for Fyk's property, based on an anti-competitive intent, is ***"elements of unfair or fraudulent business practices law [that] have nothing to do with speaking or publishing third party content."*** "But for" Facebook's conduct, the illegalities espoused in the Verified Complaint would not have occurred. Had Fyk's case been brought in the Fourth Circuit Court or possibly drawn a different Judge in this Court, a different result would have occurred.

There is an inherent problem (*i.e.,* §230's irreconcilable problem) with both allowing some content alterations (*e.g.,* §230(c)(2)(A)'s content restrictions), while also disallowing other content alterations (*e.g.,* §230(c)(1)'s content provision). Both types of alteration are the *by proxy* result of content consideration. Thus, if you allow content consideration at all, you allow both content restriction and content provision. If an ICS provider can "consider" what information to remove (per §230(c)(2)(A)), *by proxy,* it can also consider what information to provide (*i.e.,* what information to allow/develop). This inevitably causes a blurring of the line between "traditional editorial function" and a "material contribution" to the development of the information (*i.e.,* provision). SCOTUS wrestled with the complexity of this not so futile question, but failed to render a definitive answer.

> Justice Sotomayor: All right. So, even if I accept that you're right that sending you unrequested things [*i.e.,* provide unsolicited content] that are similar to what you've viewed, whether it's a thumbnail or an e-mail, how does that become aiding and abetting? … I guess the question is, ***how do you get yourself from a neutral algorithm to an aiding and abetting?*** *… An* ***intent, knowledge****. There has to be some intent to aid and abet.* You have to have *knowledge* that you're doing this. … So how do you get there? …
>
> Mr. Schnapper: … if they didn't know it was happening, and the other elements of an aiding-and-abetting claim were present, they would not be liable for aiding and abetting.

Ex. 3 at 24:7 – 25:23 (emphasis added).

Indeed, how do you get yourself from a neutral ICS provider to an ICP: *knowledge* and *intent*? If a website has no knowledge or intent behind the content it provides, §230(c)(1) would apply. But, as soon as they "consider" the content, they are consciously involving themselves in the content provision decision and become responsible in part for their own knowledge/intent. Thus, if they have any potential liability (*i.e.,* responsibility in part), the courts should apply that conduct to §230(c)(2)(A)'s civil liability protection, not to §230(c)(1)'s treatment protection. This harmonious interpretation confines conduct to §230(c)(2)(A), and squares nicely with "good faith" and "Good Samaritan[ism]."

Therefore, if a website has *no knowledge* or *intent* when providing users' materials (*i.e., passively* hosting), the provider in that case cannot be treated as "the publisher or speaker" who consciously considered and provided the materials (*i.e.,* had knowledge and responsibility). But, as soon as the ICS provider crosses the content "consideration" line (*i.e.,* acts with intent and knowledge to develop/manipulate content), it does "something more" than just provide an interactive computer publication service, it is now consciously providing the content. Considering §230 as a harmonious whole, §230(c) naturally applies to the motivation/intent, §230(c)(1) applies when the ICS provider has *no knowledge* of the content it provides, §230(c)(2)(A) applies when the ICS provider or user "considers" content (*i.e.,* consciously develops information in part), and §230(c)(2)(B) applies when the ICS provider provides the tools necessary to other ICS users, to restrict information for themselves.

Facebook *knowingly* considered Fyk's materials (*i.e.,* a conscious/substantive contribution), unpublished those materials (*i.e.,* a conscious rearrangement), solicited another owner for Fyk's property (*i.e.,* an anti-competitive intent), *knowingly* considered Fyk's content again (*i.e.,* another substantive contribution), and then *knowingly* re-published the same content (*i.e.,* another conscious rearrangement), based on its own anti-competitive animus (*i.e.,* the motivation/*intent*). All of Facebook's conduct was antithetical to the "Good Samaritan" general provision (*i.e.,* the "good faith" *intent* of §230). Facebook certainly did "something more" than traditional "formatting and procedural alterations" and consequently should not receive any protection for any of its anti-competitive conduct.

On Fyk's first 60(b) go-round with this Court, seeking to reconcile *Fyk* and *Enigma*, this Court (and the Ninth Circuit, effectively ratifying same by entirely refusing to address the merits of Fyk's appeal) held, in pertinent part: "The Order that Fyk seeks to vacate based its conclusion on 47 U.S.C. §230(c)(1). By contrast, the Ninth Circuit's *Enigma* opinion did not involve the application of §230(c)(1); instead, the court examined §230(c)(2)." *Fyk*, 18-cv-05159-JSW, 2021 WL 5764249 at *1 (N.D. Cal. Nov. 1, 2021) (internal citations omitted). Rather than harmonize or even rationalize *Fyk* with *Enigma* (*i.e.,* consider §230 as a whole), this Court adopted an absurd interpretation that the "Good Samaritan" *general* provision does not apply *"generally"* to the statute and is exclusive to a §230(c)(2) analysis. If that is truly the case, §230 is unconstitutional per *Jarkesy*. Either way, Fyk's case was dismissed improperly.

This Court entirely missed that Fyk's case was never a §230(c)(1) case. As "Professor" Eric Goldman inadvertently stumbled upon in a perverse article regarding Fyk's dismissal: "Yet again, the court relies on 230(c)(1) for facts fitting the 230(c)(2) paradigm." Both *Fyk* Courts inexplicably misapplied §230(c)(1) as "super-immunity" to a §230(c)(2)(A) case. The facts of Fyk's case simply do not fit the §230(c)(1) paradigm, at all. Like the District Court in *Henderson*, "[h]ere [too], th[is] district court erred by finding that §230(c)(1) barred all counts asserted against [Facebook]. To the contrary, on the facts as alleged [by Fyk], [§230(c)(1)] does not apply to any of them." *Henderson*, 53 F.4th at 129.

C. Rule 60(b)(6) – Equitable Powers Can Be Used To Prevent Furtherance Of Injustice

Even if this Court were to deny Fyk's second request (now five years into litigation) to vacate the judgment pursuant to Rule 60(b)(5), it should still vacate the judgment under Rule 60(b)(6) to avoid a "manifest injustice." Rule 60 offers equitable relief to a party seeking to vacate a judgment in order to avoid "manifest injustice." *Latshaw v. Trainer Wortham Comp. Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006); *U.S. v. Washington* 394 F.3d 1152, 1157(9th Cir. 2005), overruled on other grounds in *U.S. v.*

Washington 593 F.3d 790 (9th Cir. 2010), *U.S. v. Alpine Land & Reservoir Co*. 984 F.2d 1047, 1049 (9th Cir. 1993)). Rule 60(b)(6) has been called "a grand reservoir of equitable power," and it affords courts the discretion and power "to vacate judgments whenever such action is appropriate to accomplish justice." *Phelps v. Alameida* 569 F.3d 1120, 1135 (9th Cir. 2009) (quoting *Gonzalez v. Crosby* 545 U.S. 524, 542 (2005), quoting *Liljeberg v. Health Serv. Acquisition Corp*. 486 U.S. 847, 864 (1988)). Under this standard, Rule 60 relief is not governed by any *per se* rule, but is to be granted on a case-by-case basis when the facts of a given case warrant such relief.

In *Phelps*, the Ninth Circuit set forth certain factors "designed to guide courts in determining whether … extraordinary circumstances [as required for Rule 60 relief] have been demonstrated by an individual seeking relief under the rule." *Phelps,* 569 F.3d 1120. Courts should consider whether:

> (1) a litigant has diligently pursued relief that respects the strong public interest in timeliness and finality", "(2) whether granting relief would 'undo the past, executed effects of the judgment, thereby disturbing the parties' reliance interest in the finality of the case, as evidence, for example, by detrimental reliance or a change in position" and if "(3) given, in the court's opinion, that a central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from ever being heard[;] [i]n such cases, this factor will cut in favor of granting Rule 60(b)(6) relief.

Phelps, 569 F.3d at 1137-1140. These factors all support Fyk's request for relief.

First, Fyk has been diligent, as explained in §I above and §IV.D below. Second, no party has detrimentally relied on the judgment where it would cause harm for the case to be litigated. Facebook's conduct has not changed in reliance on the Court's Order because the Order merely maintained the status quo prior to this action. Third, this Court must correct the judgment to prevent massive injustice from continuing. Issues surrounding broad CDA immunity are of national/global significance and federal courts' consistently inconsistent application of §230 protections have "serious consequences" for millions of users like Fyk who face anti-competitive conduct by ISPs. By canning Fyk, there will never be a resolution on the open question of §230 immunity scope (*i.e.,* Fyk's case is not *"futile in this instance"*).

D. This Motion Is Timely

Motions filed pursuant to Rule 60(b) "must be made within a reasonable time." Fed. R. Civ. P. 60(c)(1). "What constitutes a reasonable time depends on the facts of each case." *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 249 (9th Cir. 1989).

> What constitutes reasonable time depends on the facts of each case. *See Washington v. Penwell,* 700 F.2d 570, 572-73 (9th Cir. 1983) (four-year delay not unreasonable because of extraordinary circumstances); *Twentieth Century-Fox Film Corp. v. Dunnahoo,* 637 F.2d 1338, 1841 (9th Cir 1981) (six-year delay unreasonable in case of liquidated damages decree and no extraordinary circumstances); *Clarke v. Burkle,* 570 F.2d at 831-32 (six year delay not unreasonable).

U.S. v. Holtzman, 762 F.2d 720, 725 (9th Cir. 1985).

When determining if a delay was reasonable, courts consider "the danger of prejudice to the petitioner; length of the delay and its potential impact on judicial proceedings; reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer Inv. Serv. Co v. Brunswick Associates L.P.*, 507 U.S. 380, 392-97, 113 S. Ct. 1489, 1497-99 (1993). In the instant matter, Fyk acted with good faith. SCOTUS denied his section petition for writ of certiorari a mere couple months ago in mid-April, and Fyk reasonably waited on SCOTUS' *Gonzalez* decision, which was handed down just a few weeks ago. Thus, there is no possible way (capable of surviving the laugh test) for this motion to be considered untimely. Moreover, and again, no prejudice will be suffered by Facebook having to finally put forth a substantive defense.

V. CONCLUSION

New law that directly impacts the outcome of this case has been decided: *Henderson* (Fourth Circuit), *Rumble* (this Court), *Doe* (SCOTUS), *Jarkesy* (Fifth Circuit), *Lemmon* (Ninth Circuit), *DZ Reserve* (this Court). Those decisions cannot be reconciled with this Court's previous decision. This reason alone justifies this Court's vacating the judgment under 60(b).

WHEREFORE, Plaintiff, Jason Fyk, respectfully requests entry of an order (1) granting Fyk's 60(b) motion; *i.e.*, vacating the Court's prior judgment, and/or (2) affording Fyk any other relief the Court deems equitable, just, or proper (*e.g.*, leave to amend the Verified Complaint).

Dated: June 16, 2023.

Respectfully Submitted,

/s/ Jeffrey Greyber
Jeffrey L. Greyber, Esq.
Poli, Moon & Zane, PLLC
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2023, I electronically filed the foregoing documents with the Clerk of the Court by using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record *via* Notices of Electronic Filing generated by CM/ECF.

/s/ Jeffrey Greyber
Jeffrey Greyber, Esq.

Exhibit #1

KeyCite Yellow Flag - Negative Treatment
Declined to Follow by Prager University v. Google LLC, Cal.App. 6 Dist., December 5, 2022

53 F.4th 110
United States Court of Appeals, Fourth Circuit.

Tyrone HENDERSON, Sr.; George I. Harrison, Jr.; Robert McBride, on behalf of himself and others similarly situated, Plaintiffs-Appellants,
v.
The SOURCE FOR PUBLIC DATA, L.P., d/b/a Publicdata.com; ShadowSoft, Inc.; Harlington-Straker Studio, Inc.; and Dale Bruce Stringfellow, Defendants-Appellees.
Federal Trade Commission; Consumer Financial Protection Bureau; North Carolina; Texas; Alabama; Arizona; Arkansas; Connecticut; Georgia; Iowa; Maine; Michigan; Minnesota; Mississippi; Nebraska; Nevada; North Dakota; Ohio; South Carolina; South Dakota; Utah; Vermont; Virginia; National Consumer Law Center; National Fair Housing Alliance; Lawyers' Committee for Civil Rights Under Law Amici Supporting Appellants.

No. 21-1678
|
Argued: May 3, 2022
|
Decided: November 3, 2022

Synopsis
Background: Job seekers brought putative class action against website operator alleging violation of Fair Credit Reporting Act (FCRA) by including inaccurate criminal information in background check reports furnished to potential employers. The United States District Court for the Eastern District of Virginia, Henry E. Hudson, Senior District Judge, 540 F.Supp.3d 539, granted judgment on the pleadings in favor of operator. Job seekers appealed.

Holdings: The Court of Appeals, Richardson, Circuit Judge, held that:

[1] claim alleging that operator violated FCRA by failing to provide the job seekers with a copy of their own consumer reports did not seek to hold operator "as a publisher" of information, and thus, operator was not entitled to CDA immunity for that claim;

[2] operator was not entitled to CDA immunity for FCRA claim alleging operator failed to obtain certification from potential employer and failed to provide summary of consumer's FCRA rights to employer; and

[3] operator was allegedly "information content provider" not entitled to immunity under CDA.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion for Judgment on the Pleadings.

West Headnotes (34)

[1] **Federal Courts** Judgment on the pleadings

The Court of Appeals reviews de novo the district court's ruling on a motion for judgment on the pleadings, and the Court of Appeals applies the same standards as it would for a motion to dismiss for failure to state a claim. Fed. R. Civ. P. 12(b)(6), 12(c).

[2] **Federal Civil Procedure** Matters deemed admitted

A court deciding a motion for judgment on the pleadings accepts all well-pleaded facts in the complaint as true. Fed. R. Civ. P. 12(c).

[3] **Telecommunications** Privilege or immunity

Hosting a website enables computer access by multiple users to a computer server, so that the host or operator of the website qualifies as a provider of "interactive computer service," as required for immunity under the Communications Decency Act (CDA). Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[4] **Telecommunications** Privilege or immunity

A claim treats the defendant as the "publisher or speaker of any information," as required for immunity under the Communications Decency Act (CDA) when it (1) alleges that the defendant is liable for publishing certain information to third parties, and (2) seeks to impose liability based on that information's improper content. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

1 Case that cites this headnote

[5] **Telecommunications** Privilege or immunity

In determining whether a claim treats the defendant as the "publisher or speaker of any information," as required for immunity under the Communications Decency Act (CDA), the court asks whether the claim thrusts the interactive computer service provider into the role of a traditional publisher. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

2 Cases that cite this headnote

[6] **Telecommunications** Privilege or immunity

The scope of the role of a traditional publisher, and therefore the scope of what the Communications Decency Act (CDA) protects, is guided by the common law of defamation. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[7] **Statutes** Statutory terms with common law meanings

Statutes Other Statutes

When a word in a statute is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

[8] **Telecommunications** Privilege or immunity

The Communications Decency Act (CDA) alters the way common law defamation claims apply to users and providers of interactive computer services that the common law would otherwise hold liable as publishers. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[9] **Libel and Slander** Publication

For purpose of a common law defamation claim, a "publisher" is someone who intentionally or negligently disseminated information to third parties.

[10] **Libel and Slander** Publication

For purpose of a common law defamation claim, a third party to whom the allegedly defamatory information is disseminated is someone other than the subject of the information disseminated.

[11] **Telecommunications** Privilege or immunity

For a claim to treat the defendant as a "publisher," as required for immunity under the Communications Decency Act, the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not subject of information. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[12] **Telecommunications** Privilege or immunity

For immunity under the Communications Decency Act (CDA), the defendant's alleged liability under the claim must be "based on the content of the speech" published by the interactive service provider. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[13] **Libel and Slander** Nature and form of remedy

To hold someone liable as a publisher, in a common law defamation claim, is to hold them responsible for the improper character of the speech or content published.

[14] **Telecommunications** Privilege or immunity

For immunity to apply to an interactive computer services provider under the Communications Decency Act (CDA), the alleged liability must attach to the provider on account of some improper content within their publication. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

1 Case that cites this headnote

[15] **Torts** False Light

Common law false-light claims hold a publisher of a statement liable only when there is at least an implicit false statement of objective fact.

[16] **Telecommunications** Privilege or immunity

To be allegedly liable for information as "publisher or speaker," as required for immunity under the Communications Decency Act (CDA), means more than the publication of information was a but-for cause of the alleged harm. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[17] **Finance, Banking, and Credit** Persons Liable

Telecommunications Privilege or immunity

The Communications Decency Act (CDA) does not provide blanket protection for interactive computer services providers from claims asserted under the Fair Credit Reporting Act (FCRA) just because they depend in some way on publishing information. Consumer Credit Protection Act §§ 603, 609, 15 U.S.C.A. §§ 1681a(d)(1), 1681a(f), 1681g(a); Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[18] **Finance, Banking, and Credit** Credit Reporting

The Fair Credit Reporting Act (FCRA) imposes procedural obligations on any consumer reporting agency. Consumer Credit Protection Act §§ 603, 609, 15 U.S.C.A. §§ 1681a(d)(1), 1681a(f), 1681g(a).

[19] **Finance, Banking, and Credit** Persons Liable

Telecommunications Privilege or immunity

A Fair Credit Reporting Act (FCRA) claim must first impose liability on defendant as publisher or speaker of information, in order for immunity to apply to the defendant for that claim under the Communications Decency Act (CDA). Consumer Credit Protection Act §§ 603, 609, 15 U.S.C.A. §§ 1681a(d)(1), 1681a(f), 1681g(a); Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[20] **Telecommunications** Privilege or immunity

When considering whether any claim treats a defendant as a publisher, as will support immunity under the Communications Decency Act (CDA), the court must look beyond the claim's formal elements. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[21] **Telecommunications** Privilege or immunity

In determining whether a claim seeks to hold defendant liable as a publisher, as will support immunity under the Communications Decency Act, the court looks to see what the plaintiff in the particular case must prove, that is, if the plaintiff's recovery requires treating the defendant as a publisher. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[22] **Finance, Banking, and Credit** 🔑 Persons Liable

Telecommunications 🔑 Privilege or immunity

Job seekers' claim against website operator, alleging that operator violated the Fair Credit Reporting Act (FCRA) by failing to provide the job seekers with a copy of their own consumer reports along with a notice of their consumer rights under the FCRA did not seek to hold operator liable "as a publisher" of information, and thus operator was not entitled to immunity for any such FCRA violations under the Communications Decency Act (CDA); claim was not based on operator's failure to disseminate information to a third party. Consumer Credit Protection Act § 609, 15 U.S.C.A. § 1681g; Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[23] **Finance, Banking, and Credit** 🔑 Persons Liable

Telecommunications 🔑 Privilege or immunity

Job seekers' claim against website operator, alleging that operator violated the Fair Credit Reporting Act (FCRA) by failing to obtain certification from a potential employer requesting consumer reports that it has complied with the FCRA and would not use the information in violation of the law and by failing to provide summary of consumer's FCRA rights to the requesting employer, did not seek to hold operator liable "as a publisher" of information, and thus operator was not entitled to immunity for any such FCRA violations under the Communications Decency Act (CDA); claim was not based on operator's failure to disseminate information to a third party, and claim did not depend on the information's improper content. Consumer Credit Protection Act § 604, 15 U.S.C.A. § 1681b(b)(1); Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[24] **Finance, Banking, and Credit** 🔑 Liability for inaccurate or incomplete information

A consumer bringing a Fair Credit Reporting Act (FCRA) claim against a consumer reporting agency for failure to follow reasonable procedures to assure maximum possible accuracy of the information in a consumer report must show that the consumer report contains inaccurate information. Consumer Credit Protection Act § 607, 15 U.S.C.A. § 1681e(b).

[25] **Finance, Banking, and Credit** 🔑 Credit reporting

A private plaintiff bringing a Fair Credit Reporting Act (FCRA) claim against a consumer reporting agency for failure to follow reasonable procedures to assure maximum possible accuracy of the information in a consumer report must show that the reporting agency disseminated information to third parties to satisfy Article III standing. U.S. Const. art. 3, § 2, cl. 1; Consumer Credit Protection Act § 607, 15 U.S.C.A. § 1681e(b).

[26] **Finance, Banking, and Credit** 🔑 Persons Liable

Telecommunications 🔑 Privilege or immunity

Website operator that allegedly disseminated consumer reports to requesting employers that included inaccurate or incomplete criminal background information about job seekers was allegedly "information content provider" not entitled to immunity under Communications Decency Act (CDA) for job seekers' Fair Credit Reporting Act (FCRA) claims, alleging failure to maintain reasonable procedures to ensure accuracy of information in consumer reports; operator allegedly obtained public criminal records, stripped certain information from the public records, replaced that information with its own summaries of criminal charges and their dispositions, did not look for or fix inaccuracies in that information before including it in reports, and sold the reports to requesting employers. Consumer Credit Protection Act § 607, 15 U.S.C.A. § 1681e(b); Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[27] **Telecommunications** Privilege or immunity

A defendant can be both a provider or user of an interactive computer service and also an information content provider, and when a defendant is both, the immunity provision of the Communications Decency Act (CDA) does not apply. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

1 Case that cites this headnote

[28] **Telecommunications** Privilege or immunity

When provider of interactive computer service also provides the challenged information at issue in the claim, it receives no protection from liability under the Communications Decency Act (CDA). Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[29] **Telecommunications** Privilege or immunity

An interactive computer services company is "information content provider," for purpose of determining entitlement to immunity under the Communications Decency Act (CDA), if it is responsible, in whole or in part, for the creation or development of the information at issue. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[30] **Telecommunications** Privilege or immunity

The Communications Decency Act (CDA) bars liability against internet computer service companies that serve as intermediaries for other parties' potentially injurious messages. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[31] **Telecommunications** Privilege or immunity

An interactive computer service is not responsible for developing the unlawful information, as will defeat immunity under the Communications Decency Act (CDA), unless they have gone beyond the exercise of traditional editorial functions and materially contributed to what made the content unlawful. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[32] **Telecommunications** Privilege or immunity

Whether a defendant developed information such that they are an "information content provider" not entitled to immunity under the Communications Decency Act turns on whether the defendant has materially contributed to the pieces of information relevant to liability. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[33] **Telecommunications** Privilege or immunity

An interactive computer service provider becomes an "information content provider," supporting denial of immunity under the Communications Decency Act (CDA), whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

[34] **Telecommunications** Privilege or immunity

The Communications Decency Act (CDA) does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

***115** Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry E. Hudson, Senior District Judge. (3:20-cv-00294-HEH)

Attorneys and Law Firms

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Before AGEE, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Opinion

Reversed and remanded by published opinion. Judge Richardson wrote the opinion, in which Judge Agee and Judge Quattlebaum joined.

RICHARDSON, Circuit Judge:

***117** Section 230(c)(1) of the Communications Decency Act protects some parties operating online from specific claims that would lead to liability for conduct done offline. But it is not a license to do whatever one wants online. Protection under § 230(c)(1) extends only to bar certain claims imposing liability for specific information that another party provided.

Public Data sought § 230(c)(1) protection against four claims brought against it for violating the Fair Credit Reporting Act ("FCRA"). The district court agreed that the claims were precluded by § 230(c)(1). Plaintiffs appealed, arguing that § 230(c)(1) does not apply. We agree. Plaintiffs have alleged facts that, if true, render § 230(c)(1) inapplicable to their four claims. So we reverse the district court and remand for further proceedings.

I. Background

[1] **[2]** Defendants are The Source of Public Data, L.P.; ShadowSoft, Inc.; Harlington-Straker Studio, Inc.; and Dale Bruce Stringfellow. Defendants' relation to each other and to the website PublicData.com is complex but unimportant to this appeal. Rather than break out the white board and red string to understand how they fit together, we accept on appeal Plaintiffs' allegation that all Defendants are alter egos jointly responsible for any FCRA liability arising from the business activities conducted on PublicData.com.[1] So we refer to Defendants collectively as "Public Data."

[1] This case comes to us on appeal from the district court's grant of a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). Our review is de novo, and we apply the same standards as we would for a Rule 12(b)(6) motion. *Massey v. Ojaniit*, 759 F.3d 343, 353 (4th Cir. 2014). This means that we accept all well-pleaded facts in the complaint as true. *Drager v. PLIVA USA, Inc.*, 741 F.3d 470, 474 (4th Cir. 2014). Given the procedural posture, our factual summary takes Plaintiffs' Second Amended Complaint at face value.

Public Data's business is providing third parties with information about individuals. Plaintiffs allege that it involves four steps.

First, Public Data acquires public records, such as criminal and civil records, voting records, driving information, and professional licensing. These records come from various local, state, and federal authorities (and other businesses that have already collected those records).

Second, Public Data "parses" the collected information and puts it into a proprietary format. This can include taking steps ***118** to "reformat and alter" the raw documents, putting them "into a layout or presentation [Public Data] believe[s] is more user-friendly." J.A. 16. For criminal records, Public Data "distill[s]" the data subject's criminal history into "glib statements," "strip[s] out or suppress[es] all identifying information relating to the charges," and then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30.

Third, Public Data creates a database of all this information which it then "publishes" on the website PublicData.com. Public Data does not look for or fix inaccuracies in the database, and the website disclaims any responsibility for inaccurate information. Public Data also does not respond to requests to correct or remove inaccurate information from the database.

Fourth, Public Data sells access to the database, "disbursing [the] information ... for the purpose of furnishing consumer reports to third parties." J.A. 19. All things told, Plaintiffs allege that Public Data sells 50 million consumer searches and reports per year. Public Data knows that traffic includes some buyers using its data and reports to check creditworthiness and some performing background checks for employment purposes.

Plaintiffs allege that Public Data's activities injured them. Plaintiffs Henderson, Harrison, and McBride have each requested a copy of the records Public Data keeps on them, but Public Data has not provided those records. Plaintiff McBride also alleges that he applied for a job that required a background check. As part of that check, his potential employer used a background report from Public Data. Public Data's report on McBride was inaccurate because it contained misleading and incomplete criminal history. McBride was not hired. [2]

2 McBride alleges that he learned about the inaccurate information included in the report when he sued his potential employer and obtained the report in discovery.

Plaintiffs bring four claims against Public Data alleging it violated four provisions of the FCRA. [3] Underlying each claim is the contention that Public Data must comply with the FCRA because they produce "consumer report[s]" and are a "consumer reporting agency" under the Act. [4]

3 Plaintiffs together represent a putative class for Count One, Plaintiff McBride alone represents a class for Counts Two and Three, and Count Four is an individual claim brought by Plaintiff McBride. Given the posture of this case, we express no opinion on the class allegations or propriety of class certification.

4 These terms are defined in 15 U.S.C. § 1681a(d) and (f), respectively. Since the only issue on appeal is whether 47 U.S.C. § 230(c)(1) bars Plaintiffs' claims, we do not address whether Public Data qualifies as a "consumer reporting agency" under the FCRA.

In Count One, Plaintiffs allege that Public Data violated § 1681g [5] by failing to provide them a copy of their own records and a notice of their FCRA rights when requested. In Count Three, Plaintiff McBride alleges that Public Data violated § 1681b(b)(1) [6] by failing to get certain ***119** certifications from employers it provided reports to, and by failing to provide those employers with a consumer-rights summary. Counts Two and Four both seek to impose liability for Public Data's failure to maintain proper procedures to ensure accurate information. Count Two alleges that Public Data violated § 1681k(a) [7] by failing to notify Plaintiffs when it provided their records for employment purposes and by failing to establish adequate procedures to ensure complete and up to date information in those records. And in Count Four, Plaintiff McBride alleges, for himself only, that Public Data violated § 1681e(b) [8] by not implementing sufficient procedures to ensure accuracy in its reports.

5 "Every consumer reporting agency shall, upon request ... clearly and accurately disclose to the consumer" certain information including "[a]ll information in the consumer's file at the time of the request," "[t]he sources of the information," and the "[i]dentification of each person ... that procured a consumer report" within the two years before the request, if procured "for employment purposes," or within one year otherwise. 15 U.S.C. § 1681g(a)(1)–(3).

6 Section 1681b(b)(1) requires that a consumer reporting agency obtain certifications from its employer-customers stating they will comply with § 1681b(b)(2)(A), and that the consumer reporting agency provide those employer-customers with a summary of the consumer's rights. 15 U.S.C. § 1681b(b)(1).

7 "A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment shall—(1) at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or (2) maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date." 15 U.S.C. § 1681k(a).

8 "Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

Public Data moved for judgment on the pleadings, arguing that each claim was barred by § 230(c)(1). The district court agreed and granted judgment for Public Data. *See Henderson v. Source for Pub. Data*, 540 F. Supp. 3d 539, 543 (E.D. Va. 2021). Plaintiffs appealed, and we have jurisdiction under 28 U.S.C. § 1291.

II. Discussion

Section 230 provides internet platforms with limited legal protections. *See generally* Adam Candeub, *Reading Section 230 as Written*, 1 J. Free Speech L. 139 (2021). Subsection 230(c)(1) prohibits treating an interactive computer service as a publisher or speaker of any information provided by a third party. And § 230(c)(2) bars liability for a platform's actions to restrict access to obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise-objectionable material.

On appeal, this case deals exclusively with the protection provided by § 230(c)(1): "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Read plainly, this text requires that a defendant like Public Data must establish three things to claim protection: (1) The defendant is a " 'provider or user of an interactive computer service' "; (2) the plaintiff's claim holds the defendant "responsible 'as the publisher or speaker of any information' "; and (3) the relevant information was " 'provided by another information content provider.' " *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (quoting § 230(c)(1)).[9] These three requirements ***120** look first to the defendant's status (i.e., are they a provider or user of an "interactive computer service"), then to the kind of claim the plaintiff has brought (i.e., does the plaintiff treat the defendant as a publisher or speaker of information), and finally to the source of the information underlying the plaintiff's claim (i.e., who provided the information).

9 There was some confusion below about these requirements. *See Henderson*, 540 F. Supp. 3d at 547. And that is understandable given that we have not been clear about separating (c)(1)'s three distinct requirements. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (discussing the protection in broad terms, without separating into distinct prongs). But when grappling with § 230(c)(1), we have applied these ideas, if not always in a neat and ordered row. *See id.* (discussing (1) "service providers" being (2) held "liable for information originating with a third-party user of the service," (3) "in a publisher's role"); *see also Nemet*, 591 F.3d at 254–55; *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139–40 (4th Cir. 2019). To avoid confusion, we follow our sister circuits and read the statute to create three requirements. *See HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173 (2d Cir. 2016); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267–68 (D.C. Cir. 2019).

[3] Public Data asserts that its activities, as described in Plaintiffs' FRCA claims, satisfy all three § 230(c)(1) requirements, so that § 230(c)(1) bars those claims. Plaintiffs disagree. For this appeal, they admit that Public Data is an interactive computer service[10] but challenge the other two requirements necessary for § 230(c)(1) protection. On the second requirement, Plaintiffs argue their claims do not treat Public Data as the publisher or speaker of the offending information. And on the third requirement, Plaintiffs allege that Public Data *itself* acted as an "information content provider" of the offending information such that the information did not come solely from "*another* information content provider."

10 "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." § 230(f)(2). Hosting a website "enables computer access by multiple users to a computer server." *See LeadClick*, 838 F.3d at 174 ("Courts typically have held that internet service providers, website exchange systems, online message boards, and search engines fall within this definition.").

We conclude that § 230(c)(1) does not bar Counts One and Three because those claims do not treat Public Data as a publisher or speaker of information. For Counts Two and Four, we need not determine whether this second requirement is met because we conclude that Plaintiffs have alleged enough facts to plausibly infer that Public Data is an information content provider that provided the improper information. As Public Data cannot establish at this stage that it meets the third requirement for Counts Two and Four, § 230(c)(1) does not now apply. So we reverse, and all claims are remanded for further proceedings consistent with this opinion.

A. Requirement Two: Publisher or Speaker of Information

[4] Section 230(c)(1)'s second requirement asks whether the plaintiff's legal claim requires that the defendant be "treated as the publisher or speaker of any information." In other words, for protection to apply, the claim must turn on some "information," and must treat the defendant as the "publisher or speaker" of that information. *See* § 230(c)(1) (No internet platform "shall be treated as the publisher or speaker of any information ..."); *see also* *Zeran*, 129 F.3d at 330 (describing § 230(c)(1) as protecting a defendant from being "liable for information" when the defendant acts in the "publisher's role" for that information). A claim treats the defendant "as the publisher or speaker of any information" when it (1) makes the defendant liable for publishing certain information ***121** to third parties, and (2) seeks to impose liability based on that information's improper content.

[5] **[6]** **[7]** **[8]** Our precedent demands that we ask whether the claim "thrust[s]" the interactive service provider "into the role of a traditional publisher." *Zeran*, 129 F.3d at 332. The term "publisher" as used in § 230(c)(1) "derive[s] [its] legal significance from the context of defamation law." *Id.* [11] Thus, the scope of "the role of a traditional publisher," and therefore the scope of what § 230(c)(1) protects, is guided by the common law. *See* *id.* ("[Defendant] falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." (citing W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 803 (5th ed. 1984)). [12]

11 When "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling v. United States*, ––– U.S. ––––, 139 S. Ct. 544, 551, 202 L.Ed.2d 512 (2019) (internal citation and quotation marks omitted). "Publisher" is just such a transplanted word. Section 230(c)(1) altered the way common-law-defamation claims would apply to users and providers of interactive computer services that the common law would otherwise hold liable as publishers. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, ––– U.S. ––––, 141 S. Ct. 13, 14, 208 L.Ed.2d 197 (2020) (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710, at *3–*4 (N.Y. Sup. Ct. May 24, 1995)); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("Section 230 marks a departure from the common-law rule that allocates liability to publishers ... of tortious material written or prepared by others.").

12 Defamation at common law distinguished between publisher and distributor liability but *Zeran* did not make this distinction. Instead, *Zeran* determined that distributor liability "is merely a subset, or a species, of publisher liability" and so treated them the same under § 230(c)(1). *Zeran*, 129 F.3d at 332. The decision has been questioned for failing to make this distinction. *See, e.g.*, *Malwarebytes*, 141 S. Ct. at 14–15 (Thomas, J., statement respecting denial of certiorari). But the approach taken in the Fourth Circuit since *Zeran* has been clear, and the parties have made no arguments based on this distinction.

[9] **[10]** **[11]** At common law, a publisher was someone who intentionally or negligently disseminated information to third parties. [13] In this context, a third party is someone other than the subject of the information disseminated. [14] Thus, for a claim to treat someone as a publisher under § 230(c)(1), the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not the subject of the information.

13 *See* Restatement (Second) of Torts § 577, at 201 (Am. L. Inst. 1965) ("Publication of defamatory matter is its communication intentionally or by a negligent act to one other than the person defamed."); *Publish*, Black's Law Dictionary 1268 (8th ed. 2004) (defining "publish" as including "[t]o distribute copies ... to the public" and "[t]o communicate (defamatory words) to someone other than the person defamed"); *Yousling v. Dare*, 122 Iowa 539, 98 N.W. 371, 371 (1904) ("The cases ... uniformly hold that ... the sending of a communication containing defamatory language directly to the person defamed, without any proof that, through the agency or in pursuance

of the intention of the sender, it has come to the knowledge of any one else, does not show such publication as to render the sender liable in damages.").

14 *See* Restatement (Second) of Torts § 577 cmt. b, at 202 (Am. L. Inst. 1965); *Scottsdale Cap. Advisors Corp. v. The Deal, LLC*, 887 F.3d 17, 21 (1st Cir. 2018) ("[P]ublication, does not mean merely uttering or writing. Rather, 'publication' ... means to communicate the defamatory material to a third party (that is, a party who is not the subject of the defamatory material) ..."); *Sheffill v. Van Deusen*, 79 Mass. 304, 305 (1859) (asserting that there can be no publication unless the words spoken were heard by third persons).

***122 [12] [13] [14] [15]** But that alone is not enough. To meet the second requirement for § 230(c)(1) protection, liability under the claim must be "based on the *content of the speech published*" by the interactive service provider. *Erie Insurance Co.*, 925 F.3d at 139. At common law, defamation required publishing a "false and defamatory statement." Restatement (Second) of Torts § 558(a), at 155 (Am. L. Inst. 1965). The publisher was held liable because of the improper nature of the content of the published information. [15] In other words, to hold someone liable as a publisher at common law was to hold them responsible for the content's improper character. We have interpreted "publisher" in § 230(c)(1) in line with this common-law understanding. Thus for § 230(c)(1) protection to apply, we require that liability attach to the defendant on account of some improper content within their publication. *See Erie Ins. Co.*, 925 F.3d at 139–40 ("There is no claim made based on the *content of speech published* by [Defendant]—such as a claim that [Defendant] had liability as the publisher of a misrepresentation of the product or of defamatory content.").

15 Other information-based torts at common law follow this mold, imposing liability on publishers for the improper nature of their disseminated content. For example, false-light claims hold a publisher liable only when there is "at least an implicit false statement of objective fact." *Flowers v. Carville*, 310 F.3d 1118, 1132 (9th Cir. 2002). And publisher liability at common law did not always require that the "impropriety" of the content be that it was false and defamatory. Claims based on publicity given to private life impose liability on a publisher for information that is "highly offensive to a reasonable person." Restatement (Second) of Torts § 652D, at 383 (Am. L. Inst. 1965). Reaching further back, publishers in England were prosecuted under a fourteenth century statute banning "constructive treason" for printing "seditious, poisonous, and scandalous" information even if that information was not false and defamatory. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 100–101 (1984); Geoffrey R. Stone et al., Constitutional Law 1009–10 (8th ed. 2018). Similarly, while libel required that the published information dishonor another or provoke violence, "truth was no defense." Philip Hamburger, *The Development of the law of Seditious Libel and the Control of the Press*, 37 Stan. L. Rev. 661, 712 (1985).

While it is commonly accepted that Congress passed § 230 in part as reaction to a case involving a defamation suit against an internet company, *see Malwarebytes, Inc.*, 141 S. Ct. at 14 (Thomas, J., statement respecting denial of certiorari) (discussing *Stratton*, 1995 WL 323710), § 230(c)(1) protection is not limited to defamation suits.

[16] This improper-content requirement helps dispel Public Data's notion that a claim holds a defendant liable as a publisher anytime there is a "but-for" causal relationship between the act of publication and liability. *See* Appellee's Response Brief 20–21 ("Put another way, had Public Data not published court records on its website, Plaintiffs could not have brought their Section 1681g(a) claim."). This "but-for" publication test would say a claim treats an entity as a "publisher" under § 230(c)(1) if liability hinges in any way on the act of publishing. This but-for test bears little relation to publisher liability at common law. To be held liable for information "as the publisher or speaker" means more than that the publication of information was a but-for cause of the harm. *See Erie Ins. Co.*, 925 F.3d at 139–40; *HomeAway.com*, 918 F.3d at 682.

Erie Insurance is a good example. There, we held that Amazon was not protected by § 230(c)(1) in a product-liability suit even though publishing information was a but-for cause of the harm—i.e., the product was bought from Amazon's website, making the advertisement's publication a necessary link in the causal chain that led to setting the buyer's house on ***123** fire. *See Erie Insurance Co.*, 925 F.3d at 138–40. Though publishing information was a but-for cause, we refused to apply § 230(c)(1) protection because the plaintiff's product-liability claim was based on Amazon "as the seller of the defective product ... [not] the *content of speech published* by Amazon." *Id.* at 139–40.

So, to paraphrase the test we began with, a claim only treats the defendant "as the publisher or speaker of any information" under § 230(c)(1) 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.

[17] **[18]** **[19]** Based on these two requirements, we can see that § 230(c)(1) does not provide blanket protection from claims asserted under the FCRA just because they depend in some way on publishing information. Yes, the FCRA imposes procedural obligations on any "consumer reporting agency." *See Ross v. FDIC*, 625 F.3d 808, 812 (4th Cir. 2010) ("The FCRA is a comprehensive statutory scheme designed to regulate the consumer reporting industry."). And each claim here alleges that Public Data ignored those obligations as a member of that regulated industry. [16] So publishing information online is a but-for cause of Public Data being a consumer reporting agency subject to the FCRA's requirements. Most of what Public Data allegedly does, after all, is publish things on the internet. That means that publishing information is one but-for cause of these FCRA claims against Public Data. If Public Data is a "consumer reporting agency" subject to FCRA liability, it is one because it is the publisher or speaker of consumer report information. Yet that alone is not sufficient, as we do not apply a but-for test. *See Erie Ins.*, 925 F.3d at 139–140; *HomeAway.com*, 918 F.3d at 682. We must instead examine each specific claim. [17]

16 Each FCRA claim here is triggered by a defendant's status as a "consumer reporting agency" as defined in 15 U.S.C. § 1681a(f). *See* 15 U.S.C. §§ 1681g(a) ("Every consumer reporting agency shall"); 1681k(a) ("A consumer reporting agency ... shall"); 1681b(b)(1) ("A consumer reporting agency may furnish a consumer report for employment purposes only if"); 1681e(b) ("Whenever a consumer reporting agency prepares a consumer report it shall").
A "consumer reporting agency" is defined as "any person which, for monetary fees ... regularly engages ... in the practice of assembling or evaluating consumer credit information ... for the purpose of furnishing consumer reports to third parties." § 1681a(f). Circular as it is, "companies that regularly prepare consumer reports" are consumer reporting agencies. *Berry v. Schulman*, 807 F.3d 600, 605 (4th Cir. 2015). The district court did not determine whether Plaintiffs made sufficient allegations to prove that Public Data is a "consumer reporting agency," and we take no position on that question. Of course, Public Data may contest that claim below. But here we only consider the preliminary question of whether § 230 bars Plaintiffs' FCRA claims even if Public Data is a "consumer reporting agency."

17 Section 230(e) catalogues other laws for which § 230(c)(1) must not be construed to impair. And the FCRA is not on the that list. But that tells us little about whether § 230(c)(1) can bar specific FCRA claims because § 230(e) does not establish "an exception to a prohibition that would otherwise reach the conduct excepted." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 582, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). Instead, it suggests a "clarification of the meaning of [§ 230] rather than an exception" to its coverage. *Id.* at 586, 108 S.Ct. 1392. In other words, a FCRA claim must first impose liability on the defendant as the publisher or speaker of information to trigger the FCRA in the first place. If it does, then § 230(c)(1) can apply to FCRA claims. And if it does not, then § 230(c)(1) will not apply.

It is also true that, at a high level, liability under the FCRA depends on the ***124** content of the information published. Both the definition of "consumer reporting agency" and the definition of "consumer reports" reference "credit information" or "information ... bearing on a consumer's credit worthiness." § 1681a(d)(1), (f). If Public Data and its activities did not meet these definitions, there could be no liability under these FCRA claims. In this way, liability for each claim hinges on the published information's content. Yet, while the informational content matters, § 230(c)(1) protects Public Data only from claims that demand the information's content be improper before imposing liability. And, as a class, there is nothing improper about "credit information" or "information ... bearing on a consumer's credit worthiness." Again, we must examine each specific claim in context to see if the claim treats Public Data as a publisher under § 230(c)(1).

[20] **[21]** **[22]** Finally, when considering whether any claim treats Public Data as a publisher, our precedent teaches that we must look beyond the claim's formal elements. Beginning in *Zeran*, our Court has stressed a functional approach. In our functional analysis, we ask whether holding this defendant liable requires treating them as a publisher, not whether every abstract violation requires it. *See Zeran*, 129 F.3d at 332; *Erie Ins. Co.*, 925 F.3d at 139. To make this determination, we look to see what the plaintiff in our case must prove. If the plaintiff's recovery requires treating the defendant as a publisher, then the defendant has satisfied § 230(c)(1)'s second requirement.

Zeran itself is instructive. There, Kenneth Zeran made a negligence claim against AOL. *Zeran*, 129 F.3d at 332. A defendant can, of course, be negligent without publishing anything. Yet Zeran asserted that AOL was negligent "because it communicated to third parties an allegedly defamatory statement." *Id.* at 333. That is, Zeran's specific negligence claim treated the defendant as a publisher. So while not every negligence claim treats a defendant as a publisher, Zeran's negligence claim did; so we held that claim was foreclosed by § 230(c)(1). *Id.* at 332–33.

We thus turn to the four specific claims asserted.

Count One is based on FCRA § 1681g and does not seek to impose liability on Public Data as a speaker or publisher of any information. Section 1681g requires consumer reporting agencies to give consumers a copy of their own consumer report along with an FCRA notice upon request.[18] So it is based on a failure to disseminate information about an individual to that same individual, not a third party. Recall that "[p]ublication of defamatory matter is its communication intentionally or by a negligent act *to one other than the person defamed.*" *See* Restatement (Second) of Torts § 577, at 201 (emphasis added). So Section 1681g does not seek to hold Public Data liable "as the publisher" ***125** under § 230(c)(1), and § 230(c)(1) does not bar Count One.

18 *Zeran* left the door open to finding § 230(c)(1) protection applies when a claim holds a party liable for a decision not to publish, *Zeran*, 129 F.3d at 330, and we need not decide here if we should shut it. *Zeran* *suggested* that it might allow § 230(c)(1) to bar claims whenever avoiding liability under those claims would require acting as a publisher. *Id.* In other words, it is possible to read *Zeran* as applying § 230(c)(1) protection when an interactive service provider would be held liable for failing to publish information. *See id.; see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir .2016) (implying that not providing a warning can be an act of publishing by considering whether § 230(c)(1) could bar a negligent-failure-to-warn claim). Since even in those circumstances the failure to publish would still need to relate to information meant to be disseminated to third-parties, we need not reach this question here.

[23] Like Count One, Count Three does not treat Public Data as a speaker or publisher. Count Three seeks to impose liability on Public Data for violating § 1681b(b)(1), which lays out two requirements that a consumer reporting agency must meet before they may provide a consumer report "for employment purposes." § 1681b(b)(1). First, the employer who gets the report must certify both that they have complied with the FCRA's requirements and that they will not use the information in violation of state or federal law. § 1681b(b)(1)(A)(i)–(ii). And, second, the consumer reporting agency must also provide a summary of the consumer's FCRA rights to the employer. § 1681b(b)(1)(B).

The requirement that a consumer reporting agency obtain certification from an employer is easily disposed of because liability is in no way based on the improper content of any information spoken or published by Public Data. Here, if liability is based on information, it is only Public Data's failure to obtain the required information (certification) from the employer that matters.

Slightly more vexingly, Count Three also does not treat Public Data as a publisher because liability depends on Public Data's failure to provide a summary of consumer rights to the putative employer (§ 1681b(b)(1)'s second requirement). Even if Public Data's decision to not provide the required summary could be described as a publisher's decision, the information it failed to provide is proper and lawful content. And § 230(c)(1) applies only when the claim depends on the content's impropriety. Therefore, Public Data's failure to summarize consumer rights cannot fall within § 230(c)(1) protection.

Unlike Counts One and Three, Counts Two and Four *may* seek to hold Public Data liable as the publisher of information. Section 1681e(b), the basis for Count Four, requires that a consumer reporting agency "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Likewise, liability under § 1681k(a), the gravamen of Count Two, requires that a consumer reporting agency that is selling consumer reports "for employment purposes" which "are likely to have an adverse effect on a consumer's ability to obtain employment" must "maintain strict procedures" to ensure that any consumer information "is complete and up to date." §§ 1681k(a), 1681(k)(a)(2).[19] Thus, both claims seek to impose liability based on an agency's failure to maintain proper procedures to ensure accurate information. On its face, liability for failing to maintain proper procedures does not seem to fall within § 230(c)(1)'s ambit as we have described it. After all, the FCRA's statutory language here requires neither dissemination of information to third parties nor improper content. Yet a little digging uncovers two levels of complexity.

19 Liability under § 1681k(a) also requires that the defendant fail to provide notifications to the consumer that the report was provided to a potential employer. § 1681k(a)(1). We have already explained why a consumer-notification requirement like this does not impose liability on Public Data as a publisher or speaker of information —it is a failure to disseminate information about an individual to that same individual, not a third party.

[24] First, current Fourth Circuit precedent requires that a plaintiff bringing a claim under both § 1681e(b), and by implication § 1681k(a), show the defendant's "consumer report contains inaccurate information." ***126** *Dalton v. Capital Associated Industries, Inc.*, 257 F.3d 409, 415 (4th Cir. 2001). Though the textual basis for requiring an inaccuracy is unclear, *Dalton* provided that liability under Counts 2 and 4 depend on inaccurate information.[20] And that suggests that Counts 2 and 4 thus functionally impose liability on the defendant based on the information's impropriety.

20 *Dalton* held that violating § 1681e(b) requires inaccurate information. *Id.* While *Dalton* did not address § 1681k(a)'s reasonable-procedures requirement, we see no principled way to distinguish the two provisions and so read *Dalton* to require the same inaccuracy.

[25] Second, a private plaintiff bringing a claim in federal court, as is the case here, under § 1681e(b) or § 1681k(a) must show that Public Data disseminated information to third parties to satisfy Article III standing. *TransUnion LLC v. Ramirez*, — U.S. ——, 141 S. Ct. 2190, 2214, 210 L.Ed.2d 568 (2021). The statutory provisions might be violated without the dissemination of any information, as the FCRA itself does not condition these provisions on disseminating the report but on failing to follow proper procedures to ensure a report's accuracy. But a private plaintiff lacks standing to bring a reasonable-procedures claim unless the plaintiff's report was provided to a third party. *Id.* So it may be that these reasonable-procedures claims turn on Public Data providing the inaccurate information to a third party.[21] *See id.*; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016) (providing "entirely accurate" information without complying fully with the FCRA's procedures is a "bare procedural violation" that cannot "satisfy ... Article III"). Considering past precedent and the Constitution's limited judicial power, perhaps Counts Two and Four functionally depend on Public Data disseminating inaccurate information to a third party. But we need not, and do not, decide whether our functional approach can stretch the meaning of being "treated as the publisher or speaker of any information" far enough to cover Counts Two and Four. For as we will see, Public Data was "another information content provider" for the information at issue in Counts 2 and 4. So, based on the third requirement, § 230(c)(1) protection fails for those two counts.

21 Again, at least in federal court. *See TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting) (suggesting a non-publication claim could be brought in state court).

B. Requirement Three: Provided by Another Information Content Provider

The third and final requirement for § 230(c)(1) protection is that the information at issue in the plaintiff's claim be "provided by *another* information content provider." § 230(c)(1) (emphasis added). An " 'information content provider' means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." § 230(f)(3).

[26] **[27]** **[28]** Plaintiffs argue that this third requirement is not met because Public Data itself is an "information content provider" for the relevant information.[22] We ***127** agree. The plaintiffs' complaint plausibly alleges that Public Data is an information content provider for the information that creates liability under these two counts. So, on these alleged facts, § 230(c)(1) does not bar Counts Two and Four. [23]

22 Public Data can be both "a provider or user of an interactive computer service" and also the "information content provider." And when a defendant is both, § 230(c)(1) provides no protection. Section 230(c)(1) applies only when the information for which liability is being imposed on the provider or user of an interactive computer service is "provided" by "another" information content provider. § 230(c)(1). The use of the modifier *another* shows that an interactive computer service provider can be an information content provider at the same time. *See* § 230(c)(1) ("No *provider or user of an interactive computer service* shall be treated as the publisher or speaker of any information provided by *another* information content provider." (emphasis added)). And when a provider of an interactive computer service also provides the information at issue in a claim, it receives no protection under § 230(c)(1). *See Nemet*, 591 F.3d at 254. In other words, § 230(c)(1) does not protect entities for their own speech, it protects them only when they serve as a conduit for other's speech. *See Zeran*, 129 F.3d at 333.

23 Since we determine that Public Data is an information content provider, we do not address Plaintiffs' argument that "provided" in the statute means "provided *to the internet user*" not "provided *to the internet company.*" Appellee's Brief 34–35; *see, e.g., Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003) ("The structure and purpose of § 230(c)(1) indicate that the immunity applies only with regard to third-party information provided *for use on the Internet.*").

[29] Public Data is an "information content provider" if they are "responsible, in whole or in part, for the creation or development" of the information at issue. This Court has never fully defined the terms "creation" or "development" as they are used in the statute. But we have explained that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran*, 129 F.3d at 330; *see also Nemet*, 591 F.3d at 258 ("creation" or "development" of information requires "something more than [what] a website operator performs as part of its traditional editorial function").

Other circuits have put more flesh onto these definitions, determining that an interactive computer service provider or user is responsible for the development [24] of the information at issue in the case if they "directly and 'materially' contributed to what made the content itself 'unlawful.' " *Force v. Facebook*, 934 F.3d 53, 68 (2d Cir. 2019) (quoting *LeadClick*, 838 F.3d at 174); *see Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (explaining that a defendant is an information content provider if they "contribute[d] materially to the alleged illegality of the conduct"); *Jones*, 755 F.3d at 413 ("Consistent with our sister circuits, we adopt the material contribution test."). And while this Court has never explicitly adopted "material contribution" as the test, we applied it in *Nemet* to determine that the website operator there was not an information content provider. *See Nemet*, 591 F.3d at 257–58 (noting that the plaintiff failed to allege that the website operator "contributed to the allegedly fraudulent nature of the comments at issue").

24 Since we find that Public Data has "developed" the information at issue we need not consider whether it might also have "created" that information.

[30] **[31]** Additionally, the material-contribution test fits well within our broader § 230(c)(1) jurisprudence. *Zeran* and *Nemet* rest on the principle that liability for an interactive computer service user or provider must turn on "something more than ... its traditional editorial function." *Nemet*, 591 F.3d at 258 (citing *Zeran*, 129 F.3d at 330). All the material-contribution test does is put a more helpful name to this "something more" standard. And defining "something more" as a material contribution makes sense. As *Zeran* notes, § 230 bars liability against "companies that serve as intermediaries for other parties' potentially injurious messages." ***128** *Zeran*, 129 F.3d at 330–31. But where a company materially contributes to a message's unlawful content, that company stops being a mere "intermediary" for another party's message. Instead, the company is adding new content to the message that harms the plaintiff. We thus hold that an interactive computer service is not responsible for developing the unlawful information unless they have gone beyond the exercise of traditional editorial functions and materially contributed to what made the content unlawful.

[32] Whether a defendant developed information such that they are an "information content provider" turns on whether the defendant has materially contributed to the piece(s) of information relevant to liability. Section 230(c)(1) applies if a defendant has materially contributed only to parts of the disseminated information that do not make the disseminated information unlawful (if § 230(c)(1) is otherwise applicable). For example, in *Jones*, the Sixth Circuit determined that a website had not materially contributed to defamatory content that it hosted. *Jones*, 755 F.3d at 416. This was so even though the website operator had authored his own comments underneath the alleged defamatory material. *Id.* In drawing this conclusion, the court noted that "[t]o be sure, [the operator] was an information content provider as to his comment ... [b]ut [Plaintiff] did not allege that [the operator's] comments were defamatory." *Id.* In other words, the § 230(c)(1)'s third requirement did not turn on whether the defendant materially contributed to some part of the total information disseminated—i.e., the entire post—but on whether the defendant materially contributed to the defamatory aspect of the information. *Id.*; *see La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020) (applying liability when defendant was responsible for the content's defamatory portion). Our approach is the same. *See Nemet*, 591 F.3d at 255–60 (discussing twenty allegedly defamatory posts in separate groups based on the defendant's involvement with the posts before concluding that the plaintiff failed to show that defendant "was responsible for the creation or development of the allegedly defamatory content at issue").

Plaintiffs have alleged enough facts to show that Public Data's own actions contributed in a material way to what made the content at issue in Counts Two and Four inaccurate and thus improper. Plaintiff McBride claims that the report Public Data sent to his potential employer was inaccurate because it omitted or summarized information in a way that made it misleading. And, from Plaintiffs' allegations, it is plausible that McBride's report was misleading based on Public Data's own actions.

As a general matter, Plaintiffs claim that Public Data handles criminal matters by "strip[ping] out or suppress[ing] all identifying information relating to the charges ... [including] dispositions" and that it then "replace[s] this information with [its] own internally created summaries of the charges, bereft of any detail." J.A. 30. As to McBride's report specifically, Plaintiffs allege that the report "suggest[ed] that Plaintiff McBride had been convicted of each of the offenses listed," but that "the report was inaccurate and incomplete as it failed to indicate that several of the offenses listed had been nolle prossed." J.A. 37–38. These allegations, and all reasonable inferences, sufficiently allege that the inaccuracies in McBride's report resulted from Public Data's stripping out the nolle prosequi disposition for McBride's charges and adding in its own misleading summaries.

[33] Thus, on Plaintiffs' allegations, Public Data's summaries and omissions ***129** materially contribute to the report's impropriety. They are not merely an exercise of traditional editorial functions. When *Zeran* proclaimed that § 230(c)(1) barred claims based on a defendant's exercise of traditional editorial functions, it also provided a suggestive list including "deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. Of course, in a sense, omitting the criminal charge dispositions is just "altering" their content, as is creating new charge summaries. Yet, *Zeran*'s list of protected functions must be read in its context, and that context cabins that list to merely "editorial" functions. It cannot be stretched to include actions that go beyond formatting or procedural alterations and change the substance of the content altered.[25] An interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful.[26]

25 An extreme example helps illustrate this point. Take a writer of a ransom note who cuts letters out of a magazine to list his demands. That writer might be said to be "altering" content. Yet, the note's writer is hardly acting as an "editor" of the magazine. Instead, he has substantively changed the magazine's content and transformed it from benign information about sports or entertainment into threatening information about bags of cash and ultimatums.

26 Drawing this line here is reinforced by another contextual reading of *Zeran*'s list of traditional editorial functions. After listing some traditional editorial functions for which liability is barred, *Zeran* then said that § 230(c)(1) prevents suits that "cast [the defendant] in the same position as the party who originally posted the offensive messages." *Id.* at 333. *Zeran* saw § 230(c)(1) as vicarious liability protection that could not be used as a shield when the offensiveness of the message comes from the defendant themselves rather than a third party. *See id.*; *see also Nemet*,

> 591 F.3d at 254 ("Congress thus established a general rule that providers of interactive computer services are liable ... for speech that is properly attributable to them"); *cf. La Liberte*, 966 F.3d at 89 (holding that there is no § 230 immunity for a defendant who posted a third-party's photo, but who supplied her own defamatory commentary to it). So we may not read the traditional editorial functions listed in *Zeran* so broadly as to include a defendant's substantive alterations that introduced the inaccuracy or falsity at issue in the claim.

Applying these principles to Counts Two and Four, Public Data—according to Plaintiffs' allegations—has materially contributed to what makes the content at issue unlawful. The content relevant to Counts Two and Four is only unlawful because it is inaccurate. But, as alleged, the content provided to Public Data about McBride was not inaccurate. Instead, through Public Data's actions, the records were changed so as to introduce the inaccuracies. Public Data thus made substantive changes to the records' content that materially contributed to the records' unlawfulness. That makes Public Data an information content provider, under the allegations, for the information relevant to Counts Two and Four, meaning that it is not entitled to § 230(c)(1) protection for those claims.

* * *

[34] Section 230(c)(1) provides protection to interactive computer services. *Zeran*, 129 F.3d at 331. But it does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties. Here, the district court erred by finding that § 230(c)(1) barred all counts asserted against Public Data. To the contrary, on the facts as alleged, it does not apply to any of them. Counts One and Three are ***130** not barred because they do not seek to hold Public Data liable as a publisher under the provision. Counts Two and Four are not barred because Public Data is itself an information content provider for the information relevant to those counts.

REVERSED AND REMANDED

All Citations

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United States District Court, N.D. California.

RUMBLE, INC., Plaintiff,
v.
GOOGLE LLC, Defendant.

Case No. 21-cv-00229-HSG
|
Signed July 29, 2022

Attorneys and Law Firms

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ORDER DENYING MOTION TO DISMISS AND TO STRIKE

Re: Dkt. No. 32

HAYWOOD S. GILLIAM, JR., United States District Judge

***1** Pending before the Court is Defendant's partial motion to dismiss and motion to strike, briefing for which is complete. *See* Dkt. No. 32 (“Mot.”), 44 (“Opp.”), 45 (“Reply”). Defendant asks the Court to dismiss Plaintiff's tying and search-dominance theories of liability and strike paragraphs 34, 35, and 75-176 of Plaintiff's First Amended Complaint. *See* Mot. at i. The Court held a hearing on the motion, *see* Dkt. No. 50, and now **DENIES** it.

I. BACKGROUND

“Since 2013, Rumble has operated an online video platform.” Dkt. No. 21 (“FAC”) ¶ 14. Plaintiff alleges that “Rumble is one of the most respected independent and privately owned companies in the online video platform industry and market, and its business model is premised upon helping the ‘little guy/gal’ video content creators monetize their videos.” *Id.* According to Plaintiff, “Rumble currently has more than 2 million amateur and professional video content-creators that now contribute to more than 100 million streams per month.” *Id.* ¶ 22. Plaintiff alleges that “Rumble's success, however, has been far less than it could and should have been as a direct result of Google's unlawful anticompetitive, exclusionary and monopolistic behavior....” *Id.* ¶ 23.

Rumble alleges that “Google has willfully and unlawfully created and maintained a monopoly in the online video platform market by pursuing at least two anticompetitive and exclusionary strategies”:

> First, by manipulating the algorithms (and/or other means and mechanisms) by which searched-for-video results are listed, Google insures [sic] that the videos on YouTube are listed first, and that those of its competitors, such as Rumble, are listed way down the list on the first page of the search results, or not on the first page at all. Second, by pre-installation of the YouTube app (which deters smart phone manufacturers from pre-installing any competitive video platform apps) as the default online video app on Google smart phones, and by entering into anti-competitive, illegal tying agreements with other smartphone manufacturers to do the same (in addition to requiring them to give the YouTube app a prime location on their phones’ opening page and making it not-deletable by the user), Google assures the dominance of YouTube and forecloses competition in the video platform market.

Id. ¶ 27; *see also id.* ¶ 194 (alleging that Google's “anticompetitive and exclusionary conduct ... has included rigging its search engine algorithms such that YouTube videos will always be listed first in search results and requiring pre-installation and prominent placement of Google's YouTube apps on all Android smartphones in the United States”). Plaintiff further alleges that “manufacturers and carriers are beholden to Google's Android ecosystem, which Google uses to preserve its monopolies in general search, search advertising, general search text advertising and the online video platform market." *Id.* ¶ 147. Plaintiff alleges that Defendant's "chokehold on search is impenetrable, and that chokehold allows it to continue unfairly and unlawfully to self-preference YouTube over its rivals, including Rumble, and to monopolize the online video platform market." *Id.* ¶ 146.

***2** Plaintiff alleges that Defendant uses various agreements with Android-based mobile smart device manufacturers and distributors to ensure its monopoly of the video platform market. *See id.* ¶¶ 75–89. According to Plaintiff, Defendant "requires Android device manufacturers that want to preinstall certain of Google's proprietary apps to sign an anti-forking agreement." *Id.* ¶ 84.[1] Plaintiff alleges that once an Android device manufacturer signs an anti-forking agreement, Google will only provide access to its vital proprietary apps and application program interfaces if the manufacturer agrees: "(1) to take (that is, pre-install) a bundle of other Google apps (such as its YouTube app); (2) to make certain apps undeletable (including its YouTube app); and (3) to give Google the most valuable and important location on the device's default home screen (including for its YouTube app)." *Id.* ¶ 85. As another example, Plaintiff asserts that "Google provides a share of its search advertising revenue to Android device manufacturers, mobile phone carriers, competing browsers, and Apple; in exchange, Google becomes the preset default general search engine for the most important search access points on a computer or mobile device." *Id.* ¶ 86. "And, by becoming the default general search engine, Google is able to continue its manipulation of video search results using its search engine to self-preference its YouTube platform, making sure that links to videos on the YouTube platform are listed above the fold on the search results page." *Id.*; *see also id.* ¶¶ 161–72 (alleging that Google's revenue sharing agreements allow it to maintain a monopoly in the general search market and online video platform market).

Plaintiff alleges that Defendant uses these agreements "to ensure that its entire suite of search-related products (including YouTube) is given premium placement on Android GMS devices." *Id.* ¶ 149. Rumble alleges that the agreements "effectuate a tie" that "reinforces Google's monopolies." *Id.* ¶ 151. Specifically, Plaintiff alleges that Defendant provides "Android device manufacturers an all-or-nothing choice: if a manufacturer wants Google Play or GPS, then the manufacturer must also preinstall, and in some cases give premium placement to, an entire suite of Google apps, including Google's search products and Google's YouTube app." *Id.* Plaintiff alleges that "[t]he forced preinstallation of Google's apps (including the YouTube app) deters manufacturers from preinstalling those of competitors, including Rumble's app.... [and] forecloses distribution opportunities to rival general search engines and video platforms, protecting Google's monopolies." *Id.* Moreover, Plaintiff alleges that "[i]n many cases" the agreements expressly prohibit the preinstallation of rival online video platforms, like Rumble. *See id.* ¶ 87.

According to Plaintiff, Defendant's "monopolist's stranglehold on search, obtained and maintained through anticompetitive conduct, including tying agreements in violation of antitrust laws, has allowed Google to unfairly and wrongfully direct massive video search traffic to its wholly-owned YouTube platform" and therefore secure monopoly profits from YouTube-generated ad revenue. *Id.* ¶ 176. Plaintiff alleges that because "a very large chunk of that video search traffic ... should have rightfully been directly to Rumble's platform," Plaintiff and content creators who have exclusively licensed their videos to Rumble "have lost a massive amount of ad revenue they would otherwise have received but for Google's unfair, unlawful, exclusionary and anticompetitive conduct." *Id.*

Accordingly, Plaintiff alleges that Defendant's conduct violates Section 2 of the Sherman Act, which makes it unlawful for any person to "monopolize, or attempt to monopolize ... any part of the trade or commerce among the several States, or with foreign nations...." 15 U.S.C. § 2; *see id.* ¶¶ 55, 191–200.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may move to dismiss a complaint for failing to state a claim upon which relief can be granted under Rule 12(b)(6). "Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). To survive a Rule 12(b)(6) motion, a plaintiff need only plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

***3** In reviewing the plausibility of a complaint, courts "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Nevertheless, courts do not "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Secs. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)).

III. DISCUSSION

A. Motion to Dismiss

Plaintiff pleads a single cause of action alleging Defendant violated Section 2 of the Sherman Act. "The offense of monopoly under [Section 2] has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Plaintiff defines the relevant market as the "online video platform market," where platforms "allow content creators and other consumers to upload, view, share and download video content." FAC ¶ 55.

Without real dispute, Plaintiff has adequately alleged a Section 2 claim. First, it alleges that Defendant obtained and maintains monopoly power in the online video platform market, asserting that YouTube controls 73% of global online video activity. *Id.* ¶ 37, 63, 193. And second, Plaintiff alleges among other things that Defendant, with no valid business purpose or benefit to users, designs its search engine algorithms to show users YouTube links instead of links to its competitors' sites. *Id.* ¶ 71; *see also* ¶¶ 68-74. According to Plaintiff, "Rumble and consumers (*e.g.* content creators) are disadvantaged, and competition is harmed, in the defined market because Google provides self-preferencing search advantages to its wholly-owned YouTube platform as a part of its scheme to maintain its monopoly power, and to reap a monopolist's financial rewards." *Id.* ¶ 74.

Instead, Defendant's motion is based on the somewhat counterintuitive premise that Plaintiff has pled *too* much. Defendant argues that Plaintiff's amended complaint should be broken into distinct theories of liability based on (1) self-preferencing, (2) tying of the YouTube app to other Google apps, and (3) unlawfully dominating the search market with agreements involving distribution of Defendant's search product. Mot. at 1. Defendant does not dispute that Plaintiff has adequately pled a Section 2 claim based on the first theory of liability, self-preferencing, but argues that the second and third theories, tying and unlawful domination of the search market, should be dismissed. *Id.* at 1-2.

The only authority Defendant cites for the premise that a court can disaggregate a single Section 2 cause of action into subtheories, then scrutinize and potentially dismiss some subtheories without dismissing the entire cause of action, comes from two unpublished district court cases, one from the Northern District of California and another from the District of Delaware. *See* Mot. at 3; *Staley v. Gilead Scis., Inc.*, No. 19-cv-02573, 2020 WL 5507555, at *11 (N.D. Cal. July 29, 2020); *see also* *In re Sensipar (Cinacalcet Hydrochloride Tablets) Antitrust Litig.*, No. 19-CV-01461, 2020 WL 7022364, at *3-4 (D. Del. Nov. 30, 2020).[2] Defendant does not cite, and the Court has been unable to find, any Supreme Court or Ninth Circuit authority ratifying this approach. And the sort of parsing urged by Defendants is at least arguably in tension with the Supreme Court's direction that Sherman Act plaintiffs "should be given the full benefit of their proof without compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962); *see also* *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). This is especially true given the Ninth Circuit's holding that "even though [a] restraint effected may be reasonable under section 1, it may constitute an attempt to monopolize forbidden by section 2 if a specific intent to monopolize may be shown." *California Comput. Prods., Inc. v. Int'l Bus. Machs. Corp.*, 613 F.2d 727, 737 (9th Cir. 1979) (quoting *United States v. Columbia Steel Co.*, 334 U.S. 495, 531-532 (1948)). Ultimately, in the absence of controlling authority supporting Defendant's proposed approach, the Court declines to reach the viability of each of the purported subtheories, given that Plaintiff undisputedly has adequately pled a Section 2 claim based on self-preferencing. Defendant's motion to dismiss is accordingly **DENIED**.[3]

B. Motion to Strike

***4** Defendant also moves to strike paragraphs 34, 35, and 75 through 176 of the amended complaint. *See* Mot. at 2. These paragraphs generally concern Plaintiff's allegations that Google has unlawfully achieved and continues to maintain a monopoly in the online video platform market by conditioning access to its mobile operating system and Defendant's other popular services on preinstallation of the YouTube app and in some cases "expressly prohibiting the preinstallation of any rival ... apps (which would include the Rumble app)[.]" *See* FAC ¶¶ 34, 87. Plaintiff argues that the allegations Defendant seeks to strike relate to forms of exclusionary conduct that are properly considered in adjudicating a monopolization claim, and further argues that "antitrust claims are to be adjudicated as a whole, ... not parsed into discrete pieces." Opp. at 20.

Rule 12(f) of the Federal Rules of Civil Procedure states that a district court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Motions to strike are "regarded with disfavor" because they are often used as delaying tactics and because of the limited importance of pleadings in federal practice. *Z.A. ex rel. K.A. v. St. Helena Unified Sch. Dist.*, No. 09-CV-03557-JSW, 2010 WL 370333, at *2 (N.D. Cal. Jan. 25, 2010). Where there is any doubt about the relevance of the challenged allegations, courts in this Circuit err on the side of permitting the allegations to stand. *See id.* (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023 (1994)); *accord Pilgram v. Lafave*, No. 12-CV-5304 GAF-EX, 2013 WL 12124126, at *5 (C.D. Cal. Feb. 7, 2013); *Art Attacks Ink, LLC v. MGA Ent., Inc.*, No. 04-CV-1035-BLM, 2006 WL 8439887, at *4 (S.D. Cal. June 21, 2006). This is particularly true when the moving party shows no prejudice and when striking the allegations will not streamline the ultimate resolution of the action. *St. Helena Unified Sch. Dist.*, 2010 WL 370333 at *2.

For the same reasons underlying the Court's denial of the motion to dismiss, Defendant has not shown that the allegations are so redundant, immaterial, impertinent, or scandalous as to justify striking them. As noted above, substantial authority suggests that, depending on the factual record as it actually develops, all of the interrelated conduct alleged in the complaint could be relevant to the Section 2 claim that is not being challenged in this motion. That fact alone weighs dispositively against striking the allegations targeted by Defendant. Obviously, whether those allegations end up being backed by sufficient evidence to survive a summary judgment motion, or to warrant presentation to the jury at trial under the Federal Rules of Evidence, is a matter for a later stage of the case. Accordingly, Defendant's motion to strike is **DENIED**.

IV. CONCLUSION

Defendant's motion to dismiss and to strike is **DENIED.** The court **SETS** a telephonic case management conference on August 30, 2022 at 2:00 p.m. The parties shall submit an updated joint case management statement by August 23, 2022. All counsel shall use the following dial-in information to access the call:

Dial-In: 888-808-6929;

Passcode: 6064255

For call clarity, parties shall NOT use speaker phone or earpieces for these calls, and where at all possible, parties shall use landlines.

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 3018062

Footnotes

1 Plaintiff explains that "in general an anti-forking agreement sets strict limits on the manufacturers' ability to make and sell Android-based devices that do not comply with Google's technical and design standards." FAC ¶ 84.

2 In its Reply, Defendant cites two additional authorities referencing the expense of antitrust discovery, but these cases are also not controlling, and do not support (or even discuss) the premise that a court can dismiss select subtheories within a single cause of action. *See* Reply at 4, *Kelsey K. v. NFL Enters., LLC*, 757 F. App'x 524, 527 (9th Cir. 2018) (affirming denial of discovery where "no plausible claim for relief has been pled"); *Feitelson v. Google Inc.*, 80 F. Supp. 3d 1019, 1025 (N.D. Cal. 2015).

3 Plaintiff also contends that Defendant's motion to dismiss is procedurally improper under Federal Rule of Civil Procedure 12(g)(2). Opp. at 19-20. However, the Court finds that the allegations in the original complaint were insufficient to place Defendant on notice of the additional theories described in the new allegations it seeks to dismiss. The Court's finding is consistent with the purpose of the federal rules, as described by the Ninth Circuit. *See* *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 318 (9th Cir. 2017) (reading "12(g)(2) in light of the general policy of the Federal Rules of Civil Procedure, expressed in Rule 1"). And to the extent Defendant could have raised its arguments in a prior motion, the Court nonetheless exercises its discretion to consider those arguments in the interest of judicial economy. *See id.* (quoting *Banko v. Apple, Inc.*, No. 13–02977 RS, 2013 WL 6623913, at *2 (N.D. Cal. Dec. 16, 2013) ("Although Rule 12(g) technically prohibits successive motions to dismiss that raise arguments that could have been made in a prior motion ... courts faced with a successive motion often exercise their discretion to consider the new arguments in the interests of judicial economy.")).

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34 F.4th 446
United States Court of Appeals, Fifth Circuit.

George R. JARKESY, Jr.; Patriot28, L.L.C., Petitioners,
v.
SECURITIES AND EXCHANGE COMMISSION, Respondent.

No. 20-61007
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FILED May 18, 2022

Synopsis
Background: Hedge fund operator and investment advisor filed petition for review of order of the United States Securities and Exchange Commission (SEC), 2020 WL 5291417, affirming administrative law judge's (ALJ) finding in civil enforcement action that they had committed fraud under Securities Act, Securities Exchange Act, and Advisers Act.

Holdings: The Court of Appeals, Elrod, Circuit Judge, held that:

[1] Seventh Amendment jury-trial right applied to civil enforcement action;

[2] action was not sort that could be properly assigned to agency adjudication under public-rights doctrine;

[3] Congress unconstitutionally delegated legislative power when it gave SEC unfettered authority to choose whether to bring enforcement actions in Article III courts or within agency; and

[4] statutory removal restrictions for SEC ALJs violated President's power of removal under Take Care Clause.

Reversed and remanded.

Davis, Circuit Judge, dissented and filed opinion.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (22)

[1] **Federal Courts** Constitutional questions in general

Court of Appeals reviews constitutional issues de novo.

1 Case that cites this headnote

[2] **Jury** Denial or Infringement of Right

Because maintenance of jury as fact-finding body is of such importance and occupies so firm a place in American history and jurisprudence, any seeming curtailment of Seventh Amendment right to jury trial should be scrutinized with utmost care. U.S. Const. Amend. 7.

1 Case that cites this headnote

[3] **Jury** Common law or statutory actions, in general

Term "suits at common law," as used in Seventh Amendment, can include suits brought under statute as long as suit seeks common-law-like legal remedies. U.S. Const. Amend. 7.

[4] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

When Congress properly assigns matter to adjudication in non-Article III tribunal, Seventh Amendment poses no independent bar to adjudication of that action by nonjury factfinder. U.S. Const. art. 3, § 1 et seq.; U.S. Const. Amend. 7.

[5] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

In cases in which public rights are being litigated, e.g., cases in which government sues in its sovereign capacity to enforce public rights created by statutes within power of Congress to enact, Seventh Amendment does not prohibit

Congress from assigning factfinding function and initial adjudication to administrative forum with which jury would be incompatible. U.S. Const. Amend. 7.

1 Case that cites this headnote

[6] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

Congress cannot circumvent Seventh Amendment jury-trial right simply by passing statute that assigns traditional legal claims to administrative tribunal. U.S. Const. Amend. 7.

[7] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

For purposes of rule that Seventh Amendment does not prohibit Congress from assigning resolution of statutory claim that is legal in nature to non-Article III tribunal that does not use jury as fact finder so long as claim asserted is public right, "public rights" arise when Congress passes statute under its constitutional authority that creates right so closely integrated with comprehensive regulatory scheme that right is appropriate for agency resolution. U.S. Const. art. 3, § 1 et seq.; U.S. Const. Amend. 7.

1 Case that cites this headnote

[8] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

In determining whether Seventh Amendment right to jury trial applies to matter that Congress has assigned to administrative adjudication, court must first determine whether action's claims arise at common law under Seventh Amendment, and if action involves common-law claims, court must then determine whether Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without jury trial. U.S. Const. Amend. 7.

3 Cases that cite this headnote

[9] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

Factor that court may consider in determining whether Seventh Amendment right to jury trial applies to matter that Congress has assigned to administrative adjudication include: (1) whether Congress created new cause of action, and remedies therefor, unknown to common law, because traditional rights and remedies were inadequate to cope with manifest public problem; and (2) whether jury trials would go far to dismantle statutory scheme or impede swift resolution of claims created by statute. U.S. Const. Amend. 7.

1 Case that cites this headnote

[10] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

Securities and Exchange Commission's (SEC) administrative civil enforcement action accusing hedge fund operator and investment advisor of securities fraud and seeking civil penalties was akin to traditional actions at law to which jury-trial right attached, and thus Seventh Amendment jury-trial right applied to action, even though SEC also sought equitable remedies to ban operator from participation in securities industry activities and to require advisor to disgorge ill-gotten gains; fraud prosecutions were regularly brought in English courts at common law, and actions seeking civil penalties were akin to special types of actions in debt from early in nation's history that were distinctly legal claims. U.S. Const. Amend. 7.

1 Case that cites this headnote

[11] **Jury** Joinder of Legal and Equitable Issues

Seventh Amendment applies to proceedings that involve mix of legal and equitable claims—facts relevant to legal claims should be adjudicated by jury, even if those facts relate to equitable claims too. U.S. Const. Amend. 7.

1 Case that cites this headnote

[12] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

Securities and Exchange Commission's (SEC) administrative civil enforcement action accusing hedge fund operator and investment advisor of securities fraud was not sort that could be properly assigned to agency adjudication free from Seventh Amendment's strictures under public-rights doctrine, even if SEC sought to vindicate rights on public's behalf; relevant federal securities statutes created causes of action that reflected common-law fraud actions, jury trials would not go far to dismantle statutory scheme or impede swift resolution of statutory claims, government alleged that operator and advisor defrauded particular investors, and Congress had not limited SEC's ability to bring enforcement actions in Article III courts. U.S. Const. art. 3, § 1 et seq.; U.S. Const. Amend. 7.

3 Cases that cite this headnote

[13] **Fraud** Elements of Actual Fraud

Fraud Statements recklessly made; negligent misrepresentation

Traditional elements of common-law fraud are (1) knowing or reckless material misrepresentation, (2) that tortfeasor intended to act on, and (3) that harmed plaintiff.

1 Case that cites this headnote

[14] **Statutes** Common or civil law

When Congress uses terms that have accumulated settled meaning under common law, court must infer, unless statute otherwise dictates, that Congress means to incorporate established meaning of these terms.

[15] **Securities Regulation** Registration Requirement in General

Securities Regulation Fraud and Manipulation

Fraud actions under federal securities statutes echo actions that historically have been available under common law. Securities Act of 1933 § 1 et seq., 15 U.S.C.A. § 77a et seq.; Securities Exchange Act of 1934 § 10, 15 U.S.C.A. § 78j(b); Investment Advisers Act of 1940 § 206, 15 U.S.C.A. § 80b-6.

1 Case that cites this headnote

[16] **Jury** Civil Proceedings Other Than Actions; Special Proceedings

Congress cannot eliminate party's Seventh Amendment right to jury trial merely by relabeling cause of action to which it attaches and placing exclusive jurisdiction in administrative agency or specialized court of equity. U.S. Const. Amend. 7.

[17] **Constitutional Law** Securities regulation

Securities Regulation Powers and functions in general; sanctions

Congress unconstitutionally delegated legislative power to Securities and Exchange Commission (SEC) when it gave SEC unfettered authority to choose whether to bring enforcement actions in Article III courts or within agency; Congress effectively gave SEC power to decide which defendants should receive certain legal processes without providing SEC with intelligible principle by which to exercise that power. U.S. Const. art. 1, § 1; U.S. Const. art. 3, § 1 et seq.; Securities Exchange Act of 1934 § 21B, 15 U.S.C.A. § 78u-2(a).

5 Cases that cite this headnote

[18] **Courts** Previous Decisions as Controlling or as Precedents

Courts Dicta

Alternative holdings are binding precedent and not obiter dictum.

5 Cases that cite this headnote

[19] **Constitutional Law** Delegation of Powers

Constitutional Law To Judiciary

Congress cannot delegate to courts, or to any other tribunals, powers that are strictly and exclusively legislative. U.S. Const. art. 1, § 1.

[20] **Constitutional Law** Delegation of Powers

Congress may grant regulatory power to another entity only if it provides intelligible principle by which recipient of power can exercise it. U.S. Const. art. 1, § 1.

5 Cases that cite this headnote

[21] **Constitutional Law** Nature and scope in general

Government actions are "legislative" if they have purpose and effect of altering legal rights, duties, and relations of persons outside legislative branch.

[22] **Public Employment** Authority to impose adverse action; manner and mode of imposition

Securities Regulation Securities and Exchange Commission in general

Statutory removal restrictions for Securities and Exchange Commission (SEC) administrative law judges (ALJ) violated President's power of removal under Take Care Clause; SEC ALJs were inferior officers, and they could only be removed by SEC Commissioners if good cause is found by Merits Systems Protection Board, and SEC Commissioners and MSPB members could only be removed by President for cause. U.S. Const. art. 2, § 3; 5 U.S.C.A. § 7521(a).

West Codenotes

Held Unconstitutional

5 U.S.C.A. § 7521(a); Securities Exchange Act of 1934 § 21B, 15 U.S.C.A. § 78u-2(a)

***449** Petition for Review of an Order of the United States Securities and Exchange Commission, No. 3-15255

Attorneys and Law Firms

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Before Davis, Elrod, and Oldham, Circuit Judges.

Opinion

Jennifer Walker Elrod, Circuit Judge:

Congress has given the Securities and Exchange Commission substantial power to enforce the nation's securities laws. It often acts as both prosecutor and judge, and its decisions have broad consequences for personal liberty and property. But the Constitution constrains the SEC's powers by protecting individual rights and the prerogatives of the other branches of government. This case is about the nature and extent of those constraints in securities fraud cases in which the SEC seeks penalties.

The SEC brought an enforcement action within the agency against Petitioners for securities fraud. An SEC administrative law judge adjudged Petitioners liable and ordered various remedies, and the SEC affirmed on appeal over several constitutional arguments that Petitioners raised. Petitioners raise those same arguments before this court. We hold that: (1) the SEC's in-house adjudication of Petitioners' case violated their Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide an intelligible principle by which the SEC would exercise the delegated power, in violation of Article I's vesting of "all" legislative power in Congress; and (3) statutory removal restrictions on SEC ALJs violate the Take Care Clause of Article II. Because the agency proceedings below were unconstitutional, ***450** we GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

I.

Petitioner Jarkesy established two hedge funds and selected Petitioner Patriot28 as the investment adviser. The funds brought in over 100 investors and held about $24 million in assets. In 2011, the SEC launched an investigation into Petitioners' investing activities, and a couple of years later the SEC chose to bring an action within the agency, alleging that Petitioners (along with some former co-parties) committed fraud under the Securities Act, the Securities Exchange Act, and the Advisers Act. Specifically, the agency charged that Petitioners: (1) misrepresented who served as the prime broker and as the auditor; (2) misrepresented the funds' investment parameters and safeguards; and (3) overvalued the funds' assets to increase the fees that they could charge investors.

Petitioners sued in the U.S. District Court for the District of Columbia to enjoin the agency proceedings, arguing that the proceedings infringed on various constitutional rights. But the district court, and later the U.S. Court of Appeals for the D.C. Circuit, refused to issue an injunction, deciding that the district court had no jurisdiction and that Petitioners had to continue with the agency proceedings and petition the court of appeals to review any adverse final order. *See* *Jarkesy v. SEC*, 48 F. Supp. 3d 32, 40 (D.D.C. 2014), *aff'd*, 803 F.3d 9, 12 (D.C. Cir. 2015).

Petitioners' proceedings moved forward. The ALJ held an evidentiary hearing and concluded that Petitioners committed securities fraud. Petitioners then sought review by the Commission. While their petition for Commission review was pending, the Supreme Court held that SEC ALJs had not been properly appointed under the Constitution. *Lucia v. SEC*, ––– U.S. ––––, 138 S. Ct. 2044, 2054–55, 201 L.Ed.2d 464 (2018). In accordance with that decision, the SEC assigned Petitioners' proceeding to an ALJ who was properly appointed. But Petitioners chose to waive their right to a new hearing and continued under their original petition to the Commission.

The Commission affirmed that Petitioners committed various forms of securities fraud. It ordered Petitioners to cease and desist from committing further violations and to pay a civil penalty of $300,000, and it ordered Patriot28 to disgorge nearly $685,000 in ill-gotten gains. The Commission also barred Jarkesy from various securities industry activities: associating with brokers, dealers, and advisers; offering penny stocks; and serving as an officer or director of an advisory board or as an investment adviser.

Critical to this case, the Commission rejected several constitutional arguments Petitioners raised. It determined that: (1) the ALJ was not biased against Petitioners; (2) the Commission did not inappropriately prejudge the case; (3) the Commission did not use unconstitutionally delegated legislative power—or violate Petitioners' equal protection rights—when it decided to pursue the case within the agency instead of in an Article III court; (4) the removal restrictions on SEC ALJs did not violate Article II and separation-of-powers principles; and (5) the proceedings did not violate Petitioners' Seventh Amendment right to a jury trial. Petitioners then filed a petition for review in this court.

II.

Petitioners raise several constitutional challenges to the SEC enforcement proceedings.[1] ***451** We agree with Petitioners that the proceedings suffered from three independent constitutional defects: (1) Petitioners were deprived of their constitutional right to a jury trial; (2) Congress unconstitutionally delegated legislative power to the SEC by failing to provide it with an intelligible principle by which to exercise the delegated power; and (3) statutory removal restrictions on SEC ALJs violate Article II.

A.

[1] Petitioners challenge the agency's rejection of their constitutional arguments. We review such issues *de novo*. *See* *Emp. Sols. Staffing Grp. II, L.L.C. v. Off. of Chief Admin. Hearing Officer*, 833 F.3d 480, 484 (5th Cir. 2016); *Trinity Marine Prods., Inc. v. Chao*, 512 F.3d 198, 201 (5th Cir. 2007).

B.

Petitioners argue that they were deprived of their Seventh Amendment right to a jury trial. The SEC responds that the legal interests at issue in this case vindicate distinctly public rights, and that Congress therefore appropriately allowed such actions to be brought in agency proceedings without juries. We agree with Petitioners. The Seventh Amendment guarantees Petitioners a jury trial because the SEC's enforcement action is akin to traditional actions at law to which the jury-trial right attaches. And Congress, or an agency acting pursuant to congressional authorization, cannot assign the adjudication of such claims to an agency because such claims do not concern public rights alone.

1.

Thomas Jefferson identified the jury "as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958). And John Adams called trial by jury (along with popular elections) "the heart and lungs of liberty." The Revolutionary Writings of John Adams 55 (C. Bradley Thompson ed., 2000); *see also* Jennifer W. Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 Tex. Tech L. Rev. 303, 303–04 (2012) (explaining that the jury is "as central to the American conception of the consent of the governed as an elected legislature or the independent judiciary"). [2]

Civil juries in particular have long served as a critical check on government power. So precious were civil juries at the ***452** time of the Founding that the Constitution likely would not have been ratified absent assurance that the institution would be protected expressly by amendment. 2 The Debate on the Constitution 549, 551, 555, 560, 567 (Bernard Bailyn ed. 1993) (collecting various state ratification convention documents calling for the adoption of a civil jury trial amendment); The Federalist No. 83 (Alexander Hamilton) ("The objection to the plan of the convention, which has met with most success in this State [i.e., New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases."); Mercy Otis Warren, Observations on the Constitution (1788), *in* 2 The Debate on the Constitution 290 (Bernard Bailyn ed. 1993) (worrying that the unamended Constitution would lead to "[t]he abolition of trial by jury in civil causes"); *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446, 7 L.Ed. 732 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."). [3]

[2] Trial by jury therefore is a "fundamental" component of our legal system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v. Covert*, 354 U.S. 1, 9–10, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). "Indeed, '[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions ....' " *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 341, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) (Rehnquist, J., dissenting) (quoting Leonard Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 281 (1960)). Because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence[,] ... any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 603 (1935).

[3] The Seventh Amendment protects that right. It provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The Supreme Court has interpreted "Suits at common law" to include all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption. *Tull v. United States*, 481 U.S. 412, 417, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). The term can include suits brought under a statute as long as the suit seeks common-law-like legal remedies. *Id.* at 418–19, 107 S.Ct. 1831. And the Court has specifically held that, under this standard, the Seventh Amendment jury-trial right applies to suits brought under a statute seeking civil penalties. *Id.* at 418–24, 107 S.Ct. 1831.

[4] That is not to say, however, that Congress may never assign adjudications to agency processes that exclude a jury. *See* ***453** *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 455, 97 S.Ct.

1261, 51 L.Ed.2d 464 (1977). "[W]hen Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder." *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, ––– U.S. ––––, 138 S. Ct. 1365, 1379, 200 L.Ed.2d 671 (2018) (internal quotations omitted).

[5] Whether Congress may properly assign an action to administrative adjudication depends on whether the proceedings center on "public rights." *Atlas Roofing*, 430 U.S. at 450, 97 S.Ct. 1261. "[I]n cases in which 'public rights' are being litigated[,] e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact[,] the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible." *Id.* Describing proper assignments, the Supreme Court identified situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights. Wholly private tort, contract, and property cases, [and] a vast range of other cases as well are not at all implicated." *Id.* at 458, 97 S.Ct. 1261.

[6] **[7]** The Supreme Court refined the public-right concept as it relates to the Seventh Amendment in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989). There, the Court clarified that Congress cannot circumvent the Seventh Amendment jury-trial right simply by passing a statute that assigns "traditional legal claims" to an administrative tribunal. *Id.* at 52, 109 S.Ct. 2782. Public rights, the Court explained, arise when Congress passes a statute under its constitutional authority that creates a right so closely integrated with a comprehensive regulatory scheme that the right is appropriate for agency resolution. *Id.* at 54, 109 S.Ct. 2782.

[8] **[9]** The analysis thus moves in two stages. First, a court must determine whether an action's claims arise "at common law" under the Seventh Amendment. *See* *Tull*, 481 U.S. at 417, 107 S.Ct. 1831. Second, if the action involves common-law claims, a court must determine whether the Supreme Court's public-rights cases nonetheless permit Congress to assign it to agency adjudication without a jury trial. *See* *Granfinanciera*, 492 U.S. at 54, 109 S.Ct. 2782; *Atlas Roofing*, 430 U.S. at 455, 97 S.Ct. 1261. Here, the relevant considerations include: (1) whether "Congress 'creat[ed] a new cause of action, and remedies therefor, unknown to the common law,' because traditional rights and remedies were inadequate to cope with a manifest public problem"; and (2) whether jury trials would "go far to dismantle the statutory scheme" or "impede swift resolution" of the claims created by statute. *Granfinanciera*, 492 U.S. at 60–63, 109 S.Ct. 2782 (quoting *Atlas Roofing*, 430 U.S. at 454 n.11, 461, 97 S.Ct. 1261 (first and second quotations)).

2.

The rights that the SEC sought to vindicate in its enforcement action here arise "at common law" under the Seventh Amendment. Fraud prosecutions were regularly brought in English courts at common law. *See* 3 William Blackstone, Commentaries on the Laws of England *42 (explaining the common-law courts' jurisdiction over "actions on the case which allege any falsity or fraud; all of which savour of a criminal nature, although the action is brought for a civil remedy; and make the defendant liable in strictness to ***454** pay a fine to the king, as well as damages to the injured party"). And even more pointedly, the Supreme Court has held that actions seeking civil penalties are akin to special types of actions in debt from early in our nation's history which were distinctly legal claims. *Tull*, 481 U.S. at 418–19, 107 S.Ct. 1831. Thus, "[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law." *Id.* at 422, 107 S.Ct. 1831.

[10] Applying that principle, the Court in *Tull* held that the right to a jury trial applied to an action brought by an agency seeking civil penalties for violations of the Clean Water Act. *Id.* at 425, 107 S.Ct. 1831. Likewise here, the actions the SEC brought seeking civil penalties under securities statutes are akin to those same traditional actions in debt. Under the Seventh Amendment, both as originally understood and as interpreted by the Supreme Court, the jury-trial right applies to the penalties action the SEC brought in this case.

That conclusion harmonizes with the holdings of other courts applying *Tull*. The Seventh Circuit followed the Supreme

Court's lead in that case and has specifically said that when the SEC brings an enforcement action to obtain civil penalties under a statute, the subject of the action has the right to a jury trial. *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) ("Because the SEC was seeking both legal and equitable relief (the former under the Insider Trading Sanctions Act, 15 U.S.C. § 78u–1, which (in subsection (a)(1)) authorizes the imposition of civil penalties for insider trading at the suit of the SEC[)] ... [the defendant] was entitled to and received a jury trial."); *see also* *id.* (explaining that another circuit was wrong to tacitly assume "that civil penalties in SEC cases are not a form of legal relief"[4]). Some district courts have applied *Tull* similarly. *See, e.g.,* *SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (explaining that "whether the facts are such that the defendants can be subjected to a civil penalty ... is a question for the jury, [and] the determination of the severity of the civil penalty to be imposed ... is a question for the Court, once liability is established"); *SEC v. Solow*, 554 F. Supp. 2d 1356, 1367 (S.D. Fla. 2008) (applying *Tull* for the proposition that civil penalties are "legal, as opposed to equitable, in nature," and that it therefore "was [the defendant's] constitutional right to have a jury determine his liability, with [the court] thereafter determining the amount of penalty, if any").

[11] Other elements of the action brought by the SEC against Petitioners are more equitable in nature, but that fact does not invalidate the jury-trial right that attaches because of the civil penalties sought. The Supreme Court has held that the Seventh Amendment applies to proceedings that involve a mix of legal and equitable claims—the facts relevant to the legal claims should be adjudicated by a jury, even if those facts relate to equitable claims too. *See* *Ross v. Bernhard*, 396 U.S. 531, 537–38, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970); *see also* *Lipson*, 278 F.3d at 662 (noting that the defendant was entitled to a jury trial because the SEC sought legal relief in the form of penalties, even though the SEC also sought equitable relief). Here, the SEC sought to ban Jarkesy from participation in securities industry activities and to require Patriot28 to disgorge ill-gotten gains—both equitable remedies. Even so, the penalty facet of the action suffices for the jury-trial right to ***455** apply to an adjudication of the underlying facts supporting fraud liability.

3.

[12] Next, the action the SEC brought against Petitioners is not the sort that may be properly assigned to agency adjudication under the public-rights doctrine. Securities fraud actions are not new actions unknown to the common law. Jury trials in securities fraud suits would not "dismantle the statutory scheme" addressing securities fraud or "impede swift resolution" of the SEC's fraud prosecutions. And such suits are not uniquely suited for agency adjudication.

[13] **[14]** Common-law courts have heard fraud actions for centuries, even actions brought by the government for fines. *See* Blackstone, *supra* at *42; *see also* *Tull*, 481 U.S. at 422, 107 S.Ct. 1831 ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."). Naturally, then, the securities statutes at play in this case created causes of action that reflect common-law fraud actions. The traditional elements of common-law fraud are (1) a knowing or reckless material misrepresentation, (2) that the tortfeasor intended to act on, and (3) that harmed the plaintiff. *In re Deepwater Horizon*, 857 F.3d 246, 249 (5th Cir. 2017). The statutes under which the SEC brought securities fraud actions use terms like "fraud" and "untrue statement[s] of material fact" to describe the prohibited conduct. *See* 15 U.S.C. §§ 77a–77aa, 78j(b), 80b-6. When "Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992) (quoting *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989)); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (explaining that "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it").

[15] Accordingly, the Supreme Court has often looked to common-law principles to interpret fraud and misrepresentation under securities statutes. *See, e.g,* *Omnicare, Inc. v. Laborers Dist. Council Indus. Pension Fund*, 575 U.S. 175, 191, 135 S.Ct. 1318, 191 L.Ed.2d 253 (2015) (considering the Restatement (Second) of Torts to determine whether material omissions are actionable under a securities statute); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343–44, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (relying on "the common-law roots of the securities fraud action" in "common-law deceit and misrepresentation actions" to interpret the statutory securities-fraud action); *SEC v. Cap. Gains Rsch. Bureau*, 375 U.S. 180, 192–95, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963) (considering the principles of common-law fraud to determine the requirements of fraud under the Advisers Act). Thus, fraud actions under the securities statutes echo actions that historically have been available under the common law.

Next, jury trials would not "go far to dismantle the statutory scheme" or "impede swift resolution" of the statutory claims. *See* *Granfinanciera*, 492 U.S. at 60–63, 109 S.Ct. 2782. For one, the statutory scheme itself allows the SEC to bring enforcement actions either in-house or in Article III courts, where the jury-trial right would apply. *See* Dodd–Frank Act § 929P(a), 15 U.S.C. § 78u-2(a). If Congress has not prevented the SEC from bringing claims in Article III courts with ***456** juries as often as it sees fit to do so, and if the SEC has in fact brought many such actions to jury trial over the years,[5] then it is difficult to see how jury trials could "dismantle the statutory scheme." Congress could have purported to assign such proceedings *solely* to administrative tribunals, but it did not. And there also is no evidence that jury trials would impede swift resolution of the claims.[6] In this case, for example, the SEC took seven years to dispose of Petitioners' case and makes no argument that proceedings with a jury trial would have been less efficient.

Relatedly, securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication. Again, Congress has not limited the SEC's ability to bring enforcement actions in Article III courts. Consider the statutory scheme in *Atlas Roofing* for contrast. The statutes in that case were new and somewhat unusual. They provided elaborate enforcement mechanisms for the sorts of claims that likely could not have been brought in legal actions before that point. *See* *Atlas Roofing*, 430 U.S. at 445, 97 S.Ct. 1261 (describing how the statutes required factfinders to undertake detailed assessments of workplace safety conditions and to make unsafe-conditions findings even if no injury had occurred). But the federal courts have dealt with actions under the securities statutes for many decades, and there is no reason to believe that such courts are suddenly incapable of continuing that work just because an agency may now share some of the workload. In fact, for the first decades of the SEC's existence, securities-fraud actions against nonregistered parties could be brought *only* in Article III courts. Thomas Glassman, *Ice Skating Uphill: Constitutional Challenges to SEC Administrative Proceedings*, 16 J. Bus. & Sec. L. 47, 50–52 (2015).[7]

The SEC counters that the securities statutes are designed to protect the public at large, and that some circuits have identified SEC enforcement actions as vindicating rights on behalf of the public. Indeed, the SEC says, the statutes allow for enforcement proceedings based on theories broader than actions like fraud that existed at common law.

Those facts do not convert the SEC's action into one focused on public rights. Surely Congress believes that the securities statutes it passes serve the public interest and the U.S. economy overall, not just individual parties. Yet Congress cannot ***457** convert any sort of action into a "public right" simply by finding a public purpose for it and codifying it in federal statutory law. *See* *Granfinanciera*, 492 U.S. at 61, 109 S.Ct. 2782 (explaining that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity"). Purely private suits for securities fraud likely would have a similar public purpose —they too would serve to discourage and remedy fraudulent behavior in securities markets. That does not mean such suits concern public rights at their core. Granted, some actions provided for by the securities statutes may be new and not rooted in any common-law corollary. The fact remains, though, that the enforcement action seeking penalties in this case was one for securities fraud, which is nothing new and nothing foreign to Article III tribunals and juries.

That being so, Petitioners had the right for a jury to adjudicate the facts underlying any potential fraud liability that justifies penalties. And because those facts would potentially support not only the civil penalties sought by the SEC, but the injunctive remedies as well, Petitioners had a Seventh Amendment right to a jury trial for the liability-determination portion of their case.

4.

[16] The dissenting opinion cannot define a "public right" without using the term itself in the definition. That leads to a good bit of question-begging. It says at times that the "SEC's enforcement action" is itself "a 'public right' because it is a case 'in which the Government sues in its sovereign capacity to enforce public rights." *Post* at 469. So the action is a public right because (1) the SEC is the government, and (2) it is vindicating a public right. And what is that public right being vindicated? The dissenting opinion does not say. In reality, the dissenting opinion's rule is satisfied by the first step alone: The action is itself a "public right" because the SEC is the government. And the not-so-far-removed consequences that flow from that conclusion: When the federal government sues, no jury is required. This is perhaps a runner-up in the competition for the "Nine Most Terrifying Words in the English Language." [8] But fear not, the dissenting opinion's proposal runs headlong into *Granfinanciera*: "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity" 492 U.S. at 61, 109 S.Ct. 2782. With that limit in place, the dissenting opinion's bright-line rule burns out. Congress cannot change the nature of a right, thereby circumventing the Seventh Amendment, by simply giving the keys to the SEC to do the vindicating.

In this light, this approach treats the government's involvement as a sufficient condition for converting "private rights" into public ones. But from 1856 to 1989, the government's involvement in a suit was only a necessary condition, *not* a sufficient condition, for determining whether a suit vindicated public rights. *See* *Granfinanciera*, 492 U.S. at 65–66, 68–69, 109 S.Ct. 2782 (Scalia, J., concurring in part) (referring to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283, 15 L.Ed. 372 (1856), and ***458** *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 68–69, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality op.)); *cf.* *N. Pipeline Constr. Co.*, 458 U.S. at 69 n.23, 102 S.Ct. 2858 ("It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing 'private rights' from 'public rights.' "). Then *Granfinanciera* said that a dispute between two private parties could still vindicate "public rights," such that the government was no longer a *necessary* condition for such suits. *See* 492 U.S. at 53–55, 109 S.Ct. 2782. The dissenting opinion thus says that, after *Granfinanciera*, the government is no longer a necessary condition, but it is now a *sufficient* condition. That is at odds with *Granfinanciera* and does not follow from any of the Court's previous decisions, which stressed that the government's involvement alone does not convert a suit about private rights into one about public rights.

The question is not just whether the government is a party, but also whether the right being vindicated is public or private, and how it is being vindicated. Tracing the roots of, and justification for, the public-rights doctrine, the Supreme Court has explained "that certain prerogatives were [historically] reserved to the political Branches of Government." *N. Pipeline Constr. Co.*, 458 U.S. at 67, 102 S.Ct. 2858. Specifically, "[t]he public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are 'inherently ... judicial.' " *Id.* at 68, 102 S.Ct. 2858 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 458, 49 S.Ct. 411, 73 L.Ed. 789 (1929)).

The inquiry is thus inherently historical. The dissenting opinion tries to avoid the history by again emphasizing that *Granfinanciera* dealt with private parties, not the government. But again, if the right being vindicated is a private one, it is not enough that the government is doing the suing. That means we must consider whether the form of the action—whether brought by the government or by a private entity—is historically judicial, or if it reflects the sorts of issues which courts of law did not traditionally decide.

As discussed in Part II.B.2, history demonstrates that fraud claims like these are "traditional legal claims" that arose at common law. Even aside from post-*Atlas Roofing* refinements of the "public rights" doctrine, this fact, among others, distinguishes that case. In *Atlas Roofing*, OSHA empowered the government to pursue civil penalties and abatement orders whether or not any employees were "actually injured or killed as a result of the [unsafe working] condition." 430 U.S. at 445, 97 S.Ct. 1261; *see also* *id.* at 461, 97 S.Ct. 1261 ("[Congress] created a new cause of action, and remedies therefor, unknown to the common law ...."). The government's right to relief was exclusively a creature of statute and was therefore distinctly public in nature.

In contrast, fraud claims, including the securities-fraud claims here, are quintessentially about the redress of private harms. Indeed, the government alleges that Petitioners defrauded particular investors. *Cf.* 15 U.S.C. §§ 77q(a), 78j(b), 80b-6. As explained above, these fraud claims and civil penalties are analogous to traditional fraud claims at common law in a way that the "new" claims and remedies in *Atlas Roofing* were not. *See* *Atlas Roofing*, 430 U.S. at 461, 97 S.Ct. 1261.

That being so, *Granfinanciera*'s considerations about whether Congress created a new action unfamiliar to the common law, and whether jury trial rights are incompatible with the statutory scheme, are appropriate ***459** for us to address even if the suit involves the federal government. And as discussed above: (1) this type of action was commonplace at common law, (2) jury trial rights are consistent and compatible with the statutory scheme, and (3) such actions are commonly considered by federal courts with or without the federal government's involvement. Thus, the agency proceedings below violated Petitioners' Seventh Amendment rights, and the SEC's decision must be vacated.

C.

[17] **[18]** Petitioners next argue that Congress unconstitutionally delegated legislative power to the SEC when it gave the SEC the unfettered authority to choose whether to bring enforcement actions in Article III courts or within the agency. Because Congress gave the SEC a significant legislative power by failing to provide it with an intelligible principle to guide its use of the delegated power, we agree with Petitioners. [9]

"We the People" are the fountainhead of all government power. Through the Constitution, the People delegated some of that power to the federal government so that it would protect rights and promote the common good. *See* The Federalist No. 10 (James Madison) (explaining that one of the defining features of a republic is "the delegation of the government ... to a small number of citizens elected by the rest"). But, in keeping with the Founding principles that (1) men are not angels, and (2) "[a]mbition must be made to counteract ambition," *see* The Federalist No. 51 (James Madison), the People did not vest all governmental power in one person or entity. It separated the power among the legislative, executive, and judicial branches. *See* The Federalist No. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). The legislative power is the greatest of these powers, and, of course, it was given to Congress. U.S. Const. art. I, § 1.

The Constitution, in turn, provides strict rules to ensure that Congress exercises the legislative power in a way that comports with the People's will. Every member of Congress is accountable to his or her constituents through regular popular elections. U.S. Const. art I, §§ 2, 3; *id.* amend. XVII, cl. 1. And a duly elected Congress may exercise the legislative power only through the assent of two separately constituted chambers (bicameralism) and the approval of the President (presentment). U.S. Const. art. I, § 7. This process, cumbersome though it may often seem to eager onlookers, [10] ensures that the ***460** People can be heard and that their representatives have deliberated before the strong hand of the federal government raises to change the rights and responsibilities attendant to our public life. *Cf.* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 Stan. L. Rev. 989, 1017 (2006). ("[T]he Framers weighed the need for federal government efficiency against the potential for abuse and came out heavily in favor of limiting federal government power over crime.").

But that accountability evaporates if a person or entity other than Congress exercises legislative power. *See* *Gundy v. United States*, ––– U.S. ––––, 139 S. Ct. 2116, 2134, 204 L.Ed.2d 522 (2019) (Gorsuch, J., dissenting) ("[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow."). Thus, sequestering that power within the halls of Congress was essential to the Framers. As John Locke—a particularly influential thinker at the Founding—explained, not even the legislative branch itself may give the power away:

> The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated

> power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorised to make laws for them.

Id. at 2133–34 (quoting John Locke, The Second Treatise of Civil Government and a Letter Concerning Toleration § 141, p. 71 (1947)). [11]

[19] **[20]** Article I of the Constitution thus provides that "[*a*]*ll* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). In keeping with Founding conceptions of separation of powers, [12] the Supreme Court has made clear that Congress cannot "delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42, 6 L.Ed. 253 (1825); *see also* *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) ("Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."). According to the Supreme Court's more recent formulations ***461** of that longstanding rule, [13] Congress may grant regulatory power to another entity only if it provides an "intelligible principle" by which the recipient of the power can exercise it. *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)). The two questions we must address, then, are (1) whether Congress has delegated power to the agency that would be legislative power but-for an intelligible principle to guide its use and, if it has, (2) whether it has provided an intelligible principle such that the agency exercises only executive power. [14]

[21] We first conclude that Congress has delegated to the SEC what would be legislative power absent a guiding intelligible principle. Government actions are "legislative" if they have "the purpose and effect of altering the legal rights, duties and relations of persons ... outside the legislative branch." *INS v. Chadha*, 462 U.S. 919, 952, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). The Supreme Court has noted that the power to assign disputes to agency adjudication is "peculiarly within the authority of the legislative department." *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909). [15] And, as discussed above, in some special circumstances *Congress* has the power to assign to agency adjudication matters traditionally at home in Article III courts. *Atlas Roofing*, 430 U.S. at 455, 97 S.Ct. 1261. Through Dodd–Frank § 929P(a), Congress gave *the SEC* the power to bring securities fraud actions for monetary penalties within the agency instead of in an Article III court whenever the SEC in its unfettered discretion decides to do so. *See* 15 U.S.C. § 78u-2(a). Thus, it gave the SEC the ability to determine which subjects of its enforcement actions are entitled to Article III proceedings with a jury trial, and which are not. That was a delegation of legislative power. As the Court said in *Crowell v. Benson*, "the mode of determining" which cases are assigned to administrative tribunals "is completely within congressional control." 285 U.S. 22, 50, 52 S.Ct. 285, 76 L.Ed. 598 (1932) (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451, 49 S.Ct. 411).

The SEC argues that by choosing whether to bring an action in an agency tribunal instead of in an Article III court it merely exercises a form of prosecutorial ***462** discretion—an executive, not legislative, power. That position reflects a misunderstanding of the nature of the delegated power. Congress did not, for example, merely give the SEC the power to decide whether to bring enforcement actions in the first place, or to choose where to bring a case among those district courts that might have proper jurisdiction. It instead effectively gave the SEC the power to decide which defendants should receive *certain legal processes* (those accompanying Article III proceedings) and which should not. Such a decision—to assign certain actions to agency adjudication—is a power that Congress uniquely possesses. *See* *id.*

Next, Congress did not provide the SEC with an intelligible principle by which to exercise that power. We recognize that the Supreme Court has not in the past several decades held that Congress failed to provide a requisite intelligible principle. *Cf.* *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474–75, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (cataloguing the various congressional directives that the Court has found to be "intelligible principle[s]"). But neither in the last eighty years has the Supreme Court considered the issue when Congress offered *no guidance* whatsoever. The last time it did consider such an open-ended delegation of legislative power, it concluded that Congress had acted unconstitutionally: In *Panama Refining Co. v. Ryan*, 293 U.S. 388, 405–06, 55 S.Ct. 241, 79 L.Ed. 446 (1935), the Court considered a statutory provision granting the President the authority to prohibit the transportation in interstate commerce of petroleum and related products. The Court scoured the statute for directives to guide the President's use of that authority, but it found none. *Id.* at 414–20, 55 S.Ct. 241. It therefore explained:

> [I]n every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9(c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule.

Id. at 430, 55 S.Ct. 241.

Congress's grant of authority to the SEC here is similarly open-ended. Even the SEC agrees that Congress has given it exclusive authority and absolute discretion to decide whether to bring securities fraud enforcement actions within the agency instead of in an Article III court. Congress has said nothing at all indicating how the SEC should make that call in any given case. If the intelligible principle standard means anything, it must mean that a total absence of guidance is impermissible under the Constitution. [16] *See* *Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.) (noting that "we *would* face a nondelegation question" if the statutory provision at issue had "grant[ed] the Attorney General plenary power to determine SORNA's applicability to pre-Act offenders—to require them to register, or not, as she sees fit, ***463** and to change her policy for any reason and at any time" (emphasis added)). We therefore vacate the SEC's judgment on this ground as well.

D.

[22] The SEC proceedings below suffered from another constitutional infirmity: the statutory removal restrictions for SEC ALJs are unconstitutional. [17] SEC ALJs perform substantial executive functions. The President therefore must have sufficient control over the performance of their functions, and, by implication, he must be able to choose who holds the positions. Two layers of for-cause protection impede that control; Supreme Court precedent forbids such impediment.

Article II provides that the President must "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The Supreme Court has held that this provision guarantees the President a certain degree of control over executive officers; the President must have adequate power over officers' appointment and removal. [18] *Myers v. United States*, 272 U.S. 52, 117, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Only then can the People, to whom the President is directly accountable, vicariously exercise authority over high-ranking executive officials. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 498, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010). Yet not all removal restrictions are constitutionally problematic. "Inferior officers" may retain some amount of for-cause protection from firing. *See, e.g.,* *Morrison v. Olson*, 487 U.S. 654, 691–92, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988). Likewise, even principal officers may retain for-cause protection when they act as part of an expert board. *Seila Law LLC v. CFPB*, ––– U.S. ––––, 140 S. Ct. 2183, 2192, 207 L.Ed.2d 494 (2020).

But a problem arises when both of those protections act in concert. In *Free Enterprise Fund*, the Supreme Court considered the constitutionality of two layers of for-cause protection for members of the Public Company Accounting Oversight Board (PCAOB). 561 U.S. at 492, 130 S.Ct. 3138. The members of the board answered to the SEC Commissioners. But the SEC could remove them only for "willful violations of the [Sarbanes–Oxley] Act, Board rules, or the securities laws; willful abuse of authority; or unreasonable failure to enforce compliance—as determined in a formal Commission order, rendered on the record and after notice and an opportunity for a hearing." *Id.* at 503, 130 S.Ct. 3138. On top of that, the President could only remove SEC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 486–87, 502, 130 S.Ct. 3138. The Supreme Court held that this extensive system insulating PCAOB members from removal deprived the President of the ability to adequately oversee the Board's actions. *Id.* at 492, 496, 130 S.Ct. 3138.

The question here is whether SEC ALJs serve sufficiently important executive functions, and whether the restrictions on their removal are sufficiently onerous, that the President has lost the ability to take care ***464** that the laws are faithfully executed. Petitioners' argument on this point is straightforward: SEC ALJs are inferior officers; they can only be removed by the SEC Commissioners if good cause is found by the Merits Systems Protection Board; SEC Commissioners and MSPB members can only be removed by the President for cause; so, SEC ALJs are insulated from the President by at least two layers of for-cause protection from removal, which is unconstitutional under *Free Enterprise Fund*. The SEC responds that this case is not like *Free Enterprise Fund*. First, it contends that SEC ALJs primarily serve an adjudicatory role. Second, it asserts that the for-cause protections for ALJs are not as stringent as those which applied to PCAOB members at the time of *Free Enterprise Fund*—or, at least, that this court should read the removal protections for ALJs that way to avoid constitutional problems.

We agree with Petitioners and hold that the removal restrictions are unconstitutional. The Supreme Court decided in *Lucia* that SEC ALJs are "inferior officers" under the Appointments Clause because they have substantial authority within SEC enforcement actions. *Lucia v. SEC*, — U.S. —, 138 S. Ct. 2044, 2053, 201 L.Ed.2d 464 (2018). And in *Free Enterprise Fund* it explained that the President must have adequate control over officers and how they carry out their functions. 561 U.S. at 492, 496, 130 S.Ct. 3138. If principal officers cannot intervene in their inferior officers' actions except in rare cases, the President lacks the control necessary to ensure that the laws are faithfully executed. So, if SEC ALJs are "inferior officers" of an executive agency, as the Supreme Court in *Lucia* indicated was the case at least for the purposes of the Appointments Clause, they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions. Specifically, SEC ALJs exercise considerable power over administrative case records by controlling the presentation and admission of evidence; they may punish contemptuous conduct; and often their decisions are final and binding. *Lucia*, 138 S. Ct. at 2053–54. But 5 U.S.C. § 7521(a) provides that SEC ALJs may be removed by the Commission "only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing before the Board." (Parenthetical not in original.) And the SEC Commissioners may only be removed by the President for good cause.

The dissenting opinion's response is all built on dicta from *Free Enterprise Fund*. There, in noting what issues the Court was leaving open, the Court identified characteristics that were true of ALJs that were not true of PCAOB members: "[U]nlike members of the [PCAOB], many" ALJs "perform adjudicative rather than enforcement or policymaking functions." *Free Enterprise Fund*, 561 U.S. at 507 n.10, 130 S.Ct. 3138. Far from "stat[ing]" that this "may justify multiple layers of removal protection," *post* at 478, the Court merely identified that its decision does not resolve the issue presented here. In any event, the Court itself said in *Myers* that "quasi[-]judicial" executive officers must nonetheless be removable by the President "on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised." 272 U.S. at 135, 47 S.Ct. 21.[19] ***465** So even if ALJs' functions are more adjudicative than PCAOB members, the fact remains that two layers of insulation impedes the President's power to remove ALJs based on their exercise of the discretion granted to them.[20]

Finally, the SEC urges us to interpret the for-cause protections for ALJs to instead allow removal for essentially any reason. Even if we could do so (and the statutory language likely does not give us that flexibility), that would not solve the

Article II problem. As noted above, the MSPB is part of the mix as well. Furthermore, MSPB members "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). So, for an SEC ALJ to be removed, the MSPB must find good cause and the Commission must choose to act on that finding. And members of both the MSPB and the Commission have for-cause protection from removal by the President. Simply put, if the President wanted an SEC ALJ to be removed, at least two layers of for-cause protection stand in the President's way.

Thus, SEC ALJs are sufficiently insulated from removal that the President cannot take care that the laws are faithfully executed. The statutory removal restrictions are unconstitutional.

III.

In sum, we agree with Petitioners that the SEC proceedings below were unconstitutional. The SEC's judgment should be vacated for at least two reasons: (1) Petitioners were deprived of their Seventh Amendment right to a civil jury; and (2) Congress unconstitutionally delegated legislative power to the SEC by failing to give the SEC an intelligible principle by which to exercise the delegated power. We also hold that the statutory removal restrictions for SEC ALJs are unconstitutional, ***466** though we do not address whether vacating would be appropriate based on that defect alone. [21]

We GRANT the petition for review, VACATE the decision of the SEC, and REMAND for further proceedings consistent with this opinion.

W. Eugene Davis, Circuit Judge, dissenting:

The majority holds that (1) administrative adjudication of the SEC's enforcement action violated Petitioners' Seventh Amendment right to a jury trial; (2) Congress unconstitutionally delegated an Article I legislative power to the executive branch when it gave the SEC the discretion to choose between bringing its enforcement action in an Article III court or before the agency without providing an intelligible principle to guide the SEC's decision; and (3) the removal protections on SEC administrative law judges violate Article II's requirement that the President "take Care that the Laws be faithfully executed." I respectfully disagree with each of these conclusions.

I.

The majority holds that the Seventh Amendment grants Petitioners the right to a jury trial on the facts underlying the SEC's enforcement action, and administrative adjudication without a jury violated that right. In reaching this conclusion, the majority correctly recognizes that a case involving "public rights" may be adjudicated in an agency proceeding without a jury notwithstanding the Seventh Amendment. [1] But, the majority then erroneously concludes that the SEC's enforcement action does not involve "public rights." In my view, the majority misreads the Supreme Court's decisions addressing what are and are not "public rights."

A.

As declared by Professors Wright and Miller, "A definitive statement by the Supreme Court regarding congressional authority in this context is found in *Atlas Roofing v. Occupational Safety & Health Review Commission*." [2] That case concerned the Occupational Safety and Health Act ("OSHA" or "the Act"), which created a new statutory duty on employers to avoid maintaining unsafe or unhealthy working conditions. OSHA also empowered the Federal Government, proceeding before an administrative agency without a jury, to impose civil penalties on those who violated the Act. [3] Two employers who had been cited for violating the Act argued that a suit in a federal court by the Government seeking civil penalties for violation of a statute is classically a suit at ***467** common law for which the Seventh Amendment provides a right to a jury trial; therefore, Congress cannot deprive them of that right by simply assigning the function of adjudicating the Government's right to civil penalties to an administrative forum where no jury is available. [4] The Court, in a unanimous opinion, disagreed:

> At least in cases in which "public rights" are being litigated—*e.g.*, ***cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact***—the Seventh Amendment does

> not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.... This is the case even if the Seventh Amendment would have required a jury where the adjudication of those rights is assigned instead to a federal court of law instead of an administrative agency. [5]

Atlas Roofing drew its definition of "public rights" from, inter alia, *Crowell v. Benson*, which described "public rights" in slightly broader terms: matters "***which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments***." [6]

The Supreme Court has never retreated from its holding in *Atlas Roofing.* [7] In fact, the Court implicitly re-affirmed *Atlas Roofing*'s definition of "public rights" as recently as 2018, when it decided *Oil States Energy Services, LLC v. Greene's Energy Group, LLC.* [8] That case involved the Leahy-Smith America Invents Act, which granted the Patent and Trademark Office ("PTO") the power to reconsider a previously-issued patent via an administrative process called "inter partes review." [9] This was a departure from historical practice, which placed this function in Article III courts alone. [10] The petitioner argued that inter partes review violated both Article III and the Seventh Amendment. [11] The Court disagreed and explained that Congress has "significant latitude" to assign adjudication of "public rights" to non-Article III tribunals that do not use a jury. [12] Moreover, the Court, quoting *Crowell*, defined "public rights" as "matters 'which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative ***468** departments.' " [13]

As mentioned, *Atlas Roofing*'s definition of "public rights" is a slightly narrower version of *Crowell*'s definition. Thus, when *Oil States* re-affirmed *Crowell*, it necessarily re-affirmed *Atlas Roofing*'s definition as well. [14]

Oil States is also significant because it held that historical practice is not determinative in matters governed by the public rights doctrine, as such matters " 'from their nature' can be resolved in multiple ways." [15] Accordingly, the Court rejected the view that "because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so." [16]

Like *Oil States*, this court relied on *Crowell* to define "public rights" in *Austin v. Shalala.* [17] That case involved the Government's action to recover overpayment of social security benefits via an administrative proceeding before the Social Security Administration. [18] *Austin* rejected the plaintiff's argument that the proceeding violated her Seventh Amendment right, explaining that "if Congress may employ an administrative body as a factfinder in imposing money penalties for the violation of federal laws"—as was done in *Atlas Roofing* and in the securities statutes at issue here—"it plainly may employ such a body to recover overpayments of government largess." [19]

Consistent with the above cases, our sister circuits routinely hold that an enforcement action by the Government for violations of a federal statute or regulation is a "public right" that Congress may assign to an agency for adjudication without offending the Seventh Amendment. [20] For example, the Eleventh Circuit relied solely on *Atlas Roofing* when it rejected a Seventh Amendment challenge to administrative adjudication of an ***SEC*** enforcement action and declared "it is well-established that the Seventh Amendment does not require a jury trial in administrative proceedings designed to adjudicate statutory 'public rights.' " [21]

The SEC's enforcement action satisfies *Atlas Roofing*'s definition of a "public ***469** right," as well as the slightly broader definition set forth in *Crowell* and applied in *Oil States* and *Austin.* The broad congressional purpose of the securities laws is to "protect investors." [22] For example, the Securities Act of 1933 was "designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."[23] The Dodd-Frank Act, which, inter alia, expanded the SEC's authority to pursue civil penalties in administrative proceedings,[24] was "intended to improve investor protection," particularly in light of the Bernard Madoff Ponzi scheme.[25] Other circuits have consistently recognized that "[w]hen the SEC sues to enforce the securities laws, it is vindicating public rights and furthering public interests, and therefore is acting in the United States's sovereign capacity."[26] Thus, the SEC's enforcement action is a "public right" because it is a case "in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[27] It is also a matter "which arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[28]

Because the SEC's enforcement action is a "public right," the Seventh Amendment does not prohibit Congress from assigning its adjudication to an administrative forum that lacks a jury.[29] As discussed below, the fact that the securities statutes at issue resemble (but are not identical to) common-law fraud does not change this ***470** result.[30] It also makes no difference that federal courts have decided claims under the securities statutes for decades.[31]

B.

The majority's conclusion that the SEC's enforcement action is not a "public right" is based primarily on an erroneous reading of *Granfinanciera, S.A. v. Nordberg.*[32] Specifically, the majority interprets that case as abrogating *Atlas Roofing*. *Granfinanciera* did nothing of the sort.

In *Granfinanciera*, a bankruptcy trustee sued in bankruptcy court (where a jury was unavailable) to avoid allegedly fraudulent transfers the defendants had received from the debtor.[33] The defendants argued that they were entitled to a jury trial under the Seventh Amendment.[34] A key issue was whether the trustee's claim involved "public" or "private" rights. The Court held that the action was a private right.[35]

Unlike *Atlas Roofing, Granfinanciera* did not involve a suit by or against the Federal Government. This distinction is important. In discussing what constitutes a "public right," *Granfinanciera*, citing *Atlas Roofing*, recognized that "Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action ***inheres in, or lies against, the Federal Government in its sovereign capacity***."[36] *Granfinanciera* then clarified that "the class of 'public rights' whose adjudication Congress may assign to administrative agencies ... ***is more expansive*** than *Atlas Roofing*'s discussion suggests";[37] i.e., the "Government need not be a party for a case to revolve around 'public rights' " provided certain other criteria are met.[38] Nevertheless, and contrary to what is implied by the majority, *Granfinanciera*'s recognition that the public-rights doctrine can extend to cases where the Government is not a party in no way undermines or alters *Atlas Roofing*'s holding that a case where the Government sues in its sovereign capacity to enforce a statutory right is a case involving "public rights."[39]

***471** Because the bankruptcy trustee's suit involved only private parties and not the Government, *Granfinanciera*'s analysis is solely concerned with whether the action was one of the "seemingly 'private' right[s]" that are within the reach of the public-rights doctrine. Thus, any considerations or requirements discussed in *Granfinanciera* that go beyond *Atlas Roofing* or *Crowell* apply only to cases not involving the Government.

This understanding of *Granfinanciera* is supported by our subsequent decision in *Austin*, which stated:

> Although the definition is somewhat nebulous, at a minimum, suits involving public rights are those "which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments." *Crowell v. Benson*, 285 U.S. 22, 50, 52 S. Ct. 285, 292, 76 L.Ed. 598 (1932). ***Beyond that***,

> certain ***other cases*** are said to involve public rights where Congress has created a "seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." Granfinanciera, 492 U.S. at 54, 109 S.Ct. 2782 ....[40]

Similarly, while *Oil States* acknowledged that *Crowell* did not provide the sole definition of what constitutes a "public right," it did not discuss any of the other "formulations" because *Crowell*'s definition was met.[41]

The majority overlooks the fact that *Granfinanciera*'s expansion of the public-rights doctrine applies only when the Government is not a party to the case. As a result, the majority applies "considerations" that have no relevance here. For example, the majority, quoting *Granfinanciera*, states that "jury trials would not 'go far to dismantle the statutory scheme' or 'impede swift resolution' of statutory claims." Again, *Granfinanciera* discussed these considerations in the context of a suit between private persons, not a case involving the Government acting in its sovereign capacity under an otherwise valid statute creating enforceable public rights.[42] Indeed, neither *Austin* nor *Oil States*, both of which were decided after *Granfinanciera* and which found public rights to exist, mentions these considerations.[43]

The majority also states that the securities statutes at issue created causes of ***472** action that "reflect" and "echo" common-law fraud. But this does not matter, because, as *Granfinanciera* itself recognized, the public-rights doctrine allows Congress to "fashion causes of action that are closely ***analogous*** to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable."[44]

The majority asserts that *Atlas Roofing* is distinguishable from the SEC's enforcement action because "OSHA empowered the government to pursue civil penalties regardless of whether any employe[e]s were 'actually injured or killed as a result of the [unsafe working] condition.' "[45] But the securities statutes share this feature: The SEC may impose civil penalties on a person who makes a material misrepresentation even if no harm resulted from the misrepresentation.[46] The statutory cause of action created by the securities statutes is as "new" to the common law as the one created by OSHA.[47]

Relatedly, the majority harps on the fact that federal courts have dealt with actions under the securities statutes for decades. But *Oil States* makes clear that "[h]istorical practice is not decisive here."[48] "That Congress chose the courts in the past does not foreclose its choice of [an administrative adjudication] today."[49]

The majority also states that "securities-fraud enforcement actions are not the sort that are uniquely suited for agency adjudication." Again, this is not relevant. As *Oil States* explained, "the public-rights doctrine applies to matters 'arising between the government and others, which from their nature do not require judicial determination ***and yet are susceptible of it***.' "[50] Indeed, "matters governed by the public-rights doctrine 'from their nature' can be ***473** resolved in multiple ways."[51]

Finally, it should be emphasized that *Tull v. United States*[52] does not control the outcome here. That case concerned the Government's suit ***in district court*** seeking civil penalties and an injunction for violations of the Clean Water Act.[53] *Tull* did not involve an administrative proceeding. Thus, while *Tull* concluded that the Government's claim was analogous to a "Suit at common law" for Seventh Amendment purposes,[54] the Court did not engage in the "quite distinct inquiry" into whether the claim was also a "public right" that Congress may assign to a non-Article III forum where juries are unavailable.[55] *Tull* itself acknowledges in a footnote prior decisions "holding that the Seventh Amendment is not applicable to administrative proceedings," making clear that it was not deciding whether the defendant would be entitled to a jury in an administrative adjudication.[56]

C.

In summary, the SEC's enforcement action against Petitioners for violations of the securities laws is a "public right" under Supreme Court precedent as well as our own. Accordingly, Congress could and did validly assign adjudication of that action to an administrative forum where the Seventh Amendment does not require a jury.

II.

I also disagree with the majority's alternative holding that Congress exceeded its power by giving the SEC the authority to choose to bring its enforcement action in either an agency proceeding without a jury or to a court with a jury. The majority reasons that giving the SEC this power without providing guidelines on the use of that power violates Article I by delegating its legislative authority to the agency. The majority's position runs counter to Supreme Court precedent. As set forth below, by authorizing the SEC to bring enforcement actions either in federal court or in agency proceedings, Congress fulfilled its legislative duty.

In support of its determination that Congress unconstitutionally delegated its authority to the SEC, the majority relies on *Crowell v. Benson*, wherein the Supreme Court explained that "the mode of determining" cases involving public rights "is completely within congressional control." [57] *Crowell* did not state that Congress cannot authorize that a case involving public rights may be determined in either of two ways. By passing Dodd-Frank § 929P(a), Congress established that SEC enforcement actions can be brought in Article III courts or in administrative proceedings. In doing so, Congress fulfilled its duty of controlling the mode of determining public rights cases asserted by the SEC.

***474** The majority maintains that because the SEC has "the power to decide which defendants should receive certain legal processes (those accompanying Article III proceedings) and which should not," then such a decision falls under Congress's legislative power. The Supreme Court's decision in *United States v. Batchelder* [58] demonstrates that the majority's position on this issue is incorrect.

In *Batchelder*, the issue presented was whether it was constitutional for Congress to allow the Government, when prosecuting a defendant, to choose between two criminal statutes that "provide[d] different penalties for essentially the same conduct." [59] The defendant had been convicted under the statute with the higher sentencing range, and the Court of Appeals determined that the delegation of authority to prosecutors to decide between the two statutes, and thus choose a higher sentencing range for identical conduct, was a violation of due process and the nondelegation doctrine. [60] Specifically, the Court of Appeals determined that "such prosecutorial discretion could produce 'unequal justice' " and that it might be "impermissibl[e] [to] delegate to the Executive Branch the Legislature's responsibility to fix criminal penalties." [61]

The Supreme Court disagreed. The Court explained that "[t]he provisions at issue plainly demarcate the range of penalties that prosecutors and judges may seek and impose." [62] The Court further stated: "In light of that specificity, the power that Congress has delegated to those officials is no broader than the authority they routinely exercise in enforcing the criminal laws." [63] The Court concluded: "Having informed the courts, prosecutors, and defendants of the permissible punishment alternatives available under each Title, Congress has fulfilled its duty." [64]

The Supreme Court has analogized agency enforcement decisions to prosecutorial discretion exercised in criminal cases. [65] If the Government's prosecutorial authority to decide between two criminal statutes that provide for different sentencing ranges for essentially the same conduct does not violate the nondelegation doctrine, then surely the SEC's authority to decide between two forums that provide different legal processes does not violate the nondelegation doctrine. Thus, the SEC's forum-selection authority is part and parcel of its prosecutorial authority. [66]

Although no other circuit court appears to have addressed the particular nondelegation issue presented in this case, a district court did so in *Hill v. SEC.* [67] Like the ***475** majority does here, the plaintiff in *Hill* relied on *I.N.S. v. Chadha* [68] to assert that the SEC's choice of forum is a legislative action because it "alter[s] the rights, duties, and legal relations of individuals." [69] *Chadha* addressed the question whether a provision in the Immigration and Nationality Act (INA) allowing one House of Congress to veto the Attorney General's decision to allow a particular deportable alien to remain in the United States violated the Presentment Clauses and bicameral requirement of Article I. [70] Specifically, it addressed whether Congress, after validly delegating authority to the Executive, can then alter or revoke that valid delegation of authority through the action of just one House.

I agree with the district court in *Hill* that if *Chadha*'s definition of legislative action is interpreted broadly and out of context, then any SEC decision which affected a person's legal rights—including charging decisions—would be legislative actions, which is contrary to the Supreme Court's decision in *Batchelder.* [71] *Chadha*, one of the primary authorities the majority relies on, does not touch on any issue involved in this case.

I agree with the persuasive and well-reasoned decision of the district court in *Hill* that "Congress has properly delegated power to the executive branch to make the forum choice for the underlying SEC enforcement action." [72] In sum, it is clear to me that Congress's decision to give prosecutorial authority to the SEC to choose between an Article III court and an administrative proceeding for its enforcement actions does not violate the nondelegation doctrine.

III.

Finally, the majority concludes that the statutory removal restrictions applicable to SEC administrative law judges are unconstitutional because they violate Article II's requirement that the President "take Care that the Laws be faithfully executed." Specifically, the majority determines that SEC ALJs enjoy at least two layers of for-cause protection, and that such insulation from the President's removal power is unconstitutional in light of the Supreme Court's decisions in *Free Enterprise Fund v. Public Company Accounting Oversight Board* [73] and *Lucia v. SEC.* [74] I disagree. Rather than support the majority's conclusion, these cases explain why the SEC ALJs' tenure protections are constitutional: ALJs perform an adjudicative function.

Free Enterprise concerned the Public Company Accounting Oversight Board ("PCAOB"), which Congress created in 2002 to regulate the accounting industry. [75] The PCAOB's powers included promulgating standards, inspecting accounting firms, initiating formal investigations and disciplinary proceedings, and issuing sanctions. [76] In other words, PCAOB members were inferior officers who exercised "significant ***476** executive power." [77] The President could not remove the members of the PCAOB; rather, they could be removed by the Securities and Exchange Commission under certain, limited circumstances. [78] Furthermore, SEC Commissioners cannot themselves be removed by the President except for inefficiency, neglect of duty, or malfeasance in office. [79] While prior cases upheld restrictions on the President's removal power that imposed one level of protected tenure, *Free Enterprise* held that these dual for-cause limitations on the removal of PCAOB members unconstitutionally impaired the President's ability to ensure that the laws are faithfully executed, because "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the [PCAOB]." [80]

Free Enterprise, however, "did not broadly declare all two-level for-cause protections for inferior officers unconstitutional." [81] Furthermore, the Court expressly declined to address "that subset of independent agency employees who serve as administrative law judges." [82] The Court made two observations about ALJs that potentially distinguished them from the PCAOB: (1) whether ALJs are "Officers of the United States" was, at that time, a disputed question, and (2) "unlike members of the [PCAOB], many administrative law judges of course perform ***adjudicative rather than enforcement or policymaking functions or possess purely recommendatory powers***." [83]

The Supreme Court subsequently addressed the first observation in *Lucia v. SEC.* [84] There, the Court held that SEC ALJs are "inferior officers" within the meaning of the Appointments Clause in Article II. [85] However, the Court again expressly declined to decide whether multiple layers of statutory removal restrictions on SEC ALJs violate Article II. [86]

Thus, neither *Free Enterprise* nor *Lucia* decided the issue raised here: whether multiple layers of removal restrictions for SEC ALJs violate Article II. As the Ninth Circuit recently concluded, the question is open. [87]

It is important to recognize that the Constitution does not expressly prohibit removal protections for "Officers of the United States." [88] The concept that such protections may be unconstitutional is drawn from the fact that "Article II vests '[t]he executive Power ... in a President of the United States of America,' who must 'take Care that the Laws be faithfully executed.' "[89] The test is functional, not categorical:

> ***477** The analysis contained in our removal cases is designed ***not*** to define rigid categories of those officials who may or may not be removed at will by the President, but to ensure that Congress does not interfere with the President's exercise of the "executive power" and his constitutionally appointed duty to "take care that the laws be faithfully executed" under Article II.[90]

Consistent with this standard, *Free Enterprise* thoroughly explained why two levels of removal protection for the PCAOB interfered with the executive power.[91] The first step in the Court's analysis focused on the fact that the PCAOB exercised "significant executive power"[92] as it "determine[d] the policy and enforce[d] the laws of the United States."[93] Then the Court explained how the PCAOB's removal protections subverted the President's ability to oversee this power.[94] The point here is that the function performed by the officer is critical to the analysis—the Court did not simply conclude that because members of the PCAOB were "Officers of the United States" (which was undisputed)[95] that dual for-cause protections were unconstitutional.

Unlike the PCAOB members who determine policy and enforce laws, SEC ALJs perform solely adjudicative functions. As the *Lucia* Court stated, "an SEC ALJ exercises authority 'comparable to' that of a federal district judge conducting a bench trial."[96] Their powers include supervising discovery, issuing subpoenas, deciding motions, ruling on the admissibility of evidence, hearing and examining witnesses, generally regulating the course of the proceeding, and imposing sanctions for contemptuous conduct or procedural violations.[97] After a hearing, the ALJ issues an initial decision that is subject to review by the Commission.[98] Commentators have similarly observed that "SEC ALJs do not engage in enforcement or rulemaking"[99] and proceedings before them are "analogous to that which would occur before a federal judge."[100]

Free Enterprise stated, albeit in dicta, that the fact that an ALJ performs adjudicative rather than enforcement or policymaking functions may justify multiples layers of removal protection.[101] I believe this to be the case. The ALJs' role is similar to that of a federal judge;[102] it is not central to the functioning of the Executive Branch for purposes of the Article II removal precedents.[103] As the Southern District of ***478** New York concluded, invalidating the "good cause" removal restrictions enjoyed by SEC ALJs would only "undermine the ALJs' clear adjudicatory role and their ability to 'exercise[ ] ... independent judgment on the evidence before [them], free from pressures by the parties or other officials within the agency.' "[104]

In fact, the Ninth Circuit recently employed similar reasoning in *Decker Coal Co. v. Pehringer*, which held that two layers of removal protection for ALJs in the Department of Labor do not violate Article II.[105] Like SEC ALJs, the ALJs in *Decker Coal* performed "a purely adjudicatory function."[106] The majority's decision is in tension, if not direct conflict, with *Decker Coal*.

Free Enterprise also noted that the exercise of "purely recommendatory powers" may justify multiple removal protections.[107] When an SEC ALJ issues a decision in an enforcement proceeding, that decision is essentially a recommendation as the Commission can review it de novo.[108] Even when the Commission declines review, the ALJ's decision is "deemed the action of the Commission."[109] Furthermore, the Commission is not required to use an ALJ and may elect to preside over the enforcement action itself.[110] This further supports the conclusion that the SEC ALJs' removal protections do not interfere with the President's executive power.

The majority reasons that because *Lucia* determined that SEC ALJs are inferior officers under the Appointments Clause, "they are sufficiently important to executing the laws that the Constitution requires that the President be able to exercise authority over their functions," and, consequently, multiple for-cause protections inhibit the President's ability to take care that the laws be faithfully executed. But nowhere does the majority explain ***how*** the ALJs' tenure protections interfere with the President's ability to execute the laws. The majority does not mention *Free Enterprise*'s observation that the performance of "adjudicative rather than enforcement or policymaking functions" or "possess[ing] purely recommendatory powers" distinguishes ALJs from the PCAOB and may justify multiples layers of removal protection for ALJs.[111] The majority does not mention that *Lucia* found SEC ALJs to be similar to a federal judge.[112] The majority does not mention *Decker Coal*. Instead, the majority applies what is essentially a rigid, categorical standard, not the functional analysis required by the Supreme Court's precedents.[113]

***479** Accordingly, I disagree with the majority that multiple layers of removal protection for SEC ALJs violate Article II. Because SEC ALJs solely perform an adjudicative function, and because their powers are recommendatory, these removal restrictions do not interfere with the President's ability to "take Care that the Laws be faithfully executed."

IV.

I find no constitutional violations or any other errors with the administrative proceedings below. Accordingly, I would deny the petition for review.

All Citations

34 F.4th 446, Fed. Sec. L. Rep. P 101,401

Footnotes

1 Multiple *amici* have filed briefs with this court as well: the Cato Institute, Phillip Goldstein, Mark Cuban, Nelson Obus, and the New Civil Liberties Alliance. Each argues that the SEC proceedings exceeded constitutional limitations for reasons that Petitioners raise.

2 Veneration of the jury as safeguard of liberty predates the American Founding. Our inherited English common-law tradition has long extolled the jury as an institution. William Blackstone said that trial by jury is "the glory of the English law" and "the most transcendent privilege which any subject can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 142–43, 14 L.Ed. 75 (1851) (quoting 4 William Blackstone, Commentaries on the Laws of England 227–29 (Oxford, Clarendon Pr. 1992) (1765)); *see also* Jennifer W. Elrod, *W(h)ither The Jury? The Diminishing Role of the Jury Trial in Our Legal System*, 68 Wash. & Lee L. Rev. 3, 7 (2011). Indeed, King George III's attempts to strip colonists of their right to trial by jury was one of the chief grievances aired against him and was a catalyst for declaring independence. The Declaration of Independence para. 20 (U.S. 1776).

3 *See also* Kenneth Klein, *The Validity of The Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 Hastings Const. L.Q. 1013, 1015 (1994) ("At the time the Constitution was proposed, the people of the United States greatly distrusted government, and saw the absence of a guaranteed civil jury right as a reason, standing alone, to reject adoption of the Constitution; only by promising the Seventh Amendment did the Federalists secure adoption of the Constitution in several of the state ratification debates.").

4 The Seventh Circuit was referring to the Ninth Circuit's opinion in *SEC v. Clark*, 915 F.2d 439, 442 (9th Cir. 1990). *Clark* did not address the issue whatsoever.

5 Indeed, the SEC regularly brings securities-fraud actions in Article III courts and adjudicates them through jury trials. *See, e.g., SEC v. Fowler*, 6 F.4th 255, 258–60 (2d Cir. 2021); *SEC v. Johnston*, 986 F.3d 63, 71 (1st Cir. 2021); *SEC v. Life Partners Holdings, Inc.*, 854 F.3d 765, 772 (5th Cir. 2017); *SEC v. Quan*, 817

F.3d 583, 587 (8th Cir. 2016); *SEC v. Miller*, 808 F.3d 623, 626 (2d Cir. 2015); *SEC v. Jasper*, 678 F.3d 1116, 1119, 1121–22 (9th Cir. 2012); *SEC v. Seghers*, 298 F. App'x 319, 321 (5th Cir. 2008).

6 The dissenting opinion contends that these considerations are "not decisive" (that the SEC has for decades sued in Article III courts under securities statutes) or "not determinative" (that those same suits are not unique to agency adjudication). To disregard these facts is to ignore the Supreme Court's explanation for what public rights are made of. And in any event, though the facts may not in isolation make up a private right, they together establish (along with the other considerations discussed above) that the right being vindicated here is a private right, not a public one.

7 Moreover, the Supreme Court has noted that agency adjudicators generally do not have special expertise to address structural constitutional claims—precisely the issues central to this case. *Carr v. Saul*, ––– U.S. ––––, 141 S. Ct. 1352, 1360, 209 L.Ed.2d 376 (2021) ("[T]his Court has often observed that agency adjudications are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise.").

8 *Cf.* Ronald Reagan, Presidential News Conference (Aug. 12, 1986), https://www.presidency.ucsb.edu/documents/the-presidents-news-conference-957.

9 This is an alternative holding that provides ground for vacating the SEC's judgment. "This circuit follows the rule that alternative holdings are binding precedent and not obiter dictum." *Texas v. United States*, 809 F.3d 134, 178 n.158 (5th Cir. 2015) (quoting *United States v. Potts*, 644 F.3d 233, 237 n.3 (5th Cir. 2011)).

10 Indeed, President Woodrow Wilson, the original instigator of the agency that became the SEC, believed agencies like that one could solve the "problem" of congressional gridlock and the burden of popular accountability. *See* *Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) ("Wilson's 'new constitution' would ditch the Founders' tripartite system and their checks and balances for a 'more efficient separation of politics and administration, which w[ould] enable the bureaucracy to tend to the details of administering progress without being encumbered by the inefficiencies of politics.' " (quoting Ronald J. Pestritto, Woodrow Wilson and the Roots of Modern Liberalism 227 (2005))), *cert. granted sub nom., SEC v. Cochran*, 21-1239, 2022 WL 1528373, ––– U.S. ––––, ––– S.Ct. ––––, --- L.Ed.2d –––– (U.S. May 16, 2022); *see also id.* ("Wilson's goal was to completely separate 'the province of constitutional law' from 'the province of administrative function.' " (quoting Philip Hamburger, Is Administrative Law Unlawful? 464 (2014))).

11 Locke's perspective on the legislature's delegation of its power was influential in the United States around the time of the framing of the Constitution. *See* Hamburger, *supra* at 384.

12 Principles of non-delegation had even taken hold in England before the American Founding. *See* Hamburger, *supra* at 381 (explaining that "even under [King] James I, the judges recognized that the king's prerogative power came from his subjects—that he was exercising a power delegated by the people" and, as a result, he could not transfer the royal powers to anyone else); *see also id.* ("[P]arliamentary subdelegations were widely understood to be unlawful.").

13 Some contemporary academics have argued that the non-delegation doctrine lacks a sound historical basis. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 Colum. L. Rev. 277 (2021); *but see* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490 (2021) (arguing that the doctrine was present at the Founding); Philip Hamburger, *Delegating or Divesting?*, 115 Nw. U. L. Rev. Online 88 (2020) (similar). Of course, our role as an inferior court is to faithfully apply Supreme Court precedent, so

we do not reach the proper historical scope of the non-delegation doctrine. *See* *Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019).

14 Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547, 1558 (2015) ("[T]here is [no] delegation of legislative power at all so long as the legislature has supplied an 'intelligible principle' to guide the exercise of delegated discretion. Where there is such a principle, the delegatee is exercising executive power, not legislative power." (emphasis and footnote omitted)).

15 Moreover, at the Virginia Ratifying Convention in 1788, then-delegate John Marshall suggested that it is proper to the legislative power to determine the expedience of assigning particular matters for jury trial. *See* John Marshall on the Fairness and Jurisdiction of the Federal Courts, *in* 2 The Debate on the Constitution 740 (Bernard Bailyn ed. 1993) ("The Legislature of Virginia does not give a trial by jury where it is not necessary. But gives it wherever it is thought expedient. The Federal Legislature will do so too, as it is formed on the same principles.").

16 As a member of this court aptly noted just last year, the fact that the modern administrative state is real and robust does not mean courts are never called to declare its limits. *See* *Cochran*, 20 F.4th at 222 (Oldham, J., concurring) ("If administrative agencies 'are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people,' the Court warned that 'we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties.' " (quoting *Jones v. SEC*, 298 U.S. 1, 24–25, 56 S.Ct. 654, 80 L.Ed. 1015 (1936))).

17 Because we vacate the SEC's judgment on various other grounds, we do not decide whether vacating would be the appropriate remedy based on this error alone. *See* *Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022) (remanding to the district court to determine what remedy, if any, is appropriate in light of the Supreme Court's holding that removal restrictions applicable to the Director of the Federal Housing Finance Agency were unconstitutional).

18 Of course, the President's authority over appointments derives from the Appointments Clause as well. *See* U.S. Const. art. II, § 2, cl. 2.

19 The dissenting opinion deems this proposition from *Myers* to be *obiter dicta* that the Court subsequently disregarded in *Humphrey's Executor v. United States*, 295 U.S. 602, 626–28, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). *Post* at 478 n.113. But that itself is to disregard the Supreme Court's more recent guidance, which fortifies the Court's "landmark decision" in *Myers* and narrowed *Humphrey's Executor. See* *Seila Law*, 140 S. Ct. at 2191–92, 2197–99 & n.2 (limiting the *Humphrey's Executor* exception to *Myers* to cases involving "for-cause removal protections [given] to a multimember body of experts, balanced along partisan lines, that perform[ ] legislative and judicial functions and [are] said not to exercise any executive power," while casting doubt on the existence of wholly non-executive, quasi-legislative or quasi-judicial agency powers altogether); *see also* *City of Arlington v. F.C.C.*, 569 U.S. 290, 305 n.4, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (noting that "[agency] activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must* be exercises of—the 'executive Power' " (citing U.S. Const. art. II, § 1, cl. 1)).

20 In the next breath, the dissenting position draws from a law review article that "[t]he ALJs' role is similar to that of a federal judge." *Post* at 477. It then concludes that they must be insulated from removal by the president

to maintain their independence. But that analogy runs out under a little scrutiny. The SEC's ALJs are not mere neutral arbiters of federal securities law; they are integral pieces within the SEC's powerful enforcement apparatus. The ALJs report to the Commission itself and act under authority delegated by it. SEC Organization Chart (2020), https://www.sec.gov/about/secorg.pdf; 15 U.S.C. § 78d-1(a); 17 C.F.R. § 200.30-10. As the amicus brief by the Cato Institute points out, these administrative proceedings differ significantly from cases resolved in federal district courts and reviewed by federal courts of appeals. Cato Amicus Br. at 19–31. First, the Commission has *ex parte* discussions with the prosecutors to determine whether to pursue securities-fraud claims. Then the Commission itself decides what claims should be brought by the prosecutors. Only then do ALJs resolve the claims, which are then again reviewed by the Commission. Suffice it to say, even if ALJs have some of the same "tools of federal trial judges," *Lucia*, 138 S. Ct. at 2053, they use those tools at the direction of and with the power delegated to them by the Commission.

21 Petitioners also argue that the SEC violated their equal protection rights, and that its decision was infected with bias and violated their due process rights. Because we vacate the SEC's decision on other grounds, we decline to reach these issues.

1 *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) ("If a claim that is legal in nature asserts a 'public right,' ... then the Seventh Amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency or specialized court of equity. The Seventh Amendment protects a litigant's right to a jury trial only if a cause of action is legal in nature and it involves a matter of 'private right.' " (citation omitted)).

2 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2302.2, at 59 (4th ed. 2020) (citing *Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 430 U.S. 442, 97 S.Ct. 1261, 51 L.Ed.2d 464 (1977)) (italics added).

3 *Atlas Roofing*, 430 U.S. at 445, 97 S.Ct. 1261.

4 *Id.* at 449–50, 97 S.Ct. 1261.

5 *Id.* at 450, 455, 97 S.Ct. 1261 (emphasis added; paragraph break omitted); *see also id.* at 458, 97 S.Ct. 1261 ("Our prior cases support administrative factfinding in only those situations involving 'public rights,' *e.g.*, where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").

6 *Id.* at 452, 97 S.Ct. 1261 (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 52 S.Ct. 285, 76 L.Ed. 598 (1932)) (emphasis added); *see also id.* at 456, 457, 460, 97 S.Ct. 1261 (citing *Crowell*, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598).

7 Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 95 (2016).

8 —— U.S. ——, 138 S. Ct. 1365, 200 L.Ed.2d 671 (2018).

9 *Id.* at 1370–72.

10 *Id.* at 1384 (Gorsuch, J., dissenting) ("[F]rom the time it established the American patent system in 1790 until about 1980, Congress left the job of invalidating patents at the federal level to courts alone.").

11 *Id.* at 1372.

12 *Id.* at 1373, 1379.

13 *Id.* at 1373 (quoting *Crowell*, 285 U.S. at 50, 52 S.Ct. 285).

14 *Oil States* did not purport to provide an exhaustive definition of "public rights," and the opinion alludes to the possibility that, under certain circumstances, matters not involving the Government may also fall within the realm of "public rights." *See* *id.* However, the Court did not need to address these other, "various formulations" of "public rights," because inter partes review fell squarely within *Crowell*'s definition. *See* *id.* This court reached a similar conclusion in *Austin v. Shalala*, discussed below.

15 *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451, 49 S.Ct. 411, 73 L.Ed. 789 (1929)).

16 *Id.*; *see also* *id.* ("That Congress chose the courts in the past does not foreclose its choice of the PTO today.").

17 994 F.2d 1170, 1177 (5th Cir. 1993).

18 *Id.* at 1173.

19 *Id.* at 1177-78 (citing *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S.Ct. 671, 53 L.Ed. 1013 (1909)).

20 *See, e.g., Imperato v. SEC*, 693 F. App'x 870, 876 (11th Cir. 2017) (unpublished) (administrative adjudication for violations of the Securities Exchange Act); *Crude Co. v. FERC*, 135 F.3d 1445, 1454–55 (Fed. Cir. 1998) (Mandatory Petroleum Allocation Regulations); *Cavallari v. Office of Comptroller of Currency*, 57 F.3d 137, 145 (2d Cir. 1995) (Financial Institutions Reform, Recovery and Enforcement Act); *Sasser v. Adm'r EPA*, 990 F.2d 127, 130 (4th Cir. 1993) (Clean Water Act).

21 *Imperato*, 693 F. App'x at 876 (citing *Atlas Roofing*, 430 U.S. at 455–56, 97 S.Ct. 1261).

22 *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 (5th Cir. 1974).

23 *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). In a similar vein, the Investment Advisers Act of 1940 seeks to "protect[ ] investors through the prophylaxis of disclosure," in order to eliminate "the darkness and ignorance of commercial secrecy," which "are the conditions upon which predatory practices best thrive." *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 200, 84 S.Ct. 275, 11 L.Ed.2d 237 (1963).

24 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, Sec. 929P, 124 Stat. 1376, 1862–64 (2010) (codified at 15 U.S.C. §§ 77h-1(g), 78u-2(a), 80a-9(d), 80b-3(i)).

25 Mark Jickling, Congressional Research Service, R41503 *The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title IX, Investor Protection* at i (2010).

26 *SEC v. Diversified Corporate Consulting Grp.*, 378 F.3d 1219, 1224 (11th Cir. 2004), *abrogated on other grounds by* *Kokesh v. SEC*, —— U.S. ——, 137 S. Ct. 1635, 198 L.Ed.2d 86 (2017); *see also* *SEC v. Rind*, 991 F.2d 1486, 1491 (9th Cir. 1993); *United States v. Badger*, 818 F.3d 563, 566 (10th Cir. 2016).

27 *Atlas Roofing*, 430 U.S. at 450, 97 S.Ct. 1261.

28 *Crowell*, 285 U.S. at 22, 52 S.Ct. 285; *Oil States*, 138 S. Ct. at 1373; *Austin*, 994 F.2d at 1177.

The majority asserts that "[t]he dissenting opinion cannot define a 'public right' without using the term itself in the definition." First, I rely on definitions the Supreme Court has provided. Second, while *Atlas Roofing* does use "public rights" to define "public rights," *Crowell* does not. Furthermore, *Granfinanciera* observed that *Atlas Roofing* "left the term 'public rights' undefined" and so looked to *Crowell* to fill in any perceived gap. *Granfinanciera*, 492 U.S. at 51 n.8, 109 S.Ct. 2782; *see also* *id.* at 53, 109 S.Ct. 2782 (noting that, under *Atlas Roofing*, a "public right" is simply "a statutory cause of action [that] inheres in, or lies against, the Federal Government in its sovereign capacity").

29 *Atlas Roofing*, 430 U.S. at 450, 97 S.Ct. 1261; *Granfinanciera*, 492 U.S. at 52–54, 109 S.Ct. 2782; *Oil States*, 138 S. Ct. at 1379.

30 *See* *Granfinanciera*, 492 U.S. at 52, 109 S.Ct. 2782 ("Congress may fashion causes of action that are closely ***analogous*** to common-law claims and place them beyond the ambit of the Seventh Amendment by assigning their resolution to a forum in which jury trials are unavailable" if the action involves "public rights.").

31 *See* *Oil States*, 138 S. Ct. at 1378 ("[W]e disagree with the dissent's assumption that, because courts have traditionally adjudicated patent validity in this country, courts must forever continue to do so. Historical practice is not decisive ... [in] matters governed by the public-rights doctrine .... That Congress chose the courts in the past does not foreclose its choice of the PTO today.")

32 492 U.S. 33, 109 S.Ct. 2782, 106 L.Ed.2d 26.

33 *Id.* at 36.

34 *Id.* at 40.

35 *Id.* at 55, 64.

36 *Granfinanciera*, 492 U.S. at 53, 109 S.Ct. 2782 (citing *Atlas Roofing*, 430 U.S. at 458, 97 S.Ct. 1261) (emphasis added).

37 *Id.* at 53, 109 S.Ct. 2782 (emphasis added).

38 *Id.* at 54, 109 S.Ct. 2782 (citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 586, 596–99, 105 S.Ct. 3325, 87 L.Ed.2d 409 (1985)).

39 *Granfinanciera* itself makes this clear when it states:

> The crucial question, ***in cases not involving the Federal Government***, is whether "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, ***and if that right neither belongs to nor exists against the Federal Government***, then it must be adjudicated by an Article III court.

Id. at 54-55, 109 S.Ct. 2782 (quoting *Thomas*, 473 U.S. at 593–94, 105 S.Ct. 3325) (footnote omitted; emphasis added; bracketed alterations in original).

40 *Austin*, 994 F.2d at 1177 (emphasis added).

41 *Oil States*, 138 S. Ct. at 1373.

42 *Granfinanciera*, 492 U.S. at 61, 63, 109 S.Ct. 2782.

43 The same goes for the out-of-circuit decisions cited in footnote 20 above. *Atlas Roofing*, in a footnote, does make a passing reference to "go far to dismantle the statutory scheme." 430 U.S. at 454 n.11, 97 S.Ct. 1261. But the Court was merely describing its reasoning in another bankruptcy case. Nothing in *Atlas Roofing* suggests that this consideration is relevant to whether Congress may assign the Government's enforcement action to an administrative proceeding lacking a jury.

44 *Granfinanciera*, 492 U.S. at 52, 109 S.Ct. 2782 (citations omitted); *see also* *id.* at 53, 109 S.Ct. 2782 ("Congress may effectively supplant a common-law cause of action carrying with it a right to a jury trial with a statutory cause of action shorn of a jury trial right if that statutory cause of action inheres in, or lies against, the Federal Government in its sovereign capacity." (citing *Atlas Roofing*, 430 U.S. at 458, 97 S.Ct. 1261)); *accord* *Crude Co.*, 135 F.3d at 1455 ("The public right at issue is not converted into a common law tort simply because the theory of liability underlying the enforcement action is analogous to a common law tort theory of vicarious liability.").

45 Majority Op. at 458–59 (quoting *Atlas Roofing*, 430 U.S. at 445, 97 S.Ct. 1261).

46 *See* 15 U.S.C. §§ 78u-2(c), 77h-1(g)(1), 80a-9(d)(3), 80b-3(i)(3).

47 *Atlas Roofing* recognized that, before (and after) OSHA, a person injured by an unsafe workplace condition may have an action at common law for negligence. *See* *Atlas Roofing*, 430 U.S. at 445, 97 S.Ct. 1261. Through OSHA, specific safety standards were promulgated, and the Government could bring an enforcement action for a violation even if no one was harmed by the violation. *Id.* Similarly, before enactment of the securities statutes, an investor who was defrauded in the course of a securities transaction had a common-law action for fraud. Like OSHA, the securities statutes expressly prohibited certain conduct and empowered the SEC to bring an enforcement action for a violation, even if no one was actually harmed by the violation.

48 138 S. Ct. at 1378.

49 *Id.* *Oil States* likewise refutes the majority's assertion that "[t]he inquiry is thus inherently historical." I add that the majority's support for this proposition consists of a concurring opinion in *Granfinanciera* and the plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (plurality), which addressed whether a bankruptcy court may decide a breach of contract action between two private parties.

50 *Id.* at 1373 (citing *Crowell*, 285 U.S. at 50, 52 S.Ct. 285) (emphasis added).

51 *Id.* at 1378 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451, 49 S.Ct. 411).

52 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

53 *Id.* at 414–15, 107 S.Ct. 1831.

54 *Id.* at 425, 107 S.Ct. 1831.

55 *Granfinanciera*, 492 U.S. at 42 n.4, 109 S.Ct. 2782; *accord* *Sasser*, 990 F.2d at 130.

56 *Tull*, 481 U.S. at 418 n.4, 107 S.Ct. 1831 (citing *Atlas Roofing*, 430 U.S. at 454, 97 S.Ct. 1261; *Pernell v. Southall Realty*, 416 U.S. 363, 383, 94 S.Ct. 1723, 40 L.Ed.2d 198 (1974)).

57 285 U.S. at 50, 52 S.Ct. 285 (quoting *Ex parte Bakelite Corp.*, 279 U.S. at 451, 49 S.Ct. 411).

58 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

59 *Id.* at 116, 99 S.Ct. 2198.

60 *Id.* at 123, 125–26, 99 S.Ct. 2198.

61 *Id.* at 125–26, 99 S.Ct. 2198.

62 *Id.* at 126, 99 S.Ct. 2198.

63 *Id.*

64 *Id.* (citation omitted).

65 *See* *Heckler v. Chaney*, 470 U.S. 821, 832, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985) ("[W]e recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch ....").

66 *Cf.* *SEC v. Chenery Corp.*, 332 U.S. 194, 203, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.") (citation omitted).

67 114 F. Supp. 3d 1297 (N.D. Ga. 2015) (holding that SEC's forum-selection authority does not violate the nondelegation doctrine), *vacated and remanded on other grounds*, 825 F.3d 1236 (11th Cir. 2016).

68 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

69 *Hill*, 114 F. Supp. 3d at 1312 (quoting *Chadha*, 462 U.S. at 952, 103 S.Ct. 2764).

70 462 U.S. at 923, 946, 103 S.Ct. 2764.

71 *Hill*, 114 F. Supp. 3d at 1313.

72 *Id.*

73 561 U.S. 477, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010).

74 —— U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018).

75 *Id.* at 484-85, 130 S.Ct. 3138.

76 *Id.* at 485, 130 S.Ct. 3138.

77 *Id.* at 514, 130 S.Ct. 3138.

78 *Id.* at 486, 503, 130 S.Ct. 3138.

79 *Id.* at 487, 130 S.Ct. 3138.

80 *Id.* at 496, 130 S.Ct. 3138.

81 *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1132 (9th Cir. 2021).

82 *Free Enter. Fund*, 561 U.S. at 507 n.10, 130 S.Ct. 3138.

83 *Id.* (citations omitted; emphasis added).

84 —— U.S. ——, 138 S. Ct. 2044, 201 L.Ed.2d 464 (2018).

85 *Id.* at 2055.

86 *Id.* at 2051 & n.1.

87 *See* *Decker Coal Co.*, 8 F.4th at 1132.

88 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 4.2 (5th ed. 2015) ("No constitutional provision addresses the [President's] removal power.").

89 *Free Enter. Fund*, 561 U.S. at 483, 130 S.Ct. 3138 (quoting U.S. CONST., art. II §§ 1 & 3).

90 *Morrison v. Olson*, 487 U.S. 654, 689–90, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (footnote omitted; emphasis added).

91 *Free Enter. Fund*, 561 U.S. at 495–96, 130 S.Ct. 3138.

92 *Id.* at 514, 130 S.Ct. 3138.

93 *Id.* at 484, 130 S.Ct. 3138; *see also* *id.* at 508, 130 S.Ct. 3138 (describing the PCAOB as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

94 *Id.* at 498, 130 S.Ct. 3138.

95 *Id.* at 506, 130 S.Ct. 3138.

96 *Lucia*, 138 S. Ct. at 2049 (quoting *Butz v. Economou*, 438 U.S. 478, 513, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)).

97 *Id.*

98 *Id.*

99 Mark, *supra*, at 107.

100 David Zaring, *Enforcement Discretion at the SEC*, 94 TEX. L. REV. 1155, 1166 (2016).

101 561 U.S. at 507 n.10, 130 S.Ct. 3138.

102 *Lucia*, 138 S. Ct. at 2049.

103 *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 669 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing *Morrison*, 487 U.S. at 691–92, 108 S.Ct. 2597).

104 *Duka v. SEC*, 103 F. Supp. 3d 382, 395–96 (S.D.N.Y. 2015), *abrogated on other grounds by* *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (quoting *Butz*, 438 U.S. at 513–14, 98 S.Ct. 2894). *See also* Mark, *supra*, at 102–08 (arguing that multiple layers of removal protection for SEC ALJs do not violate Article II); Zaring, *supra*, at 1191–95 (same).

105 *Decker Coal Co.*, 8 F.4th at 1133.

106 *Id.*

107 *Free Enter. Fund*, 561 U.S. at 507 n.10, 130 S.Ct. 3138.

108 *See* *Lucia*, 138 S. Ct. at 2049 (citing 17 C.F.R. § 201.360(d)); 5 U.S.C. § 557(b).

109 *Lucia*, 138 S. Ct. at 2049 (quoting 15 U.S.C. § 78d-1(c)).

110 *Id.* (citing 17 C.F.R. § 201.110).

111 561 U.S. at 507 n.10, 130 S.Ct. 3138.

112 138 S. Ct. at 2049.

113 *Morrison*, 487 U.S. at 689–90, 108 S.Ct. 2597. The majority also cites *Myers v. United States*, 272 U.S. 52, 135, 47 S.Ct. 21, 71 L.Ed. 160 (1926), for the proposition that quasi-judicial executive officers must be removable by the President. But that part of *Myers* is dicta, which is why the Court disregarded it in *Humphrey's Executor v. United States*, 295 U.S. 602, 626–28, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

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142 S.Ct. 1087
Supreme Court of the United States.

Jane **DOE**
v.
FACEBOOK, INC.

No. 21-459
|
Decided March 7, **2022**

Case below, 625 S.W.3d 80.

Opinion

The petition for a writ of certiorari is denied.

Statement of Justice THOMAS respecting the denial of certiorari.

In 2012, an adult, male sexual predator used **Facebook** to lure 15-year-old Jane **Doe** to a meeting, shortly after which she was repeatedly raped, beaten, and trafficked for sex. **Doe** eventually escaped and sued **Facebook** in Texas state court, alleging that **Facebook** had violated Texas' anti-sex-trafficking statute and committed various common-law offenses. **Facebook** petitioned the Texas Supreme Court for a writ of mandamus dismissing **Doe's** suit. The court held that a provision of the Communications Decency Act known as § 230 bars **Doe's** common-law claims, but not her statutory sex-trafficking claim.

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Texas Supreme Court emphasized that courts have uniformly treated internet platforms as "publisher[s]" under § 230(c)(1), and thus immune, whenever a plaintiff 's claim " 'stem[s] from [the platform's] publication of information created by third parties.' " *In re* ***Facebook****, Inc.*, 625 S.W.3d 80, 90 (Tex. 2021) (quoting ***1088** ***Doe*** *v. MySpace, Inc.*, 528 F.3d 413, 418 (CA5 2008)). As relevant here, this expansive understanding of publisher immunity requires dismissal of claims against internet companies for failing to warn consumers of product defects or failing to take reasonable steps "to protect their users from the malicious or objectionable activity of other users." 625 S.W.3d, at 83. The Texas Supreme Court acknowledged that it is "plausible" to read § 230(c)(1) more narrowly to immunize internet platforms when plaintiffs seek to hold them "strictly liable" for transmitting third-party content, *id.*, at 90–91, but the court ultimately felt compelled to adopt the consensus approach, *id.*, at 91.

This decision exemplifies how courts have interpreted § 230 "to confer sweeping immunity on some of the largest companies in the world," *Malwarebytes, Inc.* v. *Enigma Software Group USA, LLC*, 592 U. S. ––––, ––––, 141 S.Ct. 13, 13, 208 L.Ed.2d 197 (2020) (statement of THOMAS, J., respecting denial of certiorari), particularly by employing a "capacious conception of what it means to treat a website operator as [a] publisher or speaker," *id.*, at ––––, 141 S.Ct., at 17 (internal quotation marks omitted). Here, the Texas Supreme Court afforded publisher immunity even though **Facebook** allegedly "knows its system facilitates human traffickers in identifying and cultivating victims," but has nonetheless "failed to take any reasonable steps to mitigate the use of **Facebook** by human traffickers" because doing so would cost the company users—and the advertising revenue those users generate. Fourth Amended Pet. in No. 2018–69816 (Dist. Ct., Harris Cty., Tex., Feb. 10, 2020), pp. 20, 22, 23; see also Reply Brief 3, n. 1, 4, n. 2 (listing recent disclosures and investigations supporting these allegations).

It is hard to see why the protection § 230(c)(1) grants publishers against being held strictly liable for third parties' content should protect **Facebook** from liability for its *own* "acts and omissions." Fourth Amended Pet., at 21.

At the very least, before we close the door on such serious charges, "we should be certain that is what the law demands." *Malwarebytes*, 592 U. S., at ––––, 141 S.Ct. at, 18. As I have explained, the arguments in favor of broad immunity under § 230 rest largely on "policy and purpose," not on the statute's plain text. *Id.*, at ––––, 141 S.Ct., at 15. Here, the Texas Supreme Court recognized that "[t]he United States Supreme Court—or better yet, Congress—may soon resolve the burgeoning debate about whether the federal courts have thus far correctly interpreted section 230." 625 S.W.3d, at 84. Assuming Congress does not step in to clarify § 230's scope, we should do so in an appropriate case.

Unfortunately, this is not such a case. We have jurisdiction to review only "[f]inal judgments or decrees" of state courts. 28 U.S.C. § 1257(a). And finality typically requires "an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 89 L.Ed. 1171 (1945). Because the Texas Supreme Court allowed **Doe's** statutory claim to proceed, the litigation is not "final." Conceding as much, **Doe** relies on a narrow exception to the finality rule involving cases where "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). But that exception cannot apply here because the Texas courts have not yet conclusively adjudicated a personal-jurisdiction defense that, if successful, would "effectively moot the federal-law question raised here." ***1089** *Jefferson v. City of Tarrant*, 522 U.S. 75, 82, 118 S.Ct. 481, 139 L.Ed.2d 433 (1997).

I, therefore, concur in the Court's denial of certiorari. We should, however, address the proper scope of immunity under § 230 in an appropriate case.

All Citations

142 S.Ct. 1087 (Mem), 212 L.Ed.2d 244, 22 Cal. Daily Op. Serv. 2430, 29 Fla. L. Weekly Fed. S 155

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KeyCite Blue Flag – Appeal Notification
Appeal Filed by DZ RESERVE, ET AL v. META PLATFORMS, INC., 9th Cir., June 21, 2022

2022 WL 912890
Only the Westlaw citation is currently available.
United States District Court, N.D. California.

DZ RESERVE, et al., Plaintiffs,
v.
META PLATFORMS, INC., Defendant.

Case No. 3:18-cv-04978-JD
|
Signed 03/29/2022

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ORDER RE MOTION TO CERTIFY CLASS AND *DAUBERT* MOTIONS

JAMES DONATO, United States District Judge

***1** In this action alleging fraud against Meta Platforms, Inc. (Meta), formerly known as Facebook, named plaintiffs DZ Reserve and Cain Maxwell have asked to certify a class of United States residents who paid Meta for placement of advertisements on social media platforms. Dkt. No. 282. The gravamen of the lawsuit is that Meta inflated its potential advertising reach to consumers, and charged artificially high premiums for ad placements. Meta opposes certification, and filed two *Daubert* motions challenging the opinions and conclusions proffered by plaintiffs' expert witnesses. Dkt. Nos. 285, 286.

Three claims alleged in the Third Amended Complaint (TAC) remain in play. Dkt. No. 332.[1] The Court dismissed with prejudice plaintiffs' claims for breach of the implied covenant of good faith and fair dealing and a quasi-contract claim. Dkt. No. 255 at 2. The Court sustained plaintiffs' claims for fraudulent misrepresentation and fraudulent concealment, with the proviso that plaintiffs could not pursue those claims for conduct before August 15, 2015. *Id.* at 1-2. While the certification motion was pending, the Court granted a motion for judgment on the pleadings and dismissed plaintiffs' claim of restitution under the California Unfair Competition Law (UCL). Dkt. No. 366. The UCL claim was sustained for injunctive relief only. *Id.* at 2. Consequently, the claims subject to certification are fraudulent misrepresentation and fraudulent concealment for damages, and the UCL for injunctive relief.

DISCUSSION

I. BACKRGOUND

Before getting into the merits, a few words about Meta's brief are in order. Meta fired a blunderbuss of objections at certification. Virtually every page of its lengthy opposition brief presented a new argument, often in just a paragraph or two of discussion. As a result, many of its arguments were underdeveloped to the point where the Court had ample justification to disregard them. Even so, the Court undertook the burden of sorting through Meta's brief to identify and address what appear to be its main arguments. Meta aggravated this situation further by making factual arguments much more suited to summary judgment proceedings than a class certification motion. To be sure, as the ensuing certification standards make clear, the Court will review the evidence as pertinent to the question of whether a class should certified. Meta's arguments went far beyond that inquiry.

The parties' familiarity with the record is assumed. In pertinent part, the undisputed facts are that Meta sells advertising to businesses and business owners like plaintiffs DZ Reserve and Cain Maxwell. Dkt. No. 332 at ¶ 2 Meta's Ads Manager platform is used by advertisers to identify their advertising targets, including the demographic reach they desire. *Id.* at ¶ 3. After advertisers select their targeting and placement criteria, the Ads Manager displays a "Potential Reach" for the advertisement. *See* Dkt. No. 282-3. The Potential Reach is expressed as a number of people that the ad may reach. *Id.* The default Potential Reach number, before any targeting criteria are selected, is the Potential Reach for people in the United States aged 18 and up, which was shown during the putative class period to be over 200 million people. Dkt. No. 281-9 at ¶¶ 55-60. As targeting criteria are selected, the Potential Reach is revised accordingly. Dkt. No. 282-3; 281-13 at 54:21-59:25. Meta describes the Potential Reach as an estimate of people in the ad's target audience. *See* Dkt. No. 296-17 at 3.

II. CLASS CERFITICATION STANDARDS

***2** Plaintiffs propose to certify this class under Federal Rules of Civil Procedure 23(a), 23(b)(2), and 23(b)(3):

> All United States residents (including natural persons and incorporated entities) who, from August 15, 2014, to the present ("Class Period"), paid for the placement of at least one advertisement on Facebook's platforms, including the Facebook and Instagram platforms, which was purchased through Facebook's Ads Manager or Power Editor.
>
> Excluded from the class are: (1) advertisements purchased pursuant to agreements other than Facebook's Terms of Service or Statement of Rights and Responsibilities; (2) advertisements purchased using only non-lookalike Custom Audiences as the targeting criteria; (3) advertisements purchased using Reach and Frequency buying; (4) advertisements purchased with the objectives of canvas app engagement, canvas app installs, offer claims, event responses, page likes, or external; and (5) advertisements for which Facebook provided Potential Reach lower than 1000.

Dkt. No. 282 at 15.

The Court has written extensively on the standards for class certification, which informs the discussion here. *See, e.g.*, *Sapan v. Yelp, Inc.*, No. 18-cv-3240-JD, 2021 WL 5302908 (N.D. Cal. Nov. 15, 2021); *Meek v. SkyWest, Inc.*, ––– F. Supp. 3d ––––, 2021 WL 4461180 (N.D. Cal. Sep. 29, 2021). A class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quotations omitted). The overall goal is "to select the metho[d] best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 568 U.S. 455, 460 (2013) (internal quotations omitted) (modification in original). Plaintiffs must show that their proposed class satisfies all four requirements of Rule 23(a), and at least one of the subsections of Rule 23(b). *Comcast*, 569 U.S. at 33 (2013); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). As the parties seeking certification, plaintiffs bear the burden of showing that the requirements of Rule 23 are met for their proposed class. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

The Court's class certification analysis "must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim," but merits questions may be considered only to the extent that they are "relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen*, 568 U.S. at 465-66 (internal quotations and citations omitted). The class certification procedure is decidedly not an alternative form of summary judgment or an occasion to hold a mini-trial on the merits. *Alcantar v. Hobart Service*, 800 F.3d 1047, 1053 (9th Cir. 2015). The decision of whether to certify a class is entrusted to the sound discretion of the district court. *Zinser*, 253 F.3d at 1186.

III. RULE 23(B)(3) CLASS

The Rule 23(a) factors are the same for certification of the proposed class under Rule 23(b)(2) or (b)(3), and the conclusions reached here for the Rule 23(a) elements apply to both types of classes. The main difference is the predominance element of Rule 23(b)(3), which Rule 23(b)(2) does not require. The Court takes up the proposed Rule 23(b)(3) class first.

***3** The Court granted Meta's motion for judgment on the pleadings to dismiss plaintiffs' UCL claims for restitution, *see* Dkt. No. 366, so monetary relief is only available for plaintiffs' common law fraudulent concealment and fraudulent misrepresentation claims.

A. Numerosity (23(a)(1))

Rule 23(a)(1) requires that a proposed class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs state, with evidentiary support, that "[d]uring each year of the class period, more than 2 million United States advertisers purchased Facebook ads." Dkt. No. 282 at 15. Meta does not contest numerosity, and the Court finds this element is satisfied.

B. Typicality and Adequacy (23(a)(3)-(4))

Rule 23(a) requires the named plaintiffs to demonstrate that their claims are typical of the putative class, and that they are capable of fairly and adequately protecting the interests of the class. Fed. R. Civ. P. 23(a)(3)-(4). The named plaintiffs say typicality is satisfied because they "bring the same legal claims as the rest of the putative [c]lass" and "rely on the same grounds for liability as the rest of the class." Dkt. No. 282 at 17. Plaintiffs also say that they are adequate representatives because "[t]hey have no conflicts with the class," have "participated actively in this case," and their counsel has no conflicts, has experience with class actions, and has demonstrated a "willingness to vigorously prosecute this action." *Id.*

Meta makes multiple objections to adequacy and typicality. The primary one is that the proposed class is said to include a diverse population of advertisers ranging from " 'large sophisticated corporations' to 'individuals and small businesses.' " Dkt. No. 294 at 16-17. In Meta's view, this means that the putative class members are necessarily in such disparate positions vis-à-vis its advertising services that the named plaintiffs, as advertisers on the smaller end of the spectrum, cannot fairly or adequately represent them. *Id.*

The objection is not well taken. To start, typicality is demonstrated when "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998), *overruled on other grounds by* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." (internal quotation marks omitted). *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1019.

That is the situation here. Plaintiffs have adduced evidence indicating that, regardless of size or buying power, Meta's customers saw similar representations by Meta about its advertising reach and programs. Advertisers were shown the same default Potential Reach of over 200 million people before they applied any targeting criteria. Dkt. No. 281-9 at ¶¶ 55-60. Plaintiffs' expert, Dr. Charles Cowan, states that even with different targeting criteria for each advertiser, inflated Potential Reach representations were made across Meta's platform. Dkt. No. 281-11 at ¶ 33. All advertising customers were shown Potential Reach estimates that were inflated by a similar percentage. *Id.* at ¶ 15. [2]

***4** It may be that class members differ in advertising budgets and scope of purchases, as Meta suggests, but Meta has not shown that these differences defeat typicality or the named plaintiffs' ability to adequately represent all class members. This is not a case where the record demonstrates that the products, pricing, and programs accessed by class members were so dissimilar that typicality and adequacy could not be established. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D. 478, 489-90 (N.D. Cal. 2008) (denying certification of antitrust class where evidence demonstrated putative class members purchased entirely different products at different prices). In effect, Meta simply posits that typicality and adequacy cannot be established because the class includes large and small ad purchasers. The problem with this approach is that it is *ipse dixit* and not an evidence-based objection.

Meta's case citations do not lead to a different conclusion. It overreads *In re Facebook, Inc., PPC Advertising Litig.*, 282 F.R.D. 446 (N.D. Cal. 2012), *aff'd sub nom.* *Fox Test Prep v. Facebook, Inc.*, 588 F. App'x 733 (9th Cir. 2014), to stand for the proposition that a " 'diverse group' of advertisers" necessarily undercuts adequacy and typicality. Dkt. No. 293-4 at 16-17. But that case in fact determined that typicality had been demonstrated. *In re Facebook, Inc.*,, 282 F.R.D. at 453-54. Adequacy was not found because the record failed to show that the named plaintiffs had suffered a concrete injury from the challenged conduct. *Id.* at 454. That is not a circumstance present here.

Meta also has not demonstrated an evidence-based reason to reject the adequacy of the named plaintiffs generally. Adequacy of representation asks whether: "(1) the representative plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). Meta did not make a serious effort at answering either inquiry in the negative, and plaintiffs have demonstrated that no such concerns are in play here. *See* Dkt. No. 282 at 16-17.

Meta's effort to recast its typicality and adequacy challenges as questions of reliance and UCL standing is equally unavailing. *See* Dkt. No. 294 at 15. To start, named plaintiffs demonstrated reliance by proffering evidence that DZ Reserve was deterred from using Meta ads after learning that the Potential Reach was an inaccurate metric. Dkt. No. 293-27 at 193:17-194:5. Similarly, named plaintiff Maxwell relied on Potential Reach to set his budgets and would not have spent money on Meta ads if he knew Potential Reach was inaccurate. *See* Dkt. No. 293-29 at 199:8-12; Dkt. No. 317-2 at 257:3-14. Meta says that the named plaintiffs would still have purchased ads if they knew the Potential Reach was inaccurate. Dkt. No. 294 at 16. But plaintiffs also indicated that they would have spent less on ads after learning the Potential Reach was inaccurate, demonstrating that they were deceived into spending more money. *See, e.g.*, Dkt. No. 317-3 at 105:21-106:5. This and similar evidence also establishes reliance for UCL standing purposes. *See* *Walker v. Life Insurance Co. of the Sw.*, 953 F.3d 624, 630 (9th Cir. 2020) ("To bring a UCL claim, a plaintiff must establish he suffered 'as a result of' the defendant's conduct.") (quoting Cal. Bus. & Prof. Code § 17204); *In re Tobacco II Cases*, 46 Cal. 4th 298, 325 (Cal. 2009) (named plaintiffs, not absent ones, must provide evidence of actual reliance at the certification stage).

Meta's mention of an arbitration provision in contracts for advertising after May 2018, Dkt. No. 294 at 17, also does not defeat the adequacy and typicality of the named plaintiffs. The complaint in this case was filed in August 2018. Dkt. No. 1. Despite that, and knowing of the arbitration clause and its possible application to plaintiffs, Meta never sought to compel arbitration, and instead vigorously litigated this lawsuit in federal court as if arbitration were not an option. A good argument can be made that Meta has waived arbitration on this record. *See* *Anderson v. Starbucks Corp.*, No. 20-cv-01178-JD, 2022 WL 797014 (N.D. Cal. March 16, 2022) (and cases cited therein). In addition, the record shows that the named plaintiffs purchased ads before and after May 2018, which indicates that they are adequate representatives for advertisers who purchased ads both before and after May 28, 2018. *See* Dkt. No 328-2 at ¶ 21. If for some presently unknown reason an adjustment to the class definition might be required on arbitration grounds, the Court can alter or amend it at any time before entry of a final judgment. Fed. R. Civ. P. 23(c)(1)(C); *see also* *Powers v. Hamilton Cty. Pub. Def. Com'n*, 501 F.3d 592, 619 (6th Cir. 2007).

***5** Plaintiffs have satisfied the elements of adequacy and typicality.

C. Commonality (23(a)(2)) and Predominance (23(b)(3))

The commonality requirement under Rule 23(a)(2) is satisfied when "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Because "any competently crafted class complaint literally raises common questions," the Court's task is to look for a common contention "capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Alcantar*, 800 F.3d at 1052 (internal quotations and citations omitted). What matters is the "capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 350 (internal quotations omitted) (emphasis in original). This does not require total uniformity across a class. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019. "[E]ven a single common question will do." *Dukes*, 564 U.S. at 359. The commonality standard imposed by Rule 23(a)(2) is "rigorous." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

Rule 23(b)(3) sets out the related but nonetheless distinct requirement that the common questions of law or fact predominate over the individual ones. This inquiry focuses on whether the "common questions present a significant aspect of the case and [if] they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022 (internal quotations and citation omitted); *see also*

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016). Each element of a claim need not be susceptible to classwide proof, *Amgen*, 568 U.S. at 468-69, and the "important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance to the claims of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016). Rule 23(b)(3) permits certification when "one or more of the central issues in the action are common to the class and can be said to predominate, ... even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members." *Tyson*, 577 U.S. at 453 (internal quotations omitted).

"Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," *Comcast*, 569 U.S. at 34, and the main concern under subsection (b)(3) is "the balance between individual and common issues." *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 560 (9th Cir. 2019) (en banc) (internal quotations omitted). The Court finds it appropriate to assess commonality and predominance in tandem, with a careful eye toward ensuring that the specific requirements of each are fully satisfied. *See, e.g.*, *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120-21 (9th Cir. 2017).

1. Liability

***6** Plaintiffs have demonstrated that the main liability issues are common to the class members and are capable of resolution with common evidence. For the fraudulent concealment and fraudulent misrepresentation claims, plaintiffs must show: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e. to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Engalla v. Permanente Med. Grp., Inc.*, 15 Cal. 4th 951, 974 (1997). For plaintiffs' UCL claims (for which only commonality must be shown as part of the 23(a) factors, given the unavailability of monetary relief), plaintiffs must show that members of the public were likely to be deceived. *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir. 2008) (claims under UCL and CLRA are "governed by the 'reasonable consumer' test"; plaintiffs "must show that members of the public are likely to be deceived") (internal quotations and citations omitted).

Consequently, the main liability question is the same for all class members: did Meta's Potential Reach metric mislead advertisers? Meta does not disagree, and instead hurls a grab bag of challenges to plaintiffs' ability of proving an answer in their favor. Much of Meta's argument against commonality and predominance is simply that the evidence does not support plaintiffs' case. That is not the pertinent inquiry at the certification stage. The question is whether it makes sense under Rule 23 and as a matter of due process and efficiency to present the liability dispute to a jury on behalf of a class. Whether plaintiffs can ultimately prove it up at trial is a different matter altogether.

To the extent a merits inquiry is warranted, plaintiffs have adduced evidence showing that all class members were exposed to a similar representation about the ability of Potential Reach to reach "people," namely unique individuals. *See, e.g.*, Dkt. No. 282-3; Dkt. No. 281-9 at ¶¶ 55-60. This is seen in the Ads Manager interface, which represented Potential Reach as a number of people. *See, e.g.*, Dkt. No. 281-8. The evidence further shows that Meta's Potential Reach metric was not actually an estimate of people reached, but an estimate of "accounts" reached. *See* Dkt. No. 281-60 at ECF 10. Because the number of unique accounts and unique people were different, this led to an inaccurate representation of how many people the advertisements could reach. *See* Dkt. No. 281-11 at ¶ 15.

Meta does not dispute that the Potential Reach numbers were presented in terms of people. Instead, Meta says that the Potential Reach numbers were not uniformly inaccurate as a result of different targeting criteria producing different Potential Reach numbers. Dkt. No. 293-4 at 18-20. Even so, Potential Reach was always expressed as a number of "people," and the discrepancy between people and accounts made the number inaccurate, even if the numerical value of the inaccuracy varied across advertisers. Consequently, plaintiffs have shown that the question of whether Meta made misrepresentations to all class members can be shown through common evidence.

Meta's knowledge of the misleading statements, and intent to deceive, also lend themselves to resolution by common evidence. *See, e.g.*, *Brickman v. Fitbit, Inc.*, No. 15-cv-2077-JD, 2017 WL 5569827, at *6 (N.D. Cal. Nov. 20, 2017) (citing *Small v. Fritz Cos., Inc.*, 30 Cal. 4th 167, 173-74

(2003)). Several documents show that Meta knew that its Potential Reach estimate did not accurately reflect the number of people its advertisements could reach. *See* Dkt. No. 281-25; Dkt. No. 281-27. Meta's intent for advertisers to rely on its Potential Reach numbers is also provable through common evidence. Meta knew that the potential reach number was the most important number in its ads creation interface and that advertisers frequently relied on the estimated audience to build their budgets and advertising strategies. Dkt. No. 281-8.

***7** So too for materiality and reliance. In common law and UCL fraud cases, questions of materiality and reliance do not necessarily undermine predominance and commonality. *Brickman*, 2017 WL 5569827, at *6-*7; *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4427427, at *5 (N.D. Cal. Sep. 27, 2021). "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material." *Tobacco II Cases*, 46 Cal. 4th at 327. A misrepresentation is material "if a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." *Id.* (internal quotations omitted). The question of materiality "can be proved through evidence common to the class." *Amgen*, 568 U.S. at 467. Plaintiffs have established that materiality and reliance can be shown in this case through common evidence. Potential Reach metrics were shown to all advertisers in the Ads Manager. Dkt. No. 282-3; Dkt. No. 282-4. Meta has acknowledged that Potential Reach is an important number for advertisers. Dkt. No. 281-8. A majority of advertisers rely on Potential Reach as a metric for their advertisements. Dkt. No. 281-22.

Plaintiffs have also established that proof of injury is susceptible to common evidence. Among other evidence, a report from Pivotal Research showed that Potential Reach numbers exceeded census counts for various demographics, Dkt. No. 282-22 and several internal documents indicated various causes of inflated Potential Reach levels, *see, e.g.*, Dkt. No. 282-28; 282-7; 282-31; 282-32. Plaintiffs' expert, Dr. Cowan, conducted a statistical analysis to determine the percentage of inflation for both nationwide and targeted advertisements. *See* Dkt. No. 282-8. He concluded that it was a statistical certainty that, for any advertisement with a Potential Reach of at least 1,000 people or more, the estimate would be significantly inflated above the actual number of people the advertisement could reach. *Id.*

Meta says that Dr. Cowan improperly assumed that the inflated estimates found in the default national population (United States, aged 18-65) Potential Reach were equally applicable across all targeted groups, and that each measure of inflation was distributed across targeted groups. Dkt. No. 281-11 ¶ 82. Meta's expert, Dr. Steven Tadelis, says that this is a flawed assumption because Meta's data sampling shows that sources of inflation are not distributed evenly across all smaller demographics that an advertiser might choose. Dkt. No. 293-44 ¶ 125. But Dr. Tadelis does not conclude that no inflation occurred at all, only that Dr. Cowan did not measure the exact inflation resulting from any given targeting criteria because inflation for any given sub population may be different from the inflation for the default national population. This criticism does not foreclose classwide proof of injury.

2. Damages and *Daubert* Motions re Dr. Allenby and Mr. McFarlane

While a damages methodology need not deliver mathematical precision, and may accommodate some individual variability among class members, *see In re Capacitors Antitrust Litigation*, No. 17-md-2801-JD, 2018 WL 5980139, at *9 (N.D. Cal. Nov. 14, 2018), it must be capable of determining damages across the class in a reasonably accurate fashion. *Comcast*, 569 U.S. at 35 (plaintiffs bear burden of showing that "damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)"). The damages model "must measure only those damages attributable to" the plaintiffs' theory of liability. *Id.* Put plainly, the damages model must reasonably reflect the claims and evidence in the case.

Plaintiffs have proffered experts who analyzed the evidence to arrive at a price premium that advertisers paid for inflated Potential Reach values. Dkt. No. 281-3 at 21. Dr. Cowan measured the amount of inflation associated with Potential Reach as a result of the misleading "people" metric. *Id.* Dr. Allenby used a "conjoint survey" to test the impact of inflated Potential Reach on advertisers' budgets. *Id.* Dr. Roughgarden, an auction expert, calculated a price premium. *Id.* Dr. Levy, an economist, confirmed that Dr. Roughgarden's price premium properly considered supply and demand, and that damages could be calculated on a classwide basis. *Id.* Plaintiffs also offer expert witness Mr. McFarlane, who opined about the price premium class members paid compared to if no potential reach metric was provided at all. *Id.*

***8** Meta offers little in its class certification brief to attack plaintiffs' damages models. It relies instead on two separately filed *Daubert* motions to exclude the opinions of Dr. Allenby and Mr. McFarlane, and by extension, the portions of Dr. Levy and Dr. Roughgarden's opinions that rely on the reports of Dr. Allenby and Mr. McFarlane. Dkt. Nos. 284-4, 284-6.

Overall, Meta has not demonstrated a good reason to exclude Dr. Allenby's work. Under the familiar standards of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), there is no "definitive checklist or test" used to evaluate the reliability of proposed expert testimony. *Daubert*, 509 U.S. at 593-94. The question for the Court at this stage is to decide whether Dr. Allenby will use a generally accepted method for determining price premiums, or whether his approach is "junk science" akin to predicting criminality by feeling the bumps on a person's head. *General Electric Co. v. Joiner*, 522 U.S. 136, 153 n.6 (1997) (Stevens, J., concurring in part).

The "inquiry into the evidence's ultimate admissibility should go to the weight that evidence is given at the class certification stage." *Sali v. Corona Reg'l Med. Ctr.*, 9-9 F.3d 996, 1006 (9th Cir. 2018). The Court determines whether the expert evidence helps to establish whether class certification is appropriate. *See* *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011).

Dr. Allenby conducted a conjoint survey and analyzed the data using both a linear regression model and a "logit model" (another type of statistical analysis) before determining that the logit model did not best fit the data. Meta does not suggest that a conjoint survey is an untested method, nor does it claim that it is improper to use a linear regression to analyze survey data. Rather, Meta says that the specific regression that Dr. Allenby used was a novel type of analysis that purposely excluded data from the analysis. Dkt. No. 284-4 at 10-12.

This Court has found conjoint analysis to be a reliable method of determining price premiums. *See, e.g.*, *Milan v. Clif Bar & Co.*, No. 18-cv-2354-JD, 2021 WL 4467427, at * 7 (N.D. Cal. Sep. 27, 2021). Meta does not dispute the generally utility of conjoint analysis, and focuses its critique on Dr. Allenby's use of a linear regression model to analyze the data from the conjoint survey. Dkt. No. 284-4 at 10. Plaintiffs have shown that Dr. Allenby chose a linear regression model that is a standard method for analyzing this data. Dkt. No. 304-17 at 143:9-18; 304-20 at 57:23-58:7. Dr. Allenby's choice of one particular data analysis method over another goes to the weight of his opinion, not its admissibility. *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt., Inc.*, 618 F.3d 1025, 1036 (9th Cir. 2010). To the extent that Meta suggests that Dr. Allenby improperly limited his data set, this too is a question of weight to be afforded to the opinion, not its admissibility. *In re Capacitors Antitrust Litig.*, No. 17-md-2801-JD, 2018 WL 5980139, at *6 (N.D. Cal. Nov. 14, 2018). Dr. Allenby states that he chose a subset of the data to analyze based on the fact that his conjoint survey included allocations of advertising for both Meta and Google ads, but only Meta ads are at issue in this case. Dkt. No. 304-17 at 288:10-289:8.

***9** This is enough to be sound and useful for certification purposes. If evidence emerges at trial that substantially impeaches Dr. Allenby's methods and conclusions, the door may be opened to consideration of decertification.

Meta's objections to Mr. McFarlane's report lead to a different outcome. Meta says that Mr. McFarlane offered nothing more than his personal interpretation of documents and evidence. Dkt. No. 284-6 at 7. Meta also says that Mr. McFarlane used a price premium figure that he did not calculate, and merely applied it in an obvious fashion to the amount of money plaintiffs are said to have spent on advertising. *Id.* at 3.

These objections are well taken. Overall, Mr. McFarlane's report does not offer any specialized or scientific expertise, or anything beyond the typical knowledge and experience of a jury. *See* Fed. R. Evid. 702; *Daubert*, 509 U.S. at 592. The documents Mr. McFarlane interprets are reasonably intelligible to a jury without special assistance. Consequently, exclusion of Mr. McFarlane's opinions and report is required. Any portion of Dr. Roughgarden's opinions that is drawn on Mr. McFarlane's work is also excluded, unless an independent basis for it is demonstrated. The Court declines to undertake that analysis on the record as it currently stands. Meta may pursue it in a motion in limine, as circumstances warrant.

Because plaintiffs have adequately shown that they can calculate damages on a classwide basis using Dr. Allenby's report and evidence from their other experts (excluding Mr. McFarlane), they have shown an adequate damages model under Rule 23(b)(3).

D. Superiority

The final certification question is whether the ends of justice and efficiency are served by certification. Rule 23(b)(3) requires a finding that proceeding as a class is superior to other ways of adjudicating the controversy, which in this case would mean individual actions by each putative class member. There can be no doubt here that a class is the superior method of handling the claims of individual advertisers. The price premium at issue here for each advertiser is no more than $32, Dkt. No. 281-3, and it is not likely for class members to recover large amounts individually if they prevailed. No reasonable person is likely to pursue these claims on his or her own, especially given the cost and other resources required to litigate against a company like Meta, which has already retained multiple experts and shown that it is committed to strongly defending this case. This all "vividly points to the need for class treatment." *Just Film*, 847 F.3d at 1123.

IV. RULE 23(B)(2) CLASS

Plaintiffs seek certification of a class under Rule 23(b)(2) for the UCL injunctive relief claim. Such a class may be certified when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "Class certification under Rule 23(b)(2) is appropriate only where the primary relief sought is declaratory or injunctive." *Zinser*, 253 F.3d at 1195. The primary use of Rule 23(b)(2) classes has been the certification of civil rights class actions, but courts have certified many different kinds of classes under Rule 23(b)(2). *See* *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014). The Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy must also be shown for a Rule 23(b)(2) class. *Zinser*, 253 F.3d at 186. As discussed, plaintiffs have met their burden for proving the Rule 23(a) requirements.

***10** For Rule 23(b)(2), the Court is not required "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010). "It is sufficient to meet the requirements of Rule 23(b)(2) that class members complain of a pattern or practice that is generally applicable to the class as a whole." *Id.* (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)) (internal quotations omitted).

The California Supreme Court has held that "[i]njunctions are the 'primary form of relief available under the UCL to protect consumers from unfair business practices." *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 337 (2011); *see also* *Tobacco Cases II*, 46 Cal. 4th at 319. For the proposed Rule 23(b)(2) class, plaintiffs seek injunctive relief in the form of an order directing Meta to "either (a) correct the [Potential Reach] metric by removing known sources of inflation, or (b) remove the [Potential Reach] metric altogether." Dkt. No. 281-3 at 18.

Plaintiffs have standing to seek an injunction. As our circuit has determined, "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase," because "[k]nowledge that the advertisement or label was false in the past does not equate to knowledge that it will remain false in the future." *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 969 (9th Cir. 2018). Plaintiffs have proffered deposition testimony to the effect that they would consider purchasing ads from Meta again if Meta corrected or removed the misleading Potential Reach metric. Dkt. No. 282-65 at 242:18-23; Dkt. No. 282-64 at 105:24-106:5. This establishes plaintiffs' standing to pursue injunctive relief in this case.

Meta's arguments to the contrary are unavailing. To start, Meta repeats the same arguments that it already made in its motion for judgment on the pleadings, Dkt. No. 270, that plaintiffs have failed to show they lack an adequate remedy at law. The Court has already determined that plaintiffs have shown an inadequate remedy at law for their injunctive relief claim under the UCL. Dkt. No. 366 at 2.

Meta also says that plaintiffs did not show they face a threat of actual future harm because at least one inflation source has already been remediated and Meta updated disclosures about multiple accounts. Dkt. No. 293-4 at 25. This is a merits question that is not properly decided at the class certification stage.

Meta's passing comment that the injunction plaintiffs seek is "overbroad and unworkable," Dkt. No. 293-4 at 25, is no basis for denying certification. The remark was not developed in a meaningful way, and concerns about the scope of an inunction are premature at this stage. *See* *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019). There is considerably more to be done in this case, namely trial, before the specific terms of an injunction might warrant debate.

Consequently, a Rule 23(b)(2) class is appropriate for plaintiffs' UCL claims.

CONCLUSION

The Court certifies the proposed class under Rule 23(b)(3) for the common law fraud claims, and under Rule 23(b)(2) for the UCL injunction claim. Plaintiffs DZ Reserve, Inc. and Cain Maxwell are appointed class representatives, and their counsel at Cohen Milstein Sellers & Toll PLLC and the Law Offices of Charles Reichmann are appointed class counsel.

***11** Meta's motion to exclude the report and testimony of Dr. Allenby is denied. Meta's motion to exclude the report and testimony of Mr. McFarlane is granted.

Plaintiffs are directed to file by April 29, 2022, a proposed plan for dissemination of notice to the classes. Plaintiffs will meet and confer with Meta at least 10 days in advance of filing the plan so that the proposal can be submitted on a joint basis, to the fullest extent possible.

A status conference is set for May 26, 2022, at 10:00 a.m. in Courtroom 11, 19th Floor, San Francisco. The parties are directed to file a joint statement by May 19, 2022, with proposed dates for the final pretrial conference and trial.

The parties are referred to Magistrate Judge Hixson for a settlement conference to be held as his schedule permits.

IT IS SO ORDERED.

All Citations

Slip Copy, 2022 WL 912890

Footnotes

1 The TAC was originally filed under seal as Dkt. No. 166. The Court denied the administrative motion to seal the TAC without prejudice, *see* Dkt. No. 320, and the TAC was refiled as Dkt. No. 332.

2 Dr. Cowan's work is discussed in more detail later in the order.

End of Document

KeyCite Yellow Flag - Negative Treatment
Distinguished by Jackson v. Airbnb, Inc., C.D.Cal., November 4, 2022

995 F.3d 1085
United States Court of Appeals, Ninth Circuit.

Carly LEMMON; Michael Morby, as surviving parents of Hunter Morby (deceased); Samantha Brown; Marlo Brown, as surviving parents of Landen Brown (deceased), Plaintiffs-Appellants,
v.
SNAP, INC., doing business in California as Snapchat, Inc., Defendant-Appellee.

No. 20-55295
|
Argued and Submitted February 11, 2021 San Francisco, California
|
Filed May 4, 2021

Synopsis
Background: Parents of motor vehicle passengers brought wrongful death action against social media company, alleging claim for negligent design based on vehicle occupants being prompted by social media cell phone application's speed filter to travel at high speeds and share that over social media, which caused vehicle to run off the road and crash into tree. The United States District Court for the Central District of California, Michael W. Fitzgerald, J., 440 F.Supp.3d 1103, dismissed the action. Parents appealed.

[Holding:] The Court of Appeals, Wardlaw, Circuit Judge, held that social media company was not entitled to immunity under the Communications Decency Act (CDA), in negligent design claim.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

West Headnotes (12)

[1] **Federal Courts** Statutes, regulations, and ordinances, questions concerning in general
Federal Courts Pleading
The Court of Appeals reviews de novo both the district court's order dismissing a complaint for failure to state a claim and any questions of statutory interpretation that informed that decision. Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[2] **Federal Civil Procedure** Insufficiency in general
A complaint will survive a motion to dismiss for failure to state a claim if it states a plausible claim for relief, that is, if it permits the reasonable inference that the defendant is liable for the misconduct alleged. Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[3] **Telecommunications** Privilege or immunity
Purpose of immunity granted to internet providers under the Communications Decency Act (CDA) is to promote the continued development of the internet and other interactive computer services. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

4 Cases that cite this headnote

[4] **Telecommunications** Privilege or immunity
A plaintiff enjoys immunity under the Communications Decency Act (CDA) only if it is (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

10 Cases that cite this headnote

[5] **Telecommunications** Privilege or immunity

Social media company was not entitled to immunity under the Communications Decency Act (CDA), in negligent design claim asserted by parents of motor vehicle passengers who died when vehicle crashed into tree after passengers and driver used company's social media application's speed filter, which allegedly prompted them to travel at high rates of speed; claim did not treat company as "publisher or speaker," as it asserted that company negligently designed the application with a defect that encouraged dangerous driving, which did not depend on company's publishing of third-party content. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

6 Cases that cite this headnote

[6] **Telecommunications** Privilege or immunity

"Publication," as required for immunity under the Communications Decency Act (CDA), generally involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content on the internet. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

7 Cases that cite this headnote

[7] **Telecommunications** Privilege or immunity

Regardless of the type of claim brought, a court deciding whether immunity under the Communications Decency Act (CDA) focuses on whether the duty the plaintiff alleges stems from the defendant's status or conduct as a publisher or speaker of content on the internet. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

4 Cases that cite this headnote

[8] **Products Liability** Risk-utility test

Under California law, a negligent design action asks whether a reasonable person would conclude that the reasonably foreseeable harm of a product, manufactured in accordance with its design, outweighs the utility of the product.

[9] **Telecommunications** Privilege or immunity

The immunity provision of the Communications Decency Act (CDA) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties on the internet; thus, internet companies remain on the hook when they create or develop their own internet content. Communications Act of 1934 § 230, 47 U.S.C.A. §§ 230(c)(1), 230(f)(3).

2 Cases that cite this headnote

[10] **Telecommunications** Privilege or immunity

The immunity provision of the Communications Decency Act (CDA) was not meant to create a lawless no-man's-land on the internet; those who use the internet continue to face the prospect of liability, even for their neutral tools, so long as plaintiff's claims do not blame them for the content that third parties generate with those tools. Communications Act of 1934 § 230, 47 U.S.C.A. § 230(c)(1).

2 Cases that cite this headnote

[11] **Federal Courts** Theory and Grounds of Decision of Lower Court

The Court of Appeals may affirm the district court's dismissal for failure to state a claim on any ground supported by law. Fed. R. Civ. P. 12(b)(6).

2 Cases that cite this headnote

[12] **Federal Courts** In general; necessity

The Court of Appeals will generally refrain from deciding an issue on appeal that the district court has not had the opportunity to evaluate.

2 Cases that cite this headnote

***1087** Appeal from the United States District Court for the Central District of California, Michael W. Fitzgerald, District Judge, Presiding, D.C. No. 2:19-cv-04504-MWF-KS

Attorneys and Law Firms

Naveen Ramachandrappa (argued), Bondurant Mixson & Elmore LLP, Atlanta, Georgia, for Plaintiffs-Appellants.

Jonathan H. Blavin (argued) and Rosemarie T. Ring, Munger Tolles & Olson LLP, San Francisco, California; John B. Major and Anne K. Conley, Munger Tolles & Olson LLP, Los Angeles, California; for Defendant-Appellee.

Before: Kim McLane Wardlaw and Carlos T. Bea, Circuit Judges, and James David Cain, Jr., * District Judge.

OPINION

WARDLAW, Circuit Judge:

Carly Lemmon, Michael Morby, Samantha Brown, and Marlo Brown ("the Parents") are the surviving parents of two boys who died in a tragic, high-speed car accident. They sued Snap, Inc. ("Snap"), a social media provider, alleging that it encouraged their sons to drive at dangerous speeds and thus caused the boys' deaths through its negligent design of its smartphone application Snapchat. We must decide whether the district court correctly dismissed that action when it concluded that the Communications Decency Act ("CDA") barred the Parents' claim because it sought to treat Snap "as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

We conclude that, because the Parents' claim neither treats Snap as a "publisher or speaker" nor relies on "information provided by another information content provider," Snap does not enjoy immunity from this suit under § 230(c)(1). We therefore reverse the district court's Rule 12(b)(6) dismissal of the Parents' lawsuit and remand for further proceedings.

I.

Because the district court dismissed this action pursuant to Federal Rule of Civil Procedure 12(b)(6), we accept as true the allegations contained in the Parents' amended complaint and view them in the light most favorable to the Parents. ***1088** *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019).

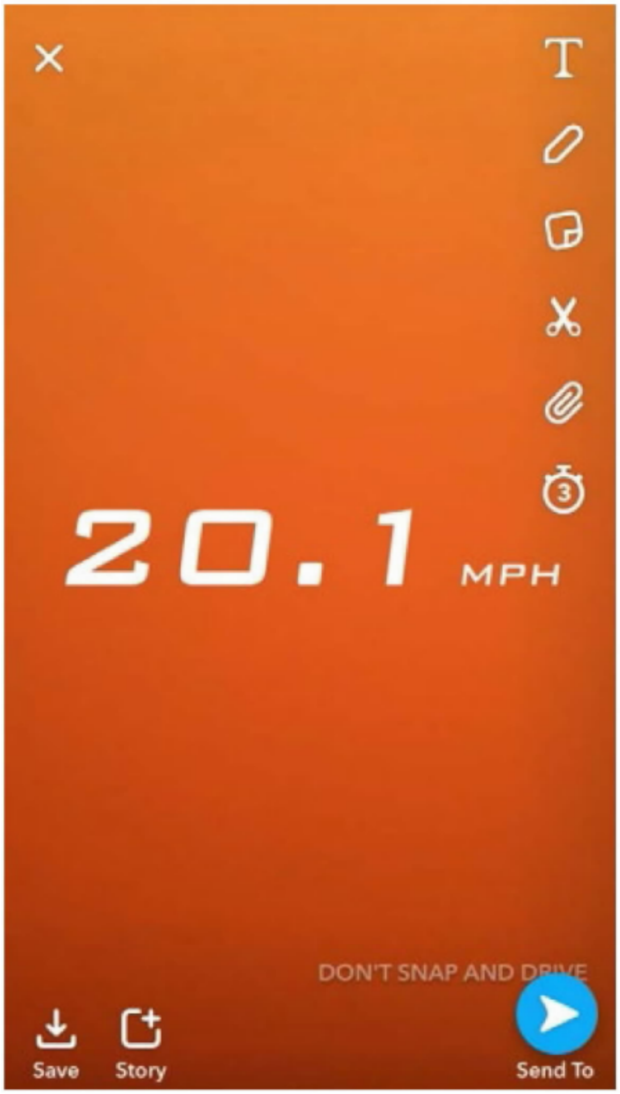
A.

According to the Parents' amended complaint, Jason Davis (age 17), Hunter Morby (age 17), and Landen Brown (age 20) were driving down Cranberry Road in Walworth County, Wisconsin at around 7:00 p.m. on May 28, 2017. Jason sat behind the wheel, Landen occupied the front passenger seat, and Hunter rode in the back seat. At some point during their drive, the boys' car began to speed as fast as 123 MPH. They sped along at these high speeds for several minutes, before they eventually ran off the road at approximately 113 MPH and crashed into a tree. Tragically, their car burst into flames, and all three boys died.

Shortly before the crash, Landen opened Snapchat, a smartphone application, to document how fast the boys were going. Snapchat is a social media platform that allows its users to take photos or videos (colloquially known as "snaps") and share them with other Snapchat users. To keep its users engaged, Snapchat rewards them with "trophies, streaks, and social recognitions" based on the snaps they send. Snapchat, however, does not tell its users how to earn these various achievements.

The app also permits its users to superimpose a "filter" over the photos or videos that they capture through Snapchat at the moment they take that photo or video. Landen used one of these filters—the "Speed Filter"—minutes before the fatal accident on May 28, 2017. The Speed Filter enables Snapchat users to "record their real-life speed." An example of the digital content that a Snapchat user might create with this filter is portrayed below.

***1089**



A Snapchat user could also "overlay" the above information onto a mobile photo or video that they previously captured.

Many of Snapchat's users suspect, if not actually "believe," that Snapchat will reward them for "recording a 100-MPH or faster [s]nap" using the Speed Filter. According to plaintiffs, "[t]his is a game for Snap and many of its users" with the goal being to reach 100 MPH, take a photo or video with the Speed Filter, "and then share the 100-MPH-Snap on Snapchat."

Snapchat allegedly knew or should have known, before May 28, 2017, that its users believed that such a reward system existed and that the Speed Filter was therefore incentivizing young drivers to drive at dangerous speeds. Indeed, the Parents allege that there had been: a series of news articles about this phenomenon; an online petition that "called on Snapchat to address its role in encouraging dangerous speeding"; at least three accidents linked to Snapchat users' pursuit of high-speed snaps; and at least one other lawsuit against Snap based on these practices. While Snapchat warned its users against using the Speed Filter while driving, these ***1090** warnings allegedly proved ineffective. And, despite all this, "Snap did not remove or restrict access to Snapchat while traveling at dangerous speeds or otherwise properly address the danger it created."

B.

On May 23, 2019, Hunter's and Landen's parents filed this negligent design lawsuit against Snap. Snap moved to dismiss the Parents' initial complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), contending that the Parents had failed to allege a plausible negligence claim and that the Communications Decency Act immunized it from liability. The district court agreed and dismissed the Parents' first complaint for failure to allege "a causal connection between Defendant's Speed Filter and the car accident" and because it was "not clear whether their claim is barred under the [CDA]." However, it granted leave to amend so that the Parents could cure these deficiencies.

On November 18, 2019, the Parents filed an amended complaint, which Snap moved to dismiss on the same grounds as before. This time, the district court granted the motion to dismiss solely on the basis of immunity under 47 U.S.C. § 230(c)(1). Because it concluded that the CDA rendered Snap immune from the Parents' claim, it did not address Snap's argument that the Parents had again failed to plead causation adequately. The district court denied further leave to amend, and entered a final judgment on February 25, 2020. The Parents then filed this timely appeal.

II.

[1] **[2]** We review de novo both the district court's order dismissing the Parents' claim pursuant to Federal Rule of Civil Procedure 12(b)(6) and any questions of statutory interpretation that informed that decision. *Dyroff*, 934 F.3d at 1096. The Parents' amended complaint will survive at this stage if it states "a plausible claim for relief," *i.e.*, if it permits "the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citation omitted). This standard requires determining whether the CDA bars the Parents' claim as pleaded in the amended complaint. *See id.*

III.

[3] In 1996, when the internet was young and few of us understood how it would transform American society, Congress passed the CDA. *See* 47 U.S.C. § 230. That act "provide[d] internet companies with immunity from certain claims" in order " 'to promote the continued development of the Internet and other interactive computer services.' " *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019) (quoting 47 U.S.C. § 230(b)(1)). Specifically, Congress commanded that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[1] 47 U.S.C. § 230(c)(1); *see also id.* § 230(e)(3) (explicitly preempting any state or local law inconsistent with this section). Though somewhat jargony, this provision shields from ***1091** liability those individuals or entities that operate internet platforms, to the extent their platforms publish third-party content.

[4] To determine whether § 230(c)(1) applies here—and thus immunizes Snap from the Parents' claim—we apply the three-prong test set forth in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. 2009). Snap thus enjoys CDA immunity only if it is "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Dyroff*, 934 F.3d at 1097 (quoting *Barnes*, 570 F.3d at 1100–01). We examine each of these questions in turn.

A.

The parties do not dispute that Snap is a provider of an "interactive computer service," and we agree that Snap qualifies as one given the CDA's "expansive" definition of that term. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016) (citation omitted); *see also Barnes*, 570 F.3d at 1101. According to the amended complaint, the Snapchat application permits its users to share photos and videos through Snap's servers and the internet. Snapchat thus necessarily "enables computer access by multiple users to a computer server," 47 U.S.C. § 230(f)(2), and Snap, as the creator, owner, and operator of Snapchat, is therefore a "provider" of an interactive computer service. *Id.* § 230(f)(3).

B.

[5] The second *Barnes* question asks whether a cause of action seeks to treat a defendant as a "publisher or speaker" of third-party content.[2] *Dyroff*, 934 F.3d at 1097; *Barnes*, 570 F.3d at 1100. We conclude that here the answer is no, because the Parents' claim turns on Snap's design of Snapchat.

[6] **[7]** In this particular context, "publication" generally "involve[s] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *HomeAway*, 918 F.3d at 681 (citation omitted). A defamation claim is perhaps the most obvious example of a claim that seeks to treat a website or smartphone application provider as a publisher or speaker, but it is by no means the only type of claim that does so. *Barnes*, 570 F.3d at 1101–02; *see also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). Thus, regardless of the type of claim brought, we focus on whether "the duty the plaintiff alleges" stems "from the defendant's status or conduct as a publisher or speaker." *Barnes*, 570 F.3d at 1107.

Here, the Parents seek to hold Snap liable for its allegedly "unreasonable and negligent" design decisions regarding Snapchat. They allege that Snap created: (1) Snapchat; (2) Snapchat's Speed Filter; and (3) an incentive system within Snapchat that encouraged its users to pursue certain unknown achievements and rewards. The Speed Filter and the incentive system then supposedly worked in tandem ***1092** to entice young Snapchat users to drive at speeds exceeding 100 MPH.

[8] The Parents thus allege a cause of action for negligent design—a common products liability tort. This type of claim rests on the premise that manufacturers have a "duty to exercise due care in supplying products that do not present an unreasonable risk of injury or harm to the public." Lewis

Bass, *Prods. Liab.: Design & Mfg. Defects* § 2.5 (2d ed., Sept. 2020 Update). Thus, a negligent design action asks whether a reasonable person would conclude that "the reasonably foreseeable harm" of a product, manufactured in accordance with its design, "outweigh[s] the utility of the product." *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 110 Cal.Rptr.2d 370, 28 P.3d 116, 125 (2001) (citation omitted); *see also* *Morden v. Cont'l AG*, 235 Wis.2d 325, 611 N.W.2d 659, 674 (2000) (explaining that the relevant "duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers" of their products "and to act accordingly" (citation omitted)). [3]

The duty underlying such a claim differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. *See* Dan B. Dobbs et al., *Dobbs' Law of Torts* § 478 (2d ed., June 2020 Update). Meanwhile, entities acting solely as publishers—*i.e.*, those that "review[ ] material submitted for publication, perhaps edit[ ] it for style or technical fluency, and then decide[ ] whether to publish it," *Barnes*, 570 F.3d at 1102—generally have no similar duty. *See Dobbs' Law of Torts* § 478.

It is thus apparent that the Parents' amended complaint does not seek to hold Snap liable for its conduct as a publisher or speaker. Their negligent design lawsuit treats Snap as a products manufacturer, accusing it of negligently designing a product (Snapchat) with a defect (the interplay between Snapchat's reward system and the Speed Filter). Thus, the duty that Snap allegedly violated "springs from" its distinct capacity as a product designer. *Barnes*, 570 F.3d at 1107. This is further evidenced by the fact that Snap could have satisfied its "alleged obligation"—to take reasonable measures to design a product more useful than it was foreseeably dangerous—without altering the content that Snapchat's users generate. *Internet Brands*, 824 F.3d at 851. Snap's alleged duty in this case thus "has nothing to do with" its editing, monitoring, or removing of the content that its users generate through Snapchat. *Id.* at 852.

To the extent Snap maintains that CDA immunity is appropriate because the Parents' claim depends on the ability of Snapchat's users to use Snapchat to communicate their speed to others, it disregards our decision in *Internet Brands*. That Snap allows its users to transmit user-generated content to one another does not detract from the fact that the Parents seek to hold Snap liable for its role in violating its distinct duty to design a reasonably safe product. As in *Internet Brands*, Snap "acted as the 'publisher or speaker' of user content by" transmitting Landen's snap, "and that action could be described as a 'but-for' cause of [the boys'] injuries." 824 F.3d at 853. This is unsurprising: Snap "is an internet publishing business. Without ***1093** publishing user content, it would not exist." *Id.* But though publishing content is "a but-for cause of just about everything" Snap is involved in, that does not mean that the Parents' claim, specifically, seeks to hold Snap responsible in its capacity as a "publisher or speaker." *Id.* The duty to design a reasonably safe product is fully independent of Snap's role in monitoring or publishing third-party content. [4]

Because the Parents' claim does not seek to hold Snap responsible as a publisher or speaker, but merely "seek[s] to hold Snapchat liable for its own conduct, principally for *the creation* of the Speed Filter," § 230(c)(1) immunity is unavailable. *Maynard v. Snapchat, Inc.*, 346 Ga.App. 131, 816 S.E.2d 77, 81 (2018) (emphasis added).

C.

CDA immunity is also unavailable in this case because the Parents' negligent design claim does not turn on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

[9] By its plain terms, and as the last part of the *Barnes* test recognizes, § 230(c)(1) cuts off liability only when a plaintiff's claim faults the defendant for information provided by third parties. 47 U.S.C. § 230(c)(1). Thus, internet companies remain on the hook when they create or develop their own internet content. *See* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc). And they also may face liability to the extent they are " 'responsible ... in part, for the creation or the development of' the offending content" on the internet. *Id.* at 1162 (quoting 47 U.S.C. § 230(f)

(3)); *see also* *Kimzey*, 836 F.3d at 1269 (asking whether a defendant "ma[de] a material contribution to the creation or development of [the] content" underlying a given claim).

This case presents a clear example of a claim that simply does not rest on third-party content. Snap indisputably designed Snapchat's reward system and Speed Filter and made those aspects of Snapchat available to users through the internet. *See* *Roommates*, 521 F.3d at 1168 (noting that the word "develop" in the CDA connotes "making usable or available"). And the Parents' negligent design claim faults Snap solely for Snapchat's architecture, contending that the app's Speed Filter and reward system worked together to encourage users to drive at dangerous speeds.

Notably, the Parents do not fault Snap in the least for publishing Landen's snap. Indeed, their amended complaint fully disclaims such a reading of their claim: "The danger is not the Snap [message using the Speed Filter] itself. Obviously, no one is harmed by the post. Rather, the danger is the speeding." AC ¶ 14. While we need not accept conclusory allegations contained in a complaint, we must nonetheless read the complaint in the light most favorable to the Parents. *See* *Dyroff*, 934 F.3d at 1096. And this statement reinforces our own reading of the Parents' negligent design claim as standing independently of the content that Snapchat's users create with the Speed Filter.

***1094** To sum up, even if Snap is acting as a publisher in releasing Snapchat and its various features to the public, the Parents' claim still rests on nothing more than Snap's "own acts." *Roommates*, 521 F.3d at 1165. The Parents' claim thus is not predicated on "information provided by another information content provider." *Barnes*, 570 F.3d at 1101.

[10] Each of Snap's novel attempts to expand CDA immunity beyond these straightforward principles is to no avail. To start, while providing content-neutral tools does not render an internet company a "creator or developer" of the downstream content that its users produce with those tools, our case law has never suggested that internet companies enjoy absolute immunity from all claims related to their content-neutral tools. *See* *Dyroff*, 934 F.3d at 1099; *Kimzey*, 836 F.3d at 1269–70; *Roommates*, 521 F.3d at 1175. To the contrary, "[t]he [CDA] was not meant to create a lawless no-man's-land on the Internet." *Roommates*, 521 F.3d at 1164. Those who use the internet thus continue to face the prospect of liability, even for their "neutral tools," so long as plaintiffs' claims do not blame them for the content that third parties generate with those tools.

Next, the Parents' allegations concerning the Speed Filter and Snapchat's reward system are not a creative attempt to plead around the CDA. In the cases where such creative pleading has posed a concern, the plaintiff's claims, at bottom, depended on a third party's content, without which no liability could have existed. *See* *Dyroff*, 934 F.3d at 1096 (alleging defendant developed content because its website's "recommendation and notification functions were 'specifically designed to make subjective, editorial decisions about users based on their posts' "); *Kimzey*, 836 F.3d at 1269 (alleging defendant developed content when it integrated a third party's defamatory review "into its own 'advertisement' or 'promotion' on Google" using its "unique star-rating system"). However, as already explained, the Parents' claim does not depend on what messages, if any, a Snapchat user employing the Speed Filter actually sends. This is thus not a case of creative pleading designed to circumvent CDA immunity.

Last, Snap misunderstands the import of our statement in *Dyroff* that a website's "tools meant to facilitate the communication and content of others" were "not content in and of themselves." 934 F.3d at 1098. For even accepting that statement at face value, it does nothing to advance Snap's argument. It is by now clear that the Parents' negligent design claim does not turn on the content of Landen's particular snap. Thus, if Snapchat's Speed Filter and award system were not content for purposes of the CDA, then the Parents' negligence or negligent design claim would rest on no CDA "content" whatsoever, and Snap would still receive no immunity. After all, CDA immunity is available only to the extent a plaintiff's claim implicates third-party content. *See* 47 U.S.C. § 230(c)(1).

***

In short, Snap "is being sued for the predictable consequences of" designing Snapchat in such a way that it allegedly encourages dangerous behavior. *Roommates*, 521 F.3d at 1170. The CDA does not shield Snap from liability for such claims. *See* *Internet Brands*, 824 F.3d at 853 ("Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.”).

IV.

[11] Snap has also urged us to affirm the district court's decision on the alternative ***1095** ground that the Parents have failed to plead adequately in their amended complaint the causation element of their negligent design claim. Though we may affirm on any ground supported by law, we decline to exercise that discretion here for three reasons. *Upper Skagit Indian Tribe v. Lundgren*, ––– U.S. ––––, 138 S. Ct. 1649, 1654, 200 L.Ed.2d 931 (2018).

[12] First, the district court dismissed the Parents' amended complaint based “entirely on the CDA[,] and we refrain from deciding an issue that the district court has not had the opportunity to evaluate.” *Roommates*, 521 F.3d at 1175 n.40. Second, the district court stated when it dismissed the Parents' amended complaint that it would ordinarily have granted leave to amend, but it declined to do so based on its belief that the Parents could not surmount the issue of CDA immunity. It thus appears the district court would have granted further leave to amend if the sole defect in the Parents' amended complaint was a mere failure to plead legal causation. Third, the district court has yet to decide whether there exists a conflict between Wisconsin and California law on the issue of legal causation. Nor has it decided, in the event there is such a conflict, which state's law governs that claim. *See generally Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 559 (9th Cir. 2020) (laying out the relevant analytic framework), *cert. denied sub nom. Cooper v. TEPCO*, No. 20-730, ––– U.S. ––––, 141 S.Ct. 1735, ––– L.Ed.2d –––– (U.S. Mar. 29, 2021).

V.

For these reasons, we **REVERSE** the district court's dismissal of the Parents' amended complaint on the ground of immunity under 47 U.S.C. § 230(c)(1) and **REMAND** this matter for further proceedings consistent with this opinion.

All Citations

995 F.3d 1085, Prod.Liab.Rep. (CCH) P 21,155, 21 Cal. Daily Op. Serv. 4203, 2021 Daily Journal D.A.R. 4358

Footnotes

* The Honorable James David Cain, Jr., United States District Judge for the Western District of Louisiana, sitting by designation.

1 The statute defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet ....” 47 U.S.C. § 230(f)(2). Meanwhile, an “information content provider” is “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” *Id.* § 230(f)(3).

2 The district court and the parties have, at various times, suggested that this aspect of the *Barnes* test is undisputed. Having parsed the Parents' arguments and citations before both our court and the district court, we do not agree. Though those arguments could have benefited from greater analytic exposition, the Parents have sufficiently preserved this issue for our review. In any event, it is within our discretion to reach this issue. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (noting we may exercise our discretion in this regard when “the issue presented is purely one of law and ... does not depend

on the factual record developed below" (citation omitted)). We exercise that discretion here, given that Snap addressed this issue both in its answering brief and before the district court.

3 The parties have agreed that the tort law of either California or Wisconsin governs in this case. *See generally* Restatement (Second) of Torts § 398 (1965) ("A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.").

4 Nor would proving causation through the snap that Landen sent shortly before his death implicate § 230(c)(1) immunity, because the Parents do not fault Snap for publishing that photo message. Instead, that snap merely suggests, as circumstantial evidence, that the alleged negligent design of Snapchat had the very causal effect that the Parents' otherwise allege. By contrast, we note that the Parents would not be permitted under § 230(c)(1) to fault Snap for publishing other Snapchat-user content (*e.g.*, snaps of friends speeding dangerously) that may have incentivized the boys to engage in dangerous behavior. For attempting to hold Snap liable using such evidence would treat Snap as a publisher of third-party content, contrary to our holding here. *See* Section III.C. *infra*.

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READING SECTION 230 AS WRITTEN

Adam Candeub[*]

Section 230 of the Communications Decency Act gives internet platforms legal protection for content moderation. Even though the statute is 25 years old, courts have not clearly stated which provision within section 230 protects content moderation. Some say section 230(c)(1), others section 230(c)(2). But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for delivering messages.

And while section 230(c)(2) addresses content moderation, its protections extend only to content moderation involving certain types of speech. All content moderation decisions for reasons not specified in section 230(c)(2), such as based on material being considered "hate speech," "disinformation," or "incitement," stand outside section 230's protections. More important, because section 230(c)(2) regulates both First Amendment protected and unprotected speech, it does raise constitutional concerns, but they may not be fatal.

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Introduction

Those who want the dominant internet platforms to impose greater restrictions on expression often claim, "Freedom of speech is not freedom of reach."[1] The slogan asks social media platforms to refrain from amplifying hurtful, threatening, or otherwise injurious speech. The slogan's supporters do not appear to call for censorship—but only for social media to limit the ability to spread ideas they find dangerous or objectionable through the platforms' content moderation and promotion policies.

An alternative vision posits that democratic deliberation needs an agora, a place where citizens can discuss views in a free and open way, approaching each other as equals. Social media is, as the Supreme Court has declared, the "public square"[2] and therefore should afford a place for all citizens to engage in political debate *with a relatively equal opportunity for reach*. Dominant social media firms that have the power to control public discourse should refrain from censoring controversial or threatening ideas. Otherwise, political discussion devolves into something analogous to Karl Wittfogel's "beggar's democracy," in which we are free to discuss only

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[1] *See, e.g.*, Renee Diresta, *Free Speech Is Not the Same As Free Reach*, WIRED (Aug. 30, 2018), https://tinyurl.com/ysfcrddx; Andrew Pulver, *Sacha Baron Cohen: Facebook Would Have Let Hitler Buy Ads for 'Final Solution,'* THE GUARDIAN (Nov. 22, 2019), https://tinyurl.com/ec33e3ed.

[2] Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017) ("Social media . . . are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.").

those matters about which the Big Tech oligarchs care little.[3]

Section 230 of the Communications Decency Act limits platforms' legal liability for the content moderation policies they impose. How courts apply this provision will advance one, or the other, vision of the internet.

Even though the statute is 25 years old, courts disagree as to which provision in section 230 protects content moderation. Some conclude that section 230(c)(1) provides such protection.[4] But section 230(c)(1) speaks only to liability arising from third-party content, codifying common carriers' liability protection for the messages they deliver. Its text says nothing about platforms' *own* moderation. In his statement concerning a denial of certiorari, the only Supreme Court statement on section 230 to date, Justice Thomas has recognized how interpreting section 230 to cover content moderation departs from the statutory text.[5]

Rather, section 230(c)(2) protects content moderation, but only content moderation involving speech of the types it lists. As is argued in *Interpreting 47 U.S.C. § 230(c)(2)* (published in this volume),[6] this list should be read under the *ejusdem generis* canon of statutory construction and refers to categories of speech considered regulable in 1996, the year Congress wrote the statute. Restrictions based on justifications not specified in section 230(c)(2)—such as that certain posts constitute "hate speech," "disinformation," or "incitement" which do not reach the level of criminal behavior—stand outside section 230's protections.

Reading section 230(c)(2) as written poses a question that courts have ignored,

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[3] KARL WITTFOGEL, ORIENTAL DESPOTISM, A COMPARATIVE STUDY OF TOTAL POWER 125–26 (1957).

[4] *See, e.g.,* Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014); *see* ERIC GOLDMAN, INTERNET LAW: CASES & MATERIALS 298 (2021), https://perma.cc/KVX9-7ENN

[5] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari) ("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by another information content provider.' . . . But from the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.'").

[6] Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175 (2021).

largely because most content moderation cases have been decided under section 230(c)(1): Is Section 230(c)(2) an unconstitutional, content-based regulation of speech? This Article provides some tentative answers to that question.

The article proceeds as follows. Part I describes the well-known history that led to section 230's passage. Drawing on this history, as well as a textual analysis, Part II sets forth the most natural understanding of sections 230(c)(1) and (c)(2): the former limits platform liability for third party content and the latter limits platform liability for content moderation. This section critiques courts that have expanded section 230(c)(1) to include content moderation protection. Part III examines the relationship between sections 230(c)(1) and (f)(3). Parts IV and V set forth textual analyses of sections 230(c)(1) and (c)(2) respectively. (Part V briefly summarizes the analysis from *Interpreting 47 U.S.C. § 230(c)(2)*.) Part VI analyzes the constitutionality of section 230(c)(2), first under a non-*ejusdem generis* reading and then an *ejusdem generis* reading. Given precedent's lack of clarity, the Article concludes tentatively that even in the unlikely event that section 230 is ruled unconstitutional, severability would be the best remedy.

I. Section 230 and Congressional Purpose

Congress passed section 230 as part of the Communications Decency Act of 1996 (CDA), an effort to control pornography and other non-family-friendly material on the internet. As opposed to the outright speech bans in the CDA that were struck down in *Reno v. ACLU*,[7] section 230 aimed to empower parents to control internet content. It did so, in part, by overruling a New York state case, *Stratton Oakmont v. Prodigy*.[8] Early platforms, such as Prodigy and its numerous bulletin boards, claimed they could not offer porn-free environments because of *Stratton Oakmont.* Developing the common law of defamation, the court had ruled that Prodigy was a "publisher" for all statements on its bulletin board (and thus potentially liable for those statements) because it content-moderated posts to render its forum "family friendly."

Stratton Oakmont's legal conclusion created a Hobson's choice for platforms' content moderation: either moderate content and face liability for all posts on your bulletin board, or don't moderate and have posts filled with obscenity or naked images. That legal rule was hardly an incentive for platforms to create family-friendly

[7] Reno v. ACLU, 521 U.S. 844, 859 n.25 (1997).

[8] 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

online environments.

Congress came to the rescue with section 230(c)(2),[9] which states that all internet platforms "shall not be held liable" for editing to remove content that they consider to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[10] Congress eliminated the Hobson's choice: when platforms content-moderate for these specific reasons, they would no longer be held liable for everything on their site.

Notice what section 230's text does *not do:* give platforms protection for content moderation for any reason not specified in section 230(c)(2). That would include "disinformation," "hate speech," "misgendering," "religious hatred," or for that matter the traffic prioritizations the platforms perform to give people content they want. Yet, some courts have blessed such an untextual expansion,[11] which is only possible under an all-inclusive reading of "otherwise objectionable" that seems implausible.[12]

Not only is the text silent about content moderation for such a broad range of reasons, but the legislative history is too. Representatives Christopher Cox and Ron Wyden floated a bill, titled "Internet Freedom and Family Empowerment Act,"[13]

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[9] 47 U.S.C. § 230(c)(2); 141 Cong. Rec. S8310–03 (daily ed. June 14, 1995) (statement of Sen. Coats) ("I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable . . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to *Stratton* decision as "backward"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

[10] The question of whether "otherwise objectionable" should be understood as an open-ended term is examined in Candeub & Volokh, *supra* note 6.

[11] See, e.g., Fed. Agency of News LLC, et al. v. Facebook, Inc., 395 F. Supp. 3d 1295 (N.D. Cal. 2019) (dismissing discrimination claims under Title II and 42 U.S.C. § 1983); Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d at 1095–96 (N.D. Cal. 2015) (holding that section 230 bars discrimination claims).

[12] *See* Candeub & Volokh, *supra* note 6.

[13] Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995–96).

that became section 230.[14] It was an alternative to Senator J. James Exon's bill that criminalized the transmission of indecent material to minors, which was codified in section 223.[15] Both became part of the Communications Decency Act, but the Supreme Court struck down Senator Exon's portion, leaving section 230.[16]

In comments on the House floor, Representative Cox explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from "offensive material, some things in the bookstore, if you will that our children ought not to see. . . . I want to make sure that my children have access to this future and that I do not have to worry about what they might running into online. I would like to keep that out of my house and off of my computer. How should we do this?"[17] He stated that "[w]e want to encourage [internet services] . . . to everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see."[18]

In fact, the comments in the Congressional record from *every* supporting legislator—and it received strong bipartisan support—reveal an understanding that the Online Family Empowerment amendment, now codified as section 230, was a

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[14] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 69 (1996).

[15] *Id.*; Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 316 (2011); 141 Cong. Rec. H8468–69 (daily ed. Aug. 4, 1995). The Supreme Court declared unconstitutional Senator Exon's part of the CDA. *See* Ashcroft v. ACLU, 535 U.S. 564, 564 (2002) ("This Court found that the Communications Decency Act of 1996 (CDA)—Congress' first attempt to protect children from exposure to pornographic material on the Internet—ran afoul of the First Amendment in its regulation of indecent transmissions and the display of patently offensive material. That conclusion was based, in part, on the crucial consideration that the CDA's breadth was wholly unprecedented.").

[16] Reno v. ACLU, 521 U.S. 844, 859 n.24 (1997) ("Some Members of the House of Representatives opposed the Exon Amendment because they thought it 'possible for our parents now to childproof the family computer with these products available in the private sector.' They also thought the Senate's approach would 'involve the Federal Government spending vast sums of money trying to define elusive terms that are going to lead to a flood of legal challenges while our kids are unprotected.' These Members offered an amendment intended as a substitute for the Exon Amendment, but instead enacted as an additional section of the Act entitled 'Online Family Empowerment.'").

[17] 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[18] *Id.* at H8470.

non-regulatory approach to protecting children from pornography and other material perceived to be harmful that the federal government *already* regulated.[19]

II. THE RELATIONSHIP BETWEEN SECTIONS 230(C)(1) & 230(C)(2)

Both section 230's text and congressional intent target a narrow set of harms: pornography, indecency, and other material considered regulable at the time. This understanding undermines the claim that section 230 claims must be read "broadly" as a seminal charter of online internet immunity carefully considered by Congress. Certain legislators, decades later, may make claims to that effect.[20] And some commentators have echoed these post hoc claims.[21] But, as the Supreme

[19] 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Wyden) ("We are all against smut and pornography . . . . [rather] than give our Government the power to keep offensive material out the hands of children . . .We have the opportunity to build a 21st century policy for the Internet employing . . . the private sector"); 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Danner) ("I strongly support . . . address[ing] the problem of children having untraceable access through on-line computer services to inappropriate and obscene pornography materials available on the Internet"); 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. White) ("I have got small children at home. . . . I want to be sure can protect them from the wrong influences on the Internet."); *id.* (statement of Rep. Lofgren) ("[The Senate approach] will not work. It is a misunderstanding of the technology. The private sector is out giving parents the tools that they have. I am so excited that there is more coming on. I very much endorse the Cox-Wyden amendment"); *id.* (statement of Rep. Goodlatte) ("Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet"); *id.* (statement of Rep. Markey) (supporting the amendment because it "deals with the content concerns which the gentlemen from Oregon and California have raised"); *id.* (statement of Rep. Fields) (congratulating the legislators for "this fine work").

[20] Ron Wyden, *I Wrote This Law to Protect Free Speech. Now Trump Wants to Revoke It*, CNN BUSINESS PERSPECTIVES (June 9, 2020), https://tinylink.net/4KNX2 ("Republican Congressman Chris Cox and I wrote Section 230 in 1996 to give up-and-coming tech companies a sword and a shield, and to foster free speech and innovation online. Essentially, 230 says that users, not the website that hosts their content, are the ones responsible for what they post, whether on Facebook or in the comments section of a news article. That's what I call the shield. But it also gave companies a sword so that they can take down offensive content, lies and slime—the stuff that may be protected by the First Amendment but that most people do not want to experience online."); JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 64 (2019) (quoting a June 2017 interview with Ron Wyden, in which he says, "We really were interested in protecting the platforms from being held liable for the content posted on their sites and being sued out of existence").

[21] As an example, Jeff Kosseff's THE TWENTY-SIX WORDS THAT CREATED THE INTERNET

Court says, "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation."[22]

While section 230(c)(2) dominated the legislative discussion, section 230(c)(1) has dominated judicial decisions.[23] Section 230(c)(1) eliminates internet platforms' "publisher or speaker" liability for the third-party user content they post. It states, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[24] In short, it treats internet platforms as conduits, such as the telephone or telegraph companies. Unlike publishers, these entities do not face strict liability under common law for the content they carry.

And section 230(c)(1), though *not* the focus of legislative attention as evidenced from the legislative history, makes good sense as written. Early platforms, such as AOL and Prodigy, would have been crushed with the legal liability of having to review all posts. Section 230(c)(1) said they were not liable for third party content—and Section 230(c)(2) said they would not become so even if they edited such content for certain, enumerated reasons. Thus, Section 230(c)(1) ratified and expanded on *Cubby v. Compuserve*, an early internet opinion that ruled that because Compuserve did not moderate or edit content, Compuserve had no liability for user posts.[25]

In a manner roughly analogous to the liability protections extended to conduits and common carriers, such as telegraphs and telephones,[26] section 230(c)(1)

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recounts the legislative history of section 230, arguing that its motivation was to counter pornography and duly footnoting the legislative history. However, when the book goes on to claim that Section 230 sought to protect online actors from crushing liability, it cites to post-enactment claims by legislators. See *id*. ch. 3 ("Chris and Ron Do Lunch") and accompanying footnotes.

[22] Bruesewitz v. Wyeth LLC, 562 U.S. 223, 242 (2011).

[23] *See* Elizabeth Banker, Internet Ass'n, *A Review of Section 230's Meaning & Application Based on More Than 500 Cases* (July 27, 2020), https://perma.cc/4B7B-U88S.

[24] 47 U.S.C. § 230(c)(1).

[25] Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[26] Telegraph companies generally had no liability for the statements they transmitted, but they could be liable if they acted with malice or with knowledge that the sender was not privileged to make the statement. *See* RESTATEMENT (SECOND) OF TORTS § 612(2); Mason v. Western Union Tel. Co., 125 Cal. Rptr. 53, 56 (1975); Figari v. New York Tel. Co., 303 N.Y.S.2d 245, 259 (1969); Western

removes liability for causes of action that include, in their elements, treating the "interactive computer service," *i.e.,* platform, as a publisher or speaker of another's words. The classic example is defamation: A Facebook user posts a defamatory statement, and the defamed plaintiff sues Facebook on the theory that, by allowing the post to stay up on its site, Facebook acted as a publisher of the post. The plaintiff's cause of action would include an element that treats the platform as "a publisher or speaker" of the user's words. Section 230(c)(1) would bar the action against Facebook, leaving the only action available to the plaintiff to be one against the user. Section 230(c)(1) thereby allowed AOL and Prodigy to run bulletin boards without the potential liability risk that hosting millions of user generated posts presents.

Taken together, both section 230's text and legislative history point to the same interpretation: Section 230(c)(1) allows platforms to accept posts from their users without liability for such speech, i.e., the situation in *Cubby*. It generally shields platforms for liability created by speech that the platform hosts. Section 230(c)(2), in turn, protects platforms that want to content-moderate, giving them protection when removing, editing, or blocking third-party, user-generated content for certain enumerated reasons:[27]

Union Tel. Co. v. Lesesne, 182 F.2d 135, 137 (4th Cir. 1950); Von Meysenbug v. Western Union Tel. Co., 54 F. Supp. 100, 101 (S.D. Fla. 1946); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940); Klein v. Western Union Tel. Co., 13 N.Y.S.2d 441, 443 (App. Div. 1939); Peterson v. W. Union Tel. Co., 65 Minn. 18, 23 (1896); Annotation, *Liability of Telegraph or Telephone Company for Transmitting or Permitting Transmission of Libelous or Slanderous Messages*, 91 A.L.R.3d 1015 (1979).

It is often said that telephone companies have absolute immunity. Cases support this claim, *see* Anderson v. New York Tel. Co., 320 N.E.2d 647 (1974), and the Restatement of Torts also reaches this conclusion. RESTATEMENT (SECOND) OF TORTS § 581 cmt. b (1976). *Anderson* reasons that because telephone companies have an obligation to carry all messages, they should not be liable for them. But common carriage law predating *Anderson* and comprehensive public utility regulation took a different approach, reasoning that, because companies have the right to refuse unlawful messages, they are liable for their *knowing* transmission. Godwin v. Carolina Tel. & Tel. Co., 136 N.C. 258, 48 S.E. 636, 637 (1904); Application of Manfredonio, 183 Misc. 770, 770–71, 52 N.Y.S.2d 392, 392 (Sup. Ct. 1944); Lesesne v. Willingham, 83 F. Supp. 918, 924 (E.D.S.C. 1949); Bruce Wyman, *Illegality As an Excuse for Refusal of Public Service*, 23 HARV. L. REV. 577, 584–85 (1910); *see also* O'Brien v. W.U. Tel. Co., 113 F.2d 539, 543 (1st Cir. 1940) (so suggesting).

[27] This view of section 230(c)(1) has been explored in greater detail elsewhere. *See* Adam

Section	Legal Protection
230(c)(1)	No liability as publishers based on third-party posts
230(c)(2)	No liability for content-moderating obscene, lewd, lascivious, filthy, excessively violent, and harassing content, and similar content
Not covered	No immunity for liability (if some cause of action so provides) for content-moderating types of speech not mentioned in 230(c)(2)

Some courts have taken a different approach, holding that section 230 bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."[28] That language has been quoted extensively.[29]

The language comes from the influential *Zeran* case, but many courts forget the *immediately preceding* language. To quote *Zeran* fully, section 230

> creates a federal immunity to any cause of action that would make service providers *liable for information originating with a third-party user of the service*. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.[30]

The "traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" are examples of third-party content decisions that section 230 protects. It does not protect platform as to their *own* editorial decisions or judgments.

When quoted out of context, the "its" would seem to suggest that section 230 immunizes the platform's publisher role. But this is an example of sloppy drafting and an imprecise pronoun antecedent, as the sentence prior speaks of "information

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Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J. L. & TECH. 391, 429 (2020); Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 945–62 (2021).

[28] Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

[29] According to a Westlaw search, at least 98 cases quote the language directly from *Zeran*. That count probably underestimates the influence of the language, because the quotation appears in other cases that are themselves quoted.

[30] Barrett v. Rosenthal, 146 P.3d 510, 516 (Cal. 2006) (quoting *Zeran*, 129 F.3d at 330) (emphasis added).

originating with a third-party user of the service."

Numerous courts mischaracterize the *Zeran* language and interpret section 230 as immunizing platforms' *own editorial decisions.* To take a typical example, in *Levitt v. Yelp!,* the plaintiff alleged that Yelp! "manipulate[d] . . . review pages—by removing certain reviews and publishing others or changing their order of appearance."[31] The *Levitt* plaintiffs argued that Yelp!'s behavior constituted unfair or fraudulent business under Cal. Bus. & Prof. Code § 17200. But the elements of the unfair or fraudulent business practices law have nothing to do with speaking or publishing third party content. Rather, they ask whether Yelp! engaged in an "unlawful, unfair or fraudulent business act or practice" or an "unfair, deceptive, untrue or misleading advertising and any act."

Ignoring this straightforward analysis, the court ruled that section 230(c)(1) immunized Yelp!'s conduct, supporting its conclusion by quoting the "traditional editorial functions" language of *Zeran*.[32] But notice the court's confusion here: Yelp! allegedly made changes and conscious re-arrangements to reviews in violation of its representations to users and customers—plaintiffs sought to make Yelp! accountable for *its own* editorial decisions and false representations.

The *Levitt* court's reading of section 230(c)(1) would protect platforms from contract, consumer fraud or even civil rights claims, freeing them to discriminate against certain users and throw them off their platforms. Courts are thus relying upon Section 230 to immunize platforms for their own speech and actions—from

[31] Levitt v. Yelp! Inc., No. C-10-1321 EMC, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).

[32] *Id.*

contract liability with their own users,[33] their own consumer fraud,[34] their own violation of users' civil rights,[35] and even assisting in terrorism.[36]

The only statement by a Supreme Court Justice on section 230 recognized the error of reading section 230(c)(1) to include a platform's "editorial functions." In his statement respecting the denial of certiorari, Justice Thomas strongly criticized "construing § 230(c)(1) to protect any decision to edit or remove content." He realized that, for instance, "[w]ith no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content."[37]

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[33] Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (stressing that "the immunity bestowed on interactive computers service providers by § 230(c) prohibits all of Plaintiff's claims [including contract claims] against Facebook"), *aff'd*, 700 F. App'x 588 (9th Cir. 2017); Lancaster v. Alphabet Inc., No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (finding that, where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract," "CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); Fed. Agency of News LLC v. Facebook, Inc., 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (asserting that CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[34] Gentry v. eBay, Inc., 99 Cal. App. 4th 816, 836 (2002) (interpreting that "Appellants' UCL cause of action is based upon . . . [the claim] that eBay misrepresented the forged collectibles offered for sale in its auctions").

[35] Sikhs for Justice "SFJ", Inc., 144 F. Supp. 3d 1088, 1094–95 (N.D. Cal. 2015).

[36] Force v. Facebook, Inc., 934 F.3d 53, 57 (2d Cir. 2019).

[37] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020). Goldman & Miers collect cases "show[ing] that Internet services have won essentially all of the lawsuits to date brought by terminated/removed users. Accordingly, Internet services currently have unrestricted legal freedom to make termination/removal decisions." Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 192 (2020). It is worth observing that most of the removals in the dataset have been under section 230(c)(1), supporting Justice Thomas's concern that this provision has been overread; the text is clear that section 230(c)(2) controls removals. Judges across the country are expressing misgiving similar to Justice Thomas's. *See* In re Facebook, Inc., __ S.W.3d __, 2021 WL 2603687, at *7 (Tex. June 25, 2021) ("We agree that Justice Thomas's recent writing lays out a plausible reading of section 230's text."); Force v. Facebook, Inc., 934 F.3d 53, 77 (2d Cir. 2019) (Katzman, C.J., dissenting) ("Instead, we today extend a provision that was designed to encourage computer service providers to shield minors from obscene material so that it now immunizes those same providers for allegedly connecting terrorists to one another. Neither the impetus for nor the text of § 230(c)(1) requires such a result.").

Similarly, in a recent statement, the Ninth Circuit in *Lemmon v. Snap* made clear that section 230(c)(1) only protects against claims that include speaking or publishing third party content and does not protect against claims merely involving a platform's "editorial functions." Clarifying the applicable law, the *Lemmon* court stated that section 230 only protects a defendant internet platform if the claims seek to treat the platform, "*under a state law cause of action, as a publisher or speaker . . . of information provided by another information content provider*."[38] This makes clear that section 230(c)(1) only applies to causes of action which contain as elements publishing or speaking third party information, such as defamation and criminal threat.

Last, reading section 230(c)(1) to protect content moderation reads section 230(c)(2) out of the statute. If section 230(c)(1) protects "editorial functions," that includes the removals and content moderation that section 230(c)(2) addresses. Reading one provision of a statute to render another superfluous violates the canon against surplusage, a basic rule of statutory construction. As the Supreme Court has held, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."[39] The Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme."[40] Here, the expansive *Zeran* reading of section 230(c)(1) renders superfluous section 230(c)(2), the immediately succeeding provision. Justice Thomas has recognized this point.[41]

III. THE RELATIONSHIP BETWEEN SECTIONS 230(C)(1) & 230(F)(3)

Section 230(f)(3) as well as section 230(c)(2) constrains the scope of section 230(c)(1), a point Justice Thomas recognized in *Malwarebytes*.[42] But courts have

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[38] Lemmon v. Snap, Inc., 995 F.3d 1085, 1091 (9th Cir. 2021) (emphasis added) (quoting Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1097 (9th Cir. 2019), and Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009)).

[39] Corley v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

[40] Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013).

[41] Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 17 (2020) (Thomas, J., respecting the denial of certiorari) (citing e-ventures Worldwide, LLC v. Google, Inc., 2017 WL 2210029, *3 (M.D. Fla. Feb. 8, 2017) (rejecting the interpretation that § 230(c)(1) protects removal decisions because it would "swallow[] the more specific immunity in (c)(2)").

[42] *Id*. at 16–19.

not carefully explained the relationship between these sections, as the recent *Gonzales* case (discussed below) indicates. A proper understanding of section 230(f)(3) would limit a platform's protections under section (c)(1) against liability for third-party content, although concededly the statutory text does not define a sharp line between the provisions.

Section 230(f)(3) defines an "internet content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information."[43] The term "interactive computer service" is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[44] Section 230(c)(1) only protects "interactive computer services," and internet content providers do not receive section 230(c)(1) protection. Putting these provisions together, if an interactive computer service creates "in whole or part" content then it becomes an internet content provider, at least with respect to that content—and stands outside section 230(c)(1) protection.

While the mere deletion of a comment here or there likely does not constitute content creation or development, some types of content moderation do. Moderating and editing which, pursuant to a distinct plan or policy, change or shape the nature of online discussion likely cross the line into content creation. As a starting principle, an anthology editor does create or develop content when he selects certain works to publish or promote. Similarly, an editor that moderates content pursuant to a clear plan or bias creates content. For example, Thomas Bowdler developed content when he moderated the content of Shakespeare's plays to make them more acceptable to Victorian audiences.

Analogously, imposing complex content moderation regimes for acceptable posting very well might be closer to bowdlerizing than to deleting the odd comment. This would be particularly the case if the content moderation regime had biases that promoted or retarded certain types of discussions even in subtle ways—as social media critics allege. And, if so, then the platforms, when they engage in content moderation, are internet content providers that lack section 230(c)(2)

[43] 47 U.S.C. § 230(f)(3).

[44] 47 U.S.C. § 230(f)(2).

protections because they are content creators under section 230(f)(3).

But the line between editing a few comments and Thomas Bowdler is not clear, and very few courts have attempted to draw the line. Courts have proposed differing tests, most influentially in the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.Com*. There, the court found that "[b]y requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information."[45] The court reasoned that, by requiring information from users that other users could use to make discriminatory judgments, the platform became a content creator and potentially liable under anti-discrimination laws. Other courts reason that a platform that makes a "material contribution" to online material becomes an internet content provider, leaving much vagueness as to how to define "material contribution."[46]

A recent case, *Gonzalez v. Google LLC,*[47] demonstrates the difficulty—and indeed perils—of drawing the line. The case involved allegations that internet platforms contributed to or promoted terrorist activity in violation of the Anti-Terrorism Act (ATA).[48] Plaintiffs alleged that "Google uses computer algorithms to match and suggest content to users based upon their viewing history. . . . [I]n this way, Google has 'recommended ISIS videos to users' and enabled users to 'locate other videos and accounts related to ISIS,' and that by doing so, Google assists ISIS in spreading its message."[49]

In *Gonzales*, over a vigorous and insightful dissent, the court distinguished *Roommates* on the grounds that "The Roommates website did not employ 'neutral tools'; it required users to input discriminatory content as a prerequisite to accessing its tenant-landlord matching service."[50] Rather, in *Gonzales*, "the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity."[51]

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[45] 521 F.3d 1157, 1166 (9th Cir. 2008).

[46] Huon v. Denton, 841 F.3d 733, 742 (7th Cir. 2016).

[47] 2 F.4th 871 (9th Cir. 2021).

[48] 18 U.S.C. § 2333.

[49] *Gonzalez*, 2 F.4th at 881.

[50] *Id.* at 894.

[51] *Id.*

This claim is strange. Platforms use algorithms to allow them to selectively distinguish, with ever greater power and specificity, different content for different users. If users type in searches of type X, they will receive promoted content of type X; if users type in searches of type Y, they will receive promoted content of type Y. The business model of these platforms requires them to identify different preferences of consumers and precisely match them to (i) content that will keep their attention focused on the platform and (ii) advertisers interested in sending them advertisements.

The problem with the *Gonzales* court's reading is that it is far from clear that there are "neutral" algorithms or even that the term is coherent. The court never defines "neutrality" and asserts, without justification, that "algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity." But, of course, platforms treat different content differently. That is their *raison d'etre*, as the more precise distinctions among users and their content leads to more effective matching for advertisers.

Indeed, Big Tech's defenders, at least when arguing against non-discrimination requirements, use this evident fact to argue that social media "neutrality" is impossible. For instance, Kir Nuthi explains that "[n]ondiscrimination is a central feature of traditional common carriers, but it is not a feature of social media. Unlike the railroads and communications companies of the Gilded Age, social media relies on the ability to contextualize and discriminate between different content."[52]

Section 230(f)(2) implies there is a point at which content moderation becomes content creation. The provision does not state where that point is, and courts have yet to provide useful tests to locate it. While this article does not suggest a test, a textual reading of section 230 must not read section 230(f)(2) out of the statute, and must recognize that the interactive computer services that cross a line into content provision lose their protection as to the content that they provide.

IV. INTERPRETING SECTION 230(C)(1)

Section 230(c)(1) states:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.[53]

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[52] Kir Nuthi, *Conservatives Want Common Carriage. They're Not Going to Like It.*, TECHDIRT (June 8, 2021), https://tinyurl.com/32sdp82r.

[53] 47 U.S.C. § 230(c)(1).

The first appellate decision interpreting this provision, *Zeran v. AOL,*[54] read the word "publisher" to include what the common law would consider "distributor" liability as well as "publisher" liability. Its opinion was extremely influential and, with perhaps one exception,[55] the courts of appeals have followed *Zeran,* conceding what can only be viewed as a first mover advantage. But as the recent statement from Justice Thomas points out, it is far from clear that this interpretation is correct.

At common law, a person is subject to "publisher" liability if he makes "an affirmative act of publication to a third party."[56] This "affirmative act requirement" ordinarily "depict[s] the defendant as part of the initial making or publishing of a statement."[57] A "distributor," under common law, in contrast, is "one who only delivers or transmits defamatory matter published by a third person."[58]

Publishers or speakers are subject to a higher liability standard, traditionally strict liability, although that standard is rarely imposed given the constitutional limits on libel law set forth in *New York Times v. Sullivan* and *Gertz*.[59] By contrast, distributors, which do not exercise editorial control, face liability only when they have knowledge or constructive knowledge that the content they are transmitting is illegal.[60]

Following this common law understanding, the word "publisher" is ambiguous because it sometimes references initial publication and other times subsequent

[54] Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[55] Chicago Lawyers' Committee For Civil Rights Under Law v. Craigslist, 519 F.3d 666, 668–669 (7th Cir. 2008) ("Subsection (c)(1) does not mention 'immunity' or any synonym. Our opinion in *Doe* explains why § 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts").

[56] Benjamin C. Zipursky, *Online Defamation, Legal Concepts, and the Good Samaritan*, 51 VAL. U. L. REV. 1, 18 (2016); RESTATEMENT (SECOND) OF TORTS § 558 (1977) (listing a statement and publication as separate elements of defamation).

[57] Zipursky, *supra* note 56, at 19.

[58] RESTATEMENT (SECOND) OF TORTS § 581.

[59] *See* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 113, at 810–11 (5th ed. 1984); *compare* RESTATEMENT (SECOND) OF TORTS § 581(1) *with* New York Times Co. v. Sullivan, 376 US 254 (1964), *and* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

[60] *See generally* Smith v. California, 361 U.S. 147, 152–54 (1959).

distribution of content.[61] Because a "distributor" can be thought of as a type of "publisher," the word "publisher" has developed a generic sense, referring to publishers and distributors, as well as a specific sense, referring to the "initial" maker of the statement.

It is not clear whether Congress intended the generic or the specific meaning of publisher. Like the term "congressman," which refers to both senators and representatives, but usually refers to representatives, "publisher" refers both to those who "actually publish" and those who republish or distribute.

Recognizing this textual ambiguity, Justice Thomas has written that "To be sure, recognizing some overlap between publishers and distributors is not unheard of. Sources sometimes use language that arguably blurs the distinction between publishers and distributors. One source respectively refers to them as 'primary publishers' and 'secondary publishers or disseminators,' explaining that distributors can be 'charged with publication.'"[62]

Nonetheless, because a distributor is a type of publisher, the *Zeran* court ruled that section 230(c)(1) protects against both types of liability. And the results of that decision have been dramatic—essentially eliminating any platform responsibility for the content they carry.

The *Zeran* court's textual reasoning is not solid. It simply states that distributors are a type of publisher and assumes Congress intended the generic, not specific, meaning. It ignores textual evidence in the statute that points in the opposite direction: If Congress wanted to eliminate both publisher and distributor liability, it would have created a categorical immunity in § 230(c)(1), stating that "No provider shall be held liable for information provided by a third party" and would not have used language that explicitly limited its protection to speaking and publishing third-party content. In fact, when Congress wants to use categorical language to block liability on any theory (and not just on a speaker-or-publisher theory), it does so—using such categorical language in the very next subsection, Section

[61] *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 578 ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

[62] *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 15 (2020) (Thomas, J., respecting denial of certiorari) (quoting KEETON ET AL., *supra* note 59, at 799, 803).

230(c)(2).[63]

Second, as Justice Thomas recently observed in a statement respecting the denial of certiorari, "Congress expressly imposed distributor liability in the very same Act that included § 230. Section 502 of the Communications Decency Act makes it a crime to 'knowingly . . . display' obscene material to children, even if a third party created that content. This section is enforceable by civil remedy. It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it."[64] If the Act follows consistent usage throughout the statute, section 230 would not affect distributor liability.

The *Zeran* court also relied on policy arguments, worrying that,

> If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice of a potentially defamatory statement—from any party, concerning any message. Each notification would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the spot editorial decision whether to risk liability by allowing the continued publication of that information. Although this might be feasible for the traditional print publisher, the sheer number of postings on interactive computer services would create an impossible burden in the Internet context.[65]

This policy concern may have had some force in 1996. However, in today's world of AI and automated takedowns—and the large platforms' moderating teams that number well into the tens of thousands—the concern seems misplaced. And imposing distributor liability on mid-sized or small web firms would not force them to hire armies of staff to review allegations of libel or similar unlawfulness: Rather, as with data breach obligations and other cybersecurity duties, reasonable behavior for dealing with notices could be scaled to firm size and resources. Under current law, the myriad internet data breach obligations found in statutes such as HIPAA[66]

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[63] "No provider or user of an interactive computer service shall be held liable on account of any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2).

[64] *Enigma Software Grp.*, 141 S. Ct. at 15 (emphasis in original) (citing 47 U.S.C. § 223(d)).

[65] Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

[66] Fero v. Excellus Health Plan, Inc., 236 F. Supp. 3d 735, 763 (W.D.N.Y. 2017), *on*

and title V of the Gramm-Leach-Bliley Act have premised and scaled liability for unlawful behavior on the capacities of small firms to follow best practices.[67] While this is not the forum to spell out the details, small firms could be exempted or best practices could be developed for what constitutes "knowledge" for distributor liability.[68] Such a burden is hardly crushing—after all, both small and large websites already have takedown obligations under the Digital Millennium Copyright Act.[69]

There is another problem: Websites will have to determine whether something is, in fact, libelous. Or, more realistically, they will have the obligation to assess the risk of libel associated with certain statements and gauge whether to accept such risk. This problem was addressed in distributor liability for telegraph liability. Courts solved this problem by only assigning liability if the libel was "apparent on the face" of the message."[70] Under this rule, only the most egregious types of speech would incur liability, as well as speech previously adjudged libelous or unlawful, which some courts have ruled section 230(c)(1) protects.[71] And, again, the accuracy of judgment to which a platform is to be held could scale to its resources, and best practices or safe harbors could be created either by courts or the Federal Communications Commission.

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reconsideration, 304 F. Supp. 3d 333 (W.D.N.Y. 2018), *order clarified*, 502 F. Supp. 3d 724 (W.D.N.Y. 2020) (in lawsuit for data breach for HIPAA-regulated entity, "both the breach of contract claim and implied covenant claim arise out of the Excellus Defendants' failure to protect the confidentiality of Plaintiffs' personal information and to comply with policies, industry standards, and best practices for data security").

[67] Title V of the GLBA states that "each financial institution has an affirmative and continuing obligation to respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information." 15 U.S.C. § 6801(a); *see also* Board of Governors of the Federal Reserve System, *Interagency Guidelines Establishing Information Security Standards [Small-Entity Compliance Guide]* (Aug. 2, 2013), https://tinyurl.com/5d43nb3z ("To achieve these objectives, an information security program must suit the size and complexity of a financial institution's operations and the nature and scope of its activities.").

[68] This idea resonates with Kyle Langvardt's *Can The First Amendment Scale?*, 1 J. FREE SPEECH L. 273 (2021), which suggests that traditional publisher and distributor categories may need to soften in the face of changing technology.

[69] 17 U.S.C.A. § 512(c).

[70] *See* sources cited in note 26.

[71] Hassell v. Bird, 5 Cal. 5th 522, 532 (2018).

V. Interpreting Section 230(c)(2)

Title 47 U.S.C. § 230(c)(2) states:

> No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."

The provision's scope turns on how the final "otherwise objectionable" should be interpreted. There are two choices: (i) an *ejusdem generis* reading in which the term refers to those objectionable things that are similar to the rest of the list and (ii) a non-*ejusdem-generis* reading in which "otherwise objectionable" is read "in the abstract" referring to literally any other objectionable thing. (Under the canon of *ejusdem generis*, "Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[72])

Courts have had difficulty in determining what is the "similar nature" that unites the section 230(c)(2) list. *Interpreting 47 U.S.C. § 230(c)(2)*[73] shows that all these terms referred in the 1990s to areas of then-permitted, or commonly believed to be permitted, types of telecommunications regulation. "Obscene, lewd, lascivious, and filthy" speech had been regulated on cable television and in telephone calls—and of course in broadcasting.[74] "Harassing" telephone calls had also long been seen by Congress as regulable, and continue to be regulated to this day.[75] "Excessively violent" speech was considered regulable content, like indecent content, in the context of regulating over-the-air broadcasting.[76]

An *ejusdem generis* reading would constrain the legal immunities in section 230(c)(2). If section 230's content moderation protections are found *only* in section 230(c)(2), not section 230(c)(1), then platforms receive such immunity only when moderating the types of speech section 230(c)(2) enumerates.

Of course, courts may ignore statutory canons even if there is a convincing

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72 Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001).

73 Candeub & Volokh, *supra* note 6.

74 *Id.* at 180–83.

75 47 U.S.C. § 223.

76 Candeub & Volokh, *supra* note 6, at 182.

argument for their application—and the canons sometimes can point in opposite directions.[77] Without *ejusdem generis*, "otherwise objectionable" would be interpreted in the abstract—*and not refer* to the list at all but rather to any possible objectionable content. This reading would provide immunity for virtually any content-moderation decision that a platform deems appropriate.

The *ejusdem* and non-*ejusdem* readings are subject to different constitutional analyses. The former is content-based. The latter is likely not. The following section examines the constitutionality of section 230(c)(2) under each interpretation.

VI. THE CONSTITUTIONALITY OF SECTION 230(C)(2)

The *ejusdem generis* reading of section 230(c)(2) seems less likely to survive First Amendment scrutiny than the non-*ejusdem-generis* reading, though the matter is not certain.

A. Non-Ejusdem Generis Reading

Under a non-*ejusdem* interpretation, section 230(c)(2)'s "otherwise objectionable" catchall term assumes an "in abstract" meaning, referring to any content objectionable in the platform's view. The statute's use of the phrase "material that the provider or user considers" to be objectionable bolsters this interpretation. The word "considers" suggests a subjective, or at least, individualized judgment.

Yet, even a non-*ejusdem-generis*, "in abstract" reading of "otherwise objectionable" has ambiguity. It could be read in a subjective way which would allow *any* objectionable material—or in an objective way which would refer to the category of speech people would likely find objectionable. The following examines the provision's constitutionality (1) under an objective reading and (2) under a subjective reading. An objective reading is likely content-based while a subjective reading could be content-neutral.

1. "Otherwise objectionable": objective reading

The "objective" interpretation has several arguments for it. First, "objectionable" has a meaning that describes and categorizes speech independent of individual's particular judgments. For instance, "otherwise religious" in the phrase "Christian, Hindi, Jewish, or otherwise religious" has a distinct content—and if section 230(c)(2) were to be so read, it would be clearly content-based.

Second, Congress intended "otherwise objectionable" to refer to a distinct set

[77] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (1960).

of speech. The statute's clear purpose was to combat certain speech in media, such as indecency and profanity. In other words, Congress likely intended to catch other types of speech it thought to be regulable in telecommunications media in 1996. There is no evidence from the legislative history that Congress intended a purely subjective understanding of "objectionable." The evidence suggests that Congress intended to impose some sort of community standards even if imposed via individual internet platforms.

Third, when Congress wants individual subjective judgments about particular content be controlling, it does so explicitly. For instance, the statute banning "pandering advertisements in the mails" "provides a procedure whereby any householder may insulate himself from advertisements that offer for sale 'matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative.'"[78] Under Post Office procedure, which the Supreme Court has upheld, the Post Office must accept *any* advertisement as qualifying under the statute that a mail householder judges arousing or provocative. If Congress had wanted a subjective reading, it would have used language similar to that found in this statute, *i.e.,* used words like "sole discretion." The use of the word "consider" does not convey subjectivity in such a definitive way.

An "objective" reading of "otherwise objectionable" would be subject to a constitutionality analysis similar to that of an *ejusdem generis* reading,[79] as both are content-based and refer to a similar set of things.

2. "Otherwise objectionable": subjective reading

On the other hand, a purely subjective reading is also reasonable and probably the better of the two readings (assuming one rejects the *ejusdem generis* approach, which I think is the best reading of all). As mentioned above, the text references what the platform "considers" to be objectionable, suggesting a subjective approach. Also, even if what everyone considers to be objectionable could be defined in some theoretical way as a distinct set of speech, this category is fuzzy and amorphous—suggesting that in practice the statute refers to whatever a platform subjectively deems objectionable.

A purely subjective reading of section 230 does not at first blush appear to be a

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[78] Rowan v. U.S. Post Office. Dep't, 397 U.S. 728, 729–30 (1970).

[79] *See* Part VI.B.1.

regulation of speech at all. A platform can choose to moderate content according to the factors in section 230(c)(2) or not. Section 230 does not mandate or compel any particular type of speech, nor does it punish any particular type of speech. The statute does not define objectionable but leaves the definition and application to individuals.

Yet it could still be a regulation of speech, even if a content-neutral one. Section 230 favors the expression of a certain type of speech—those that interactive computer services would likely find objectionable. "Even if the hypothetical measure on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional."[80] Certainly, Congress *intended* restrictions on the flow of speech.

Further, by encouraging private censorship, Congress successfully made certain types of information more difficult to obtain. "'[T]he Court long has recognized that by limiting the availability of particular means of communication, content-neutral restrictions can significantly impair the ability of individuals to communicate their views to others.'"[81]

In order to justify a content-neutral regulation, the government must demonstrate, among other things, that "it furthers an important or substantial governmental interest [and that] the governmental interest is unrelated to the suppression of free expression."[82] Courts typically do not require a "least restrictive means" test, requiring instead that the means be narrowly tailored and leave ample alternative outlets.[83] But the government still "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[84] We must identify the content-neutral governmental goal of section 230 and see whether section 230 is narrowly tailored to that goal.

Identifying neutral interests supporting section 230 is not an easy inquiry. Most of its stated policy goals are quite content-based. Congress sought to empower

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[80] Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011).

[81] City of Ladue v. Gilleo, 512 U.S. 43, 55 n.13 (1994) (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 57 (1987)).

[82] United States v. O'Brien, 391 U.S. 367, 377 (1968).

[83] *See* Ward v. Rock Against Racism, 491 U.S. 781, 797–99 (1989).

[84] McCullen v. Coakley, 573 U.S. 464, 486 (2014).

parents' power to limit children's access to "objectionable and inappropriate"[85] speech and further "vigorous enforcement of obscenity and harassment."[86] Similarly, as discussed below, the legislative history as it exists suggests that the justifications for Congress passing the statute were content-based.

On the other hand, the stated justifications include some neutral justifications, such as to "promote the continued development of the Internet and other interactive computer services," "preserve the vibrant and competitive free market," and "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools."[87]

This ambiguity could lead to a finding of neutrality because the Court allows itself flexibility in determining statutory justification. For instance, in *Turner*,[88] the Court ruled on the constitutionality of the "must carry" obligations of the 1992 Cable Television Consumer Protection and Competition Act.[89] This law required cable systems to carry over-the-air television broadcasting. As some of the justices recognized, this appeared to be a content-based regulation.[90] Congressmen, ever solicitous to the local broadcaster who carries their political advertisements and whose news shows cover politicians' deeds, granted broadcasters favors by forcing cable systems to carry their content.[91]

The Court looked past this obvious purpose and found that the law's stated

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[85] 47 U.S.C. § 230(b)(4).

[86] 47 U.S.C. § 230(b)(5).

[87] 47 U.S.C. § 230(b)(1)-(3).

[88] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994).

[89] 47 U.S.C. §§ 534(b)(1)(B), (h)(1)(A), 535(a).

[90] 512 U.S. at 677 (O'Connor, J., dissenting) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content. They may not reflect hostility to particular points of view, or a desire to suppress certain subjects because they are controversial or offensive. They may be quite benignly motivated. But benign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications."); *id.* at 680 ("But when a content-based justification appears on the statute's face, we cannot ignore it because another, content-neutral justification is present.").

[91] Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1767 (1995) ("What was the purpose of the must-carry rules? This is a complex matter. A skeptic, or perhaps a realist, might well say that the rules were simply a product of the political power of the broadcasting industry. Perhaps the broadcasting industry was trying to protect its economic interests at the expense of cable.").

justification was to preserve free, over-the-air television. The Court ruled that the regulation, in simply specifying the source of programming to be carried, was not content-based.[92]

The Court could follow the *Turner* approach in interpreting section 230. The statute's stated purposes of "promot[ing] the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and schools" might serve as content-neutral justifications.[93] One could say that limiting liability for content moderation furthers these goals by lowering the cost of blocking and moderation technologies. If you want to create markets in what is essentially private censorship, then lowering liabilities associated with creating tools for censorship is a good idea.

While this argument might very well win the day, there are a few caveats. First, *Turner* explicitly recognized the market power of the cable systems as justifying, in part, must-carry.[94] Given the market power of cable, it had the power to silence others, and therefore access was required. In contrast, section 230(c)(2) affects Twitter as well as your personal website—the big and the little. It is possible that the Court's willingness to find a content-neutral justification—which would be more likely to be upheld—stemmed from its overall greater willingness to accept regulation of dominant firms than smaller actors.

Second, the provision favors certain types of expression—namely forwarding a set of opinions and views through editing, amplifying, muting, shaping, and content-moderating posters' comments. It is perhaps odd to think of comment deletion as expression or speech. But, it can be, for reasons similar to those discussed in Part III in relation to section 230(f)(3). A comment thread subject to a strict content

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[92] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[T]he importance of local broadcasting outlets 'can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.' The interest in maintaining the local broadcasting structure does not evaporate simply because cable has come upon the scene.").

[93] 47 U.S.C. § 230(b)(1)–(3).

[94] *Turner*, 512 U.S. at 632–33 ("In brief, Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.").

moderation policy certainly expresses something different than a comment thread that is not so subject—just as a bonsai tree, which is pruned to control its growth, is different from a tree than is allowed to develop freely.

By adopting content moderation policies, platforms can promote (or hide) ideas and control discussion. They become the anthologists of the internet, editing discussion to create versions of expression they prefer. Similarly, they become, in a sense, book publishers.[95] They promise to provide a free service—access to their platforms—in exchange for producing speech that they like. The exchange is analogous to an advance that a book publisher would give an author.

Third, even though stated in broad language, Congress's policies in section 230 cannot be plausibly read to support massive private censorship on any topics that the platforms please, which is what section 230 as interpreted by many courts today protects. To the degree section 230 allows the dominant internet firms to impose their own censorship rules—rules that can promote anything—section 230 minimizes "user control over what information is received." Congress never even considered section 230 as protecting giant internet platforms, which did not exist in 1996 and which, with the other "FAANG" companies, now enjoy close to 22% of the S&P's total market capitalization.[96]

Finally, it may be that a subjective section 230 in fact subverts the goals of "promoting the continued development of the Internet and other interactive computer services" and "encourag[ing] the development of technologies which maximize user control over what information is received by individuals, families, and

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[95] Daphne Keller speaks of "amplification," which she defines "to encompass various platform features, like recommended videos on YouTube or the ranked newsfeed on Facebook, that increase people's exposure to certain content beyond that created by the platform's basic hosting or transmission features." Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE. SPEECH L. 227, 231 (2021). This seems to be a type of publication, in which the platform acts like an anthologist selecting messages to be repeated and shaping and directing discourse. It is not simply transmitting messages, and therefore falls outside section 230(c)(1). Ashutosh Bhagwat makes the argument that such editorializing is constitutionally protected. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97, 111–23 (2021). If so, however, such editorializing is the *platform's speech* and thus not within section 230(c)(1).

[96] Sergei Klebnikov, *Apple, Microsoft, Amazon, Google and Facebook Make up a Record Chunk of the S&P 500. Here's Why That Might Be Dangerous*, FORBES.COM (July 24, 2020), https://tinyurl.com/cy49pkr9.

schools"—particularly given the ill-defined line between interactive computer services and internet content providers set forth in sections 230(c) and 230(f)(3).

If one combines the subjective reading of "otherwise objectionable" with a highly restrictive view of section 230(f)(3), as some courts appear to have done, then platforms would be free to content-moderate in ways that could undermine users' willingness to express themselves online. Comments or arguments can be deleted, specially segregated, or, under some understandings of "content moderation," tagged with warnings. If these types of content moderation do not qualify as content provision under section 230(f)(3), then section 230(c)(2) would protect all such efforts. Exposing comments to such treatment does not further the goals of "user control" or the "growth of the internet."

B. Ejusdem Reading

The arguments for an *ejusdem generis* reading are discussed in *Interpreting 47 U.S.C. § 230(c)(2)*. An *ejusdem* reading likely renders section 230 content-based, as the terms in § 230(c)(2) refer to a distinct type of content: speech Congress thought regulable because it was inappropriate for children and families. The next question is whether a content-based section 230 is constitutional. To survive strict scrutiny, a content-based regulation of speech must be narrowly tailored to serve a compelling governmental interest, and that is a difficult test to pass.

On the other hand, classifying a provision as content-based does not necessarily doom it to strict scrutiny.[97] In particular, viewpoint-neutral (even though content-based) speech restrictions may not need to be subjected to strict scrutiny in certain contexts, particularly in designated public fora.

1. Section 230 as content-based restriction on protected speech

Under the *ejusdem* reading, section 230(c)(2) covers matters Congress thought

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[97] In *Denver Area,* arguably the case closest on point, the Court refrained from specifying what level of scrutiny should be applied to decency regulation on cable television. *See* Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 741–42 (1996) (plurality opin.) ("But no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. That is not to say that we reject all the more specific formulations of the standard—they appropriately cover the vast majority of cases involving government regulation of speech. Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure related to telecommunications, see, *e.g.*, Telecommunications Act of 1996 . . ., we believe it unwise and unnecessary definitively to pick one analogy or one specific set of words now.")

regulable in 1996. In particular, it explicitly disfavors a whole category of speech that now receives full or near full First Amendment protection under the Supreme Court's decision in *Brown v. Entertainment Merchants Association.*[98] In that case, the Court used strict scrutiny to strike down a restriction on the sale of violent video games to minors without parental permission.

And section 230 places a much higher burden on violent speech than does the California statute, which didn't restrict access to violent video games by adults or by minors who had adults who were willing to get the games for them. Section 230 limits the amount of violent content available to everyone, including adults.

While section 230's limit on speech is permissive and incentivizing—platforms do not have to block but are also not required to do so—the Court has found similar laws to be unconstitutional restrictions of speech. For instance, the Court ruled unconstitutional a statute giving permissive authority to cable systems to censor indecent material in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC.*[99] More generally, the Court has rejected for First Amendment reasons laws that place special burdens, legal or financial, on certain types of speech or speakers.[100]

Denver Area is probably the case most on-point to the question of whether content-based pro-decency regulation on the internet is constitutional. Yet it is a fractured opinion that by design does not offer clear precedent, as the Justices could not agree on the applicable constitutional standard or even if there should be one. Each of the three challenged provisions received different votes—with the plurality opinion failing to win a majority for any provision. Arguably, however, the guidance that it does provide suggests that section 230 is unconstitutional, though just barely.

The case involved three provisions of the Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), a statute that dealt with leased access of cable channels and public, educational, and government (PEGs) cable channels. Section 10(a) required cable systems to lease channels to local programmers as a way of providing competition to the large cable programming networks and

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[98] 564 U.S. 786 (2011).

[99] 518 U.S. 727 (1996).

[100] Leathers v. Medlock, 499 U.S. 439, 447 (1991); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230 (1987).

encouraging the creation of local content; section 10(c) required cable systems to carry (for free) public, educational, and government channels, which give free access for community programming, school programs, government meetings, and the like; and section 10(b) required cable systems to segregate indecent material on specific cable channels.[101]

Section 10(a), which applies to "leased access channels," reversed prior law by permitting cable operators to allow or prohibit "programming" that they "reasonably believe[s] . . . depicts sexual . . . activities or organs in a patently offensive manner." Section 10(c) gives cable operators the same authority over PEGs. Under section 10(b), which applies only to leased access channels, operators must segregate "patently offensive" programming on a single channel, block that channel from viewer access, and unblock it (or later reblock it) upon subscriber's written request.[102]

Sections 10(a) and 10(c) permit cable systems to proscribe content depicting "sexual activities or organs in a patently offensive manner." The plurality opinion—and the other opinions—understood this language as including unprotected obscenity as well as the indecent programming covered in *Pacifica.*[103]

There was disagreement about the theory of state action, the first step in any First Amendment analysis. Justice Breyer in his plurality recognized that the government mandates to carry certain cable channels were a type of state action. He did not go so far as Justice Kennedy to find a public forum, but found the channel set-aside to be sufficient government action for First Amendment purposes.

Given this type of government action, the plurality concluded, the First Amendment required a free speech balancing between speakers (PEG and leased

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[101] 47 U.S.C. §§ 532(h), 532(j), and note following § 531.

[102] *Id.*

[103] *Denver Area*, 518 U.S. at 744 (plurality opin.) ("[T]he problem Congress addressed here is remarkably similar to the problem addressed by the FCC in *Pacifica*, and the balance Congress struck is commensurate with the balance we approved there. In *Pacifica* this Court considered a governmental ban of a radio broadcast of 'indecent' materials, defined in part, like the provisions before us, to include 'language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.'" (quoting FCC v. Pacifica Found., 438 U.S. 726, 732 (1978)).

access channels) against cable operators.[104] In contrast, Justice Kennedy, joined by Justice Ginsburg, went further and considered the public access cable channels to be designated public fora—in which the First Amendment would prohibit virtually any restriction on speakers' expression.[105]

In elaborating upon his balancing test, Justice Breyer pointed out that cable operators have monopoly power, allowing them to engage in private censorship if unchecked; they are extraordinarily involved with government regulation on a local level; and, as a realistic matter, their First Amendment interests as editors are weak.[106] Given these considerations, Breyer ruled that for section 10(a), the balance tipped in favor of the cable operators, permitting them to limit indecent speech. In addition, section 10(a) simply restores the rights that cable operators once had over leased access channels.[107]

On the other hand, with section 10(c), Justice Breyer found that the expressive rights of speakers predominated and therefore, the plurality found it unconstitutional. Unlike section 10(a), section 10(c) does not give back to cable operators the editorial rights that they once enjoyed. The countervailing cable operator's First Amendment interest is nonexistent, or at least much diminished, because these channels were meant for public access,[108] and cable operators did not historically exercise editorial control over them.[109] Last, local boards and commissions and other governmental or quasi-governmental groups typically oversee public access channels. These supervisory regimes presumably would control offensive content consistent with community standards

The peculiar facts of *Denver Area*—government-required cable channel set-asides—do not permit a clear application to section 230. But section 230 is closer to section 10(c) than 10(a), which suggests it may be unconstitutional.

First, the Cable Act targets indecent speech of approximately the sort *Pacifica* permitted to be regulated, and indeed likely just a subset of indecent speech, closer

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[104] *Id.* at 744–47.

[105] *Id.* at 792 (Kennedy, J., dissenting).

[106] *Id.* at 738, 760–61 (Breyer, J., plurality opin.).

[107] *Id.* (citing 47 U.S.C. § 532(c)(2)).

[108] *Id.* at 761.

[109] *Id.*

to obscenity.[110] The speech section 230 covers (even under the *ejusdem generis* reading) is much broader than that in *Pacifica*, because it includes fully First Amendment protected "excessively violent" speech. If it is unconstitutional for government even to permit a cable operator to censor regulable *indecent* speech, on its own volition on a quasi-governmental channel, then constitutional concerns seem present when the government disadvantages *protected* unregulable speech on the entire internet. This factor weighs against section 230's constitutionality.

Second, the interest in protecting children from indecent programming supported the Court's ruling that section 10(a) is constitutional. The government interest in protecting children from fully First Amendment-protected speech is *less* powerful than the interest in protecting them from unprotected speech, such as obscenity. Here, section 230 regulates fully protected speech, i.e., speech that is excessively violent. This factor weighs against section 230's constitutionality.

Third, the plurality opinion balances the interests of the cable operators and the public, finding that the cable operators' interests predominated in section 10(a), but making the opposite determination in section 10(c).[111] The interests the Court identified as determinative were cable operators' historical rights of control over leased access and section 10(a)'s viewpoint neutrality. Significantly, section 10(a) only returned cable operators the discretion they once had.

This factor probably cuts against section 230. Congress, in the CDA, was responding to *Stratton Oakmont*, a case that determined whether an internet bulletin board was more like a telephone company or bookstore, which had limited liability for third party content, or like a newspaper, which is generally liable for the content it prints. *Stratton Oakmont* said that platforms that edit are more like newspapers. In reversing *Stratton Oakmont,* if Congress had simply imposed carrier liability, *i.e.,* only passed section 230(c)(1), not (c)(2), Congress could have been said to have "restore[d]" internet platforms to their rightful protection against liability. Instead, Congress created an entirely new, content-based regime that has no obvious precedent in United States communications law.

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[110] *Id.* at 749, 755, 761–51.

[111] *Id.* at 743–44 ("The First Amendment interests involved are therefore complex, and require a balance between those interests served by the access requirements themselves (increasing the availability of avenues of expression to programmers who otherwise would not have them) and the disadvantage to the First Amendment interests of cable operators and other programmers (those to whom the operator would have assigned the channels devoted to access)").

But these observations are speculative. The unusual facts of *Denver Area* and its hesitance to announce a level of scrutiny for regulations on cable television—let alone the internet—diminish its precedential force for section 230.

The strongest argument for section 230's unconstitutionality is probably its inclusion of the "excessively violent" term, which targets unregulatable, constitutional protected speech. Striking the phrase from the statute would help solve that problem, and the power of the federal judiciary to partially invalidate a statute in that fashion has been firmly established since *Marbury v. Madison*.[112]

When Congress includes an express severability clause in the relevant statute, courts generally follow it.[113] The Communications Act, which section 230 is part of, has an express severability clause.[114] Lower courts have relied upon this clause for statutes aimed at indecency in almost exactly the same situation presented in section 230. In *Carlin Commc'ns, Inc. v. FCC*,[115] the court had to interpret section 223(b) of the Federal Communications Commission Authorization Act of 1983, which prohibits "obscene and indecent" telephone communications. The court reasoned that, . . . "[w]ere the term 'indecent' to be given meaning other than *Miller* obscenity, we believe the statute would be unconstitutional. . . . [T]he words 'or indecent' are separable so as to permit them to be struck and the statute otherwise upheld.[116]

2. Viewpoint-neutral but content-based regulation and section 230

Another way of analyzing the *ejusdem generis* reading of section 230(c)(2) is as a viewpoint-neutral but content-based regulation.

As an initial matter, it is not clear that section 230(c) is viewpoint-neutral, although it seems likely. Protecting platforms' ability to ban types of speech Congress

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[112] Barr v. Am. Ass'n of Political Consultants, Inc, 140 S. Ct. 2335, 2350 (2020).

[113] *Id.* at 2349.

[114] 47 U.S.C. § 608 ("If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons or circumstances shall not be affected thereby."). The "chapter" referred to in the severability clause is Chapter 5 of Title 47, which includes sections 151 through 700 of Title 47, a group of provisions of which section 230 is part.

[115] 837 F.2d 546 (2d Cir. 1988).

[116] Carlin Commc'ns, Inc. v. FCC, 837 F.2d 546, 560–61 (2d Cir. 1988) (citing Regan v. Time, Inc., 468 U.S. 641, 652–53 (1984)).

thought regulable in telecommunications media in 1996, section 230 does not, for instance, target speakers advocating obscenity or advocating against it—it applies to all who distribute obscenity, whether they think obscenity sexually liberating, find it sexist and objectifying, or aren't trying to express any viewpoint at all. Like the FCC's regulation of "obscene, indecent, and profane" broadcast programming, or prohibitions on loud speakers in public parks, section 230 is viewpoint-neutral, as it prohibits speech regardless of one's view on these matters.

On the other hand, the line between viewpoint-neutral and viewpoint-based regulations is "is not a precise one."[117] The Court has held that a statute is viewpoint-based if it "distinguishes between two opposed sets of ideas: those aligned with conventional moral standards and those hostile to them; those inducing societal nods of approval and those provoking offense and condemnation."[118] In *Brunetti*, the Supreme Court found that the PTO's exclusion of "immoral or scandalous" trademarks from the trademark registration system did precisely that.

Following *Brunetti*, section 230 arguably forwards a "sense of propriety,"[119] and "distinguishes between two opposed sets of ideas": those types of speech considered so "objectionable" and so likely to 'provoke offense" in 1996 as to justify regulation in telecommunications media versus those types of ideas that were sufficiently acceptable that would not be considered regulable.

The strength of this argument rests on whether one thinks "regulable in 1996" speech is truly a discernible viewpoint in the same way that "immoral" or "scandalous" is. Given that very few people would even know what "regulable in 1996" encompasses, it likely refers to a "set of ideas" that is theoretical at best. This argument may simply point to the fuzziness of the viewpoint-based/viewpoint-neutral distinction rather than to a practical legal barrier.

Conclusion

Section 230 sets forth the immunity regime for internet content. Courts sometimes erroneously read section 230(c)(1), not section 230(c)(2), as immunizing content moderation decisions. And, similarly, courts ignore that section 230(f)(2) limits the immunity that the statute provides for content moderation. This misreading has expanded section 230 protections in ways that ignore the text and

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117 Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 831 (1995).

118 Iancu v. Brunetti, 139 S. Ct. 2294, 2300 (2019).

119 *Id.* (internal quotation marks omitted).

congressional intent.

Identifying section 230(c)(2) as the source of liability protection raises constitutional concerns, particularly under an *ejusdem generis* reading. However, it is not clear that these concerns render the provision unconstitutional; and to the degree constitutional concerns are present, severability may offer the best solution.

Exhibit #2

2022 WL 17669645 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Reynaldo GONZALEZ, et al., Petitioners,
v.
GOOGLE LLC, Respondent.

No. 21-1333.
December 7, 2022.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of U.S. Senator Ted Cruz, Congressman Mike Johnson, and Fifteen Other Members of Congress as Amici Curiae in Support of Neither Party

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CASES

*1 INTEREST OF *AMICI CURIAE* [1]

Amici curiae are seventeen members of the United States Senate and House of Representatives: Senators Ted Cruz, Mike Braun, Joni Ernst, Lindsey O. Graham, Charles E. Grassley, Bill Hagerty, James Lankford, Mike Lee, Cynthia M. Lummis, Marco Rubio, and Roger F. Wicker; and Representatives Mike Johnson, Jodey C. Arrington, Scott Fitzgerald, Doug Lamborn, Victoria Spartz, and Tom Tiffany.

Amici have a strong interest in the proper interpretation of § 230. Several *amici* sit on Committees that oversee matters related to Section 230 of the Communications Decency Act, including the Senate Committee on the Judiciary; the Senate Committee on Commerce, Science, and Transportation; and the House Committee on the Judiciary.

Several *amici* have also proposed their own legislation to revise or repeal § 230, but all agree that the lower courts' interpretation of the current § 230 has strayed far from its text. These misguided decisions have conferred near-absolute immunity on Big Tech companies to alter and push harmful content, while simultaneously censoring conservative viewpoints on important political and social matters. *Amici* are united by their interest in seeing courts ***2** construe § 230 according to its clear but narrow text, rather than based on the courts' policy judgments.

*3 SUMMARY OF THE ARGUMENT

The internet and social media are "the most important places ... for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). But that marketplace of ideas has been under assault by Big Tech companies that selectively censor and remove opposing viewpoints on a wide range of important political and social matters-all without the slightest fear of legal liability, and in defiance of Congress's mandate that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3).

This state of affairs is largely the result of lower courts' erroneous interpretations of two provisions of § 230(c) of the Communications Decency Act of 1996. *See* 47 U.S.C. § 230(c); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 138 (1996). This Court should correct those flawed interpretations and remand this case so the lower courts can reevaluate Petitioners' claims under the proper framework.

First, § 230(c)(1) states that internet service providers cannot be deemed the "publisher" or "speaker" of third-party content on their platforms. Like many lower courts, Petitioners' Question Presented erroneously assumes this provision "immunizes" certain conduct, including "traditional editorial functions," Pet. i, but that is doubly wrong. Section 230(c)(1) is merely definitional-it does not provide immunity. And it applies only to those liability regimes like defamation whose elements turn on whether the defendant is a mere "distributor" of ***4** others' speech, or instead is the publisher or speaker itself. Historically, publishers and speakers faced different liability regimes than distributors, although neither group was considered "immune" from liability. For such causes of action, all § 230(c)(1) does is preclude courts from treating internet service providers as the speaker or publisher of third-party content on their websites. *See* Part I, *infra.*

Second, § 230(c)(2)(A) does expressly provide immunity, but only where platforms "in good faith" remove or restrict access to third-party content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). Under standard canons of interpretation, the "otherwise objectionable" language refers only to material in the same league as the terms preceding it-i.e., especially egregious telecommunications content over which Congress was understood to have regulatory authority, consistent with the First Amendment. *See* Part II, *infra.*

Despite the narrow textual scope of these provisions, lower courts have persistently held that § 230(c) provides internet platforms with immunity from almost *all* suits that pertain in any way to online content.

For example, the decisions below held that § "230(c)(1) precludes liability" in almost all suits about "material posted on the website by someone else," Pet.App.19a, 29a, because such suits effectively treat the platforms as "publishers" and challenge their "editorial decisions" or "traditional editorial ***5** functions" in deciding which content to keep or remove, Pet.App.31a, 38a, 39a, 41a, 244a.

That analysis is wrong at every step. Section 230(c)(1) does not directly "preclude[] liability" at all, let alone based on whether the platform is exercising "traditional editorial functions," a term that appears nowhere in the statute. Because almost any decision about preserving, removing, or altering content can be described as an "editorial function," the lower courts' misinterpretation of § 230(c)(1) has led to a broad grant of immunity completely untethered from the text of the statute, and it has also rendered entirely superfluous the limited grant of immunity in § 230(c)(2) for removal of especially egregious content.

As a result of this warped view of § 230(c)(1), platforms have been found immune from suits far outside the narrow scope of immunity Congress actually authorized in § 230(c)(2), which has been largely eviscerated. Confident in their ability to dodge liability, platforms have not been shy about restricting access and removing content based on the politics of the speaker, an issue that has persistently arisen as Big Tech companies censor and remove content espousing conservative political views, despite the lack of immunity for such actions in the text of § 230(c).

This Court should return § 230(c) to its textual scope and make clear that beyond that realm, the statute is silent. Because the lower courts' erroneous interpretation of § 230(c) so infected their analysis in ***6** this case, this Court should remand for those courts to apply the corrected framework to Petitioners' claims in the first instance. *See* Part III, *infra.*

Under that framework, § 230(c)(1) does not directly provide any immunity for Google. At most, it requires that Google not be deemed the publisher or speaker of certain content, but that determination is relevant only if the elements of Petitioners' claims under the Anti-Terrorism Act turn on whether Google itself is the publisher or speaker of the challenged content-an issue on which *amici* take no position. Even if Google is deemed not to be the speaker or publisher of the challenged content, that does not mean Google necessarily receives immunity, as § 230(c)(1) itself does not provide immunity at all. Nor does § 230(c)(2) provide immunity here, as Google's challenged actions do not fall within the narrow scope of that provision, which does not grant *carte blanche* for social media companies to invoke immunity for removing content that any eggshell-psyche user might possibly deem offensive.

ARGUMENT

I. Section 230(c)(1) Does Not Provide Immunity and Is Relevant Only to Claims Whose Elements Require Treating a Platform As the Publisher or Speaker.

Lower courts have consistently held that § 230(c)(1) precludes liability for a wide swath of claims against internet service providers. But both aspects of that approach are wrong.

***7** Section 230(c)(1) does not provide any immunity. Rather, it states a definition: no internet service provider "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C § 230(c)(1). Although this requirement can *indirectly* affect liability, it (1) does not directly confer immunity, and (2) applies only in limited circumstances where the elements of a claim turn on treating an internet platform as the speaker or publisher of others' words. Outside of this limited realm, § 230(c)(1) plays no role whatsoever, and the lower courts-including the Ninth Circuit below-have erred by turning § 230(c)(1) into a super-immunity provision.

A. The Correct Scope and Effect of § 230(c)(1).

"To see how far we have strayed from the path on which Congress set us out, we must consider where that path began." *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (arguing that courts have drastically misinterpreted § 230(c)).

Justice Thomas has explained how § 230(c)(1)'s text--in particular its reference to "publisher or speaker"--invokes the terminology of traditional common-law liability, which should guide courts' interpretation of § 230(c)(1) today. "Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries)." ***8** *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting denial of certiorari). Publishers "could be strictly liable for transmitting illegal content" "because they exercised editorial control" over the publication of that content. *Id.* Distributors, on the other hand, were liable "only when they knew (or constructively knew) that content was illegal" because they "acted as a mere conduit without exercising editorial control." *Id.*

Accordingly, even when not labeled as the publisher or speaker, a defendant was not given immunity, although the plaintiffs burden was higher.

Congress was aware of this distinction when it enacted § 230(c)(1) in response to the New York state trial court decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which had likewise "use[d] the same terms"-i.e., "publisher" and "distributor"-in the context of libel claims against an online platform, *Malwarebytes*, 141 S. Ct. at 15-16 (Thomas, J., respecting denial of certiorari) (citation omitted).

Section 230(c)(1), then, has a narrow scope. It targets only those causes of action that "include, in their elements, treating the ... platform ... as a publisher or speaker of another's words." Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 147 (2021); *see* *Force*, 934 F.3d at 81 (Katzmann, C.J., concurring in part and dissenting in part) ("The question is ... whether to establish the claim the court must necessarily view the defendant, not as a publisher in the abstract, but rather as *the* publisher of that third-party information."). The "classic example is defamation," Candeub, ***9** *Reading Section 230 as Written, supra*, 1 J. FREE SPEECH L. at 147, although § 230(c)(1) is not limited to defamation claims.

And § 230(c)(1) also has a narrow effect for any qualifying causes of action: the court is merely barred from treating the online platform as the publisher or speaker of another's content. In the context of defamation, for example, § 230(c)(1) provides that platforms can be held liable for third-party content only if the defendant would be culpable under the higher standard for "distributor" liability. *See* *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting denial of certiorari). Although this provides platforms with a strong litigation advantage, it does not mean they are entitled to *immunity.*

Statutory context confirms this interpretation of § 230(c)(1). If Congress had intended to fully immunize internet service providers from distributor liability, it could have done so using the same language it did in the very next subsection, which provides that "[n]o provider or user of an interactive computer service shall be held liable" in certain specified circumstances. 47 U.S.C. § 230(c)(2). Indeed, courts' erroneously broad interpretation of § 230(c)(1) has rendered entirely superfluous the narrower § 230(c)(2) immunity. *See* Part II, *infra.*

Further, Congress elsewhere indicated that it was not providing immunity for distributors. "Congress expressly imposed distributor liability in the very same Act that included § 230" by making it a crime to "'knowingly ... display' obscene material to children, ***10** even if a third party created that content." *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari) (citing 47 U.S.C. § 223(d)).

B. Lower Courts Have Dramatically Misinterpreted § 230(c)(1).

Despite its clear text, lower courts have warped § 230(c)(1) beyond all recognition, holding that it provides broad immunity against a wide range of claims involving online content even while openly acknowledging that the statutory text itself says no such thing. *See, e.g.,* *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014) ("Although § 230(c)(1) does not explicitly mention immunity or a synonym thereof, this and other circuits have recognized the provision to protect internet service providers for the display of content created by someone else.") (collecting authorities); *see also* Pet.App.29a-31a; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18-19 (1st Cir. 2016); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

1. *Zeran:* The Original Flawed Decision.

Almost every erroneous § 230(c)(1) decision can trace its roots back to *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), which held that § 230(c)(1) provides immunity whenever a suit seeks "to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content." *Id.* at 330.

***11** The immunity conferred by *Zeran* is expansive because most claims involving online content can be framed as a challenge to removing, keeping, or altering content. *See Force*, 934 F. 3d. at 81 (Katzmann, C.J., concurring in part and dissenting in part) (rejecting the view that § 230(c)(1) covers "the full range of activities in which [entities subject to § 230(c)(1)] might engage").

Zeran rests on several errors. *First*, it mistakenly collapsed the publisher/distributor distinction. The court believed that distributor liability "is merely a subset, or a species, of publisher liability" because "distributors are considered to be publishers" in many scenarios. 129 F.3d at 332. The court pointed to examples like "the negligent communication of a defamatory statement" and argued that in such scenarios, distributors "may also be regarded as participating to such an extent ... as to be regarded as publishers." *Id.*

Rather than acknowledge that sometimes it may be difficult to determine whether a party is acting as a publisher or as a distributor, *see Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari), the Fourth Circuit instead held that distributors of online content *necessarily* act as publishers of that same content.

But not every act of distribution "constitute[s] publication." *Zeran*, 129 F.3d at 332. In many circumstances, even online, it is easy to distinguish the two because a distributor acts only as a conduit that "delivers or transmits matter *published by a* ***12** *third person."* Restatement (Second) of Torts § 581 (1977) (emphasis added). There is also a distinction in how an entity can react to allegedly illegal material. *See* William E. Buelow III, *Re-Establishing Distributor Liability on the Internet*, 116 W. VA. L. REV. 313, 345 (2013). A platform generally acts like a publisher if it can directly edit or alter the specific offending material, but it acts like a distributor if all it can do is remove the post or video in its entirety. *See id.*

More importantly, Congress itself distinguished between publisher and distributor liability, and courts cannot subsequently interpret that distinction into oblivion. As noted above, "Congress enacted the [Communications Decency Act] in response to" *Stratton Oakmont*, which itself expressly distinguished between publisher and distributor liability based on *who* was responsible for publication, *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). On the way to holding that the defendant internet service provider was a "publisher rather than a distributor," the court in *Stratton Oakmont* contrasted liability where the provider "republishes ... as if he had originally published" (*i.e.*, "publisher"-based liability), with distributor liability. *Stratton Oakmont*, 1995 WL 323710, at *3 ("In contrast [to the liability of republishers], 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.").

It was error for *Zeran* to disregard the finely tuned distinction that both Congress and *Stratton Oakmont* ***13** had employed. *See Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari).

Second, having vastly expanded the scope of conduct covered by § 230(c)(1), *Zeran* committed another error by granting immunity for that broad group. As explained above, § 230(c)(1) does not immunize any conduct at all. It simply directs that certain conduct be treated as falling into one of two different liability regimes, neither of which necessarily results in immunity for the defendant.

This judicially imposed immunity was premised largely on non-textual statutory "purposes" and on the "Internet context." 129 F.3d at 333. "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice" of illegal third-party content on their platform. *Id.* While it "might be feasible for the traditional print publisher" or distributor to handle the management of such potentially illegal content, the court reasoned, "the sheer number of postings on interactive computer services would create an impossible burden in the Internet context." *Id.*

"Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes," the court concluded that Congress did not "intends" to leave platforms exposed to distributor liability in § 230(c)(1). *Id.* The Fourth Circuit seems to have believed that the text of § 230(c)(1) was not strong enough, and that Congress must have meant to go further and provide ***14** immunity-despite the notable omission of any such language in the statutory text and the fact that Congress did expressly provide immunity for a narrow set of conduct in the very next subsection. But as this Court has recognized in other contexts, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012).

Third, Zeran asserted that providers would be entitled to immunity even for content they had "alter[ed]." 129 F.3d at 330. But that conflicts with another provision in the Communications Decency Act, which states that an "information content provider" includes anyone "responsible, in whole or *in part*, for the creation or development" of the content, 47 U.S.C. § 230(f)(3) (emphasis added), and "[n]owhere does [§ 230(c)(1)] protect a company that is itself the information content provider," *Malwarebytes*, 141 S. Ct at 16 (Thomas, J., respecting denial of certiorari). Stated another way, content created by a platform is not third-party content at all, and thus § 230(c)(1) does not apply, contrary to *Zeran. See* Candeub, *Reading Section 230 as Written, supra*, 1 J. FREE SPEECH L. at 151-52.

2. *Zeran's* Flawed Analysis Has Led to the Widespread Erroneous Conferral of Immunity.

Numerous circuits, including the Ninth Circuit as recognized in the decision below, have readily adopted ***15** *Zeran's* flawed logic, and the results confirm just how far those courts have strayed from the text of § 230(c)(1).

Courts have invoked § 230(c)(1) to find immunity from a wide variety of causes of action that pertain in any way to online content, under the doubly erroneous view that all such claims treat platforms as publishers and that any publication activities are entitled to immunity. This includes claims that online providers engaged in or encouraged housing discrimination, *see* *Chi. Law. Comm. for Civil Rts. Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671-72 (7th Cir. 2008); negligence, *see* *Green v. Am. Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir. 2003); securities fraud and cyberstalking, *see* *Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420-22 (1st Cir. 2007); and sex trafficking, *see* *Jane Doe*, 817 F.3d at 16-21. The Ninth Circuit has even provided immunity for content that the service provider itself had altered, which is not covered by § 230(c)(1) at all. *See* *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

A recent case demonstrates just how expansively courts continue to interpret § 230(c)(1) to provide Big Tech platforms with almost unquestioned immunity. In *Anderson v. TikTok, Inc.*, No. 22-cv-1849, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022), the district court relied on Third Circuit precedent to hold that the video-sharing platform TikTok was immune under § 230(c)(1) for distributing videos of teenagers engaged in the "Blackout Challenge," where "users strangle themselves with household items and then encourage others to do the same." ***16** *TikTok*, 2022 WL 14742788, at *2. The plaintiff argued that her claims--for design defects and failure to warn--properly treated TikTok as a distributor (not a publisher) in accordance with § 230(c)(1), but the court held that the claims actually required treating TikTok as a publisher because the case "involves decisions related to the ... distribution of [third-party] content." *Id.* at *7.

Invoking *Zeran*, the court erroneously conflated publication and distribution to the point that it covered almost anything an internet service provider does (or does not do) with respect to content. *Id* at *4. And then, also invoking *Zeran*, the court compounded that error by holding that § 230(c)(1) grants immunity against any claims falling within that overbroad scope of "publication." *See* *id.* at *4-7.

* * *

Some courts have justified their expansive misreading of § 230(c)(1) on the premise that "section 230 should not be construed grudgingly." *Jane Doe*, 817 F.3d at 18. But a statute should be construed according to its "ordinary, contemporary, common meaning"-neither "grudgingly" nor expansively. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022). Anything beyond that common meaning is a policy decision for Congress, not the courts. *See* *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., respecting the denial of certiorari) (stating that courts have "filter[ed] their decisions through the policy argument that Section 230(c)(1) should be construed broadly") (internal quotation marks omitted).

***17** This Court should hold that the ordinary, contemporary, common, and natural reading of § 230(c)(1) provides only a definitional statement for a limited set of cases, rather than the "nearly impenetrable super-First Amendment" that the lower courts have construed it to mean. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 95 (2019).

II. Restoring § 230(c)(1)'s Proper Scope Will Reinvigorate § 230(c)(2)(A), Which Provides Immunity in Limited Circumstances.

As noted above, one of the strongest arguments supporting the view that § 230(c)(1)'s definitional statement does not provide immunity is that Congress expressly provided immunity in the very next subsection, § 230(c)(2), which precludes liability where internet service providers "in good faith" remove material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

But few courts have had to interpret § 230(c)(2) because it has been rendered irrelevant by their erroneous transformation of § 230(c)(1) into a super-immunity provision. *See* JOSH HAWLEY, THE TYRANNY OF BIG TECH 128 (2021) ("[W]hen the dust had cleared from this strenuous bout of judicial renovation, Section 230 had been completely rewritten."). For example, when an organization for Sikhs alleged that Facebook used race to determine who could access the group's Facebook page, the district and circuit courts ***18** both analyzed the claim under § 230(c)(1), rather than § 230(c)(2), even though the latter directly addresses restriction of access to content. *See* *Sikhs for Just., Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094-95 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526 (9th Cir. 2017). Given the courts' longstanding erroneous interpretation of § 230(c)(1), they unsurprisingly granted immunity, even though restricting access to a Facebook page on the basis of race is in no way a "good faith" restriction of content on par with removing obscenity, as § 230(c)(2) would require before a court could confer immunity.

Restoring § 230(c)(1) to its proper scope would revitalize § 230(c)(2)'s narrow grant of immunity, where "Congress expected that tech companies would carry others' speech without favor to any specific viewpoint, and would keep defamatory and other unlawful speech off their platforms." Senator Ted Cruz, Letter to Ambassador Robert Lighthizer, United States Trade Representative, Nov. 1, 2019, *available at* https://tinyurl.com/2kuhrrpx. But because of courts' erroneous expansion of § 230(c)(1), large platforms currently enjoy immunity even for censoring content with which they simply disagree on political grounds.

And Big Tech companies have not been shy about "routinely censor[ing] lawful-- overwhelmingly conservative-speech with which they disagree. From Twitter locking the account of Senate Majority Leader Mitch McConnell's campaign to YouTube demonetizing a conservative comedian's account following pressure from the left, the examples of ***19** censorship are as disturbing as they are numerous." Press Release, Senator Ted Cruz, *Sen. Cruz Calls on USTR to Eliminate Inclusion of Special Protections for Big Tech in U.S. Trade Deals* (Nov. 1, 2019). [2]

But removing or restricting content because of the politics of the user is not "good faith" and thus not entitled to immunity under § 230(c)(2). As scholars have argued, "a pattern of dishonest explanation of the basis for removal--for instance, referring to facially neutral terms of service while covertly applying them in a viewpoint-discriminatory way--might ***20** be inconsistent with 'good faith,' which is often defined as requiring an honest explanation of one's position." Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 177 (2021).

Moreover, conservative viewpoints on social and political matters do not rise to the level of being "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," § 230(c)(2)(A), and thus removal of such content is not eligible for immunity at all. Platforms sometimes invoke the catch-all "otherwise objectionable," but the canon of *ejusdem generis* squarely rejects that view. That canon provides that "[w]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (cleaned up).

Accordingly, § 230(c)(2)'s "otherwise objectionable" phrase must mean material that is in the same league as "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" material. 47 U.S.C. § 230(c)(2)(A). Those examples largely track categories of especially egregious telecommunications speech that were commonly believed to be regulable by the government. *See* Candeub & Volokh, *supra, Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. at 180-83. But so-called misinformation, "'disinformation,' 'hate speech,' 'misgendering,' [and] 'religious hatred"' do not rise to that level-and thus removal or restriction of such content does not qualify ***21** for immunity under § 230(c)(2). Candeub, *Reading Section 230 as Written, supra, 1* J. FREE SPEECH L. at 143.

One court has gotten it right, however. In upholding Texas's social media law H.B. 20, which generally bars social media platforms from removing posts made by users in Texas based on their viewpoints, the Fifth Circuit confirmed that "read in context, § 230(c)(2) neither confers nor contemplates a freestanding right to censor," but rather "only considers the removal of limited categories of content, like obscene, excessively violent, and similarly objectionable expression"--and thus "says nothing about viewpoint-based or geography-based censorship." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 468 (5th Cir. 2022).

Finally, online platforms' own behavior confirms the inapplicability of § 230(c)(2) to censoring conservative viewpoints. Platforms often remove certain material when posted by conservatives, while consciously leaving the same type of material online when posted by liberals or others. [3] Content-removal ***22** decisions that turn on the identity of the speaker, rather than the nature of the content, are not covered by § 230(c)(2) at all and also confirm that platforms do not view the content as on par with obscenity and excessive violence.

Once the Court restores the proper interpretation of § 230(c)(1), the important but narrow immunity that Congress conferred in § 230(c)(2) will regain its place of prominence in suits about online service providers' removal and restriction of content.

III. The Court Should Correct the Ninth Circuit's Flawed Interpretation of § 230(c) and Remand for Reevaluation of Petitioners' Claims.

The courts below relied on the misguided *Zeran* line of cases to hold that Google is immunized from Petitioners' claims under the Anti-Terrorism Act because § 230(c)(1) allegedly precludes liability for any challenge to a platform's "editorial decisions" or "traditional editorial functions." Pet.App.39a, 244a.

The lower courts' analysis was so thoroughly infected by their erroneous precedent on § 230(c) that this Court should pronounce the correct view of § 230(c) and then remand for the lower courts to reevaluate Petitioners' claims under the proper framework. *See* *Force*, 934 F.3d at 84 (Katzmann, C.J., concurring in part and dissenting in part) (arguing the ***23** case should be remanded for reevaluation under the correct interpretation of § 230(c)).

In particular, this Court should hold that § 230(c)(1) does not directly provide immunity at all, and it applies only to claims whose elements turn on treating Google as the publisher or speaker of other parties' content. Even for such claims, § 230(c)(1) does not necessarily confer immunity but instead only precludes a court from treating Google as the speaker or publisher of third-party content. Whether that ultimately affects or precludes liability will turn on Petitioners' specific causes of action. But § 230(c)(1) itself does nothing more, nor has Google sought immunity pursuant to the narrow confines of § 230(c)(2).

Amici take no position on whether Petitioners ultimately should prevail, nor on whether algorithms pushing ISIS videos constitute Google's own content or instead remain third-party content. *Amici* contend that those issues would be best addressed afresh by the lower courts after this Court has scraped away the layers of erroneous § 230(c) precedent on which the decisions below relied.

*24 CONCLUSION

The Court should remand so the lower courts can reevaluate Petitioners' claims under the correct interpretation of § 230(c) as pronounced by this Court.

Respectfully submitted,

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Footnotes

1 No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket-consent letters.

2 *See also, e.g.*, Chuck Grassley, Opinion, *'Big Tech' Is Censoring Conservatives*, THE GAZETTE (Feb. 28, 2022), https://tinyurl.com/2sesc4vb ("I was surprised to learn that Facebook recently flagged a news article I posted on one of my Facebook pages as 'false information.'"); Mike Lee, Opinion, *Big Tech Companies Falsely Claim No Bias Against Conservatives-They May Be Violating Law*, Fox NEWS (Oct. 29, 2020), https://tinyurl.com/2e 7u7sx5; Diana Glebova, *Zuckerberg Admits Facebook Suppressed Hunter Biden Laptop Story Ahead of 2020 Election*, NAT'L REVIEW (Aug. 26, 2022), https://tinyurl.com/z5v9mwjz; Matt Schlapp, Opinion, *Big Tech Keeps Trying to Silence Conservatives and It Won't Stop Until We Stop Them*, Fox NEWS (Mar. 30, 2022), https://tinyurl.com/2tr4rnnx (discussing YouTube banning videos of Donald Trump's speech at the 2022 Conservative Political Action Conference); Felicia Somnez & Amy B. Wang, *YouTube Suspends Ron Johnson for a Week After GOP Senator Touts Questionable Drugs to Fight COVID-19*, WASH. POST (June 11, 2021), https://tinyurl.com/ms44ckzz; Avi Selk, *Facebook Told Two Women Their Pro-Trump*

Videos Were 'Unsafe', WASH. POST (Apr. 10, 2018), https: //tinyurl.com/2fyshj46; Erik Schelzig, *Twitter Shuts Down Blackburn Campaign Announcement Video*, AP NEWS (Oct. 9, 2017), https://tinyurl.com/2rv3v577; Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016), https://tinyurl.com/4xjdhbnz.

3 *See, e.g.*, Marco Rubio, Opinion, *We Must Stop Silicon Valley-Democrat Collusion Before Conservatives Are Silenced for Good*, FOX NEWS (July 28, 2021), https://tinyurl.com/yc8d3nap (noting the "hypocrisy" of social media companies censoring Covid-19 vaccine skepticism when "President Biden himself cast suspicion on the efficacy of the vaccines ... [and] Vice President Kamala Harris ... declar[ed] that '[i]f Donald Trump tells us that we should take it, I'm not taking it.'"); Michael Rubin, *Why Does Big Tech Censor Conservatives and Not Terrorists, AM.* ENTERPRISE INST. (Mar. 3, 2021), https://tinyurl.com/wx9wm968; Brian Flood, *Twitter, Facebook Have Censored Trump 65 Times Compared to Zero for Biden, Study Says*, FOX NEWS (Oct. 19, 2020), https://tinyurl.com/3u3yd4us.

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2022 WL 17640417 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Reynaldo GONZALEZ, et al., Petitioners,
v.
GOOGLE LLC.

No. 21-1333.
December 7, 2022.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the State of Texas as Amicus Curiae Suggesting Reversal

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*1 INTEREST OF AMICUS CURIAE [1]

The State of Texas has an interest in the proper interpretation of Section 230 of the Communications Decency Act. Like other States, Texas asks this Court to correct the lower courts' misapplication of Section 230 in a way that prevents injured citizens from obtaining relief for wrongs committed through the Internet. *See* Br. of Tennessee. Those lower-court decisions generally serve to protect bad actors from the consequences of their actions-not to promote the free exchange of ideas on the Internet.

But Texas also has a more specific interest: Internet platforms are relying on Section 230 in other litigation that is likely to come before the Court to defeat a Texas law that protects free speech on the Internet. That litigation presents important questions, and the Court's decision in this case may affect it.

SUMMARY OF ARGUMENT

I. Section 230 directs courts not to treat the provider of an interactive computer service as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). That rule of construction is irrelevant here, where petitioners allege that Google's *own* recommendations aided and abetted the acts of terror perpetrated by ISIS. Neither those recommendations nor the algorithms that produced them were provided by "another" party. Google ***2** went beyond passively hosting content. It actively promoted certain videos over others. Section 230 does not shield it from liability for doing so.

Section 230's statutory history confirms that it is inapplicable here. Congress enacted Section 230 as part of a broader statutory scheme to limit children's access to Internet pornography. Section 230 does that by allowing Internet platforms to remove pornography (and similar content) without risk of being called to account for the content *theyfail* to remove. In that way, Section 230 reflects a deliberate choice by Congress to treat Internet platforms like telephone companies, which have long had a warrant to remove certain content without becoming liable for everything else that occurs on their platforms. But Section 230's historical context does not suggest that Congress intended the statute to provide a blanket immunity for any claim tangentially related to third-party content.

II. Overbroad judicial interpretations of Section 230 have harmed States and their citizens in two ways. *First*, a court infringes state sovereignty whenever it incorrectly holds that Section 230 prevents a State from enforcing its laws. *Second*, a court harms a State's citizens whenever it misapplies Section 230 and improperly prevents those citizens from obtaining redress for wrongs committed online. This Court should stem the tide of those harms by faithfully interpreting Section 230.

III. Social-media giants and their advocates often prognosticate that any restriction on Section 230's reach would result in the end of the digital world as we know it. Those concerns are hyperbolic. A lack of Section 230 protection by no means guarantees liability. Plaintiffs, including petitioners, must still prove their claims. Allowing petitioners' claims here to proceed would not make ***3** Google liable for the content of every video it recommends. Rather, Google faces potential liability only if petitioners can demonstrate that recommendations *themselves* amount to "aiding and abetting" terrorism. And even if correctly interpreting Section 230 requires companies like Google to adjust their business models, that does not foretell disaster. Indeed, given rampant online evils like human trafficking and child pornography, such an adjustment may well prove salutary. But if Internet platforms believe the social value of their businesses justifies an immunity broader than that conferred by Section 230's text, that is a trade-off that Congress, rather than the courts, should make.

ARGUMENT

I. Section 230 Does Not Shield Google from Liability for the Recommendations It Provides.

Section 230 prevents a court from treating a provider of "an interactive computer service" (an Internet platform) as the publisher or speaker of information provided by "another information content provider" (an unaffiliated content producer). 47 U.S.C. § 230(c)(1). And it protects a provider that makes a good-faith effort to restrict access to pornography and other content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" from liability for content that it does not restrict. *Id.* § 230(c)(2)(A). But it does not confer broad immunity on a provider merely because a claim involves third-party content.

Here, petitioners do not allege that Google is directly liable for what the *terrorists* did, but for what *Google* did. According to petitioners, Google actively aided and abetted terrorism by recommending ISIS videos to YouTube users. J.A. 169-70, 173. Because petitioners' claims do not seek to hold Google liable for information provided ***4** by another information content provider, Section 230(c)(1) provides Google no protection.

The precedent on which Google relies is conspicuously flawed. It rests principally on a single circuit decision from Section 230's infancy that deviated from that statute's text in a policy-driven and misguided effort to protect then-nascent Internet service providers. That precedent also ignores Section 230's historical context, which shows that Section 230 was enacted to allow website operators to remove pornography without risking strict liability for content they do not censor-not to provide operators with a shield so expansive that it approaches the protections of sovereign immunity. Judicial decisions expanding Section 230's protections beyond its text have instead improperly immunized online businesses from liability for facilitating such heinous acts as child sex trafficking and international terrorism, as well as invidiously discriminating among who may use their services.

As a matter of first impression, this Court should recognize the scope of the statute's plain language, backed up by the context that framed its enactment. That is the only way to honor the delicate balance that Congress struck between fostering the Internet's growth and ensuring that growth does not jeopardize the most vulnerable and impressionable Americans.

A. Section 230's text provides no protection for Google's recommendations.

Entitled "Protection for private blocking and screening of offensive material," Section 230 limits the liability of providers of an interactive computer service in targeted ways. Its centerpiece is subsection (c), "Protection for 'Good Samaritan' blocking and screening of offensive material." Subsection (c)(1) states that "[n]o provider or ***5** user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." "[I]nformation content provider" is defined by subsection (f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Google argues that Section 230(c)(1) bars petitioners' claims. *E.g.*, Br. in Opp. 20. It does not.

Petitioners allege that Google repeatedly and knowingly recommended ISIS videos to YouTube users. J.A. 169, 173. According to petitioners, those recommendations were made because the ISIS videos were selected by automated algorithms created by Google. J.A. 173. Petitioners seek damages under a federal law that creates liability "as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" an act of international terrorism. 18 U.S.C. § 2333(d)(2); *see* J.A. 176-78. Petitioners thus seek to hold Google liable for taking affirmative acts-aiding and abetting terrorists-by recommending terrorist videos based on algorithms that Google created. Because those recommendations are not "information provided by another information content provider," Section 230(c)(1) offers Google no protection.

A recent decision of the Supreme Court of Texas, *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021) (orig. proceeding), is instructive. In that case, human-trafficking survivors brought claims for "negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms." *Id.* at 83. The plaintiffs also brought claims ***6** "under a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture." *Id.* The court (largely relying on federal circuit authority that it recognized as dubious) held that Section 230 barred the plaintiffs' common-law claims. *Id.* at 93-96. But the court also held that the plaintiffs' statutory claims could proceed. *Id.* at 96-101. The court reasoned that the statutory claims did not "treat Facebook as [someone] who bears responsibility for the words or actions of third-party content providers," but instead treated Facebook "like any other party who bears responsibility for its *own* wrongful acts." *Id.* at 98. And the court found it "highly unlikely that Congress... sought to immunize those companies from *all* liability for the way they run their platforms, even liability for their own knowing or intentional acts as opposed to those of their users." *Id.*

Like the statutory claims in *Facebook*, but unlike the claims at issue in many cases in which courts have held that Section 230 barred relief, petitioners' claims do not seek to hold Google liable for "information provided by another information content provider." 47 U.S.C. § 230(c)(1). That is, petitioners' claims do not seek to hold Google liable merely for harm caused by third-party information. *Cf., e.g., Bennett v. Google, LLC*, 882 F.3d 1163, 1164 (D.C. Cir. 2018) (plaintiffs claim was based on an allegedly defamatory message posted by a third party); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (same). Instead, the harm alleged by petitioners is death resulting from an act of international terrorism. J.A. 155, 178, 181. Federal law creates primary liability for the attack. 18 U.S.C. § 2333(a). And it creates secondary liability for aiding and abetting it. *Id.* § 2333(d)(2).

***7** Petitioners' claims, therefore, are two steps removed from any third-party posts. They seek to hold Google secondarily liable for a terrorist act. And their theory is that Google aided and abetted the terrorists by actively and voluntarily recommending ISIS videos. Those recommendations were provided by Google, not by ISIS or any other information content provider. Petitioners thus allege that Google's own acts-the recommendations it provided-make it secondarily liable for physical actions that the terrorists took, not for posting information online. Whether that theory entitles petitioners to relief remains to be seen. But regardless of whether petitioners can link the video recommendations and the murder on the merits, Section 230 plays no role here.

Of course, Google's liability under petitioners' theory does, in a limited respect, depend on third-party content. If ISIS videos did not exist on its platform, Google could not face potential aiding-and-abetting liability for recommending those videos. But Section 230 does not preempt petitioners' claims merely because third-party content is somehow involved. "[Section 230(c)(1)] does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties."

Henderson v. Source for Pub. Data, L.P., 53 F.4th 110, 129 (4th Cir. 2022); *see* *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (noting that Section 230 "does not provide a general immunity against all claims derived from third-party content").

The court of appeals rejected petitioners' argument that "Google does more than merely republish content created by third parties." Pet. App. 31a. It did so by applying a "material contribution" test, according to which ***8** a website operator "creat[es] or develop[s]" third-party content when it alters the content in a way that materially contributes *"to its alleged unlawfulness."* Pet. App. 32a (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157,1168 (9th Cir. 2008) (*en banc*)). But this Court need not address the propriety of the material-contribution test for determining whether the alteration of third-party content makes a defendant an information content provider under Section 230(f)(3), because Google's recommendations were solely its own acts. It is those recommendations, not Google's hosting or alteration of ISIS's videos, that are at issue here.

The court of appeals also erred in concluding that Google's conduct here is not outside of Section 230's scope because Google's "algorithms do not treat ISIScreated content differently than any other third-party created content." Pet. App. 37a. That is a *merits* determination. And that reasoning is flawed because a recommendation, by its very nature, treats some content differently from other content. There are a vast number of videos on YouTube. Google's algorithms sort through them and select a handful of videos to recommend to a given user at a given time. That is the *opposite* of treating all content the same. And Section 230(c)(1) does not shield Google's decision to go beyond merely hosting content and to instead promote certain videos over others.

B. Section 230's history confirms that it does not shield Internet platforms from the consequences of their own conduct.

The statutory history of Section 230 confirms the congressional intent to encourage Internet platforms to remove pornography and similar content, not to grant ***9** platforms government-like immunity for their own conduct. Supplementing legislation that criminalized the sharing of pornography, Section 230 gave Internet companies telephone-like liability protections, which allowed them to voluntarily remove pornography even as they carried countless other forms of content. This was necessary because an early-Internet judicial decision concluded that online platforms that remove *any* content become liable for *all* of it. Cases decided shortly after Section 230's enactment, however, badly distorted this statutory framework, requiring this Court's intervention.

1. Section 230 was enacted as part of the Telecommunications Act of 1996, the "major components of [which] have nothing to do with the Internet." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The exception was "Title V-known as the 'Communications Decency Act of 1996."' *Id.* at 858. That Act, in turn, provided two independent but overlapping legislative solutions for how to limit children's access to Internet pornography.

First, Senator Jim Exon's proposal, ultimately enacted as Section 502 of the Telecommunications Act, 47 U.S.C. § 223(a), (d), took a heavy-handed approach to what was then considered a severe problem of pornography on the Internet. Time Magazine "pour[ed] fuel" on this incendiary issue when it incorrectly reported that over 80% of images available on early Internet platforms were pornographic. 141 Cong. Rec. S9019 (daily ed. June 26, 1995) (statement of Rep. Grassley) (reprinted version of the story). That story was introduced in Congress. *Id.* And "[t]he study became the source of endless articles and editorials." Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 54 (1996). In order "to ***10** protect minors from 'indecent' and 'patently offensive' communications on the Internet," *Reno*, 521 U.S. at 849, Senator Exon's legislation imposed criminal penalties on persons who send such images to minors or who "knowingly permit[] any telecommunications facility under his control to be used" for such activity "with the intent that it be used for such" activity, *id.* at 859-60; *see* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 502.

Second, some representatives likewise recognized the need to protect children from pornography but favored a lighter legislative touch. They proposed what became Section 509 of the Telecommunications Act, and later Section 230, "as a substitute for the Exon" approach. *Reno*, 521 U.S. at 858 n.24. Instead of being coercive, Section 230 more gently encouraged Internet platforms to be "Good Samaritans" by voluntarily removing pornography. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, one of the bill's sponsors). To do that, it provided legal *protection* to Internet platforms that opted to remove such content. That protection was important in the light of a state-court decision from New York that threatened to expose Internet platforms that remove content to tremendous legal liability for what they did *not* remove. *Id.*

2. The New York *case*-*Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)-misapplied "specific background legal principles" about how Internet platforms should be liable for their users' speech. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari). Specifically, the court applied *newspaper-type* liability to an Internet platform's decisions about what to transmit, even though ***11** Internet platforms generally bear no resemblance to newspapers. The bill that became Section 230 represented Congress's rejection of that misapplication, providing critical context for how Section 230 operates.

Tort law has long applied different liability standards to speech intermediaries. The classic example is defamation: newspapers and other comparable publishers are generally deemed to be the speakers of any third-party content they carry and are held liable to the same extent as the underlying authors. *See, e.g., Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60-61 (2d Cir. 1980) (explaining that such publishers are "subject to liability just as if [they] had published [the libelous content] originally"). A newspaper, therefore, cannot defend against a defamation action on the ground that some unaffiliated party was the author of the defamation it printed.

Other entities are liable for third-party content they carry only in limited contexts. A telegraph company, for example, could be held liable only in the "rare case[]" in which it "happened to know that the message" it transmitted "was [tortious] or that the sender was acting, not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another." *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 543 (1st Cir. 1940). Telephone companies, meanwhile, are generally regarded as completely immune from liability for the third-party content they carry. *See* Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 146 n.26 (2021) (collecting authorities). [2]

***12** The *Stratton Oakmont* court botched the application of these established liability frameworks to the new Internet medium. [3] In that case, "[a]n early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). The *Stratton Oakmont* court accepted that Internet platforms generally were "conduit[s]" not legally responsible for their users' speech. 1995 WL 323710, at *3. But it concluded that liability was appropriate there because "the company... held itself out as a family-friendly service provider that moderated and took down offensive content." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). In the court's view, the practice of taking down *some* content made the Internet platform liable, just like a newspaper, for all the content it allowed to remain available. *Stratton Oakmont*, 1995 WL 323710, at *3, *4.

"Congressmen on both sides of the debate"-Senator Exon's side, and those who favored the light-touch approach-"found *Stratton* objectionable." Cannon, *supra*, at 62. That is because the case essentially "create[d] a 'Hobson's choice'" for Internet platforms: they could either "creat[e] 'child safe' areas that expose" their companies to "liability as ... editor[s], monitor[s], or publisher[s]" of *everything* on their platforms, or they could "do[] nothing," allowing pornography to blight their spaces, "in order to protect [themselves] from liability." ***13** *Id.* As a result, "[e]arly platforms ... claimed they could not offer porn-free environments because of *Stratton Oakmont.*" Candeub, *supra*, at 142.

3. "One of the specific purposes of" what became Section 230 was "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions." H. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (cleaned up). *Stratton Oakmont's* Hobson's choice blocked Congress's goal of limiting Internet pornography. Its reasoning also made little practical sense because telephone companies, the closest analogue to Internet companies, had long been allowed to remove certain content without jeopardizing their immunity from liability for other content passing through their wires. *See, e.g, Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291,1292 (9th Cir. 1987) (pre-recorded pornographic messages). Likewise for telegraph companies: "If... the message is expressed in indecent, obscene or filthy language, then, in our opinion, the telegraph company will be excused from the [obligatory] transmission of any such message." *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498-99 (1877) (stating the common law rule). Section 230 attempted to solve the Hobson's choice problem by largely adopting the same liability framework for the Internet. *See, e.g.*, Candeub, *supra*, at 146.

For many reasons, prevailing sentiment at the time aptly supported the equivalence between telephones and the Internet. For one, Internet service was generally delivered "through a modem that uses a telephone line to connect to the Internet." *See* Mississippi State University Extension, *Types of Internet Connections*, https://tinyurl.com/dialupconnection (noting that a "dial-up" ***14** connection "was the first widely used type of Internet connection"). [4]

Additionally, instantaneous communication on Internet platforms most nearly resembled and was regarded as "analogous to a telephone party line, using a computer and keyboard rather than a telephone." *ACLU v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996) (three-judge panel's findings of fact), *aff'd*, 521 U.S. 844 (1997). That is "because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online." *Id.* at 851-52; *see Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (Easterbrook, J.) ("A web host, like a delivery service or phone company, is an intermediary."). And, after all, Section 230 was enacted as part of the "Telecommunications Act" of 1996-an Act that in most relevant part modified federal law that applied to telephones.

Section 230 codified the telephone-style liability scheme for Internet platforms in two ways. *First*, it provided that "[n]o provider or user of an interactive computer service"-i.e., an Internet platform-"shall be treated as the publisher or speaker of any information provided by *another*." 47 U.S.C. § 230(c)(1) (emphasis added). *Second*, it established that this default rule is not displaced if the Internet platform takes action "in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2). That way, a message board like the one at issue in *Stratton Oakmont* could remove pornography without becoming responsible for other potentially tortious material it did *not* remove. ***15** Importantly, however, Section 230 offered no protection to "information content providers"-meaning persons or entities "responsible, in whole or in part, for the creation or development of information." *Id.* § 230(f)(3).

4. Although Section 230 was originally offered as a "substitute" for Senator Exon's legislation, it was (as already noted) ultimately "enacted as an *additional* section of the Act." *Reno*, 521 U.S. at 858 n.24 (emphasis added). Indeed, it provided that nothing in it should "be construed to impair the enforcement of" Exon's language. 47 U.S.C. § 230(e)(1). "As a result, the [two components] were described as fitting together 'like a hand in a glove.'" Cannon, *supra*, at 68. Exon's component criminalized acts of sharing pornography. 47 U.S.C. § 223(a), (d). And Section 230 protected "Good Samaritan[s]" who take it down. *Id.* § 230(c).

5. Two early court decisions had an outsized impact on the interpretation of the Communications Decency Act and continue to have significant distorting effects on how lower courts apply Section 230.

First, in *Reno*, this Court held that Exon's approach ran afoul of the First Amendment because it "effectively suppresse[d] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another." 521 U.S. at 874. That took the Exon glove off the Section 230 hand.

Second, in *Zeran v. America Online*, 129 F.3d 327, the Fourth Circuit adopted an atextual test for determining when Section 230's protection applies. Specifically, it concluded that "lawsuits seeking to hold an [Internet platform] liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone *or alter* content-are barred." *Id.* at 330 (emphasis added). This ruling ran ***16** directly afoul of the provision of Section 230 that expressly maintained liability for those "responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). Nevertheless, *Zeran* started a cascade of authority whereby other circuits and state courts adopted the Fourth Circuit's decision, treating it as akin to a decision of *this* Court. *See, e.g., Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (*Zeran* was a "seminal" decision); Candeub, *supra*, at 154-55 ("with perhaps one exception," the lower courts all follow *Zeran).*

Zeran's capacious conception of Section 230 protection has wrongly immunized Internet platforms from liability in a range of situations, including for their *own* conduct. *See Malwarebytes*, 141 S. Ct. at 16 (Thomas, J.). But Section 230 does not, and was not designed to, protect Internet platforms from the consequences of their own actions. An Internet platform, after all, can remove pornography without committing its own unlawful acts. And the telephone companies to which Internet platforms were compared have historically been liable for their *own* acts and omissions-notwithstanding the absence of liability for their *users'* speech. *See, e.g., Mountain States Tel. & Tel. Co. v. Hinchcliffe*, 204 F.2d 381,382 (10th Cir. 1953) ("where a telephone company negligently fails to furnish proper telephone facilities"); *Cain v. Chesapeake & Potomac Tel. Co.*, 3 App. D.C. 546, 553 (D.C. Cir. 1894) (holding that a telephone company can be held liable for misleading callers about a subscriber's availability); *Emery v. Rochester Tel. Corp.*, 3 N.E.2d 434, 437 (N.Y. 1936) ("unexplained failure to give any service"); *Chesapeake & Potomac Tel. Co. of Va. v. Carless*, 102 S.E. 569, 570 (Va. 1920) (negligently disconnecting subscribers).

***17** * * *

Far from suggesting that the Court should depart from Section 230's plain text, the statute's history confirms that it means what it says: Section 230 provides targeted protections for platforms that want to censor pornography and other harmful content without being exposed to liability for all third-party content that is not removed. But Section 230 does not "create a lawless noman's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. And just as acts that aid and abet terrorists "are unlawful when [done] face-to-face or by telephone, they don't magically become lawful when [done] electronically online." *Id.*

II. Judicial Expansion of Section 230 Causes Real-World Harm.

The proper interpretation of Section 230 is no mere academic exercise. By going beyond Section 230's text, courts have harmed States and their citizens in two ways.

First, state sovereignty is infringed when courts improperly hold that Section 230 preempts state law. Section 230(e)(3) provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The stakes for States are therefore high.

For example, Texas recently enacted "a groundbreaking... law that addresses the power of dominant social media corporations to shape public discussion of the important issues of the day." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715,1716 (2022) (Alito, J., dissenting from grant of application to vacate stay). That law seeks to preserve free speech on the Internet by preventing the biggest social-media platforms from censoring users based on viewpoint. *Id.*

***18** Trade associations representing the platforms sued the Texas Attorney General, arguing primarily that the law violates the First Amendment. *Id.* In the alternative, the trade organizations, whose members include Google and YouTube, *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1103 (W.D. Tex. 2021), *vacated and remanded sub nom.* *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), have also argued that Texas's law "is preempted" by Section 230, *id.* at 1101. If Section 230 is given an overbroad interpretation, Texas may be unable to enforce its carefully structured scheme for protecting free speech in the digital public square. It would be remarkable for Section 230 to preempt a law like Texas's which, after all, dovetails with one of Section 230's own stated values-free speech. 47 U.S.C. § 230(a)(3). And Texas's law in no way frustrates Section 230's safe harbor for the removal of pornography. It does not impose *any* liability on the Internet platforms for content they fail to remove. And it allows them to continue removing pornography in multiple ways. First, removing pornography will generally (and perhaps always) not constitute "viewpoint" discrimination, and so will not fall within the law's proscription. *NetChoice*, 49 F.4th at 445-46. Second, the law gives Internet platforms an explicit permit to remove unlawful content or content they are "specifically authorized to censor by federal law," even if it would constitute "viewpoint" discrimination. *Id.* at 446. In all events, the Court should not interpret Section 230 in a way here that pre-determines the answer to the questions posed in that case.

Second, courts have prevented the citizens of Texas and other States from obtaining redress for their injuries. Courts have strayed so far from the statute's text that they now extend immunity to online platforms even ***19** when the plaintiff is not "trying to hold the defendants liable 'as the publisher or speaker' of third-party content" but only for "the defendant's own misconduct." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.).

For example, in *Jane Doe No. 1 v. Backpage.com, LLC*, victims of sex trafficking alleged "that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website." 817 F.3d 12, 16 (1st Cir. 2016). The plaintiffs further alleged that "Backpage's expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking," that "Backpage selectively removed certain postings made in the 'Escorts' section (such as postings made by victim support organizations and law enforcement 'sting' advertisements) and tailored its posting requirements to make sex trafficking easier," and that Backpage removed metadata from uploaded photographs to protect traffickers. *Id.* at 16-17.

As a result of being trafficked through Backpage, one plaintiff was allegedly raped over 1,000 times. *Id.* at 17. Yet the court embraced a "broad construction" of Section 230 and an admittedly "capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Id.* at 19. The court focused on "but-for" causation-that is, there would have been no harm "but for the content of the postings," *id.* at 20-and held that each decision Backpage made, even if intended to facilitate sex trafficking, was undertaken as a "publisher" and therefore entitled to protection under Section 230, *id.* at 20-21.

The attorneys general of 44 States, the District of Columbia, and two Territories have pointed out to Congress ***20** that courts have interpreted Section 230 too broadly and reached "the perverse result" of protecting those who knowingly profit from illegal activity. Letter from Nat'l Ass'n of Att'ys Gen. to Cong. Leaders (May 23, 2019), https://tinyurl.com/naagletter2019. For these reasons, it is critical that the Court faithfully construe Section 230 and avoid the interpretive errors made by many lower courts. *See* Br. of Tennessee.

III. Faithfully Interpreting Section 230 Will Neither Render It a Nullity nor Threaten the Internet.

Google insists that a holding from this Court that Section 230 does not bar petitioners' claims would make Section 230 "a dead letter" and "would threaten the basic organizational decisions of the modern internet." Br. in Opp. 22. Google is wrong.

First, neither petitioners nor the State of Texas suggest that Section 230 offers Google and other online platforms no protections. It certainly does. Section 230 shields Google from claims seeking to hold it liable as though it had spoken or published the myriad videos it hosts, and it allows Google to maintain that shield even when it chooses to censor pornography and similar offensive content. Section 230's protections would still fully honor Congress's decision that Internet platforms *not* be treated like newspapers, for example.

Second, as petitioners recognize, recommending content does not make a platform liable for the recommended content, but only for the recommendation. *See* Pet. Br. 28-29. That distinction is subtle but significant because it could affect-among other things-questions of causation and the extent of liability. Here, recommending ISIS videos potentially exposes Google to aiding-and-abetting liability because *the recommendations themselves* are allegedly unlawful. And petitioners must ***21** show that the *recommendations themselves* caused their alleged harm. By contrast, if the alleged offense-or the act that proximately caused petitioners' harm-were creating and posting terrorist recruiting videos, Google would not be liable. Similarly, Google would not become liable for defamation by recommending a defamatory video. Holding Google liable for the contents of a third-party video would violate Section 230(c)(1)'s prohibition on treating Google "as the publisher or speaker of any information provided by another information content provider." Holding Google liable for its own recommendations does not.

Third, a lack of protection from Section 230 does not mean that Google will be liable for these or any other recommendations. "Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.). Plaintiffs must still prove their cases. *See id.* Here, for example, it may be that recommending ISIS videos does not constitute aiding and abetting the terrorists "by knowingly providing substantial assistance." 18 U.S.C. § 2333(d)(2). A lack of

Section 230 protection just means that a court can consider that question. Honoring Congress's enacted language will result in a new status quo that gives platforms and consumers alike ample protections from liability and abuse.

More fundamentally, Google assumes that "the basic organizational decisions of the modern internet"-which were enabled only by an overbroad interpretation of Section 230-are desirable. Br. in Opp. 22. But it is highly debatable that "the 'Internet as we know it' is ... what we want it to be, particularly when it comes to sex ***22** trafficking, pornography, child sex-abuse images, and exploitation." Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 554 (2018). "It is clear that, whatever § 230 did for the legitimate digital economy, it also did for the illicit digital economy." *Id.* And Section 230's overbroad interpretation has left victims of this illicit behavior unable to obtain adequate redress. If that trade-off is worthwhile, it is one for Congress to make-not for Google to obtain through textually unjustifiable interpretations of Section 230.

CONCLUSION

The Court should reverse the court of appeals' judgment and remand the case for further proceedings.

Respectfully submitted.

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Footnotes

1 No counsel for any party authored this brief, in whole or in part. No person or entity other than the State of Texas contributed monetarily to its preparation or submission. Counsel of record for all parties received notice of amicus's intention to file this brief. The State of Texas takes no position on whether petitioners will prevail on the merits of their claims.

2 There is some authority for the proposition that telephone companies may be held liable for the "*knowing* transmission" of tortious third-party content. Candeub, *supra*, at 146 n.26. But, because telephone companies (unlike telegraph companies) seldom have the opportunity to review speech *before* it is transmitted, this category of liability, if it exists at all, is exceedingly narrow.

3 Indeed, after Section 230 was enacted, New York's high court overruled *Stratton Oakmont* because it concluded-consistent with what was by then the prevailing view-that an Internet platform is more analogous to a "telephone company" than a newspaper. *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

4 All websites were last accessed on December 7, 2022.

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2022 WL 17650509 (U.S.) (Appellate Brief)
Supreme Court of the United States.

Reynaldo GONZALEZ, et al., Petitioners,
v.
GOOGLE LLC.

No. 21-1333.
December 7, 2022.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for the United States as Amicus Curiae in Support of Vacatur

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*I QUESTION PRESENTED

Whether 47 U.S.C. 230(c)(1), which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," bars petitioners' claims alleging that Google LLC violated the Antiterrorism Act of 1990, 18 U.S.C. 2331 *et seq.*, by hosting on its YouTube platform, and providing targeted recommendations for, videos created by a foreign terrorist organization.

[Note: Page II missing in original document]

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Constitution and statutes:

***1 INTEREST OF THE UNITED STATES**

This case concerns a federal statute commonly known as Section 230 of the Communications Decency Act of 1996, [1] which prohibits courts from treating a provider of an interactive computer service as the "publisher or speaker" of third-party content posted on its platform. 47 U.S.C. 230(c)(1). The United States has a substantial interest in the proper interpretation of that provision. Congress enacted Section 230 "to promote the continued development of the Internet," 47 U.S.C. 230(b)(1), ***2** by protecting online service providers and users from unwarranted liability. But an overly broad reading of Section 230(c)(1) would undermine the enforcement of other important federal statutes by both private plaintiffs and federal agencies.

STATEMENT

A. Section 230

Congress enacted the Communications Decency Act of 1996 (CDA) as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, Tit. V, 110 Stat. 133; see *Reno* v. *American Civil Liberties Union*, 521 U.S. 844, 857-858 (1997). One CDA provision, entitled "Protection for private blocking and screening of offensive material" and commonly referred to as Section 230, establishes protections for online service providers, including websites and other online platforms. CDA § 509, 110 Stat. 137-139 (47 U.S.C. 230).

A "specific purpose[]" of the provision was to respond to a state trial-court decision, *Stratton Oakmont, Inc.* v. *Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995). H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 194 (1996). *Stratton Oakmont* involved a defamation suit against an online service provider, Prodigy, based on messages a third party had posted on one of Prodigy's online bulletin boards. 1995 WL 323710, at *1. Under common-law defamation principles, one who "publishes" a defamatory statement - *i.e.*, communicates it to someone other than the person defamed - can be held liable without proof that he knew the statement was defamatory, resulting in a form of strict liability. See Dan B. Dobbs et al., *Hornbook on Torts* 938 (2d ed. 2016) (Dobbs). And subsequent publishers can likewise face strict liability under the general rule that "one who repeats or otherwise republishes ***3** defamatory matter is subject to liability as if he had originally published it." *Cianci* v. *New Times PubVg Co.*, 639 F.2d 54, 61 (2d Cir. 1980) (Friendly, J.) (quoting Restatement (Second) of Torts § 578 (1977) (Restatement)). [2]

The *Stratton Oakmont* court used the term "publisher" to refer to the kind of entity who could be held strictly liable in this way, and understood the term to include entities like newspapers, which are presumed to have editorial control over what they print. 1995 WL 323710, at *3. The plaintiffs had argued that Prodigy maintained that kind of control over the content on its bulletin boards because Prodigy screened postings in some respects and sometimes removed postings it deemed objectionable.

Id. at *2-*3. The court agreed that those attempts at content moderation rendered Prodigy a "publisher" of, and thus liable for, any defamatory speech that remained. *Id.* at *4-*5.

In the legislative findings accompanying Section 230, Congress recognized that the Internet "represent[s] an extraordinary advance in the availability of educational and informational resources" and "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. 230(a)(1) and (3). Congress declared it the "policy of the United States" to "promote the continued development of the Internet and other interactive computer services," 47 U.S.C. 230(b)(1), and to "remove disincentives for the development and utilization of blocking and filtering ***4** technologies" that could better restrict access to objectionable material online, 47 U.S.C. 230(b)(4).

To that end, Section 230(c) establishes two complementary protections. Section 230(c)(1) directs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(1). And Section 230(c)(2) states that "[n]o provider or user of an interactive computer service shall be held liable on account of *** any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. 230(c)(2)(A). The statute expressly preempts any "cause of action" or "liability" "under any State or local law that is inconsistent with" those provisions. 47 U.S.C. 230(e)(3).

B. The Present Controversy

1. Plaintiffs (petitioners here) are relatives of No-hemi Gonzalez, an American citizen who was murdered in a November 2015 terrorist attack in Paris, France, for which the Islamic State of Iraq and Syria (ISIS) claimed responsibility. J.A. 14, 19-20. In 2016, plaintiffs sued respondent Google LLC under the Antiterrorism Act of 1990 (ATA), 18 U.S.C. 2331 *et seq.* The ATA authorizes American nationals injured "by reason of an act of international terrorism" to bring a civil action for treble damages in federal court. 18 U.S.C. 2333(a). In 2016, Congress amended the ATA to impose secondary civil liability on "any person who aids and abets, by knowingly providing substantial assistance" to, "an act of international terrorism." Justice Against Sponsors ***5** of Terrorism Act, Pub. L. No. 114-222, § 4(a), 130 Stat. 854 (18 U.S.C. 2333(d)(2)).

In their operative complaint, plaintiffs allege that Google is liable under the ATA for providing resources and assistance to ISIS through Google's ownership of the YouTube video-sharing platform. J.A. 18. YouTube allows users to register an account, establish a "channel," post videos, and post comments on other users' videos. J.A. 59, 62. According to plaintiffs, ISIS and its adherents have used YouTube "to disseminate its videos and messages and execute its propaganda, recruitment, and operational campaigns." J.A. 72. Plaintiffs allege that, notwithstanding YouTube's policies prohibiting terrorist content, J.A. 65, "[p]rior to the Paris attacks, [YouTube] refused to actively monitor" the site "to block ISIS's use of" the platform, J.A. 157-158. Plaintiffs further allege that, even after identifying ISIS content, YouTube took inadequate steps to remove those accounts or to prevent blocked accounts from being reestablished. J.A. 158.

Plaintiffs also allege that YouTube supplies its users with videos that other users have posted. First, a user can "subscribe[]" to another user's "channel," and YouTube will "distribute" new videos on that channel to the channel's subscribers. J.A. 172. Second, plaintiffs allege that YouTube implements "computer algorithms" to "suggest[]" to particular users "videos and accounts" that are "similar" to those the user has previously watched and that play automatically when another video ends. J.A. 173; see J.A. 170 (screenshot of this feature showing a sidebar titled "Up next" with five videos listed). Plaintiffs allege that, by using the algorithms and related features to "recommend[] ISIS ***6** videos," YouTube "assists ISIS in spreading its message." J.A. 169.

Plaintiffs additionally allege that Google maintains a commercial service called "AdSense," which allows users to "share in the revenue" from advertisements placed alongside the users' YouTube videos. J.A. 163. Plaintiffs allege that ISIS-affiliated users have received revenue from Google for participating in AdSense. J.A. 164-165.

2. The district court dismissed plaintiffs' complaint for failure to state a claim. Pet. App. 172a. The court held that Section 230(c)(1) barred plaintiffs' ATA claims except to the extent they were premised on revenue sharing through AdSense. *Id.* at 193a-207a. The court further held that the revenue-sharing claims did not plausibly allege an ATA violation. *Id.* at 214a-215a.

3. A divided panel of the Ninth Circuit affirmed. Pet. App. 1a-169a.

a. The court of appeals agreed with the district court that plaintiffs' non-revenue-sharing ATA claims were barred by Section 230(c)(1). Pet. App. 17a-44a. The court of appeals first held that YouTube provides an "interactive computer service" and is thus eligible for Section 230 protection. *Id.* at 29a-30a. The court then held that most of plaintiffs' ATA claims seek "to treat YouTube as a publisher or speaker" of ISIS content within the meaning of Section 230(c)(1). *Id.* at 30a-31a. The court stated that "[p]ublishing encompasses 'any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.'" *Id.* at 31a (citation omitted). And it concluded that, "[b]ecause the non-revenue sharing claims seek to impose liability for allowing ISIS to place content on the ***7** YouTube platform, they seek to treat [YouTube] as a publisher." *Ibid.*

The court of appeals further held that YouTube had not acted as an "information content provider" with respect to ISIS videos. Pet. App. 31a-44a. Plaintiffs had argued that YouTube "develop[s] the ISIS content that appears on YouTube, at least in part," *id.* at 32a (brackets in original), by recommending ISIS content to other users through its algorithms, *id.* at 38a. The court disagreed. It emphasized the absence of allegations that YouTube's algorithms treated ISIS-created content more favorably than any other content type. *Id.* at 37a. The court concluded that, because YouTube recommends content "based upon users' viewing history and what is known about the users," its recommendations reflect the same "core principle" as "a traditional search engine." *Id.* at 38a.

Finally, the court of appeals held that Section 230(c)(1) did not apply to plaintiffs' AdSense-related claims because those claims were premised on Google "giving ISIS money," not on "the publication of third-party information." Pet. App. 46a (emphasis omitted). The court agreed with the district court, however, that the revenue-sharing allegations did not state a claim for either direct or aiding-and-abetting liability under the ATA. *Id.* at 47a-68a.

b. Judge Berzon concurred. Pet. App. 81a-92a. She viewed circuit precedent as dictating the conclusion that Section 230(c)(1) bars claims based on YouTube's recommendations. *Id.* at 81a-82a. She explained, however, that if she were writing on a clean slate, she would hold that the term "publisher" in Section 230(c)(1) "does not include activities that promote or recommend content." *Id.* at 82a.

***8** c. Judge Gould concurred in part and dissented in part. Pet. App. 92a-110a. He agreed with the majority that Section 230(c)(1) protects YouTube from liability for "carrying the posts from ISIS on its platform." *Id.* at 102a. He would have held, however, that Section 230(c)(1) does not immunize YouTube from claims based on conduct that "that goes beyond merely publishing" ISIS videos, such as "recommending terrorism-related content based on past content viewed." *Ibid.* Judge Gould endorsed the views articulated by Chief Judge Katzmann's separate opinion in a similar case, *Force* v. *Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020). Pet. App. 98a.

SUMMARY OF ARGUMENT

Section 230(c)(1) directs that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(1). That text is typically analyzed in three elements: (1) the defendant must be a provider of an "interactive computer service," and (2) the plaintiff's claim must seek to treat the defendant as a "publisher or speaker" of (3) "information provided by another information content provider." Section 230(c)(1) precludes a plaintiff's claim only if all three elements are met.

A. Section 230(c)(1)'s text is most naturally read to prohibit courts from holding a website liable for failing to block or remove third-party content, but not to immunize other aspects of the site's own conduct.

1. The statute's definition of "interactive computer service" covers most interactive websites and other providers of online services. 47 U.S.C. 230(f)(2).

2. A claim "treat[s]" an online-service-provider defendant "as the publisher or speaker" of information if ***9** it seeks to hold the defendant liable for the presence of unlawful content on the defendant's platform. 47 U.S.C. 230(c)(1). "Publisher" is best read in this context to refer to one who commits the common-law act of "publication": the communication or dissemination of expressive material to another. Claims alleging liability based on a platform operator's failure to block or remove material created and posted by third parties meet this element, regardless of the precise cause of action. This includes claims alleging that the defendant was negligent or reckless with respect to, or had actual or constructive knowledge of, the disseminated material's objectionable character. Challenges to other aspects of the defendant's conduct, however - such as certain kinds of claims targeting the platform's own design choices - do not treat the defendant as a "publisher or speaker" of content provided by others and therefore do not trigger Section 230(c)(1) protection.

3. The third required element is that the disseminated material must have been "provided by another information content provider." 47 U.S.C. 230(c)(1). The statute defines "information content provider" to include anyone who "is responsible, in whole or in part, for the creation or development of information." 47 U.S.C. 230(f)(3). A website operator therefore loses Section 230(c)(1) protection when it is partially responsible for the content at issue. But a website does not become a co-developer (and thus an "information content provider") of third-party content merely by taking actions to display it or make it more accessible or usable.

B. Section 230(c)(1) bars plaintiffs' ATA claims to the extent those claims are premised on YouTube's alleged failure to block or remove ISIS videos from its ***10** site, but the statute does not bar claims based on YouTube's alleged targeted recommendations of ISIS content. The judgment below therefore should be vacated.

1. Plaintiffs' broadest theory of direct and secondary ATA liability is that YouTube is liable for allowing ISIS-affiliated users to create accounts and post videos on the site. The court of appeals correctly held that Section 230(c)(1) precludes liability on that basis. YouTube is undoubtedly a provider of an interactive computer service, and plaintiffs do not allege that YouTube edited or otherwise contributed to the creation of the videos at issue. To the extent plaintiffs allege that YouTube violated the ATA by allowing its platform to be used for the dissemination of videos, Section 230(c)(1) bars their claims.

2. Plaintiffs' allegations regarding YouTube's use of algorithms and related features to recommend ISIS content require a different analysis. That theory of ATA liability trains on YouTube's own conduct and its own communications, over and above

its failure to block or remove ISIS content from its site. Because that theory does not ask the court to treat YouTube as a publisher or speaker of content created and posted by others, Section 230(c)(1) protection is not available.

That does not mean that YouTube should be deemed an information content provider with respect to the videos themselves. Although Section 230(c)(1) does not preclude liability premised on YouTube's recommendations if the elements of a private ATA suit are otherwise met, liability must be determined without regard to the fact that the recommended videos appeared on YouTube's own platform. Because the court of appeals did not consider whether plaintiffs have adequately ***11** pleaded the elements of ATA liability on that theory, the case should be remanded so that the court may do so in the first instance.

3. Plaintiffs' other arguments lack merit. YouTube acts as a provider of an interactive computer service when it displays content on its site to users, even in the absence of an affirmative request. An online platform does not become an information content provider by taking the technical steps necessary to render user-generated content available to others on the site, such as creating URLs for videos and embedding them in hyperlinks. Finally, plaintiffs suggest that a platform becomes an information content provider by "notifying" users about new content. But to the extent they are challenging YouTube's distribution of new videos on a channel to the channel's subscribers, that feature is not meaningfully different from YouTube hosting the channel in the first place, and it does not justify treating YouTube as a co-creator of that content.

ARGUMENT

Section 230(c)(1) directs that a website operator may not be "treated as the publisher or speaker" of content provided by others. 47 U.S.C. 230(c)(1). This Court has never construed that provision. Over the last quarter century, however, the courts of appeals have developed a substantial body of precedent applying Section 230(c)(1) to disparate factual settings.

Congress's most immediate objective in enacting Section 230(c)(1) was to protect online service providers from possible defamation liability when they remove some objectionable third-party content but allow other postings to remain. The lower courts have correctly recognized that Section 230(c)(1)'s text goes beyond that immediate objective. Many courts, however, have ***12** concluded that Section 230 should be construed "broadly, so as to effectuate Congress's 'policy choice'" to protect the operators of interactive websites. *Universal Commc'n Sys., Inc.* v. *Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); see, *e.g.,* *Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). And they have applied that approach to foreclose claims even when platform operators' allegedly wrongful conduct went well beyond a failure to block or remove objectionable third-party content.

That approach to Section 230(c)(1) contradicts this Court's admonition that, absent some contrary "'textual indication,'" a court's views about the policy Congress sought to achieve provide "no license" to give statutory provisions "anything but a fair reading." *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (citation omitted). The Court should give Section 230(c)(1) a fair reading, with no thumb on the scale in favor of either a broad or a narrow construction. Properly construed, Section 230(c)(1) protects YouTube from asserted ATA liability for hosting or failing to remove ISIS-related content, but not for claims based on YouTube's own conduct in designing and implementing its targeted-recommendation algorithms.

A. Section 230 Prohibits Courts From Holding A Website Liable For Failing To Block Or Remove Third-Party Content, But It Does Not Immunize The Site's Own Conduct

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(1). That text is typically analyzed in three elements, all of which must be present for Section 230(c)(1) ***13** to bar the claim: (1) the defendant must be a provider of an "interactive computer service," and (2) the plaintiff's claim must seek to treat the defendant as a "publisher or speaker" of (3) "information provided by another information content provider." We address those elements in turn.

1. The defendant must be a provider of an interactive computer service

Section 230 defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. 230(f)(2). That definition encompasses early online service providers like Prodigy and America Online. See, *e.g., Zeran* v. *America Online, Inc.*, 129 F.3d 327, 328-329 (4th Cir. 1997), cert. denied, 524 U.S. 937 (1998). It also includes interactive websites such as dating or housing services, see, *e.g., Fair Hous. Council* v. *Room-mates.com, LLC*, 521 F.3d 1157, 1162 n.6 (9th Cir. 2008) (en banc); search engines that reproduce content from other websites, see, *e.g., Marshall's Locksmith Serv., Inc.* v. *Google, LLC*, 925 F.3d 1263, 1268 (D.C. Cir. 2019); and social media services like YouTube, Face-book, and Twitter, see, *e.g., Force* v. *Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), cert. denied, 140 S. Ct. 2761 (2020). In most Section 230(c)(1) cases, this element is not disputed.

2. The plaintiff's claim must seek to treat the defendant as a "publisher or speaker" of third-party content

In the view of the United States, a plaintiff's claim seeks to "treat[]" a website provider as "the publisher or speaker" of third-party content, 47 U.S.C. 230(c)(1), if liability turns on the provider's failure to block or ***14** remove unlawful content from its platform, so that avoiding liability would require the defendant to withdraw or refuse to publish that content. By contrast, if the plaintiff's claim seeks to hold the defendant liable for other aspects of its own conduct, imposing liability does not "treat" the defendant as a "publisher or speaker," even if third-party speech is essential to the plaintiff's cause of action.

a. Section 230 does not define the term "publisher." As a matter of ordinary usage, that term can refer broadly to "one that makes [something] public," or more narrowly to "one whose business is publishing." *Webster's Third New International Dictionary of the English Language* 1837 (1993) *(Webster's Third).* Several clues suggest that Section 230(c)(1) uses "publisher" in its broader sense. The word is paired with "speaker," which carries the more general sense of "one that speaks." *Id.* at 2185. The broader sense of "publisher" also accords with the word's common-law meaning and Section 230(c)(1)'s origin. As noted above, "publication" is an element of the tort of defamation that encompasses all "communication intentionally or by a negligent act to one other than the person defamed." Restatement § 577(1). In that context, the term is not limited to persons whose business is publishing. See Dobbs § 37.4, at 940. And at common law, publication specifically includes a failure to remove speech exhibited on one's property. See Restatement § 577(2).

b. The more difficult interpretive task is to identify the types of legal claims that would "treat[]" an entity like YouTube "as the publisher or speaker" of third-party content displayed on its site. 47 U.S.C. 230(c)(1). Section 230(c)(1) reflects Congress's recognition that "imposing tort liability on companies that serve as ***15** intermediaries for other parties' potentially injurious messages" could substantially impede the development of online platforms. *Zeran*, 129 F.3d at 330-331. "It would be impossible for service providers to screen each of their millions of postings for possible problems." *Id.* at 331. And if (as in *Stratton Oakmont*, see p. 3, *supra)* the provider's removal of *some* content triggered potential legal liability for any unlawful third-party content that remained, providers would have a strong incentive to eschew screening mechanisms - the opposite of Congress's intent in enacting the CDA. See *Zeran*, 129 F.3d at 331; see also 47 U.S.C. 230(b)(4). Alternatively, "providers might choose to severely restrict the number and type of messages posted," *Zeran*, 129 F.3d at 331, to the detriment of Americans who have turned to the Internet for "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. 230(a)(3).

Section 230(c)(1) represents Congress's effort to avoid those harms. The provision most obviously applies to causes of action, like defamation, that allege the violation of legal duties imposed on publishers and speakers as such. But other causes of action may likewise "be premised on the publication or speaking of what one might call 'information content.'" *Barnes* v. *Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009). "[W]hat matters is not the name of the cause of action - defamation versus negligence versus intentional infliction of emotional distress" - but "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101-1102.

Section 230(c)(1) applies, however, only when a plaintiff's theory of liability seeks to hold the defendant ***16** liable for allowing unlawful third-party information to remain on its platform. "[T]o hold someone liable as a publisher at common law was to hold them responsible for the content's improper character." *Henderson* v. *The Source for Public Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022). The protection is not triggered merely because "there is a 'but-for' causal relationship between the act of publication and liability." *Ibid.*

For instance, Section 230(c)(1) should not bar a products-liability claim against an online marketplace, even if a third-party retailer creates the product's online listing, if the plaintiff's claim is based on the product's defect. Cf. *Erie Ins. Co.* v. *Amazon.com, Inc.*, 925 F.3d 135, 139-140 (4th Cir. 2019). Section 230(c)(1) should not insulate a review website from claims that it manipulated third-party reviews to extort businesses. But see *Levitt* v. *Yelp! Inc.*, No. C-10-1321, 2011 WL 5079526, at *6-*9 (N.D. Cal. Oct. 26, 2011). And, as the courts below recognized here, Section 230(c)(1) should not immunize Google from plaintiffs' ATA claims based on Google sharing revenue from advertisements that accompany ISIS-created videos. Pet. App. 45a-46a.

As those examples show, Section 230(c)(1) protects an online platform from claims premised on its dissemination of third-party speech, but the statute does not immunize a platform's *other* conduct, even if that conduct involves the solicitation or presentation of third-party content. The Ninth Circuit's *Room-mates.com* decision illustrates the point in the context of a website offering a roommate-matching service. 521 F.3d at 1161. As a condition of using the service, Roommates.com "require[d] each subscriber to disclose his sex, sexual orientation and whether he would bring children to a household," and to "describe his preferences ***17** in roommates with respect to the same three criteria." *Ibid.* The plaintiffs alleged that asking those questions violated housing-discrimination laws, and the court of appeals agreed that Section 230(c)(1) did not shield Roommates.com from liability for its "own acts" of "posting the questionnaire and requiring answers to it." *Id.* at 1165.

Imposing liability in such circumstances does not treat online platforms as the publishers or speakers of content provided by others. Nor does it obligate them to monitor their platforms to detect objectionable postings, or compel them to choose between "suppressing controversial speech or sustaining prohibitive liability." *Zeran*, 129 F.3d at 333. Illustrating that distinction, the *Roommates.com* court held that although Section 230(c)(1) did not apply to the website's discriminatory questions, it *did* shield the website from liability for any discriminatory third-party content that users unilaterally chose to post on the site's "generic" "Additional Comments" section. 521 F.3d at 1174-1175.

c. In a statement respecting the denial of certiorari in *Malwarebytes, Inc.* v. *Enigma Softivare Grp. USA, LLC*, 141 S. Ct. 13 (2020), Justice Thomas suggested a narrower interpretation of Section 230(c)(1)'s "publisher or speaker" element. Drawing on the provision's origin as a response to *Stratton Oakmont*, the statement suggested that Section 230(c)(1) may have had only one "modest" effect: to "indicate[] that an Internet provider does not become the publisher of a piece of third-party content - and thus subjected to strict liability - simply by hosting or distributing that content." *Id.* at 14-15. On that understanding, Section 230(c)(1) would shield a website operator from a cause of action that seeks to impose strict liability for third-party ***18** content, but not from allegations that the defendant acted with actual or constructive knowledge. *Ibid.*

Justice Thomas's *Malwarebytes* statement correctly noted two respects in which lower courts have extended Section 230(c)(1) beyond its proper bounds. First, some courts have misconstrued Section 230(c)(1) to confer immunity whenever an online service provider's allegedly unlawful conduct can be analogized to actions traditionally performed by a book or newspaper publisher. *Malwarebytes*, 141 S. Ct. at 16. Those decisions rest on the mistaken premise that the term "publisher" refers to companies whose *business* is publishing. See p. 14, *supra.* And courts have compounded that error by extending Section 230(c)(1)'s protections to activities beyond the "publication" of the third-party content itself. These courts have read Section 230(c)(1) to "protect[] the 'exercise of a publisher's traditional editorial functions,"' including even the *alteration* of content. *Mal-ivarebytes*, 141 S. Ct. at 16 (quoting *Zeran*, 129 F.3d at 330).

Second, as Justice Thomas further explained, some lower courts have read Section 230(c)(1) to immunize website operators whose platforms are knowingly designed to facilitate their use for unlawful activity. In *Jane Doe No. 1* v. *Backpage.com, LLC*, 817 F.3d 12 (2016), cert. denied, 137 S. Ct. 622 (2017), for example, the First Circuit considered a claim that a classifieds website had violated federal prohibitions on sex trafficking. The plaintiffs alleged that Backpage.com - which allowed users to post ads for "Escorts" - had "deliberately structured its website to facilitate illegal human trafficking" by, among other things, "accept[ing] anonymous payments, fail[ing] to verify e-mails, and stripp[ing] metadata from photographs to make crimes ***19** harder to track." *Malwarebytes*, 141 S. Ct. at 17. The First Circuit held that the website's actions were shielded by Section 230(c)(1) because they amounted to "choices about what content can appear on the website and in what form," and thus fell "within the purview of traditional publisher functions." *Backpage.com*, 817 F.3d at 21.

Under the principles articulated above, the *Backpage.com* decision was erroneous. The plaintiffs did not seek to treat Backpage.com as the publisher or speaker of the ads through which others carried out sex trafficking. Rather, they sought to hold the operator liable for its own policies and platform-design choices that facilitated sex trafficking. Where a website operator's conduct in furthering unlawful activities goes well beyond failing to block or remove objectionable third-party content from its platform, holding the operator liable does not "treat" it "as the publisher or speaker of" the third-party posts. [3]

Justice Thomas correctly identified ways in which some lower courts have unduly expanded Section 230(c)(1), and he rightly emphasized that the terms "publisher" and "speaker" should be construed in light ***20** of their common-law roots. But it does not follow that Section 230(c)(1) should be limited to claims based on strict-liability theories. As explained above, in defamation law, "publication" refers broadly to the communication of expressive material to another. See Restatement § 577;

see also p. 14, *supra.* And although the common law set a different standard of liability for distributors and others "who perform a secondary role in disseminating defamatory matter," *Prosser and Keeton on the Law of Torts* § 113, at 810-811 (W. Page Keeton ed., 5th ed. 1984) (Prosser), those entities likewise communicate content to others and therefore are "publishers." See *id.* at 799 ("[E]very one who takes part in the publication *** is charged with publication."); see also Dobbs § 37.4, at 940 ("Anyone who participates in publication can be a publisher."); *Zeran*, 129 F.3d at 334. Accordingly, leading torts authorities refer to both kinds of actors as "publishers." See Prosser § 113, at 803-804 (referring to the original speaker and entities like newspapers as "primary publishers," and to entities like libraries and newsstands as "secondary publishers" and "disseminator publisher[s]"); see also Dobbs § 37.4, at 942 (distinguishing between "primary publishers" and other "publishers *** called transmitters, distributors, or secondary publishers").

Thus, where a website operator's alleged wrongful act is the failure to block or remove objectionable third-party content from its site, imposing liability would "treat" the operator as "the publisher or speaker" within the meaning of Section 230(c)(1), even if the plaintiff alleges that the operator acted negligently, recklessly, or with actual or constructive knowledge. [4]

21** ***3. The content must be provided by another information content provider

Section 230 defines "information content provider" to mean "any person or entity that is responsible, *in whole or in part*, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. 230(f)(3) (emphasis added). The italicized language makes clear that, when two (or more) entities are jointly responsible "for the creation or development of" particular online content, each is an "information content provider" with respect to that content. See, *e.g.*, *FTC* v. *Accusearch Inc.*, 570 F.3d 1187, 1197 (10th Cir. 2009) (explaining that "there may be several information content providers with respect to a single item of information"). And by limiting the provision's application to claims based on "information provided by *another* information content provider," 47 U.S.C. 230(c)(1) (emphasis added), Section 230(c)(1) instructs that an online platform "remains liable for its own speech." *Lycos*, 478 F.3d at 419.

Determining what qualifies as "creation or development" of content under Section 230(f)(3) therefore can be integral to the Section 230(c)(1) analysis. The word "create" is straightforward: "to bring into existence" or ***22** "make out of nothing and for the first time." *Webster's Third* 532. But the meaning of "develop" in this context is less clear-cut. On the one hand, the transitive verb can be used as a close synonym of "create," though usually to refer to a drawn-out process. See *Oxford English Dictionary Online* (3d ed., modified Sept. 2022) ("[t]o formulate or create by successive stages of improvement or advancement"). But the word can also mean to "cause to increase or improve," "promote the growth of," or "expand by a process of growth." *Webster's Third* 618; see also *Oxford English Dictionary Online* ("[t]o bring (something) to a fuller or more advanced state; to improve, extend"). In this sense, the word conceivably could encompass a website operator's efforts to augment third-party content generally, or to make it more readily available or viewable.

Contextual considerations indicate that Congress did not intend "development" to carry its broadest "definitional possibilities." *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011). Within Section 230(f)(3), "development" is paired with "creation," a term that unambiguously excludes measures platforms employ to make third-party information more available to users without altering its content. Section 230(f)(3) also refers to one who is *"responsible"* for the information's development. That term typically connotes more than being a but-for cause or making an incidental contribution to an end result. See *Accusearch*, 570 F.3d at 1199 ("We would not ordinarily say that one who builds a highway is 'responsible' for the use of that highway by a fleeing bank robber.").

Adjacent subsections likewise indicate that "development" does not include actions a website takes to better display preexisting third-party content or make it more usable. Section 230's definition of "interactive ***23** computer service" includes an "access software provider," 47 U.S.C. 230(f)(2), which the statute defines as a provider of "software" or "enabling tools" that "filter, screen, allow, or disallow content," "pick, choose, analyze, or digest content," or "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." 47 U.S.C. 230(f)(4)(A), (B), and (C). It would make little sense for Congress to specifically include entities that provide "enabling tools" that "filter," "organize," and "reorganize" content as among those to which Section 230(c)(1) applies, only to categorically withdraw that protection through the definition of "information content provider." Rather, the statute's structure suggests that content development must go beyond the mere provision of basic organizational or display tools that Congress viewed as inherent in an interactive online service.

More fundamentally, deeming a website an "information content provider" whenever it enhances user access to third-party content would produce a "self-defeating" result. *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019). Interactive websites invariably provide tools that enable users to create, and other users to find and engage with, information. A chatroom might supply topic headings to organize posts; a photo-sharing site might offer a feature for users to signal that they like or dislike a post; a classifieds website might enable users to add photos or maps to their listings. If such features rendered the website a co-developer of all users' content, Section 230(c)(1) would be a dead letter.

By contrast, other actions may implicate website operators more deeply in objectionable content. If, for example, a website seeks out information from third parties and compiles that information into background- ***24** check reports, Section 230(c)(1) protection should not be available for the reports. Cf. *Henderson*, 53 F.4th at 128-129; but see *Dennis* v. *MyLife.Com, Inc.*, No. 20-cv-954, 2021 WL 6049830, at *6 (D.N.J. Dec. 20, 2021) (holding that a background-check site could not face liability for a "reputation score" it generated, because the score was based on information originating from others). The same is true if a classifieds website solicits advertisements for illegal services and edits third-party postings to make their unlawful nature more difficult to detect. See H.R. Rep. No. 572, 115th Cong., 2d Sess. Pt. 1, at 5 (2018) (noting that Backpage.com had been "soliciting" sex-related content and "systematically editing" ads to "delete incriminating words"). Thus, when an online service provider substantially adds or otherwise contributes to a third party's information - such that the resulting content can fairly be deemed the joint product of the provider and that party - both may be viewed as "information content providers" with respect to that content, and both may be held accountable even on claims that would treat the platform as the "publisher or speaker" of that content.

B. The Judgment Of The Court Of Appeals Should Be Vacated

The court of appeals correctly held that Section 230(c)(1) bars plaintiffs' claims to the extent they allege that YouTube violated the ATA by publishing videos created by ISIS. But plaintiffs also allege that YouTube violated the ATA by providing targeted recommenddations of ISIS content to others in a way that radicalized viewers or recruited them to ISIS's cause. That theory of liability does not seek to hold YouTube liable for hosting, or failing to remove, unlawful third-party content. Rather, it challenges YouTube's own conduct in ***25** designing and implementing recommendation algorithms that result in the communication of a distinct message from YouTube. Whatever its viability under the ATA, that theory does not implicate Section 230(c)(1) because it does not seek to hold YouTube liable as the "publisher or speaker" of ISIS content.

1. Section 230(c)(1) bars plaintiffs' claims to the extent they are premised on YouTube's failure to block or remove third-party content

Plaintiffs assert claims against Google, as the owner of YouTube, for direct and secondary liability under the ATA. They allege that YouTube - an undisputed provider of an interactive computer service, see Pet. App. 29a; see also *id.* at 193a n.8 - provided resources to, and aided and abetted, ISIS and its terrorist activities. J.A. 176-183. The communication of content is not an essential element of an ATA violation. See 18 U.S.C. 2333(a) and (d). But many of the allegations in plaintiffs' operative complaint assert that the specific *way* YouTube assisted ISIS's terrorist activities was by disseminating ISIS content on its platform.

Plaintiffs allege that ISIS "openly maintained and used official YouTube accounts with little or no interference," J.A. 18, and thereby utilized the "YouTube platform and services to distribute high-production-quality videos, images, and recordings," J.A. 17. Plaintiffs further allege that ISIS used those videos "to issue terroristic threats, attract attention to its terror attacks and atrocities, instill and intensify fear from terror attacks, intimidate and coerce civilian populations, take credit for terror attacks," and "communicate its desired messages about the terror attacks." J.A. 64. In this manner, ISIS allegedly "use[d] YouTube to actually carry out essential communication components of ISIS's ***26** terror attacks," *ibid.*, and to recruit new adherents, J.A. 75-79. ATA claims based on this theory necessarily target YouTube's role as a publisher of harmful or otherwise objectionable third-party content.

Moreover, the videos themselves are "information provided by another information content provider." 47 U.S.C. 230(c)(1). Plaintiffs allege that ISIS and its affiliates filmed, edited, and posted the videos that appeared on their user channels. *E.g.*, J.A. 17, 61, 69, 172. And plaintiffs do not allege that YouTube altered the videos. See J.A. 61 ("Google does not preview or edit content published by users to their own YouTube channels or accounts.").

By asserting ATA claims premised on such allegations, plaintiffs asked the district court to "treat[]" YouTube as a "publisher or speaker" by holding the platform liable for allowing (or failing to remove) unlawful content provided by "another information content provider." 47 U.S.C. 230(c)(1). The court of appeals correctly held that Section 230(c)(1) foreclosed those theories of ATA liability. See Pet. App. 29a-31a, 33a.

2. Section 230(c)(1) does not preclude plaintiffs' claims based on YouTube's targeted recommendations

a. In addition to alleging that YouTube has failed to remove ISIS-related content from its platform, plaintiffs allege that YouTube has violated the ATA by using "computer algorithms" and related features to "suggest[]" to particular users "YouTube videos and accounts" that are "similar" to videos and accounts those users have previously watched. J.A. 173; see J.A. 169. These "suggestions" are located on "the side margin of the user's YouTube page," and suggested videos "automatically load and play when a selected video ends," J.A. 173; the complaint includes a screenshot showing a ***27** sidebar entitled "Up next" with multiple videos listed, J.A. 170. Plaintiffs allege that, through this feature, YouTube has "recommended ISIS videos" to other users, J.A. 169, thereby enabling ISIS to "use[] YouTube as a tool to connect with others and promote its terrorist activity," J.A. 173. Plaintiffs' recommendation-based claims under the ATA would face obstacles on the merits. See p. 32 & n.5, *infra.* But Section 230(c)(1) does not shield YouTube from any liability it might otherwise face for recommending ISIS content.

The distinction between a recommendation and the recommended content is particularly clear when the recommendation is explicit. If YouTube had placed a selected ISIS video on a user's homepage alongside a message stating, "You should watch this," that message would fall outside Section 230(c)(1). Encouraging a user to watch a selected video is conduct distinct from the video's publication *(i.e.*, hosting). And while YouTube would be the "publisher" of the recommendation message itself, that message would not be "information provided by another information content provider." 47 U.S.C. 230(c)(1).

Here, plaintiffs do not contend that YouTube's recommendations take that explicit form. Rather, plaintiffs allege that YouTube "has recommended ISIS videos" by causing ISIS-affiliated content to appear on a user's "Up next" sidebar. J.A. 169-170. But the effect of YouTube's algorithms is still to communicate a message from YouTube that is distinct from the messages conveyed by the videos themselves. When YouTube presents a user with a video she did not ask to see, it implicitly tells the user that she "will be interested in" that content "based on the video and account information and characteristics." J.A. 173. The appearance ***28** of a video in a user's queue thus communicates the implicit message that YouTube "thinks you, the [user] - you, specifically - will like this content." *Force*, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part). And because YouTube created the algorithms that determine which videos will be recommended to which users, the recommendations are bound up with YouTube's own platform-design choices.

A claim premised on YouTube's use of its recommendation algorithms thus falls outside of Section 230(c)(1) because it seeks to hold YouTube liable for its own conduct and its own communications, above and beyond its failure to block ISIS videos or remove them from the site. See pp. 16-17, *supra.* To be sure, those algorithms operate in conjunction with YouTube's display of third-party content. But as explained above, Section 230(c)(1) does not immunize providers from all claims in which third-party content plays a role. See pp. 15-16, *supra.* If a third party unaffiliated with YouTube recommended ISIS videos posted on YouTube, Section 230(c)(1) would not insulate that party from any liability those recommendations otherwise might create. See *Force*, 934 F.3d at 82 (Katzmann, C.J., concurring in part and dissenting in part). Section 230(c)(1) would be likewise inapplicable if YouTube recommended ISIS content posted on a different media platform. Cf. Pet. Br. 30. So too here: a claim premised on YouTube's recommendations, even for content posted on its own platform, does not "seek to punish [YouTube] for the content others post" or "for deciding whether to publish third parties' content." *Force*, 934 F.3d at 77 (Katzmann, C.J., concurring in part and dissenting in part).

***29** b. The court of appeals analyzed the issue differently. The court considered whether, by recommending ISIS videos through the "Up next" feature, YouTube became a creator or developer (and thus an information content provider) of the videos it suggested. Pet. App. 31a-39a. If that were so, Section 230(c)(1) would not protect YouTube from liability even for allowing the videos to remain on the site. The court held that YouTube's recommendation feature does not have that effect, reasoning that the "Up next" algorithm is analogous to a "more sophisticated" search engine. *Id.* at 38a.

The court of appeals was correct in holding that YouTube is not an "information content provider" of any ISIS videos it recommends. That term encompasses persons who participate in the "creation or development of" online "information." 47 U.S.C. 230(f)(3). YouTube's algorithms direct content to particular users only *after* that content has been created, developed, and posted (by third parties) on YouTube's platform. And the larger statutory context reinforces the conclusion that a website's choices about the organization and presentation of user-generated content do not constitute the "creation or development" of that material. See pp. 22-23, *supra.*

For essentially the same reason, courts of appeals have consistently recognized that a website does not act as an information content provider by offering a method to search or filter third-party content. See *Marshall's Locksmith*, 925 F.3d at 1269; *O'Kroley* v. *Fastcase, Inc.*, 831 F.3d 352, 354-355 (6th Cir. 2016), cert. denied, 137 S. Ct. 639 (2017); *Getachew* v. *Google, Inc.*, 491 Fed. Appx. 923, 925-926 (10th Cir. 2012); *Roommates.com*, 521 F.3d at 1175. To be sure, YouTube's algorithms ***30** operate differently from many search engines in that they generate targeted recommendations without specific user queries. But in determining whether YouTube is an "information content provider" of the videos it recommends, the salient point is that the algorithms simply direct to particular users videos that were created and developed without YouTube's involvement.

Thus, YouTube's use of recommendation algorithms does not make it an "information content provider" of the videos it recommends. A court determining YouTube's ATA liability therefore could give no weight to YouTube's hosting of the videos. It does not follow, however, that Section 230(c)(1) shields YouTube from possible ATA liability for making the targeted recommendations themselves. Even if YouTube plays no role in the videos' creation or development, it remains potentially liable for its own conduct and its own communications, to the extent those go beyond allowing third-party content to appear on the site. Such claims fall outside Section 230(c)(1) because they do not seek to hold YouTube liable as a "publisher or speaker." See pp. 16-19, *supra.*

c. An online platform's potential liability in these circumstances is subject to important limitations. Three related limits are especially significant.

First, as this case illustrates, determining Section 230(c)(1)'s application to a particular case is not an all-or-nothing choice. Section 230(c)(1) generally does not shield a website operator from liability for its own communications or other conduct. But despite YouTube's use of allegedly unlawful revenue-sharing and targeted-recommendation features, Section 230(c)(1) continues to protect YouTube from liability for failing to remove ***31** third-party content, including the content it has recommended. See pp. 25-26, 29-30, *supra*; see also *Force*, 934 F.3d at 85 (Katzmann, C.J., concurring in part and dissenting in part).

Second, for purposes of determining whether YouTube can be held liable for the targeted recommendations at issue here, Section 230(c)(1) precludes the court from giving weight to the fact that the recommended videos appear on YouTube's own site. As suggested above (see p. 28, *supra)*, the court instead should analyze plaintiffs' claims as it would if YouTube had recommended ISIS videos posted on *other* sites. In particular, in determining whether plaintiffs have adequately alleged an ATA claim, the court can consider the alleged content of the recommended videos, as it would if YouTube's recommendations of videos on another platform were alleged to constitute prohibited assistance to ISIS. But Section 230(c)(1) would still preclude the court from considering, as a possible form of assistance giving rise to ATA liability, either YouTube's provision of a platform for the posting of the videos or YouTube's failure to block or remove them.

Third, the court of appeals concluded that Section 230(c)(1) precludes liability based on YouTube's targeted recommendations because YouTube is not alleged to give any preference or priority to ISIS content, Pet. App. 37a, but instead "matches what it knows about users based on their historical actions and sends third-party content to users that [YouTube] anticipates they will prefer," *id.* at 38a. That understanding of Section 230(c)(1) was flawed, because the recommendations' status as YouTube's own conduct does not depend on the criteria YouTube considers in directing particular videos to particular users. Those criteria may be ***32** directly relevant, however, in determining YouTube's liability under specific causes of action, including whether plaintiffs have plausibly alleged the elements of aiding-and-abetting liability under the ATA. See U.S. Br. at 17-26, *Twitter, Inc.* v. *Taamneh*, cert. granted, No. 21-1496 (Oct. 3, 2022).

d. Because the court of appeals held that Section 230(c)(1) precluded any ATA claim based on a non-revenue-sharing theory, it did not examine whether plaintiffs could state a claim based on YouTube's recommendation function. Because this Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), the Court should vacate the judgment below and remand the case to allow the court of appeals to conduct that analysis in the first instance, informed by the Court's decision in *Taamneh.* [5]

3. Plaintiffs' alternative theories lack merit

Plaintiffs offer additional rationales for concluding that their recommendation-based ATA claims fall outside Section 230(c)(1). Those theories are unpersuasive.

Reynaldo GONZALEZ, et al., Petitioners, v. GOOGLE LLC., 2022 WL 17650509 (2022)

a. In the courts below, plaintiffs did not dispute that YouTube is a provider of an interactive computer service. See p. 25, *supra.* But in this Court, plaintiffs ***33** argue that YouTube does not act as such a provider when it recommends content to others. Specifically, plaintiffs argue (Br. 44) that YouTube "provides or enables" a user's "access" to a "server," 47 U.S.C. 230(f)(2), only when a user makes a "specific request" to the server, such as by clicking on a video link. And they contend that YouTube is no longer "acting as" a provider of an interactive computer service when it "sends a user third-party material which the recipient had not requested." Br. 43-44.

That argument reflects a misunderstanding of what the statute requires. When a user directs her browser to the youtube.com website, or opens the YouTube app on an Internet-enabled smartphone, YouTube has provided the user with access to its server. And plaintiffs allege that YouTube provides the recommendations at issue on its online platform. See J.A. 169-170, 173.

b. Plaintiffs also argue (Br. 34-39) that YouTube acts as a content creator - and therefore an information content provider - because it generates URLs for user videos and embeds those URLs in hyperlinks and hy-perimages. But the creation of navigational hyperlinks is inherent in the provision of an online platform; a URL is an address where content can be located. See *Reno*, 521 U.S. at 852. A website does not act as an information content provider by taking the technical steps necessary to render user-generated online content visible to others.

A related federal statute enacted a year after the CDA reflects this commonsense understanding. See Child Online Protection Act, Pub. L. No. 105-277, Div. C, Tit. XIV, § 1403, 112 Stat. 2681-736 (1998) (47 U.S.C. 231). Section 231 criminalizes certain "communica-tion[s]" of obscene material "by means of the World ***34** Wide Web." 47 U.S.C. 231(a)(1). The statute specifies that providing "an Internet information location tool" - defined to include "hypertext links" that "refer[] or link[] users to an online location" - does not constitute a "communication." 47 U.S.C. 231(b)(3) and (e)(5). Similarly here, YouTube's creation of location tools does not render it a creator or developer of the linked speech.

c. Plaintiffs also suggest (Br. 34) that a platform becomes a content creator by "notifying a user that something new is available on the website." Although plaintiffs do not specify a YouTube feature they have in mind, their complaint alleges that YouTube automatically "distribute[s]" new videos posted on a channel to that channel's subscribers. J.A. 172. But that mechanism simply implements the user's decision to subscribe to a particular channel and thus to request material from that channel as it becomes available in the future. Such a feature is no different from YouTube hosting the channel in the first place - an act that plaintiffs appear to agree is protected by Section 230. See Br. 26, 42; see also Pet. 2.

***35 CONCLUSION**

The judgment of the court of appeals should be vacated.

Respectfully submitted.

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DECEMBER 2022

Footnotes

1 That common name is technically a misnomer, as the provision appeared in Section 509 of the Telecommunications Act of 1996 (of which the Communications Decency Act was one title), and was enacted as a new Section 230 of the Communications Act of 1934. See Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 137-139.

2 Notwithstanding these common-law principles, the First Amendment limits the imposition of strict liability in this context. See, *e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); see also Dobbs 938-940.

3 In 2018, Congress responded to *Backpage.com* by enacting the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), Pub. L. No. 115-164, 132 Stat. 1253. FOSTA amended Section 230 to add new exceptions to Section 230(c)(1) for certain civil and criminal sex-trafficking and prostitution laws. See § 4(a), 132 Stat. 1254 (47 U.S.C. 230(e)(5)). FOSTA's "Sense of Congress" provision states that Section 230 "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution" or "facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." § 2(1), 132 Stat. 1253. Congress described the amendment as a "clarification" of the statute, not as a change to its original scope. § 2(3), 132 Stat. 1253.

4 Justice Thomas's *Malwarebytes* statement also stated that another CDA provision, 47 U.S.C. 223(d)(1)(B), "expressly imposed distributor liability" enforceable by a civil cause of action at 47 U.S.C. 207, and observed that it would be "odd" for Congress to have created such liability in one provision while eliminating it in another. 141 S. Ct. at 15. But it is not clear that Section 223(d)(1)(B) (which this Court held unconstitutional in *Reno* v. *American Civil Liberties Union*, 521 U.S. 844 (1997)) was civilly enforceable. Section 207 provides a cause of action for a person "claiming to

be damaged by any common carrier," 47 U.S.C. 207, and Section 223(e)(6) states that "nothing in [Section 223] shall be construed to treat interactive computer services as common carriers," 47 U.S.C. 223(e)(6).

5 Because the two cases were dismissed on different grounds, Pet. App. 4a, 17a-18a, the court of appeals evaluated the allegations against the *Taamneh* defendants (including Google) without considering whether Section 230 narrowed the potential theories of ATA liability, see *id.* at 68a-75a. As explained in the government's amicus brief in that case, see U.S. Br. at 13-30, *Taamneh, supra* (No. 21-1496), even when Section 230 is put to the side and all of the allegations against the *Taamneh* defendants are considered, those allegations are insufficient to state a claim for secondary liability under the ATA. Unlike this case, however, *Taamneh* does not present a direct-liability claim.

* The Solicitor General is recused in this case.

Exhibit #3

SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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REYNALDO GONZALEZ, ET AL.,)

Petitioners,)

v.) No. 21-1333

GOOGLE LLC,)

Respondent.)

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Pages: 1 through 163

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Date: February 21, 2023

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IN THE SUPREME COURT OF THE UNITED STATES

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REYNALDO GONZALEZ, ET AL.,)
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v.) No. 21-1333
GOOGLE LLC,)
Respondent.)

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Washington, D.C.

Tuesday, February 21, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

ERIC SCHNAPPER, ESQUIRE, Seattle, Washington; on behalf of the Petitioners.

MALCOLM L. STEWART, Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting vacatur.

LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of the Respondent.

C O N T E N T S

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 21-1333, Gonzalez versus Google.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

Section 230(c)(1) distinguishes between claims that seek to hold an Internet company liable for content created by someone else and claims based on the company's own conduct. That distinction is drawn in each of the three sections of the statute.

First, Section 230(c)(1) is limited to claims that would treat the defendant as a publisher of third-party content. The statute uses "published" in the common law sense. The Fourth Circuit decision in Henderson correctly interprets the statute in that manner and concludes that it involves two elements: the claim must be based on the action of the defendant in disseminating third-party content, and the harm must arise from the content itself.

Second, Section 231 -- 230(c)(1) is limited to publication of information provided by another content provider, which is often referred to as third-party content. The statutory defense doesn't apply insofar as a claim is based on words written by the defendant or other content created by the defendant. In some circumstances, the manner in which third-party content is organized or presented could convey other information from the defendant itself, as the government notes.

Third, Section 230(c)(1) only applies insofar as a defendant was acting as an Internet computer service. Most entities that are Internet computer services do other things as well. This Court technically is an interactive computer service because of its website. It does other things, as it is doing today. Conduct that falls outside that line of activity is outside the scope of this statute.

A number of the briefs in this case urge the Court to adopt a general rule that things that might be referred to as a recommendation are inherently protected by the

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statute, a decision which would require the courts to then fashion some judicial definition of "recommendation."

We think the Court should decline that invitation and should instead focus on interpreting the specific language of the statute.

I welcome the Court's questions.

JUSTICE THOMAS: Mr. Snapper -- Schnapper, just so we're clear about what we're -- your claim is, are you saying that YouTube's application of its algorithms is particular to -- in this case, that they're using a different algorithm to the one that, say, they're using for cooking videos, or are they using the same algorithm across the board?

MR. SCHNAPPER: It's the same algorithm across --

JUSTICE THOMAS: So --

MR. SCHNAPPER: -- the board.

JUSTICE THOMAS: -- so what is -- if -- if it's the same algorithm, I think you have to give us a clearer example of what your point is exactly. The same algorithm to present cooking videos to people who are interested in cooking and ISIS videos to people who are interested in ISIS, racing videos to people who are interested in racing.

Then I think you're going to have to explain more clearly, if it's neutral in that way, how your claim is set apart from that.

MR. SCHNAPPER: Surely. The -- if I might turn to the practice of displaying thumbnails, which is a major part of what's at issue here, the problem -- and the issue is not the manner in which YouTube displays videos. It actually displays, as you doubtless know from having looked at, these little pictures, which are referred to as thumbnails. They are intended to encourage the viewer to click on them and go see a video.

It's the use of algorithms to generate these -- these thumbnails that's at issue, and the thumbnails, in turn, involve a -- involve content created by the defendant.

JUSTICE THOMAS: But the -- it's basing the thumbnails -- from what I understand, it's based upon what the algorithm suggests the user is interested in. So, if you're interested in cooking, you don't want thumbnails on light jazz. You -- so the -- it's -- it's -- it's neutral in that sense. You're interested in cooking. Say you get interested in rice -- in pilaf from Uzbekistan. You don't want pilaf from some other place, say, Louisiana.

The -- so the -- I don't see how that is any different from what is happening in this case. And what I'm trying to get you to focus on is if -- if the -- are we talking about the neutral application of an algorithm that works generically for pilaf and -- and it also works in a similar way for ISIS videos? Or is there something different?

MR. SCHNAPPER: No, I think that's correct, but -- but our -- our view is that the fact that a -- a -- an algorithm is neutral doesn't alter the application of the statute. The statute requires that one work through each of the elements of the defense and see if it applies.

The -- the lower courts, in a couple of cases, have said that -- really disregarding the requirements of the -- of the defense, that as long as an algorithm is neutral, that puts the -- the conduct outside the -- within the protection of the statute. But that's not what the statute says.

The statute says you must be acting -- you must be -- the claim must treat you as a publisher.

CHIEF JUSTICE ROBERTS: Well, but, I mean, the -- the -- the difference is that the Google, You -- YouTube, they're still not responsible for the content of the videos or -- or text that is transmitted.

Your focus is on the actual selection and recommendations. They're responsible that a particular item is there but not for what the item -- item says. And I don't -- I -- I think part -- it may be significant if the algorithm is the same across -- as Justice Thomas was suggesting, across the different subject matters, because then they don't have a focused algorithm with respect to terrorist activities or -- or pilaf or something, and then I think it might be harder for you to say that there's selection involved for which they could be held responsible.

MR. SCHNAPPER: The -- the -- the statute, I think, doesn't draw the distinction that way. The -- the claim here is about the encouragement of -- of -- of users to go look at particular content. And that's the JASTA claim that we'll hear about tomorrow.

And the underlying substantive claim is encouraging people to go look at ISIS videos would be aiding and abetting ISIS. More on that tomorrow.

But, if that's an actionable claim, then the conduct here would fit within it, the -- because certain individuals would be shown these thumbnails, which would encourage them to go look at those videos.

JUSTICE KAGAN: So I think you're right, Mr. Schnapper, that the statute doesn't make that distinction. This was a pre-algorithm statute. And, you know, everybody is trying their best to figure out how this statute applies, the statute which was a pre-algorithm statute applies in a post-algorithm world.

But I think what was lying underneath Justice Thomas's question was a suggestion that algorithms are endemic to the Internet, that every time anybody looks at anything on the Internet, there is an algorithm involved, whether it's a Google search engine or whether it's this YouTube site or -- or -- or a Twitter account or countless other things, that everything involves ways of organizing and prioritizing material.

And -- and that would essentially mean that, you know, 230 -- I guess what I'm asking is, does -- does -- does your position send us down the road such that 230 really can't mean anything at all?

MR. SCHNAPPER: I -- I -- I don't think so, Your Honor. The question -- as you say, algorithms are ubiquitous, but the question is what does the defendant do with the algorithm. If it uses the algorithm to direct -- to encourage people to look at ISIS videos, that's within the scope of JASTA.

It's not different than if back in 1996 a lot of clerks somewhere at Prodigy did this manually and just had a bunch of file cards and they figured out who was interested in what.

The statute would have meant the same thing there that it does now. It's automated, it's at a larger scale, but it doesn't change the nature of what they're doing with the algorithm. So --

JUSTICE SOTOMAYOR: Can I -- I'm sorry, finish.

MR. SCHNAPPER: The -- the -- the brief -- I think the brief for Respondent points to a number of uses of algorithms, for example, to pick the cheapest fare or things like that. That's just outside the scope of the statute. The algorithm is being used there to generate additional content.

So the question is what you do with the algorithm. The fact that you did it with an algorithm doesn't give -- yield a different result than if you had a lot of hard-working people in a -- in an office somewhere doing the same thing.

JUSTICE SOTOMAYOR: You seem --

JUSTICE KAGAN: Well, I -- I -- I guess I --

JUSTICE SOTOMAYOR: Oh.

JUSTICE KAGAN: -- I -- I take the point -- if -- if I could?

JUSTICE SOTOMAYOR: No, no, go ahead.

JUSTICE KAGAN: You know, I take the point that there are a lot of algorithms that are not going to produce pro-ISIS content and that won't create a problem under this statute, but maybe they'll produce defamatory content or maybe they'll produce content that violates some other law.

And your -- your argument can't be limited to this one statute. It has to extend to any number of harms that can be done by -- by speech and -- and so by the organization of speech in ways that basically every provider uses.

MR. SCHNAPPER: Well, if I might turn to the example of you said -- you referred to an algorithm that produces defamation. I may be paraphrasing that wrong.

If the -- if the -- let's say the algorithm generates a recommendation -- a -- a -- a face -- a thumbnail that on its face is -- is benign, it just says interesting information about Frank, you go there, and it's defamatory.

The defendant's not responsible -- or excuse me -- the defense applies to the video itself that you saw. The question would be whether the thumbnail was actionable. And under

-- in most circumstances, thumbnails aren't going to be actionable.

In addition, the -- the thumbnails typically include a snippet from a -- a video or a text or whatever. If the snippet itself were defamatory, again, the defense -- the statutory defense would apply because what was being displayed was third-party content. And so the statute still applies there.

JUSTICE ALITO: Suppose that Google could -- YouTube could display these thumbnails purely at random, but if it does anything than displaying them purely at random, isn't it organizing and presenting information to people who access YouTube?

MR. SCHNAPPER: Yes, but --

JUSTICE ALITO: All right.

MR. SCHNAPPER: -- that doesn't put it within the scope of the statute.

JUSTICE ALITO: Well, does that -- does that constitute publishing?

MR. SCHNAPPER: Yes. So they would --

JUSTICE ALITO: It does?

MR. SCHNAPPER: -- they would be publishing -- they would be publishing the --

the thumbnail.

JUSTICE ALITO: Right.

MR. SCHNAPPER: But -- but, if the -- if the thumbnail isn't itself -- if -- if the -- if the -- they way they're using it is -- is -- is encouraging people to engage --

JUSTICE ALITO: Well, that's a different question, though, isn't it? I -- I don't know where you're drawing the line. That's the problem.

MR. SCHNAPPER: Oh, I see, I see, I see.

JUSTICE ALITO: That's the problem that I see.

MR. SCHNAPPER: Oh.

JUSTICE ALITO: Unless you're -- you're saying that the publication requirement is satisfied under all circumstances unless the thumbnails are presented purely at random.

MR. SCHNAPPER: It's publication even if it's at random, but the -- but the -- the -- the injury in the hypothetical we're talking about about ISIS doesn't follow from the content of the thumbnail. The thumbnail would typically be fairly benign. The harm comes --

JUSTICE ALITO: Yeah, but in every instance, in those instances where the thumbnail is benign, that's not a concern for purposes of this case, but in all those instances where some plaintiff might have some cause of action based on the content of the video that has been posted --

MR. SCHNAPPER: There would have to be a cause of action, as we assert there is in JASTA, for encouraging people to go look at the video. That's a fairly uncommon form of cause of action.

The cause of action -- insofar as the plaintiff asserts a cause of action based on the video itself, that's within the -- that you've been sent to, that's within the scope of the defense.

JUSTICE JACKSON: Is that because of the way in which you're interpreting the statute? I mean, can we -- can we back up a little bit and try to at least help me get my mind around your argument about how we should read the text of the statute?

I took your brief to be arguing and that of those who support you that the statute really is about one kind of publishing conduct, and that is the failure to block or screen offensive content.

Am I right about that? In other words, what you say is covered by Section 230 and that Google could, like -- could rightly claim immunity for is a claim that there was something defective about their ability to screen or block content, that the content is up there and you should be liable for it?

MR. SCHNAPPER: I -- I think we -- we've -- I -- I think that's not our claim.

JUSTICE JACKSON: Okay.

MR. SCHNAPPER: I think we are trying to distinguish between liability for what's in the content that's on their websites that you could access and actions they take to encourage you to go look at it.

JUSTICE JACKSON: Yes, yes, that's your claim. I'm just trying to --

MR. SCHNAPPER: If you encourage it, then we're --

JUSTICE JACKSON: -- understand how you read the statute. Your -- the statute, you say, covers only scenarios in which the claim that's being made is that there's offensive content on the website, that you didn't take it down, that, you know, you failed to screen it out, but if you're making a claim that you're encouraging people to look at this content, that's something different, that's the claim you're making, and it's not covered by the statute.

MR. SCHNAPPER: That's our -- that's the distinction --

JUSTICE JACKSON: All right.

MR. SCHNAPPER: -- we're trying to draw. I mean, it -- the distinction is illustrated by the e-mail in the Dyroff case, which -- which is the precedent that -- that got us here in the Ninth Circuit.

In that case, there was a, I think, 26-word -- 26-word e-mail from the website to an individual which read something like there's something new that's been posted to the question where can I buy heroin in Jacksonville, Florida. To access it, use this URL or use this URL.

It's our contention that that is outside the protection of the statute.

JUSTICE JACKSON: But is that really

different -- I guess I'm trying -- so they would argue, I think, that even assuming that the statute only covered the kinds of things that you say it covers, you know, defective blocking and screening, meaning there's still offensive stuff on your website and you should be liable for it, I think they would say that to the extent your claim is talking about their -- their algorithm that presents the information, it's really the same thing, that you're -- that it reduces -- it's tantamount to saying we haven't, you know, blocked this information, it's still on the website, because algorithms are the way in which the information is presented.

MR. SCHNAPPER: So, if I may make clear, as I may not have done that well, the distinction we're drawing, our claim is not that they did an inadequate job of block -- of keeping things off their -- their computers that you can access from -- from outside or from failure to -- to block it.

It's that that's the -- that's the heartland of the statute. What we're saying is that insofar as they were encouraging people to go look at things, that's what's outside the protection of the statute, not that the stuff was there.

If they stopped recommending things tomorrow and -- and all sorts of horrible stuff was on their website, as far as we read the statute, they're fine. It's the recommendation practice that we think is actionable.

JUSTICE SOTOMAYOR: Can I break down your complaint a moment? There -- the vast majority of it is paragraph after paragraph after paragraph that says they're liable because they failed to take ISIS off their website. I think, as I'm listening to you today, you seem to have abandoned that and -- and are saying they don't have to take it off their website.

MR. SCHNAPPER: That --

JUSTICE SOTOMAYOR: Am I correct about that?

MR. SCHNAPPER: That's exactly right. That -- that --

JUSTICE SOTOMAYOR: So that can't be --

MR. SCHNAPPER: -- is the way we've framed the question presented.

JUSTICE SOTOMAYOR: So that can't be --

MR. SCHNAPPER: We did not advance that claim.

JUSTICE SOTOMAYOR: So you're abandoning that claim, so that can't be aiding and abetting. So I think I'm listening to you, and the only aiding and abetting that you're arguing is the recommendation, correct?

MR. SCHNAPPER: That's correct.

JUSTICE SOTOMAYOR: You're not arguing that they're -- some of these providers create chat rooms or put people together, users together. You're not claiming that that's part of what you're arguing about? The social networking, I want to call it.

MR. SCHNAPPER: Well, that's not at issue in this case.

JUSTICE SOTOMAYOR: It's in --

MR. SCHNAPPER: Face --

JUSTICE SOTOMAYOR: -- tomorrow's case? All right.

MR. SCHNAPPER: Face -- if I can be more specific --

JUSTICE SOTOMAYOR: All right. So

you're limiting -- you're limiting your --

MR. SCHNAPPER: -- Facebook -- Facebook does that.

JUSTICE SOTOMAYOR: All right.

MR. SCHNAPPER: Facebook recommends people --

JUSTICE SOTOMAYOR: Right.

MR. SCHNAPPER: -- which is very difficult to find within the four walls of the statute. Google's created a lot of things but so far not --

JUSTICE SOTOMAYOR: But you're not claiming that in this case?

MR. SCHNAPPER: Not in -- it's not what --

JUSTICE SOTOMAYOR: You're just focusing --

MR. SCHNAPPER: No. This is about content. It not about --

JUSTICE SOTOMAYOR: This is about content. And I just want to focus your complaint so I understand it very clearly. You're saying the -- the YouTube or the "Next up" feature of the algorithm that says you viewed this and so you might like this, it's the "you might like this" that's the aiding and abetting?

MR. SCHNAPPER: Uh --

JUSTICE SOTOMAYOR: What -- what part of what they're doing? Because, I mean, you -- whoever the user is types in something, they get an ISIS video, you say that's okay -- they can't be liable for you, the -- me, the viewer, looking at the ISIS vehicle. But the Internet providers can be liable for what?

MR. SCHNAPPER: Okay. So they're -- they're --

JUSTICE SOTOMAYOR: For showing me the next video that's similar to that?

MR. SCHNAPPER: All right. They're -- it would be helpful perhaps if I distinguish between two kinds of practices that -- that go on at YouTube. The complaint doesn't describe them in detail, but we're fairly familiar with them. So what we can talk --

JUSTICE SOTOMAYOR: I'm glad, but I'm going to be to look at complaint because it can only survive if the complaint is adequate. So you're going to have to tell me where in the complaint you're saying this if I'm going to think about holding them liable. So --

MR. SCHNAPPER: I'm about three questions --

JUSTICE SOTOMAYOR: -- you're going to have to separate out the two things then.

MR. SCHNAPPER: Okay. I'm about three questions behind. Let me ---

JUSTICE SOTOMAYOR: All right.

MR. SCHNAPPER: -- let me try and do my best here. So what we've been talking about up until now is the use of -- of thumbnails to encourage people to look at content -- people who haven't clicked on any video yet. And our contention is the use of thumbnails is -- is the same thing under the statute as sending someone an e-mail and saying: You might like to look at this new video.

Now the "Up next" feature is a different problem, and the problem there is -- is that when you click on one video and you picked that one, YouTube will automatically keep sending you more videos which you haven't asked for.

That, in our view, runs afoul of a different element of the statutory defense, which is that they be acting as an interactive computer service. And when they go beyond delivering to you what you've asked for, to start sending things you haven't asked for, our contention is they're no longer acting as an interactive computer service.

JUSTICE SOTOMAYOR: All right. So, even if I accept that you're right that sending you unrequested things that are similar to what you've viewed, whether it's a thumbnail or an e-mail, how does that become aiding and abetting? I'm going back to Justice Thomas's question, okay, which is, if they aren't purposely creating their algorithm in some way to feature ISIS videos, if they're -- I mean, I can really see that an Internet provider who was in cahoots with ISIS provided them with an algorithm that would take anybody in the world and find them for them and -- and do recruiting of people by showing them other videos that will lead them to ISIS, that's an intentional act, and I could see 230 not going that far.

I guess the question is, how do you get yourself from a neutral algorithm to an aiding and abetting?

MR. SCHNAPPER: Right.

JUSTICE SOTOMAYOR: An intent, knowledge. There has to be some intent to aid and abet. You have to have knowledge that you're doing this.

MR. SCHNAPPER: Yes.

JUSTICE SOTOMAYOR: So how do you get there?

MR. SCHNAPPER: So the -- the -- if -- if the algorithm recommends an ISIS video or it automatically plays it, that -- as we'll see tomorrow, that by itself isn't going to satisfy aiding and abetting.

Aiding and abetting requires knowledge that it's happening. So the elements of the aiding and abetting claim, which we'll be talking about tomorrow, address the question you're asking.

If -- if this was teed up, if they didn't know it was happening, and the other elements of an aiding-and-abetting claim were present, they would not be liable for aiding and abetting.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Just one short question. Your -- your friend on the other side presented an analogy that she thought would be helpful, which -- a book seller that has a table with sports books on it and somebody comes in and says, I'm looking for the book about Roger Maris, and the bookseller says, well, it's over there on the table with the other sports books.

Isn't that analogous to what's happening here? You type in ISIS --

MR. SCHNAPPER: I'm not sure -- I'm not sure where that -- that gets us. I mean, it wouldn't be any different than sending an e-mail saying that.

CHIEF JUSTICE ROBERTS: Well, we'll figure out where we get -- it gets us in a minute. But I just want to know if you think that's a good -- a good analogy.

MR. SCHNAPPER: I -- I -- I'm a little concerned to know where it's taking me. It's an analogy of --

(Laughter.)

MR. SCHNAPPER: -- it's an analogy of sorts.

CHIEF JUSTICE ROBERTS: That's what we

call -- that's what we call questions.

MR. SCHNAPPER: But -- but I still -- I mean, I'm going to -- at some point, I'm going to go yes, but you still have to fit it within the four walls of the statute. Perhaps you could -- you could tell me what lies ahead. I think I could -- I mean, sure, it's an analogy of sorts, but --

(Laughter.)

CHIEF JUSTICE ROBERTS: What lies ahead is, I give up, Your Honor.

MR. SCHNAPPER: -- but I would like to know what it leads up to. Yes. Yeah. But --

CHIEF JUSTICE ROBERTS: No, what lies ahead is the idea that you could look at that and say it's not pitching something in particular to the person who's made the request. It is recognizing that it's a request about a particular subject matter and it's there on the table, and they might want to look at that or they may not want to look at it.

But it's really just a 21st Century version of what has taken place for a long time in many contexts, which, when you ask a question, people are putting together a group of things, not necessarily precisely answering your question. I mean, if somebody said --

MR. SCHNAPPER: Yes -- no, I -- all right. I think -- I think I know where we're going here.

The -- insofar as I -- I go to YouTube and I say show me a cat -- you know, it's a little more complicated than this -- but show me -- show -- -- tell me what cat videos you have, and in responding to that, they're --

CHIEF JUSTICE ROBERTS: Sure. That's an easy case. They give you a bunch of cat videos. You don't have any complaint about something like that.

In this case, if they put in something, say, show me ISIS videos, they would get a bunch of ISIS videos, and you don't have any objection to that given the way the search was phrased.

MR. SCHNAPPER: It -- I have to answer that with precision. If I say, play for me an ISIS video, and they just directly play the video, then what they've done falls within the language of the statute. It's requested, it's purely third-party content, and I would try and be hold -- trying to be holding them liable for displaying that content.

But what actually has happened -- and this is maybe analogous to what goes on to some extent at Twitter, where they might actually literally just show you the thing. But what's happening at YouTube is they're not doing that.

I type in ISIS video, and there are going to be a catalogue of thumbnails which they created. It's as if I went into the bookstore and said, I'm interested in sports books, and they said, we've got this catalogue which we wrote of sports books, sports books we have here, and handed that to me. They created that content.

And -- and -- and if you publish content you've created, you're not within the four walls of the statute. So --

CHIEF JUSTICE ROBERTS: But you would not -- you would not -- under your theory, they would not be liable for the content of the books, they'd be liable for the catalogue?

MR. SCHNAPPER: By -- by -- by providing the catalogue.

CHIEF JUSTICE ROBERTS: Okay. Thank

you.

Justice Thomas, anything further?

JUSTICE THOMAS: What if the YouTube, instead of automatically providing this list, which is hard -- it's hard for me because I don't see this as -- I see these as suggestions and not really recommendations because they don't really comment on them.

But what if you had to click on something like "For more like this, click here"? Would that also be, as far as you're concerned, aiding and abetting or outside this statute?

MR. SCHNAPPER: It's -- so you -- you've played one video and they say click here to see another one?

JUSTICE THOMAS: No, click here if you want suggestions for more like this.

MR. SCHNAPPER: No, suggestions are -- depending how it happens. Let's say they say send me more -- show me more thumbnails. It's outside the statute.

And if I might come back to an earlier part of what's embedded in your question, we aren't asking the Court to adopt a rule that's about recommendations versus suggestions.

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What we're suggesting -- what -- what we're arguing is -- is that this -- is that you take the normal standards in each of the elements and you apply it to what's going on. It doesn't -- it doesn't matter if they're encouraging it.

If -- if -- in terms of aiding and abetting, if someone comes to me and says what's al-Baghdadi's phone call -- phone number, I'd like to call him, and I give him the phone number, I'm aiding and abetting even if I -- I don't say, and I hope you'll join ISIS.

Whether we label it a recommendation or not on our view is not the issue here. We tried to say that in our brief.

JUSTICE THOMAS: Thank you.

MR. SCHNAPPER: Was that responsive? I'm not --

JUSTICE THOMAS: Well, it's responsive, but I don't understand it.

(Laughter.)

JUSTICE THOMAS: You called -- I mean, if you called Information and asked for al-Baghdadi's number and they give it to you, I don't see how that's aiding and abetting.

And I don't understand how a neutral suggestion about something that you've expressed an interest in is aiding and abetting. I just don't -- I don't understand it.

And I'm trying to get you to explain to us how something that is standard on YouTube for virtually anything that you have an interest in suddenly amounts to aiding and abetting because you're in the ISIS category.

MR. SCHNAPPER: Well, again, I'll be answering that probably again tomorrow, but as little -- what you describe without more probably wouldn't.

But, as you'll -- as we'll learn tomorrow, the circumstances are far different than that, that these -- YouTube and these other companies were repeatedly told by government officials, by the media, dozens of times that this was going on, and they didn't do any -- they did almost nothing about it.

That's very different than providing one phone number through Information.

JUSTICE THOMAS: Well, I mean, did --

MR. SCHNAPPER: So it goes to the scope of JASTA, not to 230.

JUSTICE THOMAS: So we've gone from recommendation to inaction being the source of the problem. And this is what I'm -- you know, the -- I understand you're putting it in context, but I -- it's hard for me also to understand where this obligation to take specific actions can lead to an aiding-and-abetting claim.

MR. SCHNAPPER: Well, the interconnection in this case is that -- that we're focusing on the recommendation function, that they are affirmatively recommending or suggesting ISIS content, and it's -- and it's not mere inaction.

Mere inaction might work under aiding and abetting, but we'll get there tomorrow, but -- but the claim that we're focusing on today is that, in fact, they're affirmatively recommending things. You turn on your computer and the -- and the -- the -- the computers at -- at YouTube send you stuff you didn't ask them for. They just send you stuff. It's no different than if they were sending you e-mails. That's affirmative conduct.

CHIEF JUSTICE ROBERTS: Justice Alito?

JUSTICE ALITO: I'm afraid I'm completely confused by whatever argument you're making at the present time.

So, if someone goes on YouTube and puts in ISIS videos and they show thumbnails of ISIS videos, and don't -- don't -- don't tell me anything about the substantive underlying tort claim, if the person is -- if -- if YouTube is sued for doing that, is it acting as a publisher simply by displaying these thumbnails of ISIS videos after a search for ISIS videos?

MR. SCHNAPPER: It is acting as a publisher but of something that they helped to create because the thumbnail is a joint creation that involves materials from a third party and a URL from them and some other things.

JUSTICE ALITO: So, if YouTube uses thumbnails at all, it is acting as a publisher with respect to every thumbnail that it displays?

MR. SCHNAPPER: Yes. Yes. They're -- they're publishing the thumbnails. And the question is, are the thumbnails third-party content, or are they content they've created? And the problem is they are content.

JUSTICE ALITO: Yeah, I mean, if that's your argument, then you're really arguing that -- that this statute does not provide protection against a suit that is in substance based on the third-party-provided content.

MR. SCHNAPPER: No, we're -- we're basing the -- I'm sorry. I don't mean to be so --

JUSTICE ALITO: Okay.

MR. SCHNAPPER: That -- that -- that they -- the particular business model they have involves using this -- these thumbnails, which are materials they've in part created to -- to -- to operate.

Let me --

JUSTICE ALITO: So they shouldn't use thumbnails at all? If they want protection under the statute, they shouldn't use thumbnails?

MR. SCHNAPPER: Let me -- let -- that's -- that's the problem they have with the way the statute's written. So, if I -- if I may give a --

JUSTICE ALITO: Is there any other way they could organize themselves without using thumbnails? I suppose, if you type in "I want ISIS videos," they can just put ISIS video 1, ISIS video 2, and so forth.

MR. SCHNAPPER: That's the technical problem they have.

JUSTICE ALITO: Well, would that be acting as a publisher if they did that?

MR. SCHNAPPER: Yes, but they'd be publishing third-party content because the video itself is the content. If I might -- if I might respond --

JUSTICE ALITO: Okay. I just -- I -- I -- I have one final question. It's a technical question and probably better addressed to Ms. Blatt.

Is it your contention that everybody who uses YouTube and searches for a video involving a particular subject will be automatically presented with thumbnails that are related to that regardless of that user's YouTube setting, preferences, preferences that YouTube allows you to --

MR. SCHNAPPER: I -- I -- I don't -- I don't know. The practices are too varied. I don't know. But, if I -- if I --

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JUSTICE ALITO: You don't know if somebody uses YouTube, they can -- can -- do they have -- is there a function that allows them not to be presented with similar videos?

MR. SCHNAPPER: I -- I don't know. I mean, I've gone onto -- on YouTube and never seen that, but I -- I wouldn't --

JUSTICE ALITO: Uh-huh. Okay.

MR. SCHNAPPER: The functions there are widely varied. But if I might make a broader point about the way you framed that question?

JUSTICE ALITO: I -- I think you -- you answered my question. Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I -- I do. This has gone further than I thought or your position has gone further than I thought.

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

And I thought that you started by telling me, if I put in ISIS and they just give me a download of information, the Internet provider is not liable, correct, under (c)(1)? I just read to you (c)(1), correct?

MR. SCHNAPPER: It -- it depends what the information is they give you.

JUSTICE SOTOMAYOR: If they give me everything that has --

MR. SCHNAPPER: If they give you information they created --

JUSTICE SOTOMAYOR: No, they have --

MR. SCHNAPPER: -- they're not protected.

JUSTICE SOTOMAYOR: So you are going to the extreme. Assume I don't think you're right, I think you're wrong, that if I put in a search and they give me materials that they believe answers my search, no matter how they organize it, that they're okay. Do you survive -- does your complaint survive if I believe 230 goes that far?

MR. SCHNAPPER: So it depends on what materials they present you with. If -- if all they presented you with -- Twitter would maybe be a cleaner example -- is materials created by third parties, they -- what they've published is third-party materials, and they're good.

If they present you with things that they wrote, at the other extreme, then they're not protected because what they presented is not third-party content.

JUSTICE SOTOMAYOR: So why do you think the thumbnails are -- I type it in, they give me a thumbnail of everything they think answers my inquiry, the suggestion box.

MR. SCHNAPPER: Yes.

JUSTICE SOTOMAYOR: Why are they liable?

MR. SCHNAPPER: Because a thumbnail is not exclusively third-party material. It's a joint operation, and you can find -- if you look at the thumbnail, it'll have a picture, which comes from the third party, it has an embedded URL, which comes from the defendant, and it might have some information below the --

JUSTICE SOTOMAYOR: The URL tells you where to find it, correct?

MR. SCHNAPPER: Sorry?

JUSTICE SOTOMAYOR: The URL tells you where to find it? It's a computer language that tells you this is where this is located?

MR. SCHNAPPER: Yes, but it is information within the meaning of the statute. This is no different than an e-mail which writes it out for you.

JUSTICE SOTOMAYOR: If I don't accept your line --

MR. SCHNAPPER: Yeah.

JUSTICE SOTOMAYOR: -- assume that you've lost on that -- with that line.

MR. SCHNAPPER: Yes.

JUSTICE SOTOMAYOR: I gave you an example earlier of an Internet provider working directly with ISIS and doing an algorithm that -- teaching them how to do an algorithm that will look for everybody who is just ISIS-related. There's more a collusion in the creation than a neutral algorithm.

How do I draw the line between not accepting your point about the thumbnails and going to the other extreme of active collusion? Because there has to be a line somewhere in between. It can't be merely because you're a computer person that you can create an algorithm that discriminates against people. You have no problem with that, right? If a -- if a --

MR. SCHNAPPER: The writing of the algorithm would probably constitute aiding and abetting --

JUSTICE SOTOMAYOR: Exactly. If you write one that discriminated against people or a user, you're probably going to be liable.

MR. SCHNAPPER: I'm not sure, as we describe it, it would fall outside the four walls of the defense. If you write an algorithm that -- that in response -- that in -- that -- the -- the way you implement it's --

JUSTICE SOTOMAYOR: If you write an algorithm --

MR. SCHNAPPER: -- going to put you outside the defense. Yes.

JUSTICE SOTOMAYOR: -- if you write an algorithm for someone that, in its structure, ensures the discrimination between people, a dating app, for example, someone comes to you and says, I'm going to create an algorithm that inherently discriminates against people, it won't match black people to white people, Asian people to Hispanics, it's going to discriminate, you would say that Internet provider is discriminating, correct?

MR. SCHNAPPER: I would -- what they did -- the way the distinction played out would be important, though. They would -- you know, if -- if they're -- they would have to fall outside of one of the elements of the claim.

It's hard to do this in the abstract.

JUSTICE SOTOMAYOR: All right.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Mr. Schnapper, can I give you three kinds of practices and you tell me which gets 230 protection and which doesn't?

So one is the YouTube practices that you're complaining of, and we know you think that that does not get 230 protection.

A second would be Facebook or Twitter or any entity that essentially prioritizes items. So you're on Facebook and certain items are prioritized on your news feed, or certain tweets are prioritized on your Twitter feed, all right, and that there's some algorithm that's doing that and that's amplifying certain messages rather than other messages on your feed. That's the second.

And then the third is just a regular search engine. You know, you put in a search and something comes back, and in some ways, you know, that's one giant recommendation system. Here's the first item you should look at. Here's the second item you should look at.

So are all three of those not protected, or what happens to my second and third? Are they protected or not protected? And if they're -- and if they are protected, what's the difference between them and your practices?

MR. SCHNAPPER: Certainly. So let me -- let me start with the search engine. The -- the -- there's a lot of discussion on search engines, but there's not a specific provision in the statute that says search engines are protected. The question is, do they fit within the language of the statute?

So, if I ask a search engine for stories about John Doe and it gives me a list and, if I click on one of them, it turns out to be defamatory, they're not liable because they --

JUSTICE KAGAN: Well, they just gave it to you. It's the first thing. They just prioritized it. They think it's really a great one to click on.

MR. SCHNAPPER: The -- the mere fact -- there are three -- multiple questions here. First, are they liable just because what you -- you -- you clicked on turned out to be defamatory? The answer we think is no.

Secondly, what if the snippet that they took from the John Doe document said John Doe is a shoplifter? And the answer is they're not liable because they didn't write that. It's publishing third-party content.

The third question is, could they be liable for the way they prioritize things? And the answer is I think so. It's going to depend how -- what happened. And the example, I could --

JUSTICE KAGAN: So even all the way to the -- to the straight search engine, that they could be liable for their prioritization system?

MR. SCHNAPPER: Yes, there was -- let me --

JUSTICE KAGAN: Okay.

MR. SCHNAPPER: If I might continue -- if I --

JUSTICE KAGAN: No, I appreciate the

-- the -- go ahead. I'm sorry.

MR. SCHNAPPER: Those are the facts which led the European Union to fine Google 2.3 billion euros, because they used prioritization to wipe out competition --

JUSTICE KAGAN: Okay. So here's --

MR. SCHNAPPER: -- for things they were selling.

JUSTICE KAGAN: Yeah, so I don't think that a court did it over there, and I think that that's my concern, is I can imagine a world where you're right that none of this stuff gets protection. And, you know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear.

On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet.

(Laughter.)

JUSTICE KAGAN: And I don't have to -- I don't have to accept all Ms. Blatt's "the sky is falling" stuff to accept something about, boy, there is a lot of uncertainty about going the way you would have us go, in part, just because of the difficulty of drawing lines in this area and just because of the fact that, once we go with you, all of a sudden we're finding that Google isn't protected. And maybe Congress should want that system, but isn't that something for Congress to do, not the Court?

MR. SCHNAPPER: Well, I -- I think the -- the -- the -- the line-drawing problems are real. No one minimizes that. I think that the task for this Court is to apply the statute the way it was written.

And if I might return to a point that Justice Alito made, much of what goes on now didn't exist in 1996. The statute was written to address one or two very specific problems about defamation cases, and it drew lines around certain kind of things and it protected those.

It did not and could not have written -- been written in such a way to protect everything else that might come along that was highly desirable. Congress didn't adopt a regulatory scheme. They protected a few things. It will inevitably happen, it has happened, that companies have devised practices which are maybe highly laudable, but they don't fit within the four walls of the statute.

That will continue to happen no matter what happens -- what you do. And the answer is, when -- when someone devises some new -- some new practice that may be highly desirable but doesn't fit within the four walls of the statute, the -- the industry has to go back to Congress and say: We need you to broaden the statute because you wrote this to protect chat rooms in 1996, and we want to do something that doesn't fit within the statutes.

And -- and using thumbnails would be a perfect example of that.

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Mr. Schnapper, I just want to make sure I understand, as you say, the statutory language and how this case fits with it, and if we could start with Section 230(f)(4), which defines the term "access software provider." It includes, among other things, picking, choosing, analyzing, or digesting content.

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And we might in another world in our First Amendment jurisprudence think of picking and choosing, analyzing or digesting content as content providing, but the statute seems to suggest that's not what it is, it's something different in this context, in this statutory context, and it's protected.

Do you agree with that?

MR. SCHNAPPER: No. Let -- and I -- if I might explain why?

JUSTICE GORSUCH: Briefly.

MR. SCHNAPPER: I'll do my best. The -- the language that you refer to in Section (f)(4) doesn't apply here.

JUSTICE GORSUCH: No, I -- I -- I -- we'll get to that in a minute. But let's just take that as given, okay, that I think that what, say, Google does in picking, choosing, analyzing, or even digesting content just makes it an access software provider. Let's take that as given. And so that would normally be protected activity.

But (f)(3) carves out a scenario where you become a content provider, and that's something different in my mind to picking, choosing, analyzing, or digesting content, okay? Let's just take those two premises as given.

MR. SCHNAPPER: Okay.

JUSTICE GORSUCH: All right? You got to do something beyond picking, choosing, or analyzing or digesting content, which is what search engines typically do, even as I understand it. You've got to do something beyond that.

As I take your argument, you think that the Ninth Circuit's Neutral Tools Rule is wrong because, in a post-algorithm world, artificial intelligence can generate some forms of content, even according to Neutral Rules.

I mean, artificial intelligence generates poetry, it generates polemics today. That -- that would be content that goes beyond picking, choosing, analyzing, or digesting content. And that is not protected.

Let's -- let's assume that's right, okay? Then I guess the question becomes, what do we do about YouTube's recommendations?

And -- and as I see it, we have a few options. We could say that YouTube does generate its own content when it makes a recommendation, says up next. We could say no, that's more like picking and choosing.

Or we could say the Ninth Circuit's Neutral Tools test was mistaken because, in some circumstances, even neutral tools, like algorithms, can generate through artificial intelligence forms of content and that the Ninth Circuit wasn't sensitive to that possibility and remand the case for it to consider that question.

What's wrong with that?

MR. SCHNAPPER: Well, it's not our theory, but it's --

(Laughter.)

MR. SCHNAPPER: If the alternative is what Ms. Blatt will be telling you, I'll --

JUSTICE GORSUCH: I'm not asking you, you know, hey, I'll win at any cost.

MR. SCHNAPPER: No, there's nothing wrong with it.

JUSTICE GORSUCH: I'm asking you what's -- what's -- whether that is a correct analysis of the statutory terms you keep referring us to --

MR. SCHNAPPER: Yes.

JUSTICE GORSUCH: -- or whether it is not.

MR. SCHNAPPER: Yes, yes, yes. As -- as we've said, this now is close to something we set out in our brief, which is that the -- that the algorithm could create things on its own. It could create a catalogue of ISIS videos, which would be analogous to a compilation under Section 101 of the Copyright Act.

A compilation is a distinct entity, it's copyrightable, even if the elements of it were not. So, yes, absolutely, the software could create something like that. It would not be third-party content, and, therefore, it would fall outside the scope of the statute.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: Just to pick up on Justice Gorsuch's questions, the idea of recommendations is not in the statute. And the statute does refer to organization and the definition, as he was saying, of interactive computer service means one that filters, screens, picks, chooses, organizes content.

And your position, I think, would mean that the very thing that makes the website an interactive computer service also mean that it loses the protection of 230. And just as a textual and structural matter, we don't usually read a statute to, in essence, defeat itself.

So what's your response to that?

MR. SCHNAPPER: My response is that the text doesn't apply here. Let me explain why. The -- the element in the -- the list in -- in (f)(4) refers to only one of the three kinds of interactive computer services in (f)(2).

In (f)(2) -- and this is -- this is on page 267 of the petition appendix. (f)(2) says an interactive computer service means -- and there -- it gives you three candidates, you've got one of them -- an information service, a system, or an access software provider.

Now YouTube is one of the first two. It doesn't -- it's not a software provider. The definition in (f)(4) only delineates who is an access software provider. It doesn't apply to who's an information system or service. And that was Congress's choice.

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Congress didn't say you're an interactive -- you're a service, an information service or a system if you do those things. It said you're only -- those things only bring you within the four walls of interactive computer service if you're -- if you're a software provider. And -- and that made sense in the context of what was happening in 1996.

In 1996, if you wanted to go online, you would typically sign up with CompuServe or Prodigy and they would literally give you diskettes. They would sell -- they would be selling you software.

And -- and this provision in (f)(4) is about that activity. That's not what's happening here.

JUSTICE KAVANAUGH: Well, just -- just to go back to 1996 and maybe pick up on Justice Kagan's questions earlier, it seems that you continually want to focus on the precise issue that was going on in 1996, but then Congress drafted a broad text, and that text has been unanimously read by courts of appeals over the years to provide protection in this sort of situation and that you now want to challenge that consensus.

But the amici on the other side say: Well, to do that, to pull back now from the interpretation that's been in place would create a lot of economic dislocation, would really crash the digital economy with all sorts of effects on workers and consumers, retirement plans and what have you, and those are serious concerns and concerns that Congress, if it were to take a look at this and try to fashion something along the lines of what you're saying, could account for.

We are not equipped to account for that. So are the predictions of problems overstated? If so, how? And are we really the right body to draw back from what had been the text and consistent understanding in courts of appeals?

MR. SCHNAPPER: Well, I -- our position is that the text doesn't -- doesn't say this. With regard to the issue of what we've come to call recommendations, this isn't a longstanding, well-established body of precedent. It's really three decisions: the decision in this case, the Dyroff decision, and

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Force. And -- and of the eight justices to --

JUSTICE KAVANAUGH: What about the implications then? Go to that, the implications for the economy, that you have a lot of amicus briefs that we have to take seriously that say this is going to cause a lot of economic dislocation in the country.

MR. SCHNAPPER: I mean, I'd say a couple things in response to that. The first one is, on a close reading of the amicus briefs, it's clear that they are urging the Court to hold that a wide variety of different kinds of things are protected. They're -- they're inviting the Court to adopt a rule that recommendations are protected and that whatever they're doing would qualify as a recommendation.

The -- you can't --

JUSTICE KAVANAUGH: Well, I think they're saying a recommendation is a recommendation, something express. And your -- your whole thing is the algorithms are an implied recommendation. And they're saying: Well, they're not an express recommendation. That -- that -- so --

MR. SCHNAPPER: I'm --

JUSTICE KAVANAUGH: But, in any event, why don't we focus on the question.

MR. SCHNAPPER: Yes. Yes.

JUSTICE KAVANAUGH: Do you -- do you challenge the -- the basic point?

MR. SCHNAPPER: I think -- I think -- yes.

JUSTICE KAVANAUGH: And so --

MR. SCHNAPPER: We -- we do, on -- on a couple grounds. One of them is that I'm not sure all these decisions -- these briefs are distinguishing as we have today between liability because of the content of third-party materials and the recommendation function itself.

A -- a distinction between more and less specific suggestions --

JUSTICE KAVANAUGH: What would the difference be in liability, in damages?

MR. SCHNAPPER: I'm sorry, between which two things?

JUSTICE KAVANAUGH: The third-party content and the recommendation.

MR. SCHNAPPER: Well, most of the time the recommendations isn't going to --

JUSTICE KAVANAUGH: Like how would the money at the end of the day differ if you are successful?

MR. SCHNAPPER: It might not be. But most recommendations just aren't actionable. I mean, there -- there is no cause of action for telling someone to look at a book that has something defamatory in it.

JASTA, the statute we're talking about tomorrow, is unusual in that recommendations could run you afoul of the statute, but there are very few claims that are like that. So it's -- it's a very different kind of situation. It's -- the implications of this are limited because the kinds of circumstances in which a recommendation would be actionable are limited.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: I'd like to take you back, Mr. Schnapper, to Justice Sotomayor's questions about the complaint. It seems to me that the complaint in this case is materially indistinguishable from the complaint in tomorrow's case. Do you agree? Same aiding and

--

MR. SCHNAPPER: The complaint in which case? I'm sorry.

JUSTICE BARRETT: In tomorrow's case, in the Taamneh case, the Twitter case, and this one.

MR. SCHNAPPER: Pretty much.

JUSTICE BARRETT: So they're both relying on the same aiding-and-abetting theory. So, if you lose tomorrow, do we even have to reach the Section 230 question here? Would you concede that you would lose on that ground here?

MR. SCHNAPPER: No. The -- there was a motion to dismiss in tomorrow's case on JASTA grounds. It didn't get decided. So, if we lose tomorrow, they'll be -- the defense will be free in this case to -- to move to dismiss, but we'd be entitled to try to amend the complaint in this case to satisfy whatever standard you establish tomorrow.

JUSTICE BARRETT: Okay. Let me ask you this. I'm switching gears now. So Section 230 protects not only providers but also users. So I'm thinking about these recommendations. Let's say I retweet an ISIS video. On your theory, am I aiding and abetting and does the statute protect me, or does my putting the thumbs-up on it create new content?

MR. SCHNAPPER: I -- we don't read the word "user" in -- that broadly. There's not been a lot of litigation about this.

We -- we think the word "user" is there to deal with a situation in which one entity accesses a -- a -- a server, YouTube, for example, and then someone else uses that entity, like when I go to FedEx Office, FedEx Office is the user that is accessing my e-mail, and the statute protects them when I look at the FedEx computer and find the defamatory --

JUSTICE BARRETT: Well, let's say that I disagree with you. Let's say I'm an entity that's using the service -- the service, so I count as a user. You know, my computer is accessing the servers when I retweet the image. On your theory, could I be liable under JASTA for aiding and abetting without -- do I lose 230 protection --

MR. SCHNAPPER: Right. Right. Right.

JUSTICE BARRETT: -- if I created new content?

MR. SCHNAPPER: The problem -- whether it's enough for JASTA is a separate --

JUSTICE BARRETT: Okay. Right. Fair enough.

MR. SCHNAPPER: The question is, is it outside of 230?

JUSTICE BARRETT: Is it outside of 230.

MR. SCHNAPPER: Right. And our view is the statute doesn't mean anyone who's a user who re -- who tweet -- who -- who conveys third-party liable is protected. If you -- let's say that you -- you read a book, and it says John Doe is a shoplifter, and you send an e-mail that says John Doe is a shoplifter, you're using, you know, the Internet. You're using the -- the e-mail system.

But nobody thinks that -- that Section 230 gives -- is a blanket exemption for defamation on the website as long as you're quoting somebody else.

Retweeting is a very automatic way of doing it, but if you start down that road, you'd end up having to hold that -- that anytime I send a defamatory e-mail, I'm protected as long as I'm quoting somebody else. And I don't think anybody would --

JUSTICE BARRETT: Well, I guess I don't understand -- I mean, let's see, I guess I don't understand logically why your argument wouldn't mean that I was creating new content if I retweeted or if I liked it or if I said check this out. Why --

MR. SCHNAPPER: Well -- well, you --

JUSTICE BARRETT: -- why wouldn't that?

MR. SCHNAPPER: -- you would be, but I'm advancing an argument that gets to the same place, which is you're -- you're not a user within the meaning of the statute just because you use -- you go on e-mail or -- or YouTube or -- or on Twitter.

JUSTICE BARRETT: Let's say I disagree with you. Let's say that I think you're a user of Twitter if you go on Twitter and you're using Twitter and you retweet or you like or you say check this out. On your theory, I'm not protected by Section 230.

MR. SCHNAPPER: That's content you've created.

JUSTICE BARRETT: That's content I've created. Okay. And on the content creation point, let's imagine -- it seems like you're putting a whole lot of weight on the fact that these are thumbnails, and so it's something that YouTube separately creates.

MR. SCHNAPPER: Yes.

JUSTICE BARRETT: What if they just screenshot? They just screenshot the ISIS thing. They don't do the thumbnail. Then are they --

MR. SCHNAPPER: That's -- that's pure third-party content.

JUSTICE BARRETT: That's pure third -- so this is just about how YouTube set it up?

MR. SCHNAPPER: That's -- that's -- that's correct in this context. And it gets back to the conversation we were having earlier about this is a new technology that didn't exist in 1996, and rather than ask Congress to write the statute to cover it, they just went ahead and did it.

JUSTICE BARRETT: Okay. And last question, turning to the statutory text. So it seems to me that some the briefs in this case are focusing on what it means to treat someone as a publisher, treat an entity as a publisher. You're not really focusing on that and the traditional editorial functions argument. I mean, you're really focusing on the content provider argument, correct?

MR. SCHNAPPER: No. Well, we've advanced views as to each element of the claim. Our --

JUSTICE BARRETT: But today you've really been honing in on this are you actually creating content or just presenting third-party content.

MR. SCHNAPPER: Well, I've been answering -- that's where the questions --

JUSTICE BARRETT: Yes.

MR. SCHNAPPER: -- have taken us, but -- but -- but our -- our view would be that you're not being treated as a publisher of the video just because you -- you publish the thumbnail.

JUSTICE BARRETT: Okay. Thank you.

MR. SCHNAPPER: You're not being harmed by the thumbnail.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So I guess -- I guess I'm thoroughly confused, but let me -- let me try to -- let me try to understand what your argument is. I think that the confusion that I'm feeling is arising from the possibility that we're talking about two different concepts and conflating them in a way.

I thought that Section 230 and the questions that we were asking in this case today was about whether there was immunity and whether Google could claim the defense of immunity and that that's actually different than the question of whether whatever it does gives rise to liability. That is, is there liability for aiding and abetting? That's tomorrow's question.

And to the extent that you keep coming back to this notion of creating content or whatnot, I feel like we're conflating the two in a way that I'd like to just see if I can clear up from my perspective.

Your brief says that the immunity question, Section 230(c)(1)'s text is most naturally read to prohibit courts from holding a website liable for failing to block or remove third-party content.

And I read the arguments in your brief and I read what you said about Stratton Oakmont and the sort of background, and so I thought your argument was that the -- that you can only claim immunity, Google, if the claim that's being made against you is about your failing to block or remove third-party content.

To the extent we are making a claim about recommendations or doing anything else, any of the, you know, hypotheticals that people have brought up, that's outside of the scope of the statute because, really, the statute is narrowly tailored in a way to protect Internet platforms from claims about failing to block or remove, right? I mean, that's what I thought was happening.

All right. So, if that's true, then all the hypotheticals and the questions about are you aiding and abetting if Google, you know, has a priority list or if there's recommendations, maybe, but that's not in the statute because we're just talking about immunity. We're just talking about whether or not you've made a claim for failing to block or remove in this case today related to Section 230.

Am I doing too much of a separation here in terms of how I'm conceiving of it?

MR. SCHNAPPER: Well, let me articulate what -- what the contention is that we are advancing, and I think it's not quite the way you described it. The contention we're advancing is that a variety of things that we're loosely characterizing as recommendations fall outside of the statute.

JUSTICE JACKSON: Why?

MR. SCHNAPPER: Because, in some of them, the defendant's not being treated as the publisher; because, in some of them, third-party content's being -- content is being created by the defendant; because, in some of them, the defendant's not acting as an interactive computer service.

JUSTICE JACKSON: I see. So I -- I thought -- I thought you were -- the answer to why was because the statute is limited, because the statute only focuses on certain kind of publisher conduct, and to the extent that -- that they're doing anything else, recommending or whatever, that's not going to be covered by this statute.

But you're sort of saying, well, let's look at what they're actually doing and it may fit in or it may not. You're not sort of hewing very closely to the understanding of the original scope of the statute in terms of what it is trying to immunize these platforms against.

MR. SCHNAPPER: I -- I -- I think we're trying to do that in somewhat more of a particularized way, that is, to -- to identify -- to work our way through each of the three specific elements of the statute, each tied to particular language, to --

JUSTICE JACKSON: But I've got to tell you I don't see three elements in this. I mean, part of me -- part of this is all the confusion, I think, that has developed over time about the meaning of the statement in the statute, right?

I don't see three elements. I see literally a sentence, and the sentence in my view reads as though they're trying to actually direct courts to not impose publisher liability, strict publisher liability, against the backdrop of Stat -- of Stratton Oakmont.

So there's like some -- somehow we've gotten to a world in which we've teased out three elements and we're trying to fit it all into that, when I thought there was sort of a very simple, sort of straightforward way to read the statute that you articulate in your brief, which is this is really -- this statute, (c)(1), is really just Congress trying to not disincentivize these platforms for blocking and screening offensive conduct.

And so what they said is let's look at (c)(1). Let's have (c)(2). Let's have a system in which a system -- a platform is not going to be punished, strict liability for just having offensive conduct on their website and, if they try, if they try to screen out, we're not -- we're going to say you won't be responsible for that either. That's (c)(2).

But it really doesn't speak to whether you do a recommendation or whether you have an algorithm that does priorities or any of these other things. That's how I thought that -- that at least I was looking at the statute in light of its purposes and history and -- and -- and Stratton Oakmont and all of that, in which case I think you would win unless your recommendation's argument really is just the same thing as saying they are hosting ISIS videos on their website.

MR. SCHNAPPER: Well, I -- I think -- I think we do have to be drawing that distinction. But with regard to your question about the three elements, the -- the text does take you there.

It says, if you track the briefs, probably of either side, the -- part of what we're arguing about, the meaning of treat as a publisher because that's the first couple of words of the statute.

Then we're arguing about did they create the content because publisher has to be of -- has to be of information provided by another content provider. So we have to parse out the meaning of that.

And then it refers to the defendant as an interactive computer service. And we have to parse out the meaning of, well, what does that mean? So we -- we are forced to -- this -- this -- the language of the statute has those three components. And it -- although the overall purpose is I think as you described it, the language is more complex and particularized.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING VACATUR

MR. STEWART: Thank you, Mr. Chief Justice and may it please the Court:

I'd like to begin by addressing the Roger Maris hypothetical because I -- I think it illustrates our position and limits on our position.

Imagine in a particular state there was an unusually protective law that said no books at sellers shall be held liable on any theory for the content of any book that it sells and then the scenario that the Chief Justice described occurred, the person was asked where is the Roger Maris book and said it's over on that table with the other sports book -- books.

Now, if the book seller was sued for making that statement, our position would be there's no way textually that the immunity statute would apply. This is a statement about the book, not the contents of the book.

Now, the statement "the book is over there" is so obviously innocuous that it might seem like pedantry to quibble about should the dismissal of the suit be based on immunity or for failure to state a claim.

But a court in thinking about the possibility of harder cases down the road should distinguish carefully between liability for the content itself, liability for statements about the content.

And the other one other thing I would say is, if the consequence of saying it's over there was that the book seller lost its immunity for the content of the book, that would be a big deal. But our position on 230(c)(1) is nothing like that.

Our position is that the Internet service provider can be sued for its own organizational choices, but the fact that it makes organizational choices doesn't deprive it of the protection it receives for liability based on the third-party content.

I welcome the Court's questions.

JUSTICE THOMAS: Well, I'm still confused. But what if the book seller said it's over there on the table with the other trustworthy books?

MR. STEWART: I mean, I think at that point you would be asking could it conceivably be an actionable tort to describe the book as trustworthy.

JUSTICE THOMAS: Well, we're putting a lot of weight on organization. But doesn't it really depend on how we're organizing it and on what the basis of the organization -- for example, we could say this set -- you could organize it on the basis of what's more trustworthy than -- than something else.

MR. STEWART: I think that might matter with respect to whether there was substantive liability under the underlying cause of action. It -- it shouldn't matter for purposes, either of the hypothetical immunity I -- statute I described, which focuses exclusively on the contents of the books or for 230(c)(1).

Now, Mr. Schnapper said in a colloquy earlier that he thought the allegations in his complaint are basically the same as those in the Twitter complaint. And the government is arguing in Twitter that those allegations are not sufficient to state a claim under the Antiterrorism Act.

So our -- our interest in 230(c)(1) is not in allowing this particular suit to go forward. It is in preserving the distinction between immunity -- protection for the underlying content and protection for the platform's own choices.

JUSTICE THOMAS: Well, I -- I just think it's just going to be difficult. How would you respond to Justice Gorsuch's hypothetical about the artificial intelligence creating content organizational decisions?

MR. STEWART: I think the organizational decisions could still be subjected to a suit. Whether you think of them as recommendations or simply as the platform -- the operation of the platform, it's still the platform's own choice.

And if you ask how did a particular video wind up in the queue of a particular individual, it -- it could be some -- some sort of artificial intelligence that was making that choice but it would have to do with the -- YouTube's administration of its own platform.

It wouldn't be a choice made by any third-party who had posted it, because third parties who post on YouTube don't direct their videos to particular recipients.

And -- and I -- I do want to emphasize this -- this theory, this rationale applies even in the most mundane circumstances. For instance, if you do a Google search on the name for a famous person and you misspell the name slightly, you still get lots of content about that person. Google knows that it's smarter than we are and it knows that -- more about what we want than the literal terms of our search might suggest.

I went to the Court's website and used the docket search function and typed in Google and left off the -- the final E and I got a message that said no items find -- found. In order to call up the docket for this case, you have to spell Google exactly right.

Now, the choice between those two modes of operating the platform, it's extraordinarily unlikely, almost inconceivable that it could ever give rise to legal liability, but those are choices made by the platforms themselves. They are not choices made by any third-party. They just don't implicate 230(c)(1).

And the choice -- any conceivable lawsuit about the decision to use one mode of operation rather than another, presumably, would be dismissed on the merits. But --

JUSTICE KAGAN: I -- I think the problem, Mr. Stewart, with minimizing what your position is is that in trying to separate the content from the choices that are being made, whether it's by YouTube or anyone else, you can't present this content without making choices. So in every case in which there is content, there's also a choice about presentation and prioritization.

And the whole point of suits like this, is that those choices about presentation and prioritization amplify certain message -- messages and thus create more harm.

Now I appreciate what you're saying is like, well, that doesn't mean that you're going to have liability in every case, but -- but -- but still, I mean, you are creating a world of lawsuits. Really anytime you have content, you also have these presentational and prioritization choices that can be subject to suit.

MR. STEWART: Let -- let me say a couple things about that. The first thing I would say is you could make substantially the same argument about employment decisions; that is, in order for YouTube to operate, it has to hire employees.

But Ms. Blatt acknowledges in the -- the brief that employment decisions wouldn't be shielded by 230(c)(1) if there was an allegation of unlawful discrimination for instance.

So the fact that the platform has to make some sorts of organizational choices doesn't mean it's immune from suit in the rare instance where it might make a choice that violates some other provision of law.

The second thing is that the concern we have in mind are things like imagine a hypothetical job matching service like Indeed, where job applicants can post their qualifications and potential employers can post their own listings and the website will match them up.

And suppose it came to light that the job -- the job search mechanism was routing the high-paying, more professional jobs disproportionately to the white applicants and the lower paying jobs to the black applicants even when the qualifications were the same.

At -- at a general level, you could describe that as choices about which content would go to which users. But when we saw that kind of stark impropriety in the criteria that the platform was -- was using, I think we would say there has to be -- assuming it violates applicable law, 230(c)(1) really shouldn't be protecting that. That's not -- the complaint we have here is not to the content itself or the presence of the third-party job postings on the platform. The complaint is about the use of illicit criteria to decide which users will get which content.

And our point is, in the more innocuous cases or in the borderline cases where the criteria seem a little bit shaky but it's not clear whether they violate any applicable law, that -- that choice ought to be made based on the law that the plaintiff invokes as the cause of action.

And the Court ought to be determining does the use of those criteria violate that law? And it --

CHIEF JUSTICE ROBERTS: Well, I was just going to say, your -- the problem with your analogies is that they involve -- I don't know how many employment decisions are made in the country every day, but I know that whatever it is, hundreds of millions, billions of responses to inquiries on the Internet are made every day.

And as Justice Kagan suggested, under your view, every one of those would be a possibility of a lawsuit, if they thought there was something that the algorithm referred that was defamatory, that, you know, whatever it is, exposed them to harmful information. And so that maybe the analogy doesn't fit the particular -- particular context.

MR. STEWART: I mean, I think it is true that many platforms today are making an enormous number of these choices. And if Congress thinks that circumstances have changed in such a way that amendments to the statute are warranted because things that didn't exist or that weren't on people's minds in 1996 have taken on greater prominence, that would be a choice for Congress to make. But --

CHIEF JUSTICE ROBERTS: Well, but choice for Congress to make -- I mean, the -- the amici suggest that if we wait for Congress to make that choice, the Internet will -- will be sunk. And so maybe that's not as persuasive a outcome as it might seem in other cases.

MR. STEWART: I -- I think the main thing I would say is most of the amici making that projection are making it based on a misunderstanding of our position; namely, they are misunder- our -- misunderstanding our position to be that once YouTube recommends a video or once YouTube sends a video to a particular user without the user requesting it, that YouTube is liable for any impropriety in the content of the video itself.

And that's not our position. Our position is that YouTube's own conduct falls outside of 230(c)(1). It's unlikely in very many instances to give rise to actual liability.

JUSTICE KAVANAUGH: Why not? Why -- why -- why wouldn't it be liable? Explain that.

MR. STEWART: I think the reason -- the reason we would say is for -- for -- in this case, in particular, to -- to look ahead a little bit to the -- the Twitter argument tomorrow, there were questions at the beginning of Mr. Schnapper's presentation about the role that neutrality played in the analysis. And our view is neutrality is not part of the 230(c)(1) analysis. But it's a big part of the Antiterrorism Act analysis because we say a person is much more likely to be liable for aiding and abetting if it is due -- kind of giving special treatment to the primary wrongdoing, if it is taking --

JUSTICE KAVANAUGH: Well you -- keep going.

MR. STEWART: And -- and -- and so, if it is, in fact, the case that YouTube is applying neutral algorithms, is simply showing more ISIS videos to people who've shown an interest in ISIS, just as it does more cat videos to people who've shown an interest in -- in cats, that's much less likely to give rise to liability under the Antiterrorism --

JUSTICE KAVANAUGH: And much less likely -- I'm not sure based on what. You seem to be putting a lot of stock on the liability piece of this, rather than, as Justice Jackson, was saying, the immunity piece. And I'm just not sure, you know, if we -- if we go down this road, I'm not sure that's going to really pan out. Certainly, as Justice Kagan says, lawsuits will be non-stop --

MR. STEWART: I --

JUSTICE KAVANAUGH: -- on defamatory material, which there's a lot of, that is out there and finds its way onto the websites that host third-party conduct.

MR. STEWART: And -- and --

JUSTICE KAVANAUGH: There will be lots of lawsuits. You agree with that?

MR. STEWART: I -- I wouldn't necessarily agree with there would be lots of lawsuits, simply because there are a lot of things to sue about, but they would not be suits that have much likelihood of prevailing, especially if the Court makes clear that even after there's a recommendation, the website still can't be treated as the publisher or speaker of the underlying third-party content.

JUSTICE KAVANAUGH: Well, just bigger picture, then, to the Chief's question, isn't it better for -- to keep it the way it is, for us, and Congress -- to put the burden on Congress to change that and they can consider the implications and make these predictive judgments?

You're asking us right now to make a very precise predictive judgment that, don't worry about it, it's really not going to be that bad. I don't know that that's at all the case, and I don't know how we can assess that in any meaningful way.

MR. STEWART: I -- I think, with respect, that that -- that characterization of the existing case law overstates the extent to which courts are in agreement that platform design choices --

JUSTICE KAVANAUGH: Assume they are. Assume the status quo is against you in the law. And you're asking us, well, the status quo is wrong, okay, and this Court is the first time we're getting to look at it. But don't worry about the implications of this because it's really all going to be fine, there won't be much successful lawsuits, there won't be really many lawsuits at all.

And I -- I don't know how we can make that assessment.

MR. STEWART: I think if the Court thought that kind of the interpretive question, looking at the plain language of the statute, was on a knife's edge, it was an authentically close call, then, yes, the Court could -- and the Court perceived the existing case law to be basically uniform, the Court could give some weight to the interest in stability.

But I think, for us, neither of those things is true.

JUSTICE BARRETT: Mr. Stewart -- oh, sorry. Please finish.

MR. STEWART: I was -- I was going to say the statutory text really is not -- it may have a little bit of ambiguity at the margins, but it is very clearly focused on protecting the platform from liability for information provided by another information content provider, not by the platform's own choices.

I'm sorry, Justice Barrett?

JUSTICE BARRETT: No, no, no, I'm sorry.

So speaking of this question of what are the implications of this, and Justice Jackson's points about liability and immunity overlapping, it seems like one of the responses to should we worry about this is, well, it's going to be the rare kind of claim that could be based on recommendations.

So speaking of that, what is the government's position, if you have one, on whether, if the plaintiffs below lose tomorrow in Twitter, should we just send this back? Because there isn't -- I mean, you said the government's position is that there is no claim. So --

MR. STEWART: Certainly, our position -- we haven't analyzed the -- the Gonzalez --

JUSTICE BARRETT: Right.

MR. STEWART: -- complaint in detail, but that is our position as to the Twitter complaint. And Mr. Schnapper said he doesn't perceive a material difference between the two.

Now, presumably, the Court granted cert in both cases because it thought it would at least be helpful to clarify the law both as to the Antiterrorism Act and as to Section 230(c)(1). But if the Court no longer believes that or if it resolves Twitter in such a way that it seems evident that its decision on the 230(c)(1) issue wouldn't ultimately be outcome-determinative in Gonzalez, then it could vacate and remand for further analysis of the ATA question. That would be a permissible -- I mean, a possible course of action.

JUSTICE BARRETT: Okay.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

We're talking about the prospect of significant liability in litigation. And -- and up to this point, people have focused on the ATA because that's the one point that's at issue here.

But I suspect there would be many,

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many times more defamation suits, discrimination suits, as -- as some of the discussion has been this morning, infliction of emotional distress, antitrust actions.

I -- I mean, it -- I guess I'd be interested to understand exactly what the government's position is on the scope of the actions that could be brought and whether or not we ought to be -- I mean, it would seem to me that the terrorism support thing would be just a tiny bit of all the other stuff. And why shouldn't we be concerned about that?

MR. STEWART: Let me just address the -- the potential causes of action that you mentioned. For defamation, even if somebody is suing about the recommendation, 230(c)(1) still directs that the platform can't be treated as the publisher or speaker of the underlying content. And so the question --

CHIEF JUSTICE ROBERTS: Well, right. But it's -- it's -- defamation law is implicated if you repeat libel, even though you didn't originally commit defamation.

MR. STEWART: If you repeat it, and so if YouTube circulated videos with a little blurb saying -- and I think one of the amicus briefs describes this hypothetical scenario -- if you repeated it with a little blurb saying this video shows that John Smith is a murderer, then, yes, there would be liability. But --

CHIEF JUSTICE ROBERTS: But there wouldn't be if you just repeated it without any commentary? Normally, it would be if you're the newspaper and you just publish something, so and so's a shoplifter, the newspaper would be liable for that.

MR. STEWART: No, we think it should be analyzed as though it were an explicit recommendation. And so if Google had posted a message that we said we recommend that you watch this video, now the recommendation would be its own content. But in answering the question can it be held liable for defamation, you would ask: Can a person under the law of the applicable -- of the relevant state be held liable for recommending content that is itself defamatory, if the recommender does not repeat the defamatory aspects of that content in the course of the recommendation?

And our understanding is that at least

under the common law the answer to that would be no, that simply saying you should read this book that turns out to be defamatory would not be basis for defamation liability.

I think the same would basically be true of intentional infliction of emotional distress. That is, unless you could show that the platform was acting with the intent to cause emotional distress by circulating the video, there would be no liability. And the fact that the third-party poster may have met the elements of that offense wouldn't carry the day.

With respect to antitrust, if you had a claim that a particular search engine had configured its results in such a way as to boost its own products or to diminish the search results for products of the competitor and if that were found to be a viable claim under the antitrust laws, there would be no reason to insulate the provider from liability for that.

CHIEF JUSTICE ROBERTS: Now that's -- that's a broad overview of a lot of different areas of law, but, certainly, the law is not established the way you're suggesting, I -- I think, in any of those areas.

MR. STEWART: But I guess the question is, what did Congress intend to do or what did it do when it passed this statute?

And Congress didn't create anything that was -- even resembled a -- an all purposes of immunity, immunity for anything it might do in the course of its functions. It focused very precisely on information provided by another information content provider.

CHIEF JUSTICE ROBERTS: Thank you, thank you.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: In the government's view, are there any circumstances in which an Internet service provider could be sued for defamatory content in a video that it provides?

MR. STEWART: I think --

JUSTICE ALITO: Third-party video.

MR. STEWART: -- I think the only -- given our understanding of the -- the common law, I think the only way that would happen is if the third-party provider, in circulating the video, added its own comment that incorporated the defamatory gist of the allegations.

And as the Chief Justice was pointing out, it is true that under common law, if you repeat somebody else's defamatory statement but say what it is, that you can be held liable for that.

JUSTICE ALITO: I mean, imagine the most defamatory -- terribly defamatory video. So suppose the competitor of a restaurant posts a video saying that this rival restaurant suffers from all sorts of health problems, it -- it creates a fake video showing rats running around in the kitchen, it says that the chef has some highly communicable disease and so forth, and YouTube knows that this is defamatory, knows it's -- it's completely false, and yet refuses to take it down.

They could not be civilly liable for that?

MR. STEWART: That -- that's our -- I mean, we think that Zeran -- Zeran was not exactly a defamation case, but it fit within -- pretty closely within that profile. That is, Zeran was the early Fourth Circuit case in which a person posted a video that purported to be from another person and subjected that other person to complaints and harassment that seemed justified to -- to the people who were doing it.

JUSTICE ALITO: Well, did any -- did any entity have that scope of protection under common law?

MR. STEWART: No, not -- no, I don't believe so. And that was the point of (c)(1). The point of (c)(1) was to say --

JUSTICE ALITO: Well, it was at least to -- to shield Internet service providers from liability they -- excuse me -- based on their status as a publisher.

MR. STEWART: I -- I wouldn't put it as --

JUSTICE ALITO: But even a distributor wouldn't have immunity if it knew as a matter of fact that this material that it was distributing was defamatory, isn't that right?

MR. STEWART: I mean, that -- that -- that is right. I think we would think of the distributor as a subcategory of publisher, but, yes, the book seller would not be strictly liable. And, obviously, Justice Thomas --

JUSTICE ALITO: You really think that Congress meant to go that far?

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MR. STEWART: We -- we do, but, obviously, that is -- if we're arguing about whether the failure to take something down is actionable if it is done knowingly and with an understanding of the contents, then that -- that's a very different argument from the one that we've been having up to this point.

That -- that would be saying that the statute should be construed --

JUSTICE ALITO: But that is your -- but that is your position?

MR. STEWART: Our position --

JUSTICE ALITO: That is the government's position, is it not?

MR. STEWART: -- our position -- yes, our position is that if the -- if the wrong alleged is simply the failure to block or remove the third-party content, that 230(c)(1) protects the platform from liability for that, whether it's based on a strict liability theory or on a theory -- theory of negligence or unreasonableness in failing to take the material down upon request.

JUSTICE ALITO: The Internet service provider wants to -- really has it in for somebody, wants to harm this person as much as possible, and so posts extraordinarily gruesome videos of a family member who's been involved in an automobile accident or something like that.

MR. STEWART: Well, when you use the verb "posts," that -- that's a different analysis. That is, if YouTube created --

JUSTICE ALITO: No, it's provided by somebody else, and YouTube knows that it's -- knows what it's -- what it is, and yet it puts it up and refuses to take it down.

MR. STEWART: Yes. Our view is, if the only wrong alleged is the failure to block or remove, that would be protected by 230(c)(1). But -- but that's -- the 230(c)(1) protection doesn't go beyond that. And the theory of protecting the -- the website from that was that the wrong is essentially done by the person who makes the post, the website at most allows the harm to continue.

And what we're talking about when we're talking about the -- the website's own choices are affirmative acts by the website, not simply allowing third-party material to stay on the platform.

JUSTICE ALITO: So an express recommendation would potentially subject YouTube to civil liabilities. So they put up -- they say, watch this ISIS video, spectacular, okay, they could be liable there?

MR. STEWART: Yes, if the other elements --

JUSTICE ALITO: If it's expressed. What if it's just implicit? What if it's the fact that they put this up first and therefore amplify the message of that?

MR. STEWART: Again, you would have to ask -- they -- they could potentially be held liable for that, but you would have to ask whether the elements of the relevant tort have been shown. And with respect to the ATA, those elements include scienter, causation of the relevant harm, et cetera.

If you were looking at another cause of action, you would look at those elements. And I think part of our reason for preferring that most of the work be done at the liability stage rather than the 230(c)(1) stage is, rather than do a kind of undirected inquiry into whether this seems neutral enough, you would be looking at a specific cause of action and asking but for 230(c)(1), would this be an actionable tort under --

JUSTICE KAGAN: Let me just make sure I understand. Let's talk about defamation and an explicit recommendation, go watch this video, it's the greatest of all time, okay? But it does not repeat anything about the video. It just says go watch this video, it's the greatest of all time. And the video is terribly defamatory in the way Justice Alito was describing.

Now is the provider on the hook for that defamation?

MR. STEWART: The two things I would say are that depends on the defamation law of the relevant state, and, as we say in the brief, you should analyze that as though the platform was recommending in the same terms a video posted on another site.

So, if it would give rise to defamation liability under the law of the relevant state to give that sort of glowing recommendation of content posted on a different platform, then there's no reason that YouTube should be off the hook by virtue of the fact that the material was on its own platform.

JUSTICE KAGAN: And -- and now it's --

CHIEF JUSTICE ROBERTS: Thank you.

Justice Sotomayor, anything further?

JUSTICE SOTOMAYOR: Let's assume we're looking for a line because it's clear from our questions we are, okay? And let's assume that we're uncomfortable with a line that says merely recommending something without adornment, you suggest, we -- you're -- you might be interested in this, something neutral, not something like they're right, watch this video, because I could see someone possibly having a defamation action if they said -- if I said that video is right about that person.

I could see someone saying that I'm spreading a defamatory statement, correct?

MR. STEWART: I mean, we -- we don't understand the common law to have operated in that way, but, obviously, the laws vary from state to state and a particular law -- state could adopt a law to that effect.

JUSTICE SOTOMAYOR: All right. How do we draw a line so we don't have to go past the complaint in every case?

MR. STEWART: I mean --

JUSTICE SOTOMAYOR: And I think that's where my colleagues seem to be suffering.

And I understand your point, which is there is a line at which affirmative action by an Internet provider should not get them protection under 230(c) because that seems logical. The -- the example I used earlier, the dating site, they create a search engine that discriminates. Their action is in creating the search engine. And I would think they would be liable for that. So tell -- tell me how we get there.

MR. STEWART: I guess whether they would be liable would depend on the applicable substantive law, which could be a federal law or it could be a state law. And those questions, obviously, are -- are routinely decided at the motion to dismiss stage. That is, with respect to the search engine choices that I described earlier, do you include misspellings or not? The plaintiff would still have to identify a law that was violated by the choice that the search engine made and would have to allege facts sufficient to show a violation of law.

And -- and suits like that could easily be dismissed at the pleading stage. But it would at least predominantly be a question of the adequacy of the allegations under the underlying law.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: I guess I thought that the claims in these kinds of suits are that in making the recommendation or in presenting something as first, so really prioritizing it, that the -- the provider is -- is amplifying the harm, is creating a kind of harm that wouldn't have existed had the provider made other choices.

Are you saying that that -- that is something that could lead to liability or is not?

MR. STEWART: I think it is something that could lead to liability, but, again, it would -- you would have to establish the elements of the -- of the substantive law. And so kind of the hypothetical we're concerned with and the hypothetical that I -- I think would come out in our view as the wrong way under

Respondent's theory is imagine a particular platform had been systematically promoting third-party ISIS videos and promoting in the sense of putting them at the top of people's queues, not of adding their own messages, in order to enlist support for ISIS.

If that was the motivation and you could show the right causal link to a particular act of international terrorism, then that could give rise to liability under the ATA.

JUSTICE KAGAN: And you're not saying that the motivation matters for 230; you're saying that the motivation matters with respect to the -- the liability question down the road, right?

MR. STEWART: Exactly. Exactly.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE GORSUCH: Mr. Stewart, I just again kind of want to make sure I understand your argument, and so I'm going to ask you a question similar to what I asked Mr. Schnapper, which is the Ninth Circuit held that any information a company provides using neutral tools is protected under 230. That's at 34a of the -- of the petition.

And your argument is that this neutral tools test isn't in the statute. What is in the statute is a distinction on the one hand between interactive computer service and access software providers and on the other hand content providers.

And when we look at that, the access software provider is protected for picking, choosing, analyzing, or even digesting content. So 230 protects an access software provider, an interactive computer service provider, who does any of those things, whether using a neutral tool or not. They -- they can order, they can pick, they can choose, they can analyze, they can digest however they wish and they're protected, even those -- even though those editorial functions we might well think of as some form of content in our First Amendment jurisprudence, but, here, they're shielded by 230.

And then your argument, I think, goes that none of that means that they're protected for content generated beyond those functions. And it doesn't matter whether that content is

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generated by neutral rules or not. That content is actionable whether the -- and one could think of content generated by neutral rules, for example, by artificial intelligence.

And another problem also is that it begs the question what a neutral rule is. Is an algorithm always neutral? Don't many of them seek to profit-maximize or promote their own products? Some might even prefer one point of view over another.

And because the Ninth Circuit applied the wrong test, this neutral tools test, rather than the content test, we should remand the case for reconsideration under the appropriate standard. Is that a fair summary of your position? And, if not, what am I missing?

MR. STEWART: I think the thing -- the aspect of that we would disagree with is we don't think that the definition of "access software provider" means that an entity is immune from liability for performing all of those functions.

The statute makes clear that even if you perform those sorting, arranging, et cetera, functions, you still fall within the definition of "interactive computer service," and you are still entitled to the protection of (c)(1).

But the protection of (c)(1) is protection from liability for the third-party content. And so, if you perform those sorting functions in a way that was otherwise unlawful, you could be on the hook for that.

And that -- that takes me back to the hypothetical about the job placement service that discriminates based on race. The -- the allegation of the job placement -- of that job placement service is not that it created any of its own content. The allegation would be that with respect to third-party content provided by the firms that were looking for employees, it had used an impermissibly legal -- a legally impermissible criterion to decide which content would be sent to which users. And that wouldn't be protected by (c)(1) because imposing liability wouldn't hold the platform -- wouldn't treat the platform as the publisher or speaker of the third-party content.

JUSTICE GORSUCH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh?

JUSTICE KAVANAUGH: First, to follow up on Justice Alito's question, the distributor liability question, my understanding is that issue is not before us at this time, right?

MR. STEWART: That's correct.

JUSTICE KAVANAUGH: And your position, though, or your response to him suggested that if we were addressing that, the reason that falls within 230 is because the distributor at common law or at least by 1996 was treated as a secondary publisher in the circumstances described there. Is that --

MR. STEWART: That's basically correct, yes.

JUSTICE KAVANAUGH: Okay. Then focusing on the text of the statute and following up on Justice Gorsuch's question, it seems to me that the key move in your position as I understand it is to treat organization through the algorithms as the same thing as an express recommendation. Is that accurate?

MR. STEWART: I don't -- I don't think we would put it quite that way. That is, in some instances, if the operation of the algorithm causes particular content to appear in a particular person's queue that the person hadn't requested, then that person might perceive it to be a recommendation at least to the effect that you will like this based on what you have seen before.

So algorithms can't have that effect. I don't know that we would equate the two. I think we would say more the recommendation is simply one instance of the platform potentially being held liable for its own content rather than the third-party content.

JUSTICE KAVANAUGH: And if the algorithm prioritizes certain content, that becomes the platform's own speech under your theory of 231, correct -- or 230?

MR. STEWART: I don't know that we would call it the platform's own speech, but it's the platform's own conduct, the platform's own choice. And so, if -- if it violated antitrust law, for instance, to prioritize search results in a particular way, whether or not you thought of that as speech by the -- the platform, it would be the platform's own conduct. Holding it liable for that sort of ordering wouldn't be treating it as the publisher or speaker of any of the third-party submissions.

JUSTICE KAVANAUGH: So the other side and the amici say that happens -- that's what the -- and Justice Kagan's question, that's happening everywhere.

MR. STEWART: And --

JUSTICE KAVANAUGH: And, therefore, 230 really becomes somewhat meaningless, and you've read what makes the definition of "interactive computer service," including organizing, to be a self-defeating provision that really does nothing at all.

MR. STEWART: No, I think -- I mean, I think, if -- if it is happening everywhere, that is, if search engines are using a wide variety of mechanisms to decide how content should be ordered, that --

JUSTICE KAVANAUGH: Do you disagree with that? I mean, that's all --

MR. STEWART: No, I -- no, I agree with that.

JUSTICE KAVANAUGH: Okay.

MR. STEWART: And I think that's probably because there are very few, if any, laws out there that direct Internet service providers to order the content in a particular way.

If a particular legislature wanted to say it will now be a violation of our law to give greater priority to search results of companies that advertise with you, then the question whether that could violate the Commerce Clause, the question whether it could violate the First Amendment, those would be live questions.

They wouldn't be 230(c)(1) questions because the state's attempt to impose liability on that rationale would not be an attempt to hold the platform liable as the publisher or speaker of the third-party content.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: I want to ask you the question that Mr. Schnapper and I went back and forth about, thumbnails versus screenshots. What would the government's position on that be?

So, if there were screenshots on the side, his objection seemed to be that it was

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Google's content because YouTube creates these thumbnails.

MR. STEWART: And that -- that was one aspect of Mr. Schnapper's theory that we disagreed --

JUSTICE BARRETT: Disagreed.

MR. STEWART: -- with in the brief.

That is, we thought that it's basically the same content, the same information either way, even if in the one instance Google is creating a URL and in the other instance it's not.

JUSTICE BARRETT: So, for purposes of this case, is there any difference -- let's imagine that the Google algorithm when you search for ISIS prioritizes videos produced by ISIS in search results. I'm not talking about being on YouTube. Content produced by ISIS, as opposed to articles, if you're just looking for articles about ISIS, they could be critical of ISIS, they could be all kinds of things, but in the search result rankings, you first get the article -- the articles written by ISIS, videos made by ISIS.

Is that the same thing as this case

then?

MR. STEWART: I think that would be the same thing as this case because we would say the fact that the videos appear in that order is the result of choices made by the platform, not the choice of any person who posted an ISIS video on the platform.

And Congress -- it was very important to Congress to absolve the platforms of liability for the third-party content, but it didn't try to go beyond that. The likelihood that ISIS would be held liable just for that seems very, very slim, but it would not be a 231 -- 230(c)(1) question, it would be a question under whatever cause of action the plaintiff invoked.

JUSTICE BARRETT: Okay. And then what about users and retweets and likes, the question I asked Mr. Schnapper about that. So, you know, I gather 230(c) would protect me from liability if I simply retweeted.

On Ms. Blatt's theory, on your theory, if I retweet it, am I doing something different than pointing to third-party content?

MR. STEWART: I mean, I think,

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honestly, there hasn't been a lot of litigation over the -- the -- the user prong of it, and those are difficult issues. I think 230(c)(1) at the very least would say just by virtue of having retweeted, you can't be treated as though you had made the original post yourself.

But, with respect to you retweet, can the retweet itself be grounds for liability, I -- I'm not sure, and I doubt that there would be much of a common law history to draw upon.

JUSTICE BARRETT: So you -- but the logic of your position, I think, is that retweets or likes or check this out, for users, the logic of your position would be that 230 would not protect in that situation either, correct?

MR. STEWART: I -- I think it would -- I think more or less the case, the -- the one difference I would point to between the user and the platform is the user is -- who reads a tweet is typically making an individualized choice, do I want to like this tweet, retweet it, or neither, whereas the -- the platform decisions about which video should wind up in -- in my queue at a particular point in time, there's no live human being making that choice on an individualized basis. It's being -- that -- those choices are being made on a systemic basis.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: Yes. So can -- can you help me to understand whether there really is a difference between the recommendations and what you say is core 230 conduct?

I mean, I get -- I get and I'm holding firm in my mind that 230 immunity, Congress intended it to be directed to certain conduct by the platform and that conduct is its failure to block or screen the offensive conduct, so that if the claim is this offensive content is on your website and you didn't block or screen it, 230 says you're immune. I get that.

I guess what I'm trying to understand is whether you say and plaintiff says, Petitioner in this case says, well, what they're really doing in the situation in which they display it under a banner that says "up next" is more than just providing that content and failing to block it. They are promoting it in some way.

And I -- I'm really drilling down on whether or not there is actually a distinction in a world of the Internet where, as Ms. Blatt and others have said, in order to be a platform, what you're doing is you have an algorithm, and in the universe of things that exist, you are presenting it to people so that they can read it.

Why -- why is that -- even though it's -- you know, you call it a recommendation or whatever, why is that act any different than being a publisher who has this information and hasn't taken it down?

MR. STEWART: I mean, I think I would say, in -- in the situation that 230(c)(1) was designed to address, the decision whether the material would go up on the platform was not that of the platform itself, it was the decision of the third-party poster.

And Congress said, once that has happened, you also can't be liable for failing to take it down. But, with respect to what prominence you give it, that's the result of

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your own choice, not the third-party poster.

Now, in most circumstances, it won't make a difference because the recommendation won't be actionable. And so what we are concerned with is the -- the hypothetical that I suggested earlier. You have --

JUSTICE JACKSON: Yes. I mean, I get the -- I get the liability piece and all of the -- the parade of horribles will depend on whether or not they can actually be held liable for organizing it in a certain way. And you say they probably can't. And others say they might be able to. And that's a separate issue.

Just back on the 230 piece of it, in terms of Congress's intent with respect to the scope of immunity, I'm -- I -- I guess I just want to understand why Google or YouTube, when they have a box that brings up all of the ISIS videos and tees them up, and if you don't do anything, they just keep playing, why that's actually different than the newspaper publisher who gets the offensive content and decides to put it on page 1 versus page 20, it seemed like Congress in 230 was saying, if you -- if -- if under the common law a newspaper publisher would

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be liable for having put it on page 1 or whatever and given it to people, we don't want that to be the case for these Internet service companies.

And so I -- I don't know that I understand fully why the fact that it's called -- that you call it a recommendation or whatever is actually any different.

MR. STEWART: I -- I guess one difference I would point to is newspaper publishers can make decisions about what will be on the front page and what'll be in the back, but it's going to be the same for everybody.

And one of the things about why we call them targeted recommendations with YouTube is they are being sent differently to different users. And the situation we're concerned with is what if a platform is able through its algorithms to identify users who are likely to be especially receptive to ISIS's message, and what if it systematically attempts to radicalize them by sending more and more and more and more extreme ISIS videos, is that the sort of behavior that implicates either the text or the purposes of Section 230(c)(1), and we would say that it doesn't.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MR. STEWART: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Blatt.

ORAL ARGUMENT OF LISA S. BLATT
ON BEHALF OF THE RESPONDENT

MS. BLATT: Mr. Chief Justice, and may it please the Court:

Section 230(c)(1)'s 26 words created today's Internet. (c)(1) forbids treating websites as "the publisher or speaker of any information provided by another." Publication means communicating information. So, when websites communicate third-party information and the plaintiff's harm flows from that information, (c)(1) bars the claim.

The other side agrees Section 230 bars any claim that YouTube aided and abetted ISIS by broadcasting ISIS videos. So they instead focus on YouTube's organization of videos based on what's known about viewers, what they call targeted recommendations. They say that feature can be separated out because it implicitly conveys what viewers should watch or that they might like the content.

But accepting that theory would let plaintiffs always plead around (c)(1). All publishing requires organization and inherently conveys that same implicit message.

Plaintiffs should not be able to circumvent (c)(1) by pointing to features inherent in all publishing. (c)(1) reflects Congress's choice to shield websites for publishing other people's speech, even if they intentionally publish other people's harmful speech.

Congress made that choice to stop lawsuits from stifling the Internet in its infancy. The result has been revolutionary. Innovators opened up new frontiers for the world to share infinite information, and websites necessarily pick, choose, and organize what third-party information users see first.

Helping users find the proverbial needle in the haystack is an existential necessity on the Internet. Search engines thus tailor what users see based on what's known about users. So does Amazon, Tripadvisor, Wikipedia, Yelp!, Zillow, and countless video, music, news, job-finding, social media, and dating websites. Exposing websites to liability for implicitly recommending third-party context defies the text and threatens today's Internet.

I welcome your questions.

JUSTICE THOMAS: Ms. Blatt, is -- could you give me an example of, not a recommendation, but an endorsement similar to this that would take you beyond 230?

MS. BLATT: Sure. So whenever you have something that's going beyond the implicit features of publishing and you have an express statement, you have a continuum, and this continuum is this: You have something that's the functional equivalent of an implicit message, basically a topic heading or "Up next," all the way to the other extreme of an endorsement of the content, such that the website is adopting the content as its own.

Now, when you have that situation, the claim is fairly treating the website for publishing its own speech, and you can separate that out from the harm that's just coming from the information provided by another.

And the danger which your hypotheticals has raised with express speech is where on that continuum any express speech may go, because unlike Google and YouTube, which are the two world's largest sites, we don't have a lot of endorsements and that kind of stuff, but other websites and other users use a myriad of topic headings and emojis that have different meanings that I'm not prepared and you would have to know what they mean, like kinds of checkmarks and, I don't know, high fives and all kinds of things.

But the basic features of topic headings, "Up next," "Trending now," those kinds of things we would say are core, inherent -- they're no different than expressing what is implicit in any publishing, which is we hope you read this.

CHIEF JUSTICE ROBERTS: Well, it seems to me that the language of the statute doesn't go that far. It says that -- their claim is limited, as I understand it, to the recommendations themselves. In other words, this -- this is the list of things that you might like.

But that information, the recommendation, is not provided -- under the words of the statute, it's not provided by another information content provider. It's provided by YouTube or -- or Google.

And so, although whatever the liability issue may be, there's some issue tomorrow and there are a lot of others, the presence of an immunity under 230(c), it seems to me, is just not directly applicable.

MS. BLATT: Well, that's incorrect because of the word "recommendation." There is no word called "recommendation" on YouTube's website. It is videos that are posted by third parties. That is solely information provided by another.

You could say any posting is a recommendation. Any time anyone publishes something, you could be said, it's a recommendation. Anything.

CHIEF JUSTICE ROBERTS: Well, the videos just don't appear out of thin air. They appear pursuant to the algorithms that your clients have. And those algorithms must be targeted to something. And they're targeted --

that targeting, I think, is fairly called a recommendation, and that is Google's. That's not the -- the provider of the underlying information.

MS. BLATT: So nothing in the statute or the common law defamation turns on the degree of tailoring or how you organized it. There's no distinct actionable message. If you say I think my readers would all be interested in this or I think the readers in ZIP code 2005 would be interested in it, or you walk up to someone and say I'm going to defame someone because I thought you might be interested in it, it's still publishing.

And the other side gives you no line and no way to say in some way that would be workable or give websites or users any clarity of how you would organize the world's information. Just think about search. There are 3.5 billion searches per day. All of those are displays of other people's information. And you could call all of them a recommendation that are tailored to the user because all search engines take user information into account. They take the location, the language, and what have you.

And I can give the example of football. Football -- the same two users will enter the word "football" and get radically different results based on the user's past search history and their location and their language because most of the world thinks of football as soccer, not the way we do.

And so if you go down this road of did you target it, then you have to say how much? Was the topic hitting too much? Was it okay to have a violence channel? Was it okay to have a sex channel? Was it okay to have, you know, what have you, some other channel about skinny models that you could say, well, that just kept repeating the -- the channel and that made me crazy. So --

JUSTICE JACKSON: But, Ms. -- Ms. Blatt, Mr. Stewart suggests all of those kinds of questions in terms of the extent of liability for this kind of organization would be addressed in the context of liability, not -- by that I mean each state -- when somebody tried to claim that YouTube had done something improper in terms of pulling up those kinds of videos, that each state would then look and determine, based on their own, you know, common law, whether or not you were liable. And he posits that that wouldn't happen very often. But we don't know.

My question is isn't there something different to what Congress was trying to do with 230? Isn't it true that that statute had a more narrow scope of immunity than is -- than courts have, you know, ultimately interpreted it to have and that what YouTube is arguing here today, and that it really was just about making sure that your platform and other platforms weren't disincentivized to block and screen and remove offensive conduct -- content?

And so to the extent the question today is, well, can we be sued for making recommendations, that's just not something the statute was directed to.

MS. BLATT: So can I take this in two parts? Because I -- I feel like your first part of your question is addressing what the dispute is between the parties, and the second part of your question goes most deeper, and which is, you know, beyond the question presented.

But just on your first question about

why not -- why do you need an immunity as opposed to liability, and in our view, that's like saying -- I mean, that's death by a thousand cuts, and the Internet would have never gotten off the ground if anybody could sue every time and it was left up to 50 states' negligence regime.

And let me give you an example. A website could put something alphabetical in terms of reviews, and every Young, Williams and Zimmerman, i.e., X, Y, Z, could say, well, that was negligent because you should have rated it somewhere else.

JUSTICE JACKSON: No, I totally understand that. But I think my things are not actually different.

What I'm saying is that problem that you identify, which is a real problem, the Internet never would have gotten off the ground if everybody would have sued, was not what Congress was concerned about at the time it enacted this statute.

MS. BLATT: Well, so I -- that's correct. I mean, that's incorrect for a number of reasons. And we can talk about what two choices you're talking about. There's only two arguments on the table for what you could think that (c)(1) does.

And that is it simply says, you know, no Internet -- interactive computer service shall be treated as a publisher. And you could think, well, there are two -- two ways of looking at that. One is that you need an external law that has publication as an element. And then, second, which I think that your question may be going to, is it only directed to eliminating forms of strict liability across all causes of action? And so both -- both of those ways are highly problematic and also inaccurate, given what was happening in 1996.

In terms of just looking at this as is this just talking about defamation, it plainly can't be because the statute would be a dead letter upon inception because any defamation cause of action can be replead as negligence or intentional infliction of emotional distress.

So we think the word "treat," which means to regard, applies whenever the claim is treating the -- or imposing liability because -- by virtue of publishing; in other words --

JUSTICE JACKSON: But what do you do -- what do you do with the title and the content and the context? Right? The title of Section 230 is "protection for private blocking and screening of offensive material."

MS. BLATT: So let me just pinpoint, then, the second one, which hopefully I won't -- we'll get to on section (e), which is all the exceptions.

But in terms of the title, Stratton Oakmont and restrictions, (c)(1) and (c)(2) are a pair. So what you have is (c)(2) is -- and they work together, and if you -- every time you weaken (c)(1), you make (c)(2) useless and defeats the whole point of this statute, at least in terms of cleaning up the Internet.

(c)(2) is just a safe harbor and directs what happens when you take stuff down. It says nothing about what happens to the content that's left up. And so the more any website removes material, it perversely is showing that it has knowledge or should have known or could have known about the content that was left up.

And so you have one of two things

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happen -- that would happen and would have happened then and would happen now. The first is websites just won't take down content. And that just defeats it -- the whole point, and you basically have the Internet of filth, violence, hate speech and everything else that's not attractive.

And the second thing, which I think a lot of the briefs are worried about in terms of free speech, is you have websites taking everything down and leaving up -- you know, basically you take down anything that anyone might object to, and then you basically have, and I'm speaking figuratively and not literally, but you have the Truman Show versus a horror show.

You have only anodyne, you know, cartoon-like stuff that's very happy talk, and otherwise you just have garbage on the Internet. And Congress would not have achieved its purpose of -- and, remember, it had in all those findings only three of which are addressing the harmful content. Most of it is dealing with having free speech flourish on the Internet, jump-starting a new industry.

And it's inconceivable that any website would have started in -- I mean, one lawsuit freaked out the Congress.

JUSTICE KAGAN: Ms. Blatt?

MS. BLATT: Yes. Sorry.

JUSTICE KAGAN: Just suppose that this were a pro-ISIS algorithm. In other words, it was an algorithm that was designed to give people ISIS videos, even if they hadn't requested them or hadn't shown any interest in them.

Still the same answer, that -- that -- that a claim built on that would get 230 protection?

MS. BLATT: Yes, except for the way Justice Sotomayor raised it, which is material support. So, if there's any -- I mean, there's a criminal exception. So, if you have material supporting collusion with ISIS, that's excepted from the statute.

But, if I can just take the notion of algorithms, either they're raising --

JUSTICE KAGAN: But -- but -- but what I take you to be saying is that in general -- and this goes back to Justice Thomas's very

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first question --

MS. BLATT: Yes.

JUSTICE KAGAN: -- in general, whether it's neutral or whether it's not neutral, whether it is designed to push a particular message, does not matter under the statute and you get protection either way?

MS. BLATT: That's correct. And just referring -- I agree with what Justice Gorsuch said, except for he was saying that somehow the Ninth Circuit was at fault because it recognized this was an easy case.

It's not the Ninth Circuit's fault that the complaint said there's nothing wrong with your algorithm. You just kept repeating the same information, independent of any content.

And so we shouldn't be faulted because his complaint doesn't allege anything wrongful.

JUSTICE KAGAN: No --

MS. BLATT: But, in your hypothetical, where someone could say -- and, again, this is always going to turn on the claim. But let's just think of -- I don't know what your hypothetical would be about tortious speech, but the bookstore example, you could decide that you want to put the adult bookstore -- book -- adult book section separated from the kid section. That's a "biased" choice, and I'm doing scare quotes for the transcript, but --

JUSTICE KAGAN: Or -- or have an algorithm that looks for defamatory speech and puts it up top, right, and you're still saying 230 protection?

MS. BLATT: So our test, when you look at the claim, and so, if you have a claim for defamation, is always going to look at the claim and say is the harm flowing from the third-party information or from the website's own conduct or speech.

And so, if I can mention the race example, that's an excellent example of the claim has nothing to do with the content of the third-party information. It can be --

JUSTICE KAGAN: Right. But this is the claim would have something to do with the content of the information. It would say, you know, my complaint is that you just made defamatory speech available to millions of people who otherwise would never have seen it.

And you are on the hook for that. That was your choice. That's your responsibility.

Why doesn't -- why -- why -- why should there be protection for that?

MS. BLATT: Well, so, if there was some sort of misrepresentation or some sort of terms of service that you weren't going to do that, but let me give you an example where this opens up a can of worms is because you could say that about any content, that you elevated the most recent content.

I mean, search engines of all kinds, including Google Search, but all the amici briefs are telling you they have to make choices. They've got an undescribable amount of content, and it has to be based on something, whether it's relevance to a user request, a search history. If it says headache, the Microsoft example, do you want something from the 18 -- you know, the 1300s, or do you want something that's a little more recent? Do you --

JUSTICE BARRETT: Okay. But what if -- what if -- I'm sorry, but I just want to make sure in Justice Kagan's example, what if the criteria, the sorting mechanism, was really defamatory or pro-ISIS?

I guess I don't see analytically why your argument wouldn't say, as Justice Kagan said, that, yeah, 230 applies to that.

MS. BLATT: Well, I mean, it's similar to your -- your 303 case. You can make a distinction between content choices in terms of how you would organize or deal with any kind of publication, whether it's a book, a newspaper, a television channel, that kind of stuff, and that is inherent to all publishing. But you --

JUSTICE KAGAN: Right. So you're saying 230 does apply to that?

MS. BLATT: Yes.

JUSTICE KAGAN: 230 gives protection regardless?

MS. BLATT: Yes. I hope I didn't say something incorrect.

JUSTICE KAGAN: 230 gives protection --

MS. BLATT: Yes.

JUSTICE KAGAN: -- regardless, whether it's like put the defamatory stuff up top, put the pro-ISIS stuff on top, or whether it's, you know, what -- what people might consider a more content-neutral principle.

MS. BLATT: Correct. And let me just say you have websites that are hate speech, so they may be elevating more racist speech as opposed to some other speech that talks about how the equality of the races.

You might have a speech devoted to, you know, an interest of a certain community, like an ethnic community. So they may be saying, you know what, we don't want to put some other kind of content, we may want to publish it, but we may want to put it further down on our algorithm. And if you said -- again, this is a content distinction.

If you have a claim that --

JUSTICE KAGAN: So I can't imagine that -- and, you know, we're in a predicament here, right, because this is a statute that was written at a different time when the Internet was completely different, but the problem that the statute is trying to address is you're being held responsible for what is another person's defamatory remark.

Now, in my example, you're not being

held responsible for another person's defamatory remark. You're being held responsible for your choice in broadcasting that defamatory remark to millions and millions of people who wouldn't have seen it otherwise through this pro-defamatory algorithm.

MS. BLATT: I mean --

JUSTICE KAGAN: And the question is, you know, should 230 really be taken to go that far?

MS. BLATT: The question is can you carve out pro-defamatory as opposed to pro anything else, pro some other type of content that someone may be suing over over negligence.

If I can just give you an example of a TV channel. When you broadcast an excessively violent TV channel, you're giving it a new audience that they wouldn't otherwise have. It's still inherent to publishing. And if you decide to run reruns of the most sexually explicit and violently explicit, you could say that's a bad thing, and it may be, but on your choice -- but it would be protected under 230.

In terms of what was happening in 1996, I strongly disagree with the notion that

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algorithms weren't present based on targeted recommendations. The Center For Democracy and Technology has this wonderful history lesson of what was happening in '92 through '94 on how targeted recommendations developed.

And you had something called news groups, which were for anyone using the Internet, that was sort of what people did. They signed up for a news group, and those news groups adopted the technology that is the technology that is alleged in this case.

They looked at what the user was looking at. Say the user was looking at science news. And they thought, oh, that also user is looking at some other kind of news, maybe on psychology or something. And so they would make recommendations based on your user history and that of others.

Amazon two months into 1997 introduced its famous feature, if you buy X, you might like Y based on that technology. So this technology was present starting in '92.

And '92 through '96, the Internet was definitely different, but it was kind of a mess. You still had to organize it. So there were

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search engines. There was all kinds of features that were organizing content because even then it was massive. It's just now on, like, an exponentially greater scale.

JUSTICE JACKSON: Ms. Blatt, I guess my concern is that your theory that 230 covers the scenario that Justice Kagan pointed out seems to bear no relationship in my view to the text --

MS. BLATT: Okay.

JUSTICE JACKSON: -- of the actual statute.

MS. BLATT: Sure.

JUSTICE JACKSON: I mean, the -- the -- when we look at 230(c), it says protection for good samaritan blocking and screening of offensive material, suggesting that Congress was really trying to protect those Internet platforms that were in good faith blocking and screening offensive material.

Yet, if we take Justice Kagan's example, you're saying the protection extends to Internet platforms that are promoting offensive material. So it suggests to me that it is exactly the opposite of what Congress was trying to do in the statute.

MS. BLATT: Well, I think promoting -- I think a lot of things are offensive that other people might think are entertaining, and so --

JUSTICE JACKSON: No, it's not about -- it's not about whether -- let's take as a given we're talking about offensive material because that's all through the statute, right? You don't -- you don't disagree that Congress was focused on offensive material, that that's sort of the basis of the whole statutory scheme.

So, if we take as a given that we're talking about offensive material, it looks to me from the text of the statute that Congress is trying to immunize those platforms that are taking it down, that are doing things to try to clean up the Internet.

And in the hypothetical that was just presented, we have a platform that is not only not taking it down in the way that the statute is focused on, it is creating a separate algorithm that pushes to the front so that more people would see than otherwise the offensive material.

So how is that even conceptually

consistent with what it looks as though this statute is about?

MS. BLATT: Well, so just a couple things. And, again, I -- we're on this defamatory material. The website itself does something defamatory that's not -- it's independent of the third-party content. It's not protected.

But that same hypothetical could be said if it was on the front -- the home page as opposed to you had to do a search engine first. And I don't see anything in the statute that protects it.

In terms of what I think your deeper section is -- deeper concern is, the reading of the statute, I don't think it's coterminous with (c)(2), which is dealing with the type of offensive material, which, by the way, doesn't mention defamation.

In terms of (c), we talked about how they work together. We talked about how it could be easily overrode if it had just publication. The one thing we didn't talk about was the structure in Section (e). (e) is a laundry list, a laundry list, of a variety of exceptions under federal law to which (c)(1) does not apply as well as (c)(2). And those exceptions make very little sense if (c)(1) is read the way you're reading it. It would almost never apply to (c)(2).

And let's just take federal criminal laws. It would make very little sense because those laws -- almost none of them have strict liability as an element, and vanishingly few would be publication or speaking as an element. It's in there for no other reason, other than that (c)(1) would otherwise apply to the -- the -- the information provided by another.

And in terms of just the pure text, when you keep saying its failure to take down, I'm hearing you say what Congress wrote was treatment as a publisher. That means dissemination. That means publishing.

JUSTICE JACKSON: So Congress didn't say that.

MS. BLATT: You cannot be held liable for publishing.

JUSTICE JACKSON: If you look at the statute, it says "protection for good Samaritan blocking and screening." If you take into

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account Stratton Oakmont, if -- those things I thought were like a given, what -- what the people who were crafting this statute were worried about was filth on the Internet and the extent to which, because of that court case and -- and perhaps others, the platforms were not being incentivized to take it down, because if they were trying to take it down like Prodigy, they were going to be slammed because they were going to be treated as a publisher.

And so the statute is like we want you to take these things down, and so here's what we're going to do. We're going to say that just because they're on your -- your -- your website, it doesn't mean you're going to be held automatically liable for it. And that's (c)(1). And to the extent you're in (c)(2), you're trying to take it down but you don't get them all, we're not going to hold you liable for it.

That seems to me to be a very narrow scope of immunity that doesn't cover whether or not you're making recommendations or promoting or doing anything else.

MS. BLATT: Well, I mean, that that is -- what I understand the government and the

Petitioner to be saying is that disseminating, even 24/7 disseminating of ISIS videos, is protected. The only thing that's not protected is whether you can tease out something about the organization and call it a recommendation when there is no express speech recommending it. It's just the placement of where in the order in which content appears.

And that same complaint could be made about search engines. So I think, under your view, search engines would not be covered because they are taking user information, targeting recommendations in the sense of they're saying we think you would be interested in the first content as opposed to the content on, you know, 1,692,000 sections. I mean, they have millions and millions of hits for any search result.

And if you think those are recommendations and the other side gives you no basis for distinguishing between search engines, then the statute is just very different than I think the one that Congress was talking about, because, again, if you're going to look at findings and history and policy, this is about

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diversity of viewpoints, jump-starting an industry, having information flourishing on the Internet, and free speech.

JUSTICE BARRETT: Ms. Blatt, what about Justice Sotomayor's dating hypothetical? The discrimination, like, oh, we're only going to -- we're not going to match black people and white people, et cetera, what about that? Is that given 230's shield?

MS. BLATT: Absolutely not, because any disparate treatment claim or race discrimination is saying you're treating people different regardless of the content.

So if I'm -- I'm going to use it like with an advertising, like I don't know, whether I'm a woman of 10 or -- I mean, that was a bad example -- a woman of 30 or whatever, and whether I live somewhere, it really doesn't matter in terms of the law that's prohibiting discrimination. The law is indifferent to what the content is. It's just very unhappy about any kind of status-based distinction.

So we think -- and the -- the harm that would flow is not the third-party information. It's the website's conduct,

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whether you want to call it speech or conduct, that's based on status.

JUSTICE BARRETT: But what about the dating profile? I mean, isn't that part of the content? Isn't that part of the third-party information?

MS. BLATT: Sure. And it's just -- you could put it a bunch of different ways. You could say, even before the profiles go up, there's a complete harm, or even if the profiles go up, it doesn't matter. We would distinguish between the way dating sites work, which don't work based on status but based on criteria that's uploaded, and those are, you know, you're matching with somebody else. The website is not saying you should only date a white person.

JUSTICE BARRETT: Okay. Then what about news? What about an algorithm that says, you know, you are a white person, you're only going to be interested in news about white people. And it will screen out anything that is a story featuring racial justice issues.

MS. BLATT: Yeah, again, anything based on status because the harm is complete, independent of the information, but if a website wants to say we're going to celebrate Black History Month, no, a white person or black person is not going to be able to complain and say, well, I didn't get enough white history month on your website. Those are claims that are core within treating them as publishing of the information --

JUSTICE BARRETT: Yeah, but I guess I'm -- don't you think you're just fighting on liability?

MS. BLATT: No.

JUSTICE BARRETT: I mean, it seems to me that you're kind of going back to liability, because all of those are choices that are made independently, right? I mean, we've been talking about the distinction between -- or -- or the lack of distinction, in your view, between the content itself and the website's choice of how to publish it.

I guess I don't see why --

MS. BLATT: So here's --

JUSTICE BARRETT: -- for 230 purposes.

MS. BLATT: Here's our test, and it's the test the Fourth Circuit recently took in Henderson, and it's the test the Ninth Circuit

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took.

Let me give you an example and -- that I think may help; with the ad revenue sharing. So this was an allegation that YouTube was giving money to ISIS. Now, this was in connection with third-party videos, third-party information. But the court said no, that is not within Section 230 because that's independent of the information, that's giving money to ISIS. That kind of, whatever you think about its validity under the statute, you're not treating them as a publisher; you're treating them as a financer.

And it's just -- and that's the test of the Fourth Circuit too. The Fourth Circuit is looking -- in that case, it was about -- you know, all kinds of things were happening with third-party information, and they were trying to tease out is it the credit report, did they contribute to the credit report, was it based on the website's failure to -- to notify the employee?

And what the Fourth Circuit said is the exact same thing we said, and it's the exact same thing the plaintiff has said on four pages

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of its brief, for four times in its brief, that you're looking for the harm. What is the harm caused? And this case is the perfect example. The plaintiffs suffered a terrible fate, and their argument is it's because people were radicalized by ISIS.

And if you start with the concession that the dissemination of those ISIS videos are -- and a claim based on that is barred, the question is, is what additional comes from the way it was organized?

The government just says I don't know, let some state figure it out. That's not very helpful to Internets that have to work on a national level and are posting and sorting and organizing billions upon billions upon billions of piece of -- pieces of information.

JUSTICE BARRETT: Just to clarify, this is my last point, you're happy with the Henderson test, the Fourth Circuit test?

MS. BLATT: Yes. I would say Henderson is like 96 percent correct. I got a little lost when they were going down the common law on publication, but the result was great. I just thought they got a little weird on the publication.

But yeah, no, their test is correct, and it's also the Ninth Circuit's test on the ISIS revenue. It's the exact same test we quote in our brief, and it's the exact same test Petitioner did.

And what the harm test is doing, if I could just explain it because it kinds shorthand, but if you take the -- which I'm not sure Justice Jackson agrees with, but if you take the underlying notion that this bars treatment as a publisher, and you're saying, well, can they get around it by the way they're pleading it, you're just looking to the harm, so you are saying you can't really say that's negligence or intentional infliction because the harm is coming from the publishing of the defamatory content.

And so what I think all these cases where the courts are correctly saying 230 does not apply to the claim, is they're isolating the harm and saying that's independent of the third-party information. It's either based on the website's own speech or it's website's own conduct that's independent of the harm flowing from the third-party information.

JUSTICE ALITO: If YouTube labeled certain videos as the product of what it labels as responsible news providers, that would be -- that would be Google's own content, right?

MS. BLATT: Yes. Yes.

JUSTICE ALITO: And --

MS. BLATT: Yes. Can I say one thing just because --

JUSTICE ALITO: Yeah. Sure.

MS. BLATT: -- I forgot to mention thumbnails? I'm sorry. Thumbnails aren't mentioned in the complaint. So I was literally trying to figure out what he was talking about when I was up there because it's just not something in the complaint. But that is a screenshot of the information being provided by another. It's the embedded third-party speech. Okay. Sorry. Keep going.

JUSTICE ALITO: All right. So if -- but then if I do a search for today's news in YouTube -- and in fact, I did that yesterday -- and all the top hits were very well-known news sources. Those are not recommendations. That's not YouTube's speech? The fact that YouTube put those at the top, so those are the ones I'm most likely to look at, that's not YouTube's speech?

MS. BLATT: Right. But, I mean, all search engines work the same way. If you type in whatever you type in, there is a algorithm that's deciding what content to display. It has to be displayed somehow.

And what I think is going on, on YouTube or it's certainly going on on Google search, is they're not going to -- they're looking at what did other users look, how popular was it, that kind of thing. You know, is it -- is that news source, you know, from Russia? Probably not going to get on the top list.

So, yeah, they're having to make choices because there could be over a billion hits from yours, and there are a -- a billion hours of videos watched each day on YouTube and 500 hours uploaded every minute. So it's a lot of content on YouTube.

So some of it's based on channels. And some of it's based on searches. But they have to organize it somehow. But that is what's going on, I think, on your top searches, is

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they're -- in most search engines too, and you can look at the Microsoft brief, they're basing it on what -- time spent on those news sites, how many users are looking at them, how relevant it is, if it's -- if you're -- if you're typing in the Turkey earthquake they might be elevating some stuff featuring that because it -- you know, seems more relevant.

If there's a recent election, they might feature that. So all these kinds of decisions are being made by websites every day.

JUSTICE ALITO: Would -- would the -- would Google collapse and the Internet be destroyed if YouTube and, therefore, Google were potentially liable for posting and refusing to take down videos that it knows are defamatory and false?

MS. BLATT: Well, I don't think Google would. I think probably every other website might be, because they're not as big as Google. But here's what happens.

I mean, you do have that situation in Europe, but there -- there's not class actions. There's not plaintiffs' lawyers. There's not the tort system. So what you would have is a

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deluge of people saying, you know, my -- that restaurant review was -- you know, you say my restaurant review, I didn't like it.

I think Yelp! does an amazing job on this, about how much they got hit and had to spend, you know, almost crushing litigation because they were being accused of being, you know, biased on reviewers. And everyone -- no matter what -- they couldn't win for losing or lose for winning, whatever the phrase is, because whoever they -- whoever got reviewed, somebody was upset.

And so I think those websites, they never would have happened. And they probably would collapse.

CHIEF JUSTICE ROBERTS: Thank you, counsel. Justice Thomas, anything further?

Justice Alito?

Justice Sotomayor?

Justice Kagan?

Justice Gorsuch?

JUSTICE GORSUCH: Ms. Blatt, I -- I kind of want to return to some of the questions I asked earlier. It seems to me inherent in (c)(1) is a distinction between those who are

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simply interactive computer services and those who are information content providers.

And so, when we flip over to (f), the distinction I -- I -- I glean from that is that if you're picking, choosing, analyzing, or digesting content, which is the bulk of what you -- how you describe Google's activities in -- in the search engine context, are -- are protected and that content must be something more than that, providing content must be something more than that.

Is -- is that right in your view?

MS. BLATT: I -- I thought you were absolutely correct. And I think some of the amici's briefs do this. In terms of if you're looking at what is information being created or developed, there is that distinction. It can't be that you -- by sorting, you created or partially developed the information.

So I think you had it exactly right. I got a little upset when you talked about a remand that somehow the Ninth Circuit got it wrong.

JUSTICE GORSUCH: Well, let's -- let's go there next then, because it seems to me that even under that understanding of the statute, there is some residual content for which an interactive computer service can be liable.

You'd agree with that, that that's possible?

MS. BLATT: Not on this complaint because --

JUSTICE GORSUCH: No, no, no, of course, not on this complaint, but in the abstract, it -- it's possible?

MS. BLATT: Absolutely correct.

JUSTICE GORSUCH: Okay. And then, when -- when it comes to what the Ninth Circuit did, it applied this neutral tools test, and I guess my problem with that is that language isn't anywhere in the statute, number one.

Number two, you can use algorithms as well as persons to generate content, so just because it's an algorithm doesn't mean it doesn't -- can't generate content, it seems to me.

And third, that I'm not even sure any algorithm really is neutral. I'm not even sure what that test means because most algorithms are designed these days to maximize profits.

There are other examples -- Justice Kagan offered some, the Solicitor General offered some -- where an algorithm might be -- contain a -- a point of view and even a discriminatory one.

So I -- I guess I'm not sure I understand why the Ninth Circuit's test was the appropriate one and why a remand wouldn't be appropriate to have it apply the test that we just discussed.

MS. BLATT: Because it's not -- I don't think that was the Ninth Circuit's test. It was one sentence that -- maybe I think it mentioned it twice -- that's basically, you know, almost making fun of the complaint.

The complaint doesn't --

JUSTICE GORSUCH: Oh, oh, okay. Okay. So we're just disagreeing over how we read the Ninth Circuit's opinion, but if I read it that way, then would a remand be appropriate?

MS. BLATT: Well, I'm -- I'm going to say no because I don't understand how -- how somehow that they have a bad complaint means the Ninth Circuit's worse off when the Ninth Circuit said over and over and over you haven't -- this

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is just the way you're organizing it.

And the complaint never alleges there was something independently wrongful about the content. It never says these were colloquial recommendations. It just says because you previously liked this content.

And one other thing. The complaint never even alleges that YouTube ever recommended to any -- in terms of even displaying an ISIS video, to anybody who wasn't looking for it. I don't even know how you could get ISIS on your YouTube system unless you were searching for it. And the one --

JUSTICE GORSUCH: I certainly understand your -- your -- your complaints about the complaint. But, if I -- if -- if you -- you -- you don't think neutral tools -- you're not defending the neutral tools principle either as I understand it.

MS. BLATT: I'm defending it with respect to Justice Kagan's question, absolutely, because she's concerned about biased algorithms, and she doesn't have to worry about that in this case because they have neutral algorithms. They don't allege. And what they mean by neutral algorithms is neutral with respect to content. So there's no --

JUSTICE GORSUCH: Thank you.

MS. BLATT: Okay.

JUSTICE GORSUCH: Thank you.

MS. BLATT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Kavanaugh? No?

Justice Barrett?

Justice Jackson?

JUSTICE JACKSON: So I understood you to say that 230 immunizes platforms for treatment as a publisher, which you take to mean if they are acting as a publisher in the sense that they are organizing and editing and -- not editing, but organizing and -- content.

MS. BLATT: Communicating, broadcasting, which includes how it's displayed.

JUSTICE JACKSON: And -- and would that include -- I -- I just want to go back to Justice Alito's point. Would that include the home page of the YouTube website that has a featured video box and the featured video is the ISIS video?

MS. BLATT: Right.

JUSTICE JACKSON: That is -- is covered?

MS. BLATT: Well, maybe not because that gets into my continuum question. If you think that featured is some sort of endorsement such that the claim is actually treating the website as -- and that the harm is flowing from that -- the word feature, then that's out of 2 -- 230.

I think you would --

JUSTICE JACKSON: No, I'm sorry, why? Why -- why is that out of 230?

MS. BLATT: So the whole point about what we're saying is making sure that if you start with the assumption that the dissemination of YouTube -- I'm sorry -- of ISIS videos, you can't hold the YouTube liable for that, then the only question that we're concerned about and which is so destabilizing is if you can just plead around it by pointing to anything inherent in the publication.

And the government never said what websites are supposed to do.

JUSTICE JACKSON: No, this is not inherent in the publication.

MS. BLATT: Exactly, it's featured.

JUSTICE JACKSON: So -- so -- so this is helpful, I mean, if --

MS. BLATT: Yes.

JUSTICE JACKSON: -- we -- we have a -- a home page on YouTube and it has featured as the little title and a box, and let's say the algorithm randomly selects videos from their content and puts them up for a week at a time, and the random video that it selected is the YouTube -- is the ISIS video, and it runs when you open up YouTube for a week.

MS. BLATT: Right.

JUSTICE JACKSON: Covered or not covered?

MS. BLATT: Well, it depends on whether you think it's an endorsement of -- I mean, if it said this is the Library of Congress and we feature this because we want to show you how bad ISIS is, you know, I don't know.

The reason why I care so much about this is because, like I said, Google and YouTube don't do this, but all the other amicus briefs are talking about they do things like that and they might have a little emoji.

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JUSTICE JACKSON: No, I guess I'm just trying -- I don't understand. I just want to know whether the -- put -- putting on the home page of YouTube, the decision to have an algorithm that puts on its home page various videos, third-party content, and it turns out that one of those videos is an ISIS video and the person is radicalized and they harm the Petitioner's family.

MS. BLATT: Yes. So that is inherent to publishing the home page. The word "feature," actually using the express statement of feature, it -- first of all, is not -- the website didn't have to do it. The owner --

JUSTICE JACKSON: So I'm sorry, inherent to publishing, it's covered?

MS. BLATT: The home page.

JUSTICE JACKSON: It's covered?

MS. BLATT: Absolutely, because no website -- how are you supposed to -- how are you supposed to operate a website unless you put a home page on, and so they have to do something.

And if you could always say, well, the home page -- you know, unless you're just going

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to do it alphabetically or reverse chronological order, a website is always going to be sued for negligence.

JUSTICE JACKSON: All right. So, if I -- if I disagree with you and I -- and I'm -- about the meaning of the statute, all right, focusing in on the meaning of the statute, you say if you're making editorial judgments about how to organize things, then you're a publisher and you're covered.

If I think that the statute really only provides immunity if the claim is that the platform has this ISIS video there and it can be accessed and it hasn't taken it down, do you have an argument that the recommendations that they're talking about is -- is tantamount to the same thing?

MS. BLATT: Yes, because the only basis for saying recommendations are not covered is -- that I saw is the government saying is it conveys a distinct implicit message that you might be interested. That is a distinct implicit message that can only -- it happens every time you publish.

If you publish one thing on the

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Internet, it conveys a distinct message of dear reader, we sat around and thought you might be interested --

JUSTICE JACKSON: And you're saying --

MS. BLATT: Or we want to make money --

JUSTICE JACKSON: You're saying that -- that there's no -- that organizational choices that put that content on the front page, on the first thing, when you open it up without typing in anything, cannot be isolated and that it's the same thing as it appears on the Internet anywhere such that 230 applies?

MS. BLATT: Yes, yes, and I'll use the government's own words. They said if you hold them liable for topic headings, you render the statute a dead letter because you have to organize the content. So if you think the topic headings are conveying some implicit message you can target out, the government said then the web can't function.

And I think we care about it because we're big websites that have lots of information. Other websites, and all the amici briefs are saying, is our whole business is

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organizing to make it useful. If you need a job, you're going to organize it by location --

JUSTICE JACKSON: Are you aware of any defamation claim in any state or jurisdiction in which you would be held liable, you would -- you would actually be liable for organizational choices like this?

MS. BLATT: No, I'm not worried about the defamation claim. I'm worried for a products liability claim or what the government kept saying, your design choices. Those could just be a product liability claim or a negligence claim. You negligently went alphabetical or you negligently featured whatever you featured that made my, you know, kid addicted to whatever it was. And that -- those kind of claims happen because they're publishing. And the whole point of getting this statute was to protect against publishing. So whatever is publishing, inherent to publishing, yeah, has to be covered.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Rebuttal, Mr. Schnapper?

REBUTTAL ARGUMENT OF ERIC SCHNAPPER
ON BEHALF OF THE PETITIONERS

MR. SCHNAPPER: Thank you, Mr. Chief Justice, and may it please the Court:

If I might start with my colleague's reference to things inherent in publishing, I would just offer a cautionary note and review of the transcript will support this. That -- that has been given an extraordinarily expansive account here.

So topic headings were characterized as inherent in publishing. You know, a topic heading could how Bob steals things all the time. That's not -- shouldn't be protected. She mentioned "trending now" as inherent in publishing, but that's like "featured today." You could -- you could have a site that didn't use the words "trending now." Auto-play certainly isn't inherent in publication.

And she mentioned home pages, and you have to have a home page, and that's fair, but you don't have to have on the home page selected things that you're drawing people's attention to. The home page that I have on my desktop for Google is a box and those charming little

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cartoons, and there isn't anything featured there. One could have a -- a website home page for YouTube that wasn't promoting particular things. That's just how they've chosen to do it.

With regard to neutral tools, and this goes back to the point a number of you made about race, a neutral algorithm can end up creating very non-neutral rules. It's not hard to imagine that an algorithm might conclude that most people who -- who went to Spelman and Morehouse now live in Prince George's County and, therefore, in showing you videos, people who asked for videos about places to live near Washington, if they're black, they'll be shown Prince George's County; if they'll be -- if they're white, they'll be shown Montgomery County.

The algorithms can create those kinds of rules. Whether -- characterizing that as neutral loses its force once the defendant knows it's happening. You know, to some extent, algorithms and computer functions can run amuck, but you can't call it neutral once the defendant knows that its algorithm is doing that. And

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this runs a little bit into the issue that we'll be talking about tomorrow.

Two short points and then one closing item. With regard to Rule -- Section (f)(4), I said this before, I just want to reiterate it, Section (f)(4) does not apply to systems or to information services. It only applies to software providers. The language of the statute is very specific.

And with the question about the possible implications of the decision in -- in Taamneh, it -- it is fair -- it is normal practice in the district court when there's a motion to dismiss, to permit the plaintiff to amend, to deal with the relevant standard, and that's exactly what we ought to be afforded an opportunity to do.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 12:44 p.m., the case was submitted.)

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