

No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, ET AL.,
PETITIONERS,

v.

GOOGLE LLC,
RESPONDENT.

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The petition framed the question presented as:

Does section 230(c)(1) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

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Peter Ghavami, <i>Big Data Analytics Methods</i>	
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Tarleton Gillespie, <i>The Relevance of</i>	
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BRIEF FOR RESPONDENT

STATEMENT

The internet lets billions of people instantaneously access, share, and contribute to a vast and ever-growing universe of information. Each day users worldwide generate over 500 million tweets, 294 billion emails, 4 million gigabytes of Facebook data, and 720,000 hours of new YouTube content.¹

To make this mountain of third-party data usable, websites must filter, sort, and organize it. Virtually all

¹ Melvin M. Vopson, *The World's Data Explained*, Conversation (May 4, 2021), <https://bit.ly/3XaIZ7i>.

websites, from Amazon to Zillow, accomplish this unprecedented task using algorithms—computer programs that, in the words of Google’s founding mission statement, “organize the world’s information and make it universally accessible and useful.” Recommendation algorithms are what make it possible to find the needles in humanity’s largest haystack.

The result of these algorithms is unprecedented access to knowledge, from the lifesaving (“how to perform CPR”) to the mundane (“best pizza near me”). Google Search uses algorithms to recommend top search results. YouTube uses algorithms to share everything from cat videos to Heimlich-maneuver tutorials, algebra problem-solving guides, and opera performances. Services from Yelp to Etsy use algorithms to organize millions of user reviews and ratings, fueling global commerce. And individual users “like” and “share” content millions of times every day.

In the mid-1990s, the growing number of people uploading and sharing abundant third-party content also created a serious legal challenge. At the time, defamation law and other state-law torts defined “publishers” as anyone who communicated content to others: book publishers, printers, editors, sellers, radio and TV broadcasters, and so on. And state laws held publishers liable for conveying others’ content whenever publishers knew or had reason to know the content was problematic.

But that approach posed a problem: Everyone online was a potential defendant any time they disseminated someone else’s content. Reaching everyone at once also meant potentially falling under multiple state laws at once.

Anyone with an internet connection could become liable for publishing or republishing others' speech in all fifty States. 1990s chatroom websites faced potentially ruinous lawsuits for displaying others' speech, while users faced liability for merely reposting articles.

When liability depends on knowledge of others' statements, avoiding knowledge is the default solution. But, as the mid-1990s internet illustrated, a see-no-evil approach, where websites accepted all third-party content without organizing or limiting that content, risked a proliferation of pornography, hate speech, and illegality.

To address this dilemma, Congress enacted the Communications Decency Act's Section 230, 47 U.S.C. § 230. 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." Section 230(c)(2) encourages the removal of "objectionable" content. Absent Section 230, any provider or user of an "interactive computer service" (like a website) that broadcasts, hosts, or recommends third-party content (*i.e.*, "information provided by another information content provider") could be liable. Congress thus protected websites and their users from most liability for disseminating others' speech.

In this case, petitioners contend that YouTube violated the Anti-Terrorism Act (ATA) by displaying ISIS videos to users watching similar videos. YouTube abhors terrorism and over the years has taken increasingly effective actions to remove terrorist and other potentially harmful content. But Section 230(c)(1) forecloses petitioners' claims. YouTube provides a website that publishes

third-party videos using algorithms to sort and list related videos that may interest viewers so that they do not confront a morass of billions of unsorted videos.

Petitioners now concede that Section 230(c)(1) bars their primary theory below: that YouTube violated the ATA by failing to remove all ISIS videos that users posted in violation of YouTube’s policies. Section 230(c)(1) similarly bars petitioners’ remaining theory about YouTube displaying additional videos in a box labeled “Up next.” Petitioners do not allege any link between this aspect of YouTube and the Paris attack that is the focus of their claim. That aside, the claim “treat[s]” YouTube as the “publisher” of third-party ISIS videos because it faults YouTube for allegedly amplifying ISIS’s message by making ISIS-related videos easier to locate and view.

Petitioners and the government would gerrymander YouTube’s display of additional video recommendations out of Section 230(c)(1)’s scope. But the sorting and grouping of videos is quintessential publishing. Every website that displays third-party content must select and organize that content. If Section 230(c)(1) does not apply to how YouTube organizes third-party videos, petitioners and the government have no coherent theory that would save search recommendations and other basic software tools that organize an otherwise unnavigable flood of websites, videos, comments, messages, product listings, files, and other information.

Some amici would go further, cabining Section 230(c)(1)’s protections to defamation-like or strict-liability claims. Multiple provisions of Section 230 foreclose those

interpretations, which would turn the internet into a dystopia where providers would face legal pressure to censor any objectionable content. Some might comply; others might seek to evade liability by shutting their eyes and leaving up everything, no matter how objectionable.

This Court should not undercut a central building block of the modern internet, especially given petitioners' lack of a cognizable cause of action under the ATA.

A. Publishers' Historical Liability for Others' Speech

Section 230 flows from Congress's recognition that today's internet could not exist if the law treated every website and user as the publisher or speaker of the third-party content they disseminated. As Lord Mansfield famously observed, "Whenever a man publishes he publishes at his peril." *The King v. Woodfall*, 98 Eng. Rep. 914, 916 (1774). Publishing historically encompassed everyone in the chain of conveying content to the public—printers, newspaper editors, book publishers, distributors, vendors, bookstores, and so on—no matter whether they were conveying their own speech or someone else's. *Prosser & Keeton on the Law of Torts* § 113, at 799 (5th ed. 1984).

In the pen-and-ink world of the eighteenth and nineteenth centuries, most publishers faced strict liability even for conveying someone else's allegedly wrongful speech. Anyone who printed an author's work "became liable as [a] publisher[] from the moment that any third person read the libelous matter." *Youmans v. Smith*, 47 N.E. 265, 266 (N.Y. 1897). A bookseller was liable as the publisher for selling books containing "slanderous matter"—"it was no excuse that he was ignorant of the contents." *Dunn v. Hall*, 1 Ind. 344, 354-55 (1849). And a

newspaper that republished another paper's article while noting doubts about its veracity was "answerable for his act to the same extent as if the calumny originated with him." *Morse v. Times-Republican Printing Co.*, 100 N.W. 867, 868, 871 (Iowa 1904).

By the late nineteenth century, technological change forced the law to catch up as new modes of communication rendered thousands potentially liable for transmitting others' speech. With the telegraph's invention, local newspapers began reprinting wire-service articles; one libelous story could render "any one of the more than 1400 [Associated Press] member newspapers" liable. Frank Thayer, *The Changing Libel Scene*, 1943 Wis. L. Rev. 331, 339. With the dawn of radio and television, everyone from on-air personalities, to radio and TV stations, to station owners was in jeopardy for others' speech. *Classification of Radio Defamation*, 8 Current Legal Thought 18, 20 (1941); Note, *Television Defamation*, 42 Va. L. Rev. 63, 72 (1956).

Courts adapted to these technological shifts by moving away from strict liability. Broadcasters of third-party programming were liable only if they knew or had reason to know that a broadcast was defamatory. See *Auvil v. CBS "60 Minutes"*, 800 F. Supp. 928, 931-32 (E.D. Wash. 1992). Emerging First Amendment doctrine required plaintiffs to prove that all publishers (including distributors) acted with fault when publishing defamatory content. *N.Y. Times v. Sullivan*, 376 U.S. 254, 279-80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); cf. *Smith v. California*, 361 U.S. 147, 152-54 (1959) (no strict criminal liability for bookseller possessing obscenity). Similar fault standards governed whether publishers—be

they newspapers, book publishers, or booksellers—could be liable for other torts, like false advertising.² But even that approach was not adequate to deal with the new technological reality posed by the internet.

B. The Internet and Section 230

1. By the early 1990s, the internet was “rapidly developing” and afforded “unique opportunities for cultural development ... and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(1), (3). Millions chatted on message boards, sent their first emails, or viewed static webpages.

Chatrooms and message boards allowed Americans to connect with strangers, discuss shared interests, post their own material, and comment on other people’s content. Jeff Kosseff, *The Twenty-Six Words that Created the Internet* 37-38 (2019). But message-board users also engaged in defamatory or otherwise actionable expression. Brian McCullough, *How the Internet Happened* 74 (2018).

The internet pushed judge-made publisher-liability rules to the breaking point as users and websites simultaneously created, posted, and distributed content. Online discussion forums faced particularly acute risks. In 1991, a federal court held that online provider CompuServe could not be liable for third-party defamatory content

² *E.g.*, *Manual Enters. v. Day*, 370 U.S. 478, 492 (1962) (plurality opinion) (obscene advertisements); *Goldstein v. Garlick*, 318 N.Y.S.2d 370, 373-76 (Sup. Ct. 1971) (false advertisements); *Cardozo v. True*, 342 So.2d 1053, 1057 (Fla. Dist. Ct. App. 1977) (bookseller’s failure to warn of dangerous cookbook).

where it “neither knew nor had reason to know” of the content. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 141-43 (S.D.N.Y. 1991). While a win for CompuServe, the decision incentivized some websites to remain ignorant of user-created content to avoid liability. Kosseff 43-44. Those websites avoided reviewing or moderating content, lest intervention trigger liability. *See id.* But that risked making the internet a “virtual cesspool” of pornography and other offensive content. *See* W. Joseph Campbell, *1995: The Year the Future Began* 29-30 (2015).

Other websites screened out problematic third-party content to woo users looking for tamer alternatives. Kosseff 50. But in 1995, a New York state trial court held that Prodigy, the biggest of those websites, could be liable for publishing third-party content, on the theory that Prodigy’s efforts to remove offensive posts gave Prodigy “editorial control.” *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4-5 (N.Y. Sup. Ct. May 24, 1995). Under *Stratton Oakmont*’s logic, the price of screening, organizing, or filtering third-party content could be constant lawsuits. Kosseff 55-56.

2. Instead of leaving the internet’s future in the hands of fifty state tort regimes, Congress enacted Section 230 to provide a nationwide solution for a nationwide phenomenon. Website users and providers would remain potentially liable for their own speech, but without publishers’ traditional liability for disseminating allegedly wrongful third-party speech.

Section 230(c)(1)’s twenty-six words—“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”—impose three requirements for coverage: *First*, the defendant must use or operate “an interactive computer service,” *i.e.*, a service that “provides or enables computer access by multiple users to a computer server,” including software “tools” to “pick, choose,” “filter,” “display,” or “organize” content. 47 U.S.C. § 230(c)(1), (f)(2), (f)(4). *Second*, the plaintiff’s claim must “treat[]” the defendant “as the publisher or speaker” of the content the plaintiff is suing over. *Third*, the actionable content must come from a third party—“another information content provider.” *See, e.g., Marshall’s Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) (Garland, C.J.).

Congress also encouraged websites to remove objectionable content. Under Section 230(c)(2), interactive computer services “shall [not] be held liable” for good-faith restrictions on “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable” content or for providing “technical means” that allow users to “restrict access” to such content.

Congress expressly preempted liability under “any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). And Congress excluded various claims from Section 230’s reach. Websites charged with violating federal criminal statutes, intellectual-property law, and certain privacy laws cannot invoke Section 230, even if alleged violations arise from publishing third-party content. *Id.* § 230(e)(1)-(2), (4). In 2018, Congress added sex-trafficking offenses to those specified exclusions. *Id.* § 230(e)(5).

3. Since Section 230’s enactment, the internet has grown exponentially. In 2023, the world is on pace to share 120 zettabytes of data online—60 million times the amount of information stored in every U.S. academic library combined.³ To deal with that staggering abundance of content, websites use computer programs called algorithms to sift through billions of pieces of content and publish information in a form most useful to particular users. Websites also allow users to select content for others by liking or sharing pictures, videos, and articles.

Algorithms have become “a crucial feature” of the modern economy, connecting users to information and each other, and businesses to customers. Tarleton Gillespie, *The Relevance of Algorithms, in Media Technologies* 167 (2013). When a user types “Reagan tear down wall” in Google Search, the world’s most popular website, algorithms rank results about President Reagan’s 1987 Brandenburg Gate speech above updates on Reagan Airport’s renovations. Google’s algorithms make that recommendation by combining what the user types in the search bar with thousands of other factors, like the user’s location and each website’s popularity. *See How Results Are Automatically Generated*, Google, <https://bit.ly/3jys14l>.

Travel websites like Expedia use algorithms to recommend cheap flights by examining all possible routes, airlines, prices, and layovers. *How Expedia Finds Your Flights*, Medium (Mar. 2, 2016), <https://bit.ly/3EaLA9z>.

³ Statista, *Volume of Data/Information* (Sept. 8, 2022), <https://bit.ly/3VYN90W>; Peter Ghavami, *Big Data Analytics Methods* 3 (2d ed. 2020).

Employment websites like Monster and Indeed use algorithms to recommend jobs matched to users' skills. *Monster Improves Job Search Experience*, Monster (Apr. 30, 2018), <https://bit.ly/3WtDlgy>. Streaming services like Spotify and Netflix use algorithms to recommend songs, movies, and TV shows based on users' listening or watch histories, their ratings of other content, and similar users' preferences. *How Netflix's Recommendations System Works*, Netflix, <https://bit.ly/2J5tYT8>. Virtually no modern website would function if users had to sort through content themselves.

C. YouTube

YouTube is an online video platform that originated in a garage in 2005. YouTube was founded on a simple but novel concept: ordinary people, doing everyday things, sharing a story by video. YouTube's basic features are free for viewers and content creators. Anyone with an internet connection can broadcast breaking news footage, home movies, or instructional videos to the world. Since Google acquired YouTube in 2006, YouTube has evolved into a global hub for news, entertainment, and information, becoming the world's second-most-visited site.

Every minute, users upload more than 500 hours of video to YouTube. Grassroots journalists used YouTube to document the Arab Spring in real time. Professional news broadcasters, music labels, sports networks, and educators use YouTube to connect with and expand their audiences. Viewers have learned everything from how to tie bow ties to how to resist an invading Russian army to how to build a house. YouTube has more educational videos

than the Library of Congress has books. During the pandemic, users connected by live-streaming church services and backyard weddings, while small businesses used it as a commercial lifeline.

YouTube’s recommendation algorithms sift through the site’s hundreds of millions of videos to identify the ones that users might find most relevant based on user inputs and other information. When a viewer visits www.YouTube.com, the homepage displays a search bar at the top and a full page of videos that YouTube’s algorithms predict that viewer might find relevant. When a viewer clicks a video to watch, a sidebar appears, again populated with videos based on predicted relevance to the viewer.

From 2008 to 2014, YouTube’s algorithms, in the words of Section 230(f)(4), “pick[ed],” “organize[d],” and “display[ed]” videos primarily based on what viewers with similar YouTube browsing histories watched. If a viewer regularly watched Washington Nationals highlights, the algorithms predicted that the viewer might also enjoy Washington Capitals highlights, because (for instance) other users who watched one often watched the other.

Over the years, YouTube has modified its algorithms to better predict what content may interest individual viewers. By 2015, the algorithms incorporated thousands of inputs, including factors like a viewer’s YouTube search and watch history, location, and time of day. *Recommended Videos*, YouTube, <https://bit.ly/3C0IANS>.

YouTube’s Community Guidelines expressly prohibit pornography or violence, promotion of criminal and terrorist organizations, and other dangerous or offensive

content.⁴ YouTube’s systems are designed to identify and remove prohibited content,⁵ and they automatically detected approximately 95% of videos that were removed for violating YouTube’s Violent Extremism policy in the second quarter of 2022.⁶ Since 2019, YouTube’s recommendation algorithms have not displayed borderline videos (like gory horror clips) that even come close to violating YouTube’s policies.⁷ (Users can now view those videos only by subscribing to relevant channels or sharing links on other platforms.)

D. Procedural History

1. Petitioners are the estate and family of Nohemi Gonzalez, an American killed during a 2015 terrorist attack in Paris. J.A.14, 19. The Islamic State (ISIS) claimed responsibility. J.A.132. In 2016, petitioners sued Google under the Anti-Terrorism Act, 18 U.S.C. § 2333. Pet.App.8a-9a. Petitioners alleged that, by operating YouTube, Google committed or abetted “an act of international terrorism” that caused Ms. Gonzalez’s death. J.A.176-84. Petitioners did not allege that Google had any role in encouraging or committing the Paris attack, or that any of the Paris terrorists were recruited or radicalized through YouTube or used YouTube to plan or conduct the attack.

⁴ *Community Guidelines*, YouTube, <https://bit.ly/3viHtnH>.

⁵ *The Four Rs of Responsibility, Part 1*, YouTube (Sept. 3, 2019), <https://bit.ly/3WFDAok>.

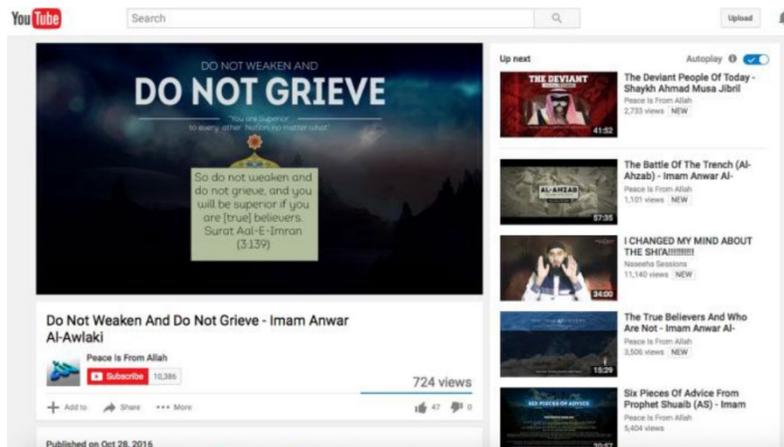
⁶ *Transparency Report*, Google, <https://bit.ly/2Iguufl>.

⁷ *The Four Rs of Responsibility, Part 2*, YouTube (Dec. 3, 2019), <https://bit.ly/3PU6XRI>.

Instead, petitioners' complaint focused on a claim petitioners now concede Section 230(c)(1) bars: YouTube's alleged failure to prevent ISIS from posting content on the website. J.A.156-63. YouTube's terms prohibit ISIS and other terrorist groups from using YouTube, and YouTube has repeatedly blocked ISIS accounts. J.A.65, 158. Petitioners alleged that YouTube nonetheless failed to promptly delete all ISIS content, and that the remaining videos fueled "the rise of ISIS," J.A.63, which petitioners cast as "knowingly provid[ing] substantial assistance" and "material support and resources" to ISIS, J.A.178, 181. In this Court, petitioners acknowledge that Section 230 bars allegations that Google "knowingly permitted ISIS to post on YouTube." Pet. 10-11 & n.2. Petitioners further alleged that YouTube "shared [advertising] revenue with ISIS," J.A.167, but the Ninth Circuit found those allegations insufficient for ATA liability (a ruling petitioners do not challenge).

Only 5 of the complaint's 594 paragraphs involved YouTube's display of recommendations. Petitioners alleged that YouTube "recommends content to users based upon the content and what is known about the viewer." J.A.169. Specifically, YouTube "uses computer algorithms to match videos and accounts with similarities, so that similar YouTube videos and accounts are suggested to a user or viewer." J.A.173. Petitioners stated that "these types of suggestions appear on the side margin of the user's YouTube page, and even automatically load and play when a selected video ends." J.A.173. So viewers who searched for one ISIS video may have seen "similar YouTube videos." J.A.173.

Petitioners did not allege that any Paris attacker saw any ISIS videos based on this feature or, indeed, that YouTube played any role in bringing about the Paris attack. Instead, the complaint contained one screenshot taken a year *after* the attack purporting to “show[] a video that was recommended based upon other videos [a user] had viewed in the past”:



J.A.169-70. The complaint did not specify what those previous videos entailed or what the recommended videos showed.

2. The district court dismissed most of the complaint under Section 230(c)(1). Pet.App.203a, 207a. Petitioners conceded that YouTube provides an “interactive computer service.” So the court addressed Section 230(c)(1)’s other requirements: whether petitioners’ claims treated YouTube as “the publisher or speaker” of content created by another “information content provider.” Pet.App.193a.

The court concluded that, because petitioners sought “to impose liability on [YouTube] for knowingly permitting ISIS and its followers to post content on YouTube,”

the complaint treated YouTube as “the publisher” of ISIS videos. Pet.App.195a-196a. And because ISIS, not YouTube, made and uploaded those videos, YouTube was not the “information content provider.” Pet.App.200a. YouTube’s algorithms, which “aggregate[] user and video data to make content recommendations across YouTube,” did not “creat[e]” or “develop[]” the underlying videos. Pet.App.201a-202a; 47 U.S.C. § 230(f)(3).

The court dismissed the remaining allegations, including allegations that YouTube shared advertising revenue with ISIS, for failure to state an ATA claim. Pet.App.214a.

3. The Ninth Circuit affirmed. Pet.App.3a-5a. The court held that petitioners’ claims treat YouTube as a publisher because they “seek to impose liability for the content [YouTube] allowed to be posted on its platform.” Pet.App.30a-31a. Publishers “review[], edit[], and decid[e] whether to publish or withdraw from publication third-party conduct.” Pet.App.31a (citation omitted). Allegedly “allow[ing]” ISIS content on YouTube is publishing. Pet.App.31a.

The Ninth Circuit held that petitioners’ claims fell within Section 230(c)(1)’s protections because ISIS, not YouTube, “creat[ed]” or “develop[ed]” the relevant content. Pet.App.31a-32a. YouTube “select[s] the particular content provided to a user based on that user’s inputs.” Pet.App.38a. The display of recommended content results from algorithms that are merely “‘tools meant to facilitate the communication and content of others,’ and ‘not content in and of themselves.’” Pet.App.37a (quoting *Dyroff v. Ultimate Software Grp.*, 934 F.3d 1093, 1098 (9th Cir. 2019)).

Separately, the court held that Section 230(c)(1) did not apply to allegations that YouTube shared advertising revenue with ISIS because that theory did “not depend on the particular content ISIS places on YouTube.” Pet.App.46a. The court dismissed these allegations for failure to state an ATA claim, Pet.App.52a-53a, and petitioners do not challenge that holding.

Judge Berzon concurred, disagreeing with circuit precedent applying Section 230(c)(1) to “activities that promote or recommend content.” Pet.App.81a-82a.

Judge Gould dissented in part. He agreed “websites using neutral tools like algorithms are generally immunized by Section 230.” Pet.App.104a. But given the “unique threat posed by terrorism compounded by social media,” he would have held Section 230(c)(1) inapplicable to these facts. Pet.App.104a.

4. The same Ninth Circuit opinion resolved the ATA claim at issue in *Twitter, Inc. v. Taamneh*, No. 21-1496 (oral argument scheduled Feb. 22, 2023). That case involves allegations that YouTube, along with Facebook and Twitter, aided and abetted a different ISIS attack.

Without addressing Section 230, the district court in *Taamneh* held that plaintiffs failed to state an ATA aiding-and-abetting claim. Pet.App.17a. The Ninth Circuit reversed that decision. Pet.App.75a. Although acknowledging that the claim was “similar” to *Gonzalez*, the Ninth Circuit “decline[d] to reach [the Section 230] question in the first instance” in *Taamneh*. Pet.App.18a n.6, 68a. The *Taamneh* plaintiffs concede that affirmance in *Gonzalez* would require dismissal of their complaint because the claims are “materially identical.” *Taamneh* J.A.171.

SUMMARY OF ARGUMENT

I. Section 230(c)(1) bars petitioners' claims that YouTube's display of related videos violates the ATA. Even assuming the ATA permits such a claim, that claim seeks to hold YouTube liable for disseminating third-party content.

A. Section 230(c)(1) applies to providers of "interactive computer service[s]." YouTube qualifies because it enables "multiple users" to "access" content stored on its "computer server[s]" using "tools" to "pick," "organize," and "display" content. 47 U.S.C. § 230(f)(2), (4).

B. Section 230(c)(1) protects against claims that "treat[]" the defendant "as the publisher or speaker." Acting as a "publisher" or "speaker" includes disseminating, selecting, and organizing others' speech. That activity is what petitioners' claims target. Instead of showing a random series of music, educational, and home-improvement videos, YouTube organizes content, in part by recommending videos that it predicts users might find relevant.

C. Section 230(c)(1) bars claims based on publishing *third-party* content, *i.e.*, speech from "another information content provider." Petitioners (at 26) agree that if "the gravamen of a plaintiff's claim was that he or she was injured by the content of ... disseminated third-party material," Section 230(c)(1) applies.

That is exactly this case. All parties agree YouTube had no role in creating ISIS videos—those videos came from "another information content provider." Petitioners allege that YouTube displayed ISIS videos in an easier-to-view and easier-to-locate fashion, "assist[ing] ISIS in

spreading its message.” J.A.169. But that does not mean YouTube created the content. YouTube does not “recommend” videos in the sense of *endorsing* them, any more than Google Search endorses search results. YouTube displays videos that may be most relevant to users. Allowing petitioners’ theory to proceed would allow future plaintiffs to circumvent Section 230(c)(1) by citing algorithms that facilitate the display of third-party content instead of pointing to the third-party content itself.

D. Congress has repeatedly ratified respondent’s interpretation, which tracks the courts of appeals’ longstanding, unanimous position.

E. Denying Section 230(c)(1)’s protection to YouTube’s recommendation display could have devastating spillover effects. Websites like Google and Etsy depend on algorithms to sift through mountains of user-created content and display content likely relevant to each user. If plaintiffs could evade Section 230(c)(1) by targeting how websites sort content or trying to hold users liable for liking or sharing articles, the internet would devolve into a disorganized mess and a litigation minefield.

II. Contrary interpretations are textually unsupported and lack any limiting principle that would allow search and other basic algorithms to operate.

A. Petitioners have made significant shifts from the petition, including in the question presented. Petitioners (at 33) now agree that publishing includes “sending users third-party material selected by the website itself” and that Section 230(c)(1) bars claims “that the plaintiff was injured by harmful content disseminated in that manner.” But that standard covers this case: YouTube shows users

potentially relevant third-party videos selected by YouTube, and petitioners' claimed injury arises because people allegedly watched those videos. Section 230(c)(1) thus bars petitioners' claim.

B. The government similarly agrees that Section 230(c)(1) forecloses claims that fault defendants for disseminating third-party content. But the government argues that any recommendation conveys the website's own "implicit message" that users will find third-party material relevant. On that theory, any organized display of content "implicitly" recommends that content and could be actionable. Publishers always choose what warrants publication and how to publish it. The government's theory ignores that the complaint does not allege that YouTube distributed its own independently tortious message. Rather, the gravamen of the claim is that YouTube made *ISIS*'s speech more visible.

C. Some amici go even further, suggesting that Section 230(c)(1) forecloses only defamation-like claims that have publication or speech as a formal element. That reading would flout the statutory text, render superfluous Section 230's textual exceptions, and, given the ease of repleading torts, eviscerate Section 230(c)(1).

Other amici suggest that Section 230(c)(1) merely forecloses the strict liability that primary publishers like newspapers once faced, but does not bar other claims that hold defendants responsible only when they knew or had reason to know of harmful third-party content. That theory misapprehends the word "publisher," which at the time of Section 230's enactment encompassed both pri-

mary publishers like newspapers *and* secondary publishers, *i.e.*, distributors, like booksellers. Moreover, by 1996, liability rules for all sorts of publishers had substantially converged; virtually no one faced strict liability. If Section 230(c)(1) had barred only strict liability, the provision would have done virtually nothing.

Gutting Section 230(c)(1), as these amici urge, would upend the internet and perversely encourage both wide-ranging suppression of speech *and* the proliferation of more offensive speech. Sites with the resources to take down objectionable content could become beholden to heckler’s vetoes, removing anything anyone found objectionable. Other sites, by contrast, could take the see-no-evil approach, disabling all filtering to avoid any inference of constructive knowledge of third-party content. Still other sites could vanish altogether.

III. The Court could also resolve this case by reversing in *Taamneh*. Petitioners’ claims here and respondents’ claim in *Taamneh* are “materially identical.” *Taamneh* J.A.171. If no cause of action exists in *Taamneh*, no cause of action exists for Section 230(c)(1) to insulate, and the Court need not reach the question of Section 230’s scope.

ARGUMENT

I. Section 230(c)(1) Bars Petitioners’ Claims

Section 230(c)(1) bars claims where (1) the defendant provides or uses an “interactive computer service,” and (2) the claim seeks to “treat[]” the defendant “as the publisher or speaker” of (3) “information provided by another information content provider.” Pet. Br. 8; U.S. Br. 13; Pet.App.29a; *Marshall’s Locksmith*, 925 F.3d at 1268 (all

agreeing on three-part test). Assuming petitioners have a cause of action, *but see infra* pp. 54-55, Section 230(c)(1)'s text squarely encompasses their claim that YouTube violated the ATA by recommending ISIS-created videos.

A. YouTube Provides an “Interactive Computer Service”

Any “provider or user” of “an interactive computer service” falls within 230(c)(1)'s scope. An “interactive computer service” includes any service that gives multiple people “access ... to a computer server.” 47 U.S.C. § 230(f)(2).

YouTube’s website, like all websites, provides such access. *See* U.S. Br. 10. All data online is stored on servers, *i.e.*, computers that provide “access to files ... to other computers in the network.” *Merriam Webster’s Collegiate Dictionary* 1070 (10th ed. 1993). Indeed, Congress expressly covered algorithms like YouTube’s, defining an “interactive computer service” to encompass “tools” that “filter,” “forward,” “search, subset, organize, reorganize,” “pick, choose, analyze, or digest content” on websites. 47 U.S.C. § 230(f)(2), (4).

In covering “provider[s] or user[s] of interactive computer service[s],” Section 230 protects service providers like America Online, search engines like Google, news websites like reuters.com, ecommerce sites like Etsy, cloud-storage services like Dropbox, moderators of Reddit forums, and anyone posting on Instagram.

B. Petitioners’ Claims Treat YouTube As a Publisher or Speaker

Section 230(c)(1) protects websites and users from claims that “treat[]” them “as the publisher or speaker” of

third-party content. Either under ordinary meaning or in the defamation-law context, “publishers” and “speakers” convey speech. And “treat” means to “regard ... and act toward or deal with accordingly.” *Webster’s Third New International Dictionary* 2434 (1993).

Claims that “treat[]” defendants “as the publisher or speaker” include those seeking to impose liability for communicating third-party content, including how, whether, and when to communicate it. Here, petitioners’ claims treat YouTube as a “publisher” or “speaker” because the claims fault YouTube for sorting and displaying, *i.e.*, publishing or speaking, ISIS videos.

1. **Statutory Text.** This Court typically interprets statutory language based on its ordinary meaning when enacted. *Sw. Airlines v. Saxon*, 142 S. Ct. 1783, 1788 (2022). Petitioners (at 21-24) counter that “publisher” is a defamation-law term of art. Both approaches lead to the same place: A “publisher or speaker” broadcasts speech. *Accord* Pet. Br. 24; U.S. Br. 14. As petitioners (at 24-26) and the government (at 13-14, 25-26) acknowledge, publication includes keeping up particular content. But publishing and speaking equally include prioritizing some content over other content, grouping content together, and telling audiences what content they will encounter next. As the government (at 27) concedes, making a “recommendation message” is publishing. *Accord* Pet. Br. 27.

Based on ordinary meaning, a “publisher” or “speaker” is “one that publishes” or “speaks.” *Merriam Webster’s Collegiate* 944, 1128. To “publish” is “to place before the public.” *Webster’s Third* 1837. “Speak” means

to give “expression to thoughts, opinions, or feelings.” *Id.* at 2185.

As petitioners and the government sometimes acknowledge, publishing includes more than passively transmitting information from one person to another. *See* Pet. 38 (all “editorial functions” are publishing); Pet. Br. 33 (“select[ing]” third-party content is publishing); U.S. Br. 14 (“failure to remove speech” is publishing). Publishers and speakers select and organize content as part of how they “place” or “express[]” it. *See Webster’s Third* 1837, 2185.

Publishers like broadcasters, cable operators, and newspapers “engage[] in protected speech” when they “select programming originally produced by others” and “present[] an edited compilation of speech.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995). Television broadcasters enjoy “abundant discretion over programming choices.” *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 651 (1994). Cable operators thus exercise “editorial discretion over which stations or programs to include.” *Id.* at 636 (citation omitted). Cable operators provide “a forum for speech” and “exercise editorial discretion over the speech and speakers in the forum.” *See Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019); *see also Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 385 (1969) (radio broadcasters “publish[]” speech); *Turner*, 512 U.S. at 647 (television broadcasters “disseminate[]” speech).

Newspapers likewise exercise “editorial judgment” on “content,” “layout,” “stories,” “columnists,” and “contributors.” *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S.

241, 255 (1974) (citation omitted). The opinion page, for example, offers a “presentation of an edited compilation of speech generated by other persons.” *Hurley*, 515 U.S. at 570. Publishers publish by selecting and organizing speech.⁸

Looking to defamation law yields the same result. Common-law defamation requires “publication to a third party.” *Restatement (Second) of Torts* § 558 (1977); Prosser § 113, at 803. “Publishers” include anyone in the chain “who takes part in the publication,” including an “editor,” “printer,” and “vendor.” Prosser § 113, at 799, 803.

Under defamation law, defendants are “publishers” when organizing content. For example, the “impression” created by “[t]he whole layout” of a newspaper can be defamatory. *Morgan v. Bulletin Co.*, 85 A.2d 869, 873 (Pa. 1952). Organizing content—say, placing someone’s photograph alongside a salacious headline—can “publish[] ...

⁸ Circuit courts thus unanimously ask whether the claim challenges “the ‘exercise of a publisher’s traditional editorial functions.’” *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (citation omitted) (collecting First, Third, Fourth, Fifth, and Ninth Circuit cases); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010); *Ben Ezra, Weinstein, & Co. v. Am. Online*, 206 F.3d 980, 986 (10th Cir. 2000). Some decisions speak broadly in discussing the “business [of] publication.” *E.g.*, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). But, in practice, these decisions examine whether claims impose liability for third-party speech that publishers broadcast, including speech reflecting editorial judgments about how to order and display content.

defamatory references.” *Id.* Likewise, if a newspaper “arrang[es] the display of articles [and] photographs” so the plaintiff’s photograph appears above a defamatory caption, that placement could amount to “publish[ing] defamatory falsehoods.” *Vázquez Rivera v. El Día, Inc.*, 641 F. Supp. 668, 669-70, 673 (D.P.R. 1986) (citation omitted). “[T]he context in which the photograph appears” can render it defamatory. Robert Sack, *Sack on Defamation* § 2:4.8 (5th ed. 2017).

Congress underscored that publishing for purposes of Section 230 includes sorting content via algorithms by defining “interactive computer service” to include “tools” that “pick, choose,” “filter,” “search, subset, organize,” or “reorganize” content. 47 U.S.C. § 230(f)(2), (4). Congress intended to provide protection for these functions, not for simply hosting third-party content.

At the same time, Section 230(c)(1) does not protect everything a company in the publishing business might do. *Cf. Pet. Br. 19-20*; *U.S. Br. 14*. A magazine does not act as a “publisher” when hiring or firing editors or negotiating advertising deals. Likewise, Section 230(c)(1) does not apply to a website’s real-world contractual promise to remove content. *E.g., Barnes*, 570 F.3d at 1107-09. Some cases may have occasionally overstepped in applying Section 230(c)(1) to non-publishing behavior like facilitating sex trafficking by accepting anonymous payments from advertisers. *E.g., Doe v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016); *U.S. Br. 18-19*. But broadcasting, grouping, or organizing selected content for display is at the core of publishing.

2. Application to YouTube. Under the above principles, petitioners' claims seek to treat YouTube as "the publisher or speaker" of third-party videos by seeking to hold it liable for broadcasting, distributing, and sorting those third-party videos. On the internet, all the steps of paper-and-ink publication—including circulating copies to wholesalers, distributors, and readers—happen simultaneously. Instead of showing an undifferentiated list of millions of random videos, YouTube publishes links to the videos or topics that users are likely to find relevant.

As petitioners' complaint puts it, YouTube "match[ed] videos and accounts with similarities, so that similar YouTube videos and accounts are suggested to a user or viewer when viewing a YouTube account." J.A.173. Watch the World Series of Poker on YouTube, and YouTube's algorithms might display Texas Hold'em tutorials. That does not mean YouTube endorses gambling, any more than spellcheck endorses a suggested substitute word, Westlaw endorses higher-listed cases, or a classroom endorses posts organized by topic. As the Ninth Circuit noted, YouTube applies the same algorithms to all content. *See* Pet.App.38a. Based on statistical predictions, YouTube filters and sorts displayed videos—activity inherent in broadcasting content online.

That ordered display is not materially different from a newspaper's curation of letters to the editor or a radio station's ordering of programs. Or compare television broadcasting: Under any definition of "publisher," when ABC broadcasts *Love Actually*, it "publishes" the movie. But ABC equally acts as a publisher when it slots *Miracle on 34th Street* on Christmas Eve. Or when it runs *Die Hard* at 10 PM and gives the family-friendly 6 PM slot to

Elf. Ditto for running *Home Alone* and *Home Alone 2, 3*, and *4* in a day-long marathon. Sorting content to make it useful for an audience is publishing. Newspapers and TV stations do so with editors, layout experts, and technicians. Given the vast quantity of information online, websites perform that function via algorithms.

C. Petitioners’ Claims Fault YouTube for Broadcasting Third-Party Content

1. **Statutory Text.** Section 230(c)(1) bars liability for publishing or speaking “information provided by *another* information content provider,” *i.e.*, content someone else created or developed “in whole or in part.” 47 U.S.C. § 230(c)(1), (f)(3) (emphasis added). Websites remain liable for their own speech, not that of others. Section 230(c)(1) thus applies when the gravamen of the claim “depend[s] on the particular content” the third party provides. Pet.App.46a; *accord Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022) (citation and emphasis omitted) (claim must be “based on the content of the speech published by” defendant).

Google Search results, for example, “display third-party content” in short snippets previewing third-party websites. *See O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016). A claim alleging that Google displayed a defamatory snippet necessarily seeks to impose liability for “reproducing this third-party content,” even where Google “performed some automated editorial acts” to display the content. *Id.* Section 230(c)(1) thus bars that claim. *Id.*; *accord* U.S. Br. 29. Similarly, Section 230(c)(1) protects a “chatroom” that “organize[s] posts” by “supply[ing] topic headings.” U.S. Br. 23. While the chatroom

operator supplies the organization and layout, the underlying posts are still third-party content.

By contrast, where a credit-reporting website fails to provide users with its own required statement of consumer rights, Section 230(c)(1) does not bar liability. *Henderson*, 53 F.4th at 125. Even if the website also publishes third-party content, the failure to summarize consumer rights and provide that information to customers is the *website's* act alone. *See id.* Likewise, Section 230(c)(1) does not apply when a roommate-matching website requires users to convey allegedly illegal preferences (like whether they would live with “Gay’ males”). *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (en banc). By “materially contributing to [the content’s] unlawfulness,” the website makes that content its own and bears responsibility for it. *Id.* at 1168.

2. Application to YouTube. YouTube undisputedly played no role whatsoever in “creat[ing]” or “develop[ing]” alleged ISIS videos. *See* U.S. Br. 26, 30; J.A.61; 47 U.S.C. § 230(f)(3). As the government (at 25) observes, Section 230(c)(1) bars petitioners’ allegations that YouTube violated the ATA by permitting ISIS to post on YouTube. That theory “necessarily target[s] YouTube’s role as a publisher of harmful or otherwise objectionable third-party content.” U.S. Br. 25-26.

Section 230(c)(1) equally bars petitioners’ attempt to hold YouTube liable for making third-party videos easier to find and watch. As petitioners’ complaint alleges, in 2015, YouTube automatically displayed videos “Up next” after a user viewed selected content, so that the viewer

saw third-party content “similar” to what she already chose to see. *See* J.A.169-70, 173. (Users could always disable automatic display (“autoplay”) using the toggle shown at the top right of J.A.170.) According to petitioners, “[b]ecause of those recommendations, users ‘were able to locate other videos and accounts related to ISIS’” more easily. Pet. Br. 9 (quoting J.A.173).

But making related content easier to find does not develop or materially contribute to the underlying content. Nor is it tortious in the abstract. Indeed, the First Amendment protects decisions about what content to display and how to format it. *E.g.*, *Turner*, 512 U.S. at 636.

D. Congress Has Ratified Section 230’s Coverage

Since 1996, ten circuit courts have considered Section 230’s applicability to myriad claims and come to a unanimous consensus that Section 230(c)(1) protects websites against claims challenging the result of decisions “whether to publish, withdraw, postpone or alter content.” *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); *see Klayman*, 753 F.3d at 1359 (collecting cases); *supra* p. 25 n.8. Over this period, Congress has amended or incorporated Section 230 twelve times, thereby ratifying the circuits’ unanimous interpretation. *See Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 537 (2015); *Jones*, 755 F.3d at 408.

For instance, in 2002, Congress expanded the definition of “interactive computer services for purposes of section 230(c)” to encompass a new internet domain (.kids.us) for websites with child-friendly content. 47 U.S.C. § 941(e)(1). In 2008, Congress incorporated Section 230

into the Controlled Substances Act, shielding online pharmacies from liability for deleting third-party content “in a manner consistent with section 230(c).” 21 U.S.C. § 841(h)(3)(A)(iii)(II). And in 2010, Congress barred U.S. courts from recognizing or enforcing foreign defamation judgments that are not “consistent with section 230.” 28 U.S.C. § 4102(c)(1). These “legislative extensions” indicate Congress’s acceptance of the “prevailing judicial understanding of section 230.” *See In re Facebook, Inc.*, 625 S.W.3d 80, 92-93 & n.7 (Tex. 2021) (collecting cases).

Further, Congress amended Section 230 “while still adhering to the operative language in” Section 230(c)(1). *See Inclusive Cmty.*, 576 U.S. at 537. In 1998, Congress added Section 230(d), which requires computer services to inform customers about parental controls. And in 2018, Congress created Section 230(e)(5), which narrowly carved out sex-trafficking claims, but otherwise left Section 230(c)(1)’s “broad immunity” in place. *See* H.R. Rep. No. 115-572, at 3 (2018).

This legislative activity is significant because Section 230 is hardly obscure. Members of Congress have expressed keen awareness of circuit courts’ interpretations. A 2002 House Report affirmed that courts had “correctly interpreted section 230(c)” to protect against “many lawsuits,” including for “negligence.” H.R. Rep. No. 107-449, at 13 (2002) (citing, *e.g.*, *Zeran*, 129 F.3d 327). Congress also reined in an outlier decision by legislatively overruling the First Circuit’s conclusion that Section 230 prohibited certain sex-trafficking claims. S. Rep. No. 115-199, at 2 & n.6 (2018) (citing *Backpage.com*, 817 F.3d 12). Members of Congress have “proposed their own legislation to revise or repeal” Section 230, Cruz Br. 1, with some

seeking more content moderation and others less. Yet, “Congress, with knowledge of the prevailing judicial understanding of Section 230,” has not seen fit to change the statute’s core protections. *Facebook*, 625 S.W.3d at 92.

E. Recommendation Algorithms Are Essential to the Internet

Because today’s internet is unimaginably vast, algorithmic tools—from search rankings and content recommendations to email spam-filtering—are indispensable to a functional internet.

If plaintiffs could subject websites and users to liability based on *how* they choose to publish third-party content, Section 230(c)(1) would protect virtually nothing. Plaintiffs could recast every tort claim as challenging how websites organize and filter third-party content, not the underlying content. That result is particularly unfathomable given Congress’s stated purpose of encouraging websites to develop the internet into a user-friendly environment with tools to search, filter, and organize third-party content. *See* 47 U.S.C. § 230(b)(1), (f)(4). Petitioners and the government offer no meaningful textual or technological distinction between the “recommendations” at issue here and the web’s basic organizational tools.

Without algorithmic sorting, Google Search would display an unordered, spam-filled list of every website. Gmail would not be able to deprioritize spam. YouTube would play every video ever posted in one infinite sequence—the world’s worst TV channel. Westlaw would display every judicial decision chronologically without headnotes. Amazon would intermingle jackets with knives and handbags with toothbrushes.

These algorithms, at root, “try to determine what [each] user would like to” see. Pet. Br. 17. Every claim could be recast as challenging how websites sort and prioritize third-party content. TripAdvisor might be sued for tortious interference with business relations by prominently listing one-star reviews. Lexis might be sued for contributing to defamation by prioritizing a defamatory law-review article. Amazon might be sued for causing eating disorders by highly ranking diet books. Even individual users, whom Section 230(c)(1) also protects, could be sued for sharing others’ content. Retweeting a defamatory news article might well be cast as telling followers they “will like this content.” U.S. Br. 28 (citation omitted).

Given that virtually everyone depends on tailored online results, Section 230 is the Atlas propping up the modern internet—just as Congress envisioned in 1996.

II. Contrary Interpretations Are Unsupported and Risk Upending the Modern Internet

A. Petitioners’ Changed Position Lacks Textual Support

Petitioners have substantially changed their position from the petition, but appear to agree with respondent on Section 230(c)(1)’s basic contours: It applies to claims challenging the defendant’s communication of third-party speech. That interpretation forecloses petitioners’ claims that YouTube helped disseminate ISIS’s speech by making ISIS videos easier to find.

1. Shifting Positions. Given petitioners’ shifting positions, the scope of the present dispute is difficult to discern. The petition asked this Court to decide whether Section 230(c)(1) “immunize[s] interactive computer services

when they make targeted recommendations of information provided by another information content provider,” and deemed *all* recommendations outside Section 230’s reach. Pet. i, 35-36, 38.

The merits brief retreats and (at i) changes the question presented to: “Under what circumstances does the defense created by section 230(c)(1) apply to recommendations of third-party content?” Petitioners (at 26) concede Section 230(c)(1) applies to “recommendation-based claims,” if the recommendation “involve[s] merely disseminating third-party material.” Petitioners (at 33) similarly concede that Section 230(c)(1) bars claims “that the plaintiff was injured by harmful content disseminated” through “the practice of sending users third-party material *selected by the website itself*” (emphasis added). The dispute now appears to be whether YouTube fits those parameters when recommending third-party videos.⁹

Meanwhile, the petition conceded that Section 230 “immunize[s] ... engag[ing] in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information.” Pet. i; *accord* Pet. 4-5, 11 n.2, 28, 37-38; Cert. Reply 1, 4; *see* Cruz Br. 3. Now, as amici observe, petitioners (at 20) try to limit publishing to

⁹ Underscoring the confusion, some topside amici stick with the original question presented. *E.g.*, Anderson Br. i; CAI Br. i; CRA Br. 1; Integrity Inst. Br. 2; LJC Br. i; NPA Br. 13-14; ZOA Br. 1-2. Others focus on new questions outside either of petitioners’ formulations. *E.g.*, AAJ Br. 2-3; Child USA Br. i; Cruz Br. 3-4; Hawley Br. 1-2; Seattle Sch. Br. 4. The government (at i) rewrites the question presented to include whether Section 230 protects “hosting” content, notwithstanding petitioners’ concessions on that score.

just displaying content to others.¹⁰ But, even under that narrow definition, petitioners do not dispute that Section 230(c)(1) protects decisions about whether to display particular content. Pet. Br. 24-26.

Petitioners (at 42-47) also retreat from their earlier representations that YouTube provides an “interactive computer service.” Pet. i, 2-3, 8, 18, 28; Pet.App.29a, 242a.

Because this Court ordinarily holds parties to their previous positions, this Court may wish to consider dismissing the petition as improvidently granted. *E.g.*, *Visa Inc. v. Osborn*, 137 S. Ct. 289, 289 (2016); *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 608-10 (2015); *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 951 (2022) (Thomas, J., dissenting). Cascading confusion over the question presented suggests this may not be the case to resolve bedrock questions about Section 230.

2. Misapplication of Section 230(c)(1). Even looking only at petitioners’ merits brief, petitioners do not dispute key aspects of Section 230. Petitioners simply avoid applying those provisions to this case.

a. **“Interactive Computer Service.”** Petitioners (at 42-47) for the first time contend that YouTube does not provide an “interactive computer service” because YouTube does not provide users with “access” to a “computer server.” *See* 47 U.S.C. § 230(c)(1), (f)(2). Petitioners

¹⁰ *See* IFS Br. 3 n.2 (“Petitioners’ arguments have shifted from their petition, where they argued that section 230(c)(1) protected ‘traditional editorial functions,’ ... to protecting Google’s publisher function under its ‘legal meaning’ in defamation law.”); CRA Br. 1, 3 (similar).

(at 45-46) theorize that “server[s]” are computers that respond to user requests, but YouTube’s recommended content is purportedly not requested by users.

Even putting aside petitioners’ waiver, this argument is meritless. Nothing in the text requires servers to respond by providing users *only* content they specifically request. All that matters is that servers provide “access to files ... to other computers in the network,” *Merriam Webster’s Collegiate* 1070, and webpages are files stored on servers, Faithe Wempen, *Computing Fundamentals* 512-13 (2014).

By allowing YouTube users to access content stored on YouTube servers, YouTube (in the words of Section 230) “enables” “multiple users” to “access” YouTube’s “computer server[s].” 47 U.S.C. § 230(f)(2). Websites, including YouTube’s, thus provide “interactive computer service[s].” *Accord* U.S. Br. 13. That is true whether users search for specific content or whether the website displays more content than what users specifically request. When users visit a webpage, their browsers (*e.g.*, Google Chrome) communicate with the website’s servers and request and receive the entire webpage as a package. Users do not pick and choose which pieces of content they actually want to see. All websites display content not affirmatively requested by users from disclaimers and settings to banner images and menus.

b. “**Publisher or Speaker.**” Petitioners (at 20) concede that “publisher[s]” “actually communicate” speech to others. And petitioners (at 33) concede that publishing includes “sending users third-party material selected by the website itself.”

But those descriptions fit YouTube’s recommendation display. YouTube displays (*i.e.*, publishes) third-party video thumbnails on its homepage and in sidebars while users watch videos. *Supra* pp. 27-28. These displays of third-party content are publishing under petitioners’ test of “actually communicat[ing]” speech.

Petitioners (at 26-28) argue that Section 230(c)(1) excludes “recommendation[s]” that go beyond “merely disseminating third-party material,” and claims where “the recommendation itself was a cause of the injury.” But that argument still focuses on the substance of the third-party content, and still targets the result of decisions about how to “filter,” “display,” “subset, organize,” or “reorganize” third-party content, 47 U.S.C. § 230(f)(4)—actions that plainly qualify as “publishing” under the statute.

Petitioners’ examples where Section 230(c)(1) would not apply involve defendants publishing *their own* content. Take petitioners’ examples (at 29-33) of endorsements like YouTube writing a “favorable review of Carl Ber[n]stein’s latest book.” Of course YouTube uses algorithms to predict what users may find relevant; it does not review or endorse videos like an Academy Award or restaurant review. *Contra* Pet. Br. 31. But accepting the hypothetical, the reviewer is publishing its own content, so claims targeting the review would not be covered by Section 230(c)(1).

The same goes for petitioners’ hypothetical (at 30) where YouTube posts a “glowing review of an ISIS video” that *another* video platform hosts, but someone later uploads to YouTube. The hypothetical YouTube review is

not *third-party* speech and thus not covered by Section 230(c)(1).

Petitioners (at 27-28) contend that Section 230(c)(1) would not protect a website that alerted users via email to new posts about where to find heroin in Jacksonville, *i.e.*, the facts of *Dyroff*, 934 F.3d 1093. But that website’s notification email was not tortious on its own. The gravamen of the claim was that the third party’s posts *on the website* led to the plaintiff’s son’s death. *Id.* at 1098. The email added nothing tortious in its own right; the allegation was that the email made the tortious third-party speech easier to discover. *Id.* Section 230(c)(1) thus protected the website’s publication of that third-party speech. *Id.* YouTube’s display of organized third-party content on its own website is even more obviously publishing.

c. **“Information Provided by Another.”** Petitioners (at 28, 33-34, 39, 42) repeatedly agree with respondent that Section 230(c)(1) protects websites for publishing *third-party* content. But that conclusion bars petitioners’ claims that YouTube, by recommending ISIS’s videos, facilitated the rise of ISIS by making ISIS’s videos easier to find and watch. *Supra* pp. 29-30. In petitioners’ articulation: “the dissemination of harmful third-party content is the gravamen of the claim.” Pet. Br. 24.

Although not entirely clear, petitioners (at 35-39) appear to fault YouTube for URL links it provides with each video listing, allowing users to click to view that video if they wish.¹¹ The complaint never mentions URLs, which

¹¹ Petitioners (at 40) mention website-created notifications, using Facebook as an example, but neither their brief nor their complaint discusses YouTube’s notifications.

are effectively a filing system for the internet, and how websites index content. As the government (at 33-34) explains, URLs are “inherent” in online publishing. All webpages have URLs, which let internet users access individual webpages. Petitioners’ ATA claims are not based on the content of any YouTube URLs. The random string of numbers and letters that make up YouTube URLs are not independently wrongful; they merely specify how users can access webpages.

B. The Government’s Position Is Internally Inconsistent and Misunderstands the Internet

The government likewise largely agrees on the legal framework, but misapplies it to the facts, trying to carve out recommendations from other aspects of publishing. The government (at 13, 32-33) agrees that YouTube and other websites “provide[]” “an interactive computer service.” The government recognizes that a “publisher” is anyone who “makes something public,” and that YouTube acts as a publisher when it leaves up and displays third-party videos. U.S. Br. 14, 28 (cleaned up). And the government (at 16, 24) concludes that Section 230(c)(1) bars “claims premised on [the] dissemination of third-party speech” and thus bars petitioners’ claims “to the extent they allege that YouTube violated the ATA by publishing videos created by ISIS.”

Rather than ending there, however, the government (at 12) argues that claims faulting “YouTube’s own conduct in designing and implementing its targeted-recommendation algorithms” fall outside Section 230(c)(1). That theory does not square with Section 230’s text and risks

imposing liability for virtually every action of nearly every website presenting relevant data to users.

1. **“Publisher or Speaker.”** The government’s positions on when claims “treat[]” a defendant “as the publisher” are puzzling. The government recognizes that a “publisher” is anyone who “makes something public,” and that YouTube acts as a publisher when displaying featured third-party videos. U.S. Br. 14, 28 (cleaned up). But the government seems to assume that display somehow happens spontaneously, failing to recognize that the ways websites organize and sort third-party content are inherent to online publication.

The government contends that being a “publisher or speaker” is limited to a binary function of “allowing third-party content to appear on the site” or “fail[ing] to block or remove” content. U.S. Br. 20, 30; *accord* U.S. Br. 14-16, 19. Based on that theory, the government (at 24-25) says petitioners’ claims that YouTube “provid[ed] targeted recommenddations [sic] of ISIS content” is not treating YouTube as a “publisher” because that “theory ... does not seek to hold YouTube liable for hosting, or failing to remove, unlawful third-party content.”

But because some selection is always necessary, any distinction between making content available and displaying selected content is illusory. As Congress recognized in Section 230(f)(4), websites “pick, choose,” “reorganize,” and “display” content. It cannot be that the very tools that make websites “interactive computer service[s]” covered by Section 230 simultaneously preclude them from invoking Section 230(c)(1)’s protections.

Moreover, the government’s constrained articulation of publishing defies both the ordinary meaning and defamation-law antecedents that the government (at 14) elsewhere embraces. Publishing includes *how* content is organized, not just *whether* that content goes out into the world. *Supra* pp. 23-26. Broadcasting “Don’t Stop Believin’” and “Hungry Like the Wolf” back-to-back during a curated countdown of Best 100 ’80s Songs is just as much publishing as airing “Eye of the Tiger” but axing “Don’t Stand So Close to Me” for uncomfortable lyrics. If (as the government concedes) keeping up content is publishing, so is formatting, displaying, and organizing that content.

YouTube formats, displays, and organizes content, based on predictions of what users might consider relevant. Such organizational tools are “inherent” in publishing. *Cf.* U.S. Br. 33. Newspapers publish different stories in their international editions to appeal to different audiences. Magazines put enticing images on the cover. Online, Spotify creates playlists of songs listeners might like. Etsy shows users items similar to ones they have bought before. Chatrooms organize posts with topic headings to help users identify topics of interest. U.S. Br. 23.

The government’s examples of non-publishing activity do not help its position, because those claims do not challenge disseminating content. Some products-liability claims against online marketplaces address the act of *selling* defective products, rather than publishing speech about products. U.S. Br. 16 (discussing *Erie Ins. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019)). Similarly, holding websites liable for knowingly facilitating sex trafficking by accepting anonymous advertising payments would not involve liability for publishing content. U.S. Br.

18-19 (discussing *Backpage.com*, 817 F.3d 12). Conversely, claims that websites deleted positive third-party reviews of businesses and retained negative reviews to induce businesses to advertise attack websites' protected choice of what content to display. U.S. Br. 16 (discussing *Levitt v. Yelp! Inc.*, 2011 WL 5079526 (N.D. Cal. Oct. 26, 2011)). Elsewhere, the government agrees Section 230(c)(1) protects such publishing. U.S. Br. 13-14.

The government's other example involves publishing the website's *own* speech. Websites that post their own discriminatory questionnaire *are* publishers broadcasting content—they just develop the content, thereby making it their own, as the Ninth Circuit held. *See* U.S. Br. 16-17 (discussing *Roommates.com*, 521 F.3d 1157).

2. **“Information Provided by Another.”** The government's theory (at 24-25) that petitioners' claims “challenge[] YouTube's own conduct in designing and implementing recommendation algorithms” would allow virtually all plaintiffs to plead around and defeat Section 230(c)(1).

On the one hand, the government (at 22) agrees that “actions a website takes to better display pre-existing third-party content or make it more usable” do not make the website the developer of third-party content. Thus, the government (at 23) seemingly agrees that Section 230(c)(1) protects organizational tools like “supply[ing] topic headings to organize [chatroom] posts.” The government (at 23) explains that “[c]ontent development must go beyond the mere provision of basic organizational or dis-

play tools that Congress viewed as inherent in an interactive online service” or Section 230(c)(1) would be a “self-defeating” “dead letter.” U.S. Br. 23 (citation omitted).

That observation gives away the game. No meaningful textual or technological difference exists between a topic-specific chatroom labeling and grouping user comments and a group of recommended videos labeled “more like this,” “other videos about chess,” “videos you might like,” or “up next.” YouTube’s algorithms let YouTube videos function like a curated chatroom or TV channel, where the viewer can keep watching related topics (or turn off the TV by unchecking autoplay or closing the browser).

But the government (at 27-28) jettisons this method-of-display-is-protected approach when it comes to algorithms’ role in selecting, organizing, and presenting content. Drawing from Judge Katzmann’s separate opinion in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), the government (at 28) distinguishes between “recommendations” (presumably produced by algorithms) and the underlying videos. YouTube’s algorithms, the government argues, communicate a “distinct” “implicit message” that the user “‘will be interested in’ that content.” U.S. Br. 27-28 (quoting J.A.173); see *Force*, 934 F.3d at 82 (Katzmann, C.J., dissenting in part). Because these algorithms are “bound up with YouTube’s own platform-design choices,” that implicit message supposedly “would not be ‘information provided by another information content provider.’” U.S. Br. 27-28.

This argument has two fundamental problems. First, it proves too much. *Every* method of displaying and organizing content implicitly tells a reader you “will be interested in” this content.” U.S. Br. 27. All sorting might equally be said to convey its own message: “You may want to click one of these search results”; “This Netflix show might interest you”; “These customer reviews at the top of the page are more relevant than ones farther down.” Similar messages could be ascribed to any publishing decision. *The Washington Post* could be said to implicitly tell readers that published letters to the editor warrant a look. HBO could be said to implicitly convey that the movie on at 8 PM is better than the one at 4 AM.

Second, neither the government nor petitioners identify any tortious message lurking within YouTube’s general-purpose, relevance-based recommendations. Nor do petitioners allege that by queuing related videos together as “Up next,” YouTube gave ISIS videos YouTube’s imprimatur. Petitioners instead fault YouTube for allegedly making all sorts of third-party speech more available by displaying potentially related content so that users could find other relevant videos more easily. *See* J.A.169, 173; Pet. Br. 9-10. But, again, the only objectionable speech is that created by third parties (ISIS supporters), not YouTube.

The government’s proposed test underscores the unworkability of its approach. In order to separate a website’s speech from third parties’, the government (at 28, 31) urges the Court to analyze petitioners’ claims “as it would if YouTube had recommended ISIS videos posted on *other* sites.” But that counterfactual does not translate to how YouTube actually works and ironically describes

how *search engines* work, the one type of website that petitioners and the government seemingly agree Section 230(c)(1) should protect. Pet. Br. 15-16; U.S. Br. 29. Organizing third-party content is still publishing—all publishers put some content before others. That counterfactual also distorts petitioners’ actual theory: that YouTube’s algorithms “induc[ed] viewers to spend more time *on the site*.” Pet. Br. 17 (emphasis added); *see also* J.A.173.

If plaintiffs could evade Section 230(c)(1) merely by claiming to target underlying algorithms, or an implicit “message” that inheres in displaying content, then Section 230(c)(1) would protect nothing. Even Judge Katzmann—the inspiration for the government’s theory—does not go so far. In his view, Section 230(c)(1) *protects* “suggestions that the user consume[] a third party’s content,” like Facebook’s “video recommendation algorithm”—which is similar to the algorithms at issue here. *See Force*, 934 F.3d at 82 & n.5.

Nor does the government offer any limiting principle. It cannot be that some organizational methods (like categorization, indexing, or the Dewey Decimal system) are fine, but more sophisticated algorithmic sorting is verboten. Sorting is sorting, whether organizing content into categories like “Gardening” and “Education” (like 1990s-era chatrooms or topical Reddit threads) or displaying content based on more sophisticated predictions about users’ interests. The government’s theory thus threatens basic organizational tools like search, despite the government’s approving citation (at 29) to a litany of circuit cases recognizing that Section 230(c)(1) protects such tools.

C. Other Interpretations Are Not at Issue and Conflict with Section 230's Text

This Court need not resolve other amici's alternative arguments that interpret Section 230(c)(1) to foreclose only defamation-like or strict-liability claims. These interpretations fall outside either of petitioners' questions presented. But if the Court considers the arguments, it should reject them. They defy the statutory text and risk undercutting daily operations of the modern internet.

1. *The Defamation-Like-Claims-Only Theory Misreads the Text*

Some amici suggest that Section 230(c)(1) protects only against liability from torts requiring publication or speech as an element. Cruz Br. 8-9; IFS Br. 6; EPIC Br. 9-10; *accord Malwarebytes, Inc. v. Enigma Software Grp. USA*, 141 S. Ct. 13, 17-18 (2020) (Thomas, J., respecting the denial of certiorari). Petitioners (at 25-26) and the government (at 15) rightly avoid this theory.

Section 230(c)(1)'s text makes the formal elements of the tort irrelevant. “[T]he language of the statute does not limit its application to defamation cases.” *Barnes*, 570 F.3d at 1101. What matters is “whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Id.* at 1102. That follows from the ordinary meaning of “treat”: to “regard” and “deal with accordingly.” *Webster’s Third* 2434. Claims that fault websites for choices inherent in publishing, such as whether and how to display content, “regard” the website as a publisher.

Limiting Section 230(c)(1) to claims with publication or speech as a formal element would reward creative

plaintiffs over statutory coherence. Plaintiffs, for example, could replead defamation as intentional infliction of emotional distress; the torts cover the same ground, but the latter does not require publication or speech as an element. *See Barnes*, 570 F.3d at 1101-02; *cf. Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (applying same First Amendment rules regardless of how tort is styled). Congress did not enact Section 230 as a paper shield for plaintiffs to blow down with artful pleading.

Section 230(e)'s exceptions further refute the defamation-only theory. Section 230 does not affect “any ... federal criminal statute,” 47 U.S.C. § 230(e)(1), “any law pertaining to intellectual property,” *id.* § 230(e)(2), certain privacy statutes, *id.* § 230(e)(4), and sex-trafficking laws, *id.* § 230(e)(5). Claims under those statutes virtually never require publication or speech as an element. The listed privacy and sex-trafficking statutes do not even provide for speech- or publication-related offenses and claims. 18 U.S.C. §§ 1591, 1595, 2421A, 2520(a), 2707. These exceptions would make no sense if Section 230 covered only claims that had publication or speech as a formal element.

As further confirmation, the 2010 SPEECH Act bars U.S. courts from recognizing foreign defamation judgments not “consistent with section 230.” 28 U.S.C. § 4102(e)(1). Congress specified that this legislation *not* be construed as “limit[ing] the applicability of section 230 ... to causes of action for defamation.” *Id.* § 4102(e)(2). If Section 230 reached only defamation from the start, this clarification “would be superfluous.” *See Inclusive Cmty.*, 576 U.S. at 537.

2. *The Strict-Liability-Protection-Only Theory Likewise Misreads the Text*

Other amici suggest that Section 230(c)(1) bars only strict-liability claims like those applicable to *publishers* accused of defamation before the mid-twentieth century, *i.e.*, decades before Section 230’s enactment. Cruz Br. 8-9; Hawley Br. 6-8; Tenn. Br. 11; *accord Malwarebytes*, 141 S. Ct. at 15. The theory goes, Section 230(c)(1) does not foreclose claims where defendants knew or had reason to know the content was wrongful—the historical liability standard for *distributors* of defamatory material. As petitioners (at 7 n.3) recognize, whether Section 230(c)(1) offers total protection or preserves “fault-based distributor liability” “is not within the scope of the question presented.”

More fundamentally, the partial-shield theory is fatally flawed, as the government (at 20-21 & n.4) details. Distributors were historically only liable when they had the knowledge to be treated as publishers. And by 1996, First Amendment and state common-law fault standards had evolved to require a showing of fault in essentially all cases against publishers (including distributors).

a. **History.** First, at common law, there was no free-standing category of liability “as a distributor.” Distributors that knew or had reason to know of defamatory content were deemed “publishers” and held liable as such. *Supra* pp. 5-6; Prosser § 113, at 803, 810-11. Everyone who disseminated content, whether primary publishers (like newspapers or book publishers) or secondary publishers (like bookshops or newsstands) were “considered to have *published* the material.” *Church of Scientology v.*

Minn. State Med. Ass'n Found., 264 N.W.2d 152, 156 (Minn. 1978) (emphasis added); U.S. Br. 20. So under this historical meaning, by protecting websites from being treated “as the publisher,” Congress barred all liability.

Second, by 1996, the historical distinction between strict liability for primary publishers and notice-based liability for other publishers (including distributors) had eroded. In the mid-to-late twentieth century, this Court held that strict liability violated the First Amendment, at least in matters involving public figures or public concerns. *E.g.*, *Sullivan*, 376 U.S. at 279-80; *Gertz*, 418 U.S. at 347; *see also Smith*, 361 U.S. at 152-54 (rejecting strict criminal liability for bookseller possessing obscene materials). Public figures must prove “actual malice,” *i.e.*, knowledge or reckless indifference. *Sullivan*, 376 U.S. at 279-80. Private figures must show at least negligence in matters of public concern, *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 768 (1986), and, in many States, even in matters of private concern, *see Brown v. Kelly Broad. Co.*, 771 P.2d 406, 424 & nn.26-27 (Cal. 1989) (collecting cases). Some States even require private plaintiffs to show actual malice in defamation cases involving matters of public concern. Restatement § 580B cmt. c.

Thus by 1996, primary publishers like newspapers no longer faced strict liability even in the defamation context. Other torts against primary and secondary publishers had likewise converged on standards requiring some degree of knowledge, not strict liability. *Supra* p. 7 n.2. Congress did not craft Section 230 to eliminate strict liability when that standard applies in at most a tiny sliver of cases.

Amici claim that *Stratton Oakmont*, the New York trial-court case that helped prompt Section 230, distinguished between “publisher” and “distributor” liability and so Section 230 must too. Cruz Br. 12; FPA Br. 18. *Stratton Oakmont* held that 1990s computer-network operator Prodigy—which moderated content on its forums—exercised “sufficient editorial control” to become “a publisher with the same responsibilities as a newspaper,” and thus faced “increased liability” compared to a distributor. 1995 WL 323710, at *3; *see supra* p. 8. But to reiterate: At common law, distributors liable for republishing defamatory content were publishers, too. *Supra* pp. 48-49. *Stratton Oakmont* never suggests otherwise. Nothing in Section 230 creates a new category of liability “as a distributor.” And “publisher” has historically encompassed all sorts of publishers, not just a subcategory of publishers who may have faced strict liability before courts imposed heightened knowledge requirements in the mid-twentieth century.

Third, the purported distinction between publishers and distributors makes even less sense on the internet, where initial publication and distribution generally happen simultaneously. When a user posts a video on YouTube, YouTube releases the video into the world (publishing it) and makes it available to billions of users (distributing it). Television had already blurred the line between initial publication and distribution given that “cable and broadcast speakers” both “communicate messages” and “disseminate[]” content in a single act. *See Turner*, 512 U.S. at 636, 647 (citation omitted). Internet publishing erases that line entirely.

b. **Statutory Context.** The rest of Section 230 confirms that 230(c)(1) does not foreclose only strict-liability claims. Section 230(c)(2)(A) bars liability for “any action voluntarily taken in good faith to restrict” content that the website considers “obscene ... or otherwise objectionable.” That provision encourages voluntary restrictions—but would become a Catch-22 if 230(c)(1) did not protect websites and users who knew or had reason to know of the objectionable nature of content. Under amici’s theory, the more that websites identify and remove harmful content (as encouraged by 230(c)(2)), the more they would risk being charged with actual or constructive knowledge under 230(c)(1) of all content on their platform. Congress does not ordinarily create self-defeating statutory schemes.

As with the defamation-only theory, Section 230(e)’s exceptions would be nonsensical if Section 230(c)(1) merely ruled out strict-liability claims. Section 230(e) excepts criminal statutes, intellectual-property law, privacy statutes, and sex-trafficking claims from Section 230(c)’s protections—but those categories are not strict-liability claims, so the exclusions would be pointless under amici’s theory. There are vanishingly few strict-liability crimes. Intellectual-property claims that plaintiffs might bring against online providers for third-party content require inducement, knowledge, or willful blindness—not strict liability.¹² Section 230(e)’s exceptions for privacy and sex-

¹² *Metro-Goldwyn-Mayer Studios v. Grokster, Ltd.*, 545 U.S. 913, 930 & n.9 (2005) (copyright); 4 *McCarthy on Trademarks & Unfair Competition* §§ 25:17, 25:20.50 (5th ed. Dec. 2022 update); 35 U.S.C. § 271(b)-(c) (patent); Unif. Trade Secrets Act § 1(2) (1986) (trade-secret misappropriation).

trafficking statutes similarly require defendants to act intentionally or knowingly.¹³ Congress presumably would not have enacted highly specific exceptions to Section 230’s protections if those protections never applied in the first place.

Contrary to amici’s suggestions, treating Section 230(c)(1) as a bar to liability does not “render[] irrelevant” 230(c)(2)(A)’s narrower protections for taking down “obscene ... or otherwise objectionable” content. *Contra* Cruz Br. 17; IFS Br. 9-10; FPA Br. 18. Section 230(c)(1) protects defendants against liability for actions taken with respect to *third-party* content, while 230(c)(2) also protects defendants for taking down content even if defendants themselves developed that content in whole or in part. *Barnes*, 570 F.3d at 1105. Anyway, petitioners fault YouTube for keeping material up and allegedly amplifying its reach, not for taking it down, so 230(c)(1)’s application to takedowns is not at issue.¹⁴

3. Jettisoning Section 230’s Protections Would Threaten the Internet’s Core Functions

“The modern Internet in the United States is built on more than two decades of reliance on Section 230.” Kosseff 8. For decades, websites and users, unchilled by endless litigation, have hosted and posted and filtered and sorted third-party content. Amici’s approaches would

¹³ See 18 U.S.C. §§ 2511(1), 2707(a) (privacy); *id.* § 1591(a) (federal sex trafficking); *e.g.*, Cal. Penal Code § 236.1(a); Ga. Code Ann. § 16-5-46(b) (state sex trafficking).

¹⁴ Regardless, the First Amendment protects decisions about whether and how to publish and disseminate others’ speech. Cert. Resp. Br. 22-24, *Moody v. NetChoice LLC*, No. 22-277.

scrap all of that. An internet without Section 230(c)(1)'s protections “would require radical changes,” *id.* at 278, that Congress would be best positioned to assess.

Eroding Section 230's protection would create perverse incentives that could both increase removals of legal but controversial speech on some websites and lead other websites to close their eyes to harmful or even illegal content. By proactively or immediately removing any third-party content that anyone might find offensive or objectionable, websites with the resources to find and remove such content (and the advertisers to insist on it) might buy some measure of litigation peace. But it would come at a cost to free expression and access to otherwise legal information. The only third-party content likely to remain would be anodyne, upbeat messaging.

That outcome would be the ultimate Pyrrhic victory for the amici who urge Section 230's demise out of concern that large platforms skew against conservative-leaning speech. AF Br. 5; Cruz Br. 5, 21; Tex. Br. 17. In a world where websites are pressured to preemptively remove third-party content that might trigger litigation, websites would be even more leery of permitting political (including conservative-leaning) speech on hot-button topics.

At the same time, other websites with fewer resources or less public or advertiser pressure might veer in the opposite direction: avoiding liability by refusing to sort, filter, or take down any content. If removing or reducing the reach of offensive content suggests that a website closely monitors user posts and thus knows enough to be liable for anything it misses, providers could filter nothing

and refuse to entertain complaints that could supply notice of objectionable content. *See Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006). Those websites could lead a race to a bottom of pornography or other offensive material—the 1990s phenomenon that prompted Section 230 in the first place. Still other websites might fold altogether in the face of untenable litigation burdens.

Eviscerating Section 230 would also leave the internet at the mercy of fifty state tort regimes. Because of Section 230, state courts have not developed the kinds of guardrails on liability that emerged to protect earlier innovations like radio and television. Instead, Congress enacted Section 230, preempting state law and recognizing that “a minimum of government regulation” is the best way to let the internet “flourish[.]” 47 U.S.C. § 230(a)(4), (e)(3).

This Court should decline to adopt novel and untested theories that risk transforming today’s internet into a forced choice between overly curated mainstream sites or fringe sites flooded with objectionable content. Amici’s policy concerns are better addressed to Congress.

III. Reversal in *Taamneh* Would Resolve This Case

Finally, this Court could chart a simpler path in light of *Taamneh*. Reversal in *Taamneh* would also resolve this case, because there would be no viable cause of action left for Section 230 to shield. The *Gonzalez* petitioners’ claims are “materially identical” to the claim in *Taamneh*. *Taamneh* J.A.171. If the aiding-and-abetting ATA claim in *Taamneh* fails, so do the parallel claims in *Gonzalez*. *See* U.S. Br. 32 n.5. Both complaints allege that YouTube “knowingly permitted ISIS ... to use [its] platform[] and other services,” including displaying related videos “Up

next.” *Taamneh* Br. in Opp. 7 (citation omitted); *Taamneh* J.A.144; *accord* Pet. Br. 9. Like the *Gonzalez* petitioners, the *Taamneh* plaintiffs claim “that the dissemination and recommendation of” “ISIS-created video[s]” facilitated “the growth of ISIS.” *Taamneh* Resp. Br. 6-7. *Compare* *Taamneh* J.A.143-44, 147, *with* *Gonzalez* J.A.169-70, 173 (identical recommendations allegations).

The government (at 32 n.5) notes that *Gonzalez* also contains direct-liability claims, based on allegations that YouTube allowed ISIS to use YouTube’s “products and services.” J.A.180-84. But petitioners never mention their direct-liability claims, which could not conceivably survive a ruling for the *Taamneh* defendants.

Like ATA aiding-and-abetting liability, direct liability requires “an act of international terrorism,” 18 U.S.C. § 2333(a), *i.e.*, the terrorist attack that injured the plaintiffs. If no aiding-and-abetting liability exists in *Taamneh* because defendants are disconnected from the “act of international terrorism” that injured those plaintiffs, the direct-liability claims here necessarily fail too. Similarly, petitioners’ direct-liability claims all assert that YouTube “knowingly” supported, transacted with, or concealed support to ISIS. J.A.180-84. If the *Taamneh* defendants did not “knowingly” assist ISIS, the allegations here fail on that basis as well.

As the government (at 27) puts it with remarkable understatement: “Plaintiffs’ recommendation-based claims under the ATA would face obstacles on the merits.” This Court need not issue an advisory opinion on Section 230 when the underlying ATA claims fail.

CONCLUSION

The court of appeals' judgment should be affirmed.

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