

No. 21-1333

IN THE

Supreme Court of the United States

REYNALDO GONZALEZ, ET AL.,
PETITIONERS

v.

GOOGLE, LLC

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

**BRIEF OF *AMICI CURIAE* INTERNET WORKS,
ETSY, INC., GLASSDOOR, INC.,
PINTEREST, INC., ROBLOX CORPORATION,
SCRIBD, INC., SKILLSHARE, INC.,
TRIPADVISOR LLC, AND VIMEO, INC.
IN SUPPORT OF RESPONDENT**

MARGRET CARUSO
RACHEL HERRICK KASSABIAN
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
555 Twin Dolphin Dr.
5th Floor
Redwood Shores, CA 94065

NATHAN ARCHIBALD
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
2755 E. Cottonwood Pkwy
Suite 430
Salt Lake City, UT 84121

JOHN F. BASH
Counsel of Record
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
300 W. 6th St., Suite 2010
Austin, TX 78701
(737) 667-6100
johnbash@quinnemanuel.com

ANDREW H. SCHAPIRO
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
191 N. Wacker Dr., Suite 2700
Chicago, IL 60606

Counsel for Amici Curiae

TABLE OF CONTENTS

	<u>Page</u>
Table Of Authorities.....	ii
Interest Of The <i>Amicus Curiae</i>	1
Introduction And Summary Of Argument	3
Argument.....	5
I. The Arguments Advanced By Petitioners And The Government Misapprehend The Common-Law Concept Of “Publication”	5
II. Adopting Petitioners’ Artificially Narrow Reading Of Section 230(c)(1) Would Degrade The User Experience Across A Range Of Platforms And Make The Internet Less Safe	18
III. An Opinion That Ventures Beyond The Question Presented Could Even More Profoundly Disrupt Settled Expectations.....	30
Conclusion	33

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Doe v. Roe</i> , 295 F. Supp. 3d 664 (E.D. Va. 2018)	9
<i>Epic Sys. Corp. v. Lewis</i> , 138 S. Ct. 1612 (2018).....	18
<i>Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC</i> , 521 F.3d 1157 (9th Cir. 2008).....	11
<i>Firth v. State</i> , 775 N.E.2d 463 (N.Y. 2002).....	10
<i>Keeton v. Hustler Magazine, Inc.</i> , 465 U.S. 770 (1984).....	8
<i>Lindberg v. Dow Jones & Co., Inc.</i> , 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021).....	9
<i>Malwarebytes, Inc. v. Enigma Software Group USA, LLC</i> , 141 S. Ct. 13 (2020)	16, 17
<i>Neibich v. Reddit, Inc.</i> , No. 20STCV10291 (Super. Ct. Los Angeles Cty., Mar. 12, 2020).....	28
<i>Stephan v. Baylor Med. Ctr. at Garland</i> , 20 S.W.3d 880 (Tex. App. 2000)	15
<i>Williams v. Univ. Med. Ctr. of S. Nev.</i> , No. 2:09-cv-00554, 2010 WL 3001707 (D. Nev. July 28, 2010)	16
<i>Yeager v. Bowlin</i> , 693 F.3d 1076 (9th Cir. 2012), cert. denied, 133 S. Ct. 2026 (2013)	10

TABLE OF AUTHORITIES – continued

Statutes

Communications Decency Act of 1996, Pub. L.
No. 104-104, tit. V, § 509, 110 Stat. 137
(47 U.S.C. § 230):3
 47 U.S.C. § 230(a)(1)25
 47 U.S.C. § 230(b)(3)24
 47 U.S.C. § 230(b)(4)24
 47 U.S.C. § 230(c)3
 47 U.S.C. § 230(c)(1)3, 13, 28
 47 U.S.C. § 230(e)(2)18
 47 U.S.C. § 230(f)(2)3
 47 U.S.C. § 230(f)(4)6

Other Sources

50 AM. JUR. 2D LIBEL AND SLANDER § 2318
Dan B. Dobbs et al., DOBBS’ LAW OF TORTS
§ 520 (July 2022)7
W. Keeton et al., PROSSER AND KEETON ON LAW
OF TORTS 799, 803 (5th ed. 1984)17
RESTATEMENT (SECOND) OF TORTS (1977):
 § 5777, 8, 9, 10
 § 577A8, 9
 § 5788, 10
 § 58116, 17
 § 6118

TABLE OF AUTHORITIES – continued

§ 6128

INTEREST OF THE *AMICI CURIAE*

Amicus Internet Works is a diverse coalition of small to mid-sized companies and organizations working together to ensure that all Internet users are represented in important policy conversations on supporting and sustaining Section 230 of the Communications Decency Act and ensuring the Internet remains a place of limitless possibility and innovation. The individual amici companies offer a wide variety of products and services to Americans—from help finding jobs, learning new skills, and starting their own businesses to tools for producing videos and creating online games. They have long relied on Section 230’s protections to provide robust platforms for Americans to communicate, create, share, transact, and learn.¹

As particularly relevant here, given the vast quantity of content available online, even the most specialized websites must rely on features that produce individualized displays of third-party content to users in order to function usefully. The legal position advanced by petitioners and the Acting Solicitor General in this case, however, threatens to expose platforms to liability for adopting such common and indispensable features for organizing and presenting content to users. Were this Court to embrace their textually unmoored view, the user experience across a range of platforms would be degraded and Americans would be

¹ Amici curiae affirm that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief. The membership of amicus Internet Works can be found here: <https://www.theinternet.works/>.

deprived of many of the economic and social benefits of modern platforms—ultimately making the Internet both less useful and less safe, especially for children.

Amici accordingly submit this brief to identify the interpretive errors in the arguments advanced by petitioners and the Acting Solicitor General and to explain the consequences of adopting their view for ordinary Americans who have come to rely on the Internet to improve their lives, make a living, fulfill their passions, and connect with the world around them.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230 was enacted as part of the Communications Decency Act of 1996. Pub. L. No. 104-104, tit. V, § 509, 110 Stat. 137 (47 U.S.C. § 230). It generally shields a “provider or user of an interactive computer service,” such as a website, from civil liability for content created by third parties. 47 U.S.C. § 230(c) and (f)(2). As the growth of the Internet exploded in the decades since its enactment, Section 230 has enabled companies both large and small to connect Americans with shared passions and interests, create specialized marketplaces for buyers and sellers from all over the world, and facilitate the rapid dissemination of knowledge.

In recent years, government leaders, innovators, academic commentators, and the broader public have debated the policy merits of the immunity conferred by Section 230 and whether the statute should be updated in light of new technologies and concerns. The sole issue presented by this case, however, is a narrow—but tremendously consequential—question of statutory interpretation: whether Section 230(c)(1) prohibits imposing civil liability on a website for displaying third-party content to users on an individualized basis, as through algorithms that take account of each user’s characteristics and interactions with the website.

The answer is yes. By its terms, Section 230(c)(1) bars claims in which a website is “treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). Under any defensible interpretation of the

word “publisher” in that subsection, imposing liability on a website for arranging and displaying third-party content to users on an individualized basis would treat the website as the “publisher” of the content. A claim premised on that theory of liability is therefore barred.

The contrary position advanced by petitioners and the Acting Solicitor General rests in part on a tortured account of how the concept of “publication” drawn from the common law of defamation would translate to the context of Section 230(c)(1). They contend that whenever a website displays third-party content to a user on an individualized basis, it conveys an implicit “recommendation” that is conceptually distinct from the act of publication. That argument makes little sense. The common law is clear that transmitting third-party content to even a single recipient constitutes an act of publication. But *every* such act of publication could be deemed to convey an implicit “recommendation” in precisely the same way as a website’s individualized display of content. There is accordingly no reason to believe that a Congress that intended to draw upon the common law would have thought that conveying such an implicit recommendation exceeds the role of a publisher.

If this Court were to embrace the view offered up by petitioners and the government, it would profoundly disrupt the basic operation of the entire Internet, not just the handful of large social-media platforms that have attracted the most attention in debates about Section 230. Despite the horrific videos that gave rise to this case, Americans access a limitless variety of beneficial content through online platforms, from educational videos and scientific-research

papers to job postings and vast markets for handmade goods. Websites catering to specific needs and interests use algorithms to present users with the most useful and relevant third-party content—including age-appropriate content for children.

Yet without the protection afforded by Section 230(c)(1), the user experience across a range of platforms would be degraded, economic activity would be suppressed, and sexually explicit and other inappropriate content would be more easily accessible by minors. Some platforms would face an existential risk of liability and litigation costs. Moreover, under the view advanced by petitioners and the Acting Solicitor General, even a website’s *users* could be held liable for content created by other people.

This Court should accordingly enforce the plain text of Section 230(c)(1) and affirm the judgment below. And however the Court rules on the question presented, amici respectfully urge the Court to speak narrowly, because any departure from the settled interpretation of Section 230(c)(1) could profoundly disrupt the modern Internet ecosystem.

ARGUMENT

I. The Arguments Advanced By Petitioners And The Government Misapprehend The Common-Law Concept Of “Publication”

Petitioners and the Acting Solicitor General argue that YouTube’s so-called “recommendations” of videos to users do not enjoy immunity under Section 230(c)(1). Their position rests in part on the view that by using the statutory term “publisher,” Congress

drew upon the concept of “publication” from the common law of defamation. Pet. Br. 20; U.S. Br. 9, 14. That premise is debatable: No other subsection of the statute, including the legislative findings and statements of policy, invokes the common law of defamation, and the parties agree that the immunity is not limited to defamation or other torts that have publication as an element. *See* Pet. Br. 21–24; U.S. Br. 15–16. But even accepting *arguendo* the premise that “publisher” is meant to refer to one who engages in an act of “publication” under the common law of defamation, that concept readily encompasses the type of common website features at issue here, which do no more than display third-party content to users on an individualized basis.²

1. As a threshold matter, petitioners and the Acting Solicitor General have characterized those features as providing “recommendations,” but that ambiguous term masks legally material distinctions. As alleged in this case, YouTube does not generally provide commentary about particular third-party content, much less explicit curated or editorial recommendations. Rather, what petitioners and the government call “recommendations” are just individualized *displays* of third-party content to users.

² Respondent persuasively explains why the position of petitioners and the United States is inconsistent with the ordinary meaning of “publisher” as well as Section 230(f)(4), which defines “interactive computer service” to include “tools” that “pick, choose,” “filter,” “search, subset, organize,” or “reorganize” content. 47 U.S.C. § 230(f)(4); *see* Resp. Br. 22–28, 39–45.

The choice of which content to display to users (a choice typically made by algorithms or other technological means) might be informed by the users’ characteristics, search history, previously viewed content, or other interactions with the website. The Acting Solicitor General contends that such individualized presentations of third-party content convey an *implicit* recommendation. U.S. Br. 27. Whatever the merit of that characterization, it is undisputed that the recommendations do not take “explicit form.” *Ibid.* For that reason, the appropriate question to ask in this case is not whether Section 230(c)(1) encompasses a website’s “recommendations” as a general matter, but rather whether a website’s display of third-party content to users on an individualized basis exceeds the role of a “publisher.”³

2. Three features of the common law of defamation bear on the interpretive question here.

First, the *sine qua non* of publication is the communication of the content at issue to another person. See RESTATEMENT (SECOND) OF TORTS § 577 cmt. b (1977) (hereinafter, “RESTATEMENT”). As the Restatement explains, “publication” encompasses any “communication [of matter] intentionally or by a negligent act to one other than the person defamed.” RESTATEMENT § 577(1); see Dan B. Dobbs et al., DOBBS’ LAW OF TORTS § 520 (July 2022). Importantly, to satisfy the publication requirement, “[i]t is not necessary that the

³ This Court should reserve judgment on whether and to what extent Section 230(c)(1) shields a website from liability for express recommendations, because that question is not presented here and may well turn on case-specific considerations. See *infra* p. 32.

defamatory matter be communicated to a large or even a substantial group of persons.” RESTATEMENT § 577 cmt. b. Rather, “[i]t is enough that it is communicated to a single individual other than the one defamed.” *Ibid.*; see 50 AM. JUR. 2D LIBEL AND SLANDER § 231 (same).

Second, “each communication of the same defamatory matter by the same defamer, whether to a new person or the same person, is a separate and distinct publication.” *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 n.3 (1984) (quoting RESTATEMENT § 577A cmt. a.). Thus, for example, if a defendant makes defamatory content available to a recipient at one point in time, and then presents the same content to the same recipient a second time, each presentation qualifies as an act of publication. *Id.* § 577A ill. 1.

Third, “one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.” RESTATEMENT § 578. Such “republisher” liability attaches even if “the second publisher names the author or original publisher of the libel.” *Id.* § 578 cmt. b; see RESTATEMENT §§ 611, 612.

3. Together, those blackletter principles show why the website features at issue here fall squarely within the scope of Section 230(c)(1), even assuming that Congress intended to draw upon the common-law concept of publication.

Website features that do no more than display third-party content to users on an individualized basis readily comport with common-law publication, which requires only that the material at issue be communi-

cated to at least one recipient. Transmission to a recipient is the essence of a publication. The activity here is thus perfectly congruent with the common-law concept.

It is of no moment that the content is presented to users individually. As explained above, a communication of defamatory content to even a single person still qualifies as a publication. RESTATEMENT § 577 cmt. b. A website therefore engages in publication when it displays content for a single user just as much as if it had posted the content on its home page.

Nor does it matter that the content presented to users on an individualized basis is also available to the same users on the website through searches and navigation. As noted, under the common law, the presentation of content to the same recipient on two separate occasions constitutes two separate acts of publication. RESTATEMENT § 577A cmt. a & ill. 1; *see, e.g., Doe v. Roe*, 295 F. Supp. 3d 664, 671 (E.D. Va. 2018). A website can therefore publish third-party content once by making it available on its website generally and a second time by presenting the content to a specific user. Moreover, even if those two acts were considered a unitary publication under the “single publication” rule,⁴ the website would still act as a

⁴ Under the “single publication” rule, an “aggregate communication,” like the distribution of the morning edition of a newspaper, is considered a “single publication.” RESTATEMENT § 577A(3). But the “republication exception” to that rule provides that “repetition of a defamatory statement in a later edition of a book, magazine or newspaper may give rise to a new cause of action.” *Lindberg v. Dow Jones & Co., Inc.*, No. 20-CV-8231, 2021 WL 3605621, at *4 (S.D.N.Y. Aug. 11, 2021) (quoting *Firth v.*

“publisher” with respect to both presentations. Under no view would the targeted presentation be deemed something other than a publication.

Finally, nothing about the fact that a website presents users with content created by third parties, rather than its own content, warrants a different understanding of how common-law “publication” would translate to the Section 230(c)(1) context. As discussed above, the common law is clear that a republisher is treated as if he or she had originally published the defamatory statement. *See* RESTATEMENT § 578. Thus, a website’s display of third-party content to users on an individualized basis is not materially different from a content creator’s direct transmission of the content to individual users. As the latter communication is clearly a “publication,” so is the former. *See* RESTATEMENT § 578 cmt. b (“Each time that libelous matter is communicated by a new person, a new publication has occurred.”).

Ultimately, even accepting the assumption that Congress intended to invoke the common-law concept of publication in Section 230(c)(1), the interpretive issue here is simple—virtually tautological. The display of content to a user on an individualized basis is a “publication” because it is an “act by which the * * * matter is intentionally or negligently communicated to [another] person.” RESTATEMENT § 577 cmt. a.

4. The Acting Solicitor General nevertheless construes Section 230(c)(1) not to apply to a website’s use

State, 775 N.E.2d 463, 466 (N.Y. 2002)). Under that exception, “a statement on a website is * * * republished” when “the website is directed to a new audience.” *Yeager v. Bowlin*, 693 F.3d 1076, 1082 (9th Cir. 2012), cert. denied, 133 S. Ct. 2026 (2013).

of computer algorithms to select the third-party content that is displayed to users on an individualized basis. U.S. Br. 26–28. This Court should reject that view.

The Acting Solicitor General acknowledges that both the common-law meaning and the ordinary meaning of “publication” encompass the communication of content to another party. U.S. Br. 14. And he accepts that “Section 230(c)(1) protects an online platform from claims premised on its dissemination of third-party speech.” *Id.* at 16. The Acting Solicitor General further observes that Section 230(c)(1) does not shield a website from liability for its “*other* conduct,” even if that conduct is performed “in conjunction with” the presentation of third-party content—for example, where a roommate-matching website poses its own illegally discriminatory questions to users. *Id.* at 16–17, 28 (citing *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc)).

But the Acting Solicitor General then inexplicably contends that a website’s “other conduct” includes the mere act of “caus[ing] * * * content to appear” on a particular user’s screen, at least where the content is not directly solicited by the user. U.S. Br. 27–28. That is because, the argument goes, whenever a website “presents a user with [content] she did not ask to see,” it conveys an “implicit message” of recommendation that is distinct from the act of publication. *Ibid.* Based on that reasoning, the Acting Solicitor General would expose websites to liability for their individualized, unsolicited presentation of third-party content to users: “Section 230(c)(1) applies,” the government maintains, “*only* when a plaintiff’s theory of liability

seeks to hold the defendant liable for allowing unlawful third-party information to remain on its platform,” *id.* at 15–16 (emphasis added), but not for “claim[s] premised on [a website’s] use of its recommendation algorithms,” *id.* at 28.

That reasoning makes little sense and is inconsistent with blackletter defamation law. As explained above, under the common law, transmitting third-party content to even a single recipient constitutes an act of publication. *See supra* p. 9. But *every* such act of publication could be deemed to convey an implicit “recommendation” in precisely the same way as a website’s individualized display of content: Transmitting content to a specific recipient “implicitly tells the [recipient] that she ‘will be interested in’ that content.” U.S. Br. 27 (quoting J.A. 173). Why else would the defendant have sent it to the recipient?

The sort of “recommendation” that the Acting Solicitor General posits thus inheres in any act of republication of third-party statements to a discrete recipient or group of recipients. And for that reason, a Congress that intended to draw upon the common-law concept of publication in enacting Section 230(c)(1) would not have understood that making such implicit “recommendations” exceeds the traditional role of a publisher. To the contrary, such a recommendation is an inextricable component of virtually any act of republication to discrete recipients. Tellingly, the Acting Solicitor General has identified no authority or legal commentary conceptualizing a republication of a defamatory statement as two separate acts—the reproduction of the content and the recommendation of the content. And to the extent that the government attaches significance to the fact that the content

presentations here are not directly solicited (in that the website “presents a user with [content] she did not ask to see”), the same could be said of many defamatory statements. But that has no bearing on whether their presentation to a recipient constitutes a publication.

Accordingly, there is no logical basis to conclude that a website acts as a “publisher” only insofar as it “allow[s] unlawful third-party information to remain on its platform,” U.S. Br. 15–16, but not when its algorithms select particular content to present to specific users. If anything, the latter activity is more clearly an act of publication under the common law because it involves the direct communication of content to a recipient. As a consequence, a legal claim based on that activity “treat[s]” the defendant as a “publisher,” *i.e.*, imposes liability for engaging in an act of publication. 47 U.S.C. § 230(c)(1).

Petitioners’ variation on the argument fares no better. Petitioners contend that Section 230(c)(1) shields a defendant from liability for “sending a user harmful content posted by a third party,” but not for “sending a user information (e.g. a recommendation) *about* that third-party content, which is not publication of the third-party content itself.” Pet. Br. 26–27 (emphasis in original). In the context of the website features at issue here, however, the display of the content to the user *is* what petitioners characterize as the “recommendation.” Like the Acting Solicitor General, petitioners simply declare the act of republication itself to entail a “recommendation” and on that basis claim that it does not qualify as a publication. There is no support for that view in the common law of defamation, which makes a republication equivalent to a

publication despite the fact that a putative “recommendation” could be read into virtually any act of republication of third-party content.

5. The interpretation of Section 230(c)(1) advanced by petitioners and the government requires unworkable and arbitrary line-drawing that bears no sensible relation to the common-law concept of publication.

Search engines are the most obvious example of that problem. Petitioners and the Acting Solicitor General seem to concede that a website that permits users to retrieve specific content through searches enjoys Section 230(c)(1) immunity when it displays the search results. Pet. Br. 15–16; U.S. Br. 29. But they also appear to maintain that a website that selects content to display for an individual user based in whole or in part on the user’s search history does not. Not only is there almost no practical distinction between the two different displays of content, given the inherent imprecision of search results, but petitioners offer no plausible or administrable ground for why the first qualifies as a “publication” and the second does not.

For its part, the government contends that displays of “recommended” content should be deemed part of a website’s “own platform-design choices” and for that reason lose immunity. U.S. Br. 28. But Section 230(c)(1) would have virtually no effect if a website lost immunity for claims based on third-party content whenever it made a decision about the placement of that content on its platform. Even before the dawn of modern targeted content, websites (much like traditional print media) had to make choices about which content to put on their home pages and how to

organize content within sub-pages for ease of navigation. Each of those choices could be framed as a “recommendation” of the content just as much as targeted displays to individual users—or a ranked order of search results for that matter. For example, if a website places third-party content prominently on its home page, it is implicitly recommending that content over other content. Likewise, if a website presents content within a sub-page dedicated to a certain area of interest, it is implicitly recommending that content to users who share that interest.

Presumably the Acting Solicitor General would not classify those sorts of basic choices about website design as exceeding the role of a publisher. But the distinction between a home page or specialized sub-pages and the sort of targeted displays at issue here—the degree of individualization—does not map on to the common-law definition of “publication” in any discernible way. Each of those features reflects the defendant’s choice about how to present third-party content, and the prominence or location of the content’s placement could be regarded as a recommendation. The government has offered no sensible reason why more sophisticated targeting of users for relevant content somehow exceeds the role of a publisher.

More fundamentally, petitioners and the government favor an interpretation of Section 230(c)(1) that, while putatively resting on the law of defamation, cannot be reconciled with how defamation law is applied in practice. For example, suppose a defendant receives a defamatory allegation about the plaintiff and then emails it to ten acquaintances separately. There is no question that each transmission constitutes a “publication.” *See, e.g., Stephan v. Baylor Med. Ctr. at*

Garland, 20 S.W.3d 880, 889 (Tex. App.—Dallas 2000, no pet.); *Williams v. Univ. Med. Ctr. of S. Nev.*, No. 2:09-cv-00554, 2010 WL 3001707, at *6 (D. Nev. July 28, 2010). But under the view advanced by petitioners and the Acting Solicitor General, a website’s selective displays of defamatory content to ten separate users would exceed the role of a publisher. There is no reasoned basis to distinguish the two situations.

6. Echoing Justice Thomas’s opinion respecting the denial of certiorari in *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020), certain amici have argued that “publisher” liability for defamation is distinct from “distributor” liability, and that Congress intended to preserve the latter in Section 230(c)(1). *See, e.g.*, Brief of Amici Curiae U.S. Senator Ted Cruz et al. 7–9 (“Cruz Br.”). Under that view, Section 230(c)(1) does not apply to claims that the website knew or had reason to know about unlawful content, which purportedly treat the website as a “distributor” rather than a “publisher.” *Id.* at 9, 12.

That argument reflects a mistaken understanding of the common law. *See* Resp. Br. 48–52. As explained above, “publication” is an element of the tort of defamation. “Distribution” is not. What amici refer to as “distributor liability” is a common-law rule that limits the circumstances in which a defendant that “only delivers or transmits defamatory matter” (such as a bookseller) will be deemed to have committed *an act of publication*—namely, when the defendant knew or had reason to know about the content’s defamatory character. RESTATEMENT § 581(1) & cmt. b.

That rule thus merely defines a certain type of publication. That is clear from the examples provided

in the Restatement section addressing distributors. For instance: “A sends to B a copy of a tabloid newspaper containing a statement defaming C. A marks the defamatory statement to bring it to the attention of B. A is subject to liability to C for *publishing* a libel.” RESTATEMENT § 581 ill. 3 (emphasis added); *see also, e.g. id.* § 581 ill. 1, 2 & 4 (describing circumstances in which a distributor is not liable for “publishing a libel”). In fact, Justice Thomas’s opinion in *Malwarebytes* acknowledged that a leading treatise “respectively refers to [publishers and distributors] as ‘primary publishers’ and ‘secondary publishers or disseminators,’ explaining that distributors can be ‘charged with publication.’” 141 S. Ct. at 15 (respecting the denial of certiorari) (citing W. Keeton et al., PROSSER AND KEETON ON LAW OF TORTS 799, 803 (5th ed. 1984)).

Thus, properly understood, the “distributor” cases do not salvage the position advanced by petitioners and their amici. Assuming, again, that the common-law definition of “publication” governs the interpretation of Section 230(c)(1), a website that “acts like a distributor” and has the requisite knowledge of the third-party content would be deemed to have “published” the third-party content. Claims challenging such conduct would therefore treat the website as a “publisher,” triggering immunity under Section 230(c)(1).

Further, the ultimate result of the argument advanced by these amici is that Section 230(c)(1) does not shield websites from liability for *any* presentations of content (whether deemed “recommendations” or not), but merely imposes a requirement of actual or constructive knowledge before a website can be held

liable. *See, e.g.*, Cruz Br. 7–10. Were that all Congress intended to achieve, Section 230(c)(1) was a very strange way to do it. If Congress had meant to impose a knowledge requirement, it easily could have said so directly, not through an “interpretive triple bank shot” off the law of defamation. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018). And the related contention that Section 230(c)(1) covers only causes of action that have publishing or speaking as an element, *see* Cruz Br. 8, is impossible to square with the statutory exceptions to Section 230(c)(1), many of which would have been unnecessary under that view (*e.g.*, claims for infringement of intellectual property, 47 U.S.C. § 230(e)(2)). *See* Resp. Br. 46–47.

II. Adopting Petitioners’ Artificially Narrow Reading Of Section 230(c)(1) Would Degrade The User Experience Across A Range Of Platforms And Make The Internet Less Safe

For the foregoing reasons, Section 230(c)(1) bars claims based on website features that display third-party content to users on an individualized basis. In the quarter-century since the enactment of Section 230—a time of explosive, transformational growth on online platforms—no court of appeals has ever ruled otherwise.

Public debate over Section 230 has focused primarily on large social-media companies. Yet the features at issue in this case are critical not only for the most widely used social-media platforms, but also for thousands of small and mid-sized platforms that cater to Americans’ more specific interests and needs. Many of those websites do not raise the types of policy concerns about harmful content, political bias, and the

suppression of alleged misinformation that have permeated debates over the statute.

To overturn the settled understanding of Section 230(c)(1) now would profoundly disrupt how businesses provide services and functionality to millions of Americans; degrade the user experience on numerous platforms; and ultimately make the Internet substantially less safe as a whole, notwithstanding the horrific facts that gave rise to the present dispute. It could even potentially expose *users* to legal liability for content created by third parties. Particularly given the tenuous textual logic of the position advanced by petitioners and the government, this Court should decline to disrupt the settled understanding of Section 230(c)(1).

1. It is no mystery why automated individualized displays of content are so common across Internet platforms. The sheer quantity of information available to users even on highly specialized platforms would make it impracticable for any individual user to navigate to the content that she seeks without mechanisms that filter and funnel relevant information to her screen.

Amicus Vimeo provides a good example. Vimeo offers tools for creating and distributing videos across the Internet. In 2022 alone, Vimeo's users uploaded over 100 *million* new videos. To help viewers find content they want to watch, Vimeo automatically plays related videos after a video ends. Viewers may alter what they see by disabling auto-play or adjusting their settings to restrict certain types of videos, such as those containing profanity, drugs or alcohol, or violence. In this manner, Vimeo enables both content

discovery and user choice—essential elements of a video-viewing experience.

The amici that have joined this brief illustrate the vast range of products and services that Section 230 has helped to foster and to protect and the varying ways in which Section 230(c)(1)'s grant of immunity for the features at issue here enhance the user experience. A few examples demonstrate why Section 230(c)(1) is so vital to the economy and to the basic functionality of the Internet—and why adopting petitioners' atextual interpretation would harm ordinary Americans who have come to rely on the Internet for important services and benefits.

Sorting for relevant content (Indeed). Internet Works member Indeed helps Americans find jobs. Indeed aggregates millions of job postings and allows users to search in their geographic area for openings in particular fields or at particular companies.

Ordered displays of content—what petitioners and the Acting Solicitor General would presumably call “recommendations”—are critical to Indeed's functionality. Indeed's home page presents users with a search engine with two fields: “What” (job title, key words, or company) and “Where” (city, state, zip code, or “remote”). Indeed's algorithms then provide hundreds or even thousands of highly relevant jobs in the chosen location, with the most relevant jobs listed first.

That presentation is the product of algorithms designed to tailor Indeed's content to what would be most helpful to the user. Because, under petitioners' theory, virtually any ordering of job results to a user

could be characterized as a “recommendation,” adopting petitioners’ interpretation would expose Indeed to costly litigation whenever, for whatever reason, a user found fault in Indeed’s “recommended” job.

Empowering small businesses through personalized search and display (Etsy). Amicus Etsy provides a global online, peer-to-peer marketplace for the sale of handmade and unique goods, from hand-carved bowls to custom family portraits. By offering specialized tools and services to the over five million sellers who use its platform—79% of them women, and 84% businesses-of-one—Etsy creates opportunities for people who might not otherwise be able to start a business.

Etsy sellers are entrepreneurs. They decide what to sell, write their own listings, make and ship their own products, and provide customer service. Etsy, for its part, does not sell any items or hold its sellers’ inventory. Rather, it offers sellers a platform to connect with buyers and leverages technology, including algorithms, to make those connections.

Algorithmic search and display are critical to Etsy’s business. Unlike large retailers with mass-produced, commoditized inventories, sellers on Etsy specialize in unique and handmade goods—which can be hard to describe and even harder to find. Many buyers, for example, visit Etsy without knowing precisely what they are looking for or lacking the words to express it, using searches like “wedding gift” to find one-of-a-kind items. Given that the platform contains over 100 million listings at any given time, Etsy’s personalization technologies are crucial to its ability to surface the right product, to the right buyer, at the

right time. This helps both buyers and sellers by making it easier for people to browse, filter, and find products they want on Etsy.

Etsy’s model—and the benefits enjoyed by millions of Americans who have grown their incomes and found personal fulfillment in creative entrepreneurship—would be fundamentally threatened if Etsy were forced to rely only on precise-match searches or a generic ordering of listings to connect buyers with sellers. Accordingly, were Section 230(c)(1) construed as petitioners propose, Etsy would have an impossible dilemma: degrade its platform, or face the threat of limitless lawsuits for transactions on its platform, despite the impossibility of policing how five million independent sellers describe their items.

Surfacing relevant content to users when searches are insufficient (Pinterest). Over 400 million people around the world visit amicus Pinterest to find inspiration. They come to discover and implement ideas for their daily activities like cooking dinner or deciding what to wear; for major commitments like remodeling a house or training for a marathon; for ongoing passions like gardening or fashion; and for milestone events like planning a wedding or a dream vacation.

“Pinner” often come to Pinterest’s platform with an intent to find inspiration for their projects. But Pinner often do not yet have a firm idea of what they want to see, or materials they might want to buy, for those projects. Accordingly, the platform employs algorithms to help users discover new content on Pinterest rather than merely navigating to products and

brands they already know, as is common on traditional search engines and e-commerce platforms. Preserving Section 230 immunity for the sorts of features at issue here would help Pinterest users discover content and products and improve their daily lives.

Protecting children (Roblox). Amicus Roblox provides an online platform that enables people to create and share virtual games and experiences. Roblox supplies users with free tools, graphics, and content libraries to create experiences. Since 2018, over 29 million Roblox creators have made more than 30 million games and experiences available on the Roblox platform, which is visited each day by over 58 million users—many of whom are children. In fact, over half of U.S. children have used Roblox.

Since its founding in 2004, safety and civility have been a top priority for Roblox, given that the bulk of its initial users and content creators were children. While the age demographics of both Roblox visitors and creators have expanded, safety and civility remain Roblox’s top priorities. In addition to a robust set of safety tools and policies, Roblox deploys a team of thousands of moderators, aided by machine-learning systems, who enforce a strict set of community standards on Roblox. As relevant here, a critical ingredient of Roblox’s safety efforts is the use of algorithms to present age-appropriate content to young people. Without such user-specific filtering, younger children could be presented with content appropriate only for older youth or adults.

In addition to identifying age-appropriate content for users, Roblox’s machine-learning systems and team of thousands of moderators are key to protecting

users from exposure to potentially harmful content, including sexual content, grooming behaviors, bullying and harassment, and violent extremist content. Without Section 230's protections, Roblox could be subject to significant liability for any of its efforts to protect its users, which could leave Roblox unable to filter content no matter how objectionable or inappropriate.

Roblox's considerable efforts to protect children from age-inappropriate content accord with Congress's basic purposes in enacting Section 230. *See* 47 U.S.C. § 230(b)(3) and (4). But if petitioners' interpretation of Section 230(c)(1) prevails, Roblox may not be able to ensure that users see experiences that are age-appropriate and tailored to their interests and tastes without subjecting itself to waves of potential lawsuits. That would leave users who are seeking age-appropriate content to wade through tens of millions of experiences that have been designed to appeal to specific age groups and target audiences.

Disseminating knowledge and facilitating research (Skillshare and Scribd). Amicus Skillshare is the world's largest online learning community for creative pursuits. Through its website and app, users can access thousands of lessons and classes in subjects like illustration, design, photography, video, freelancing, and music theory. Skillshare offers an open platform: Anyone who has skills or passions to share can create and upload a class that can be accessed by Skillshare subscribers. More than 700 new classes are uploaded on average each month.

Skillshare employs both human curation and algorithms to tailor users' learning experiences. Its search

technology uses recent and historical interactions with the Skillshare platform to understand users' interests and goals. That allows Skillshare to present a personalized experience to each user. Skillshare's approach is directly responsive to user demand: Skillshare subscribers consistently express in surveys that their biggest challenge is locating the right content on the platform.

Were Skillshare subject to liability for the content of every class uploaded to its platform, on the theory that it has recommended the content to subscribers, it would likely be forced to drastically reduce the amount of educational content available in order to review every class uploaded—or limit the platform to classes produced by Skillshare itself. It could also be forced to increase subscription costs, making Skillshare unaffordable for some users. In either event, the end result would be far less dissemination of knowledge across its innovative platform. It is hard to imagine a result more antithetical to Congress's basic objective in enacting Section 230 to preserve the Internet's "extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. § 230(a)(1).

Like Skillshare, amicus Scribd focuses on spreading knowledge around the world. It provides a vast digital library containing ebooks, audiobooks, podcasts, news articles, sheet music, documents, and more. Scribd hosts over 178 million pieces of content that subscribers access for a fee. All users, including non-subscribers, can upload their own content to Scribd's document library and gain access to many documents shared by Scribd's community at no cost. Users come to Scribd for a wide variety of needs, from

conducting research and searching for news articles to discovering new authors.

Scribd applies automated algorithms to suggest the next piece of content to its users. Those algorithms are based on a user's past reading or listening behaviors, search history, and browsing history on the platform. That technology enhances research efforts in numerous fields. For example, scientists can review literature as they prepare research papers, which they in turn can publish on Scribd's platform to be discovered by other users.

Without Scribd's algorithms, users would be unable to find relevant content, and Scribd would not be able to help users research effectively and efficiently. Unlike the physical library, with its card catalogs and librarians, digital libraries with hundreds of millions of items require a new method for discovery. Algorithms are thus essential to advancing Scribd's mission to inspire the world through the rapid and efficient dissemination of knowledge.

Enabling safe travel through the wisdom of crowds (Tripadvisor). Amicus Tripadvisor is an online travel platform focused on helping travelers benefit from the power of the Internet—scale, reach, and, most pertinently, the wisdom of crowds. Tripadvisor's platform contains more than one *billion* reviews and opinions about nearly eight million businesses and points of interest throughout the world. Rather than relying on hopes or expectations when planning an expensive and time-consuming trip to new parts of the world, Tripadvisor's users can make informed and practical decisions by accessing

reliable first-hand reviews. Tripadvisor thus leverages the wisdom of crowds to help Americans plan their vacations and other travel.

Section 230 is critical to ensuring that Tripadvisor remains a platform where travelers are free to share the good, the bad, and the ugly about the places and businesses that they have visited. Tripadvisor has invested in technology that enables users to efficiently cull through the platform's millions of reviews and opinions to find the accommodations, restaurants, experiences, airlines, and cruises that meet their individual needs. Without the immunity conferred by Section 230(c)(1), Tripadvisor could face potential liability and litigation costs from businesses that object to content posted by Tripadvisor's users, on the theory that Tripadvisor's selection or ordering of the content amounts to an actionable "recommendation." That result would undermine one of the great benefits of the Internet—the ability to aggregate the knowledge and opinions of ordinary people from across the world to help make better decisions.

Empowering users to create and moderate their own online communities (Reddit). Internet Works member Reddit is a platform that hosts online communities called "subreddits" devoted to particular interests, hobbies, or passions. Reddit's users themselves play a central role in content moderation and curation. Users called "moderators" or "mods" create the communities and establish community-specific rules. As a result of that model, over 95% of non-spam content moderation action on Reddit is performed by users themselves, not the company, using algorithmic tools provided by Reddit. For example, using the "Sticky Posts" tool, a moderator can pin posts to the

top of a community’s page—which would presumably be a “recommendation” under petitioners’ view.

Given Reddit’s user-centric model, if this Court were to adopt petitioners’ narrow interpretation of Section 230(c)(1), it would not be only Reddit that would be exposed to broader liability and litigation costs—it would be the users themselves. Section 230(c)(1) provides that “[n]o provider *or user* of an interactive computer service” shall be liable as a publisher. 47 U.S.C. § 230(c)(1) (emphasis added). It therefore protects user-moderators to the same extent as the platforms themselves. If YouTube can be liable for its individualized displays of content on the theory that it is “recommending” the content to users, then a moderator-user on Reddit would presumably face the same liability for highlighting particular content for his or her community.

That threat is not theoretical. Volunteer moderators have been sued for their moderation activities, and Section 230 was critical to an early dismissal of those individuals from the litigation before they faced significant litigation costs. *See, e.g.,* Complaint, *Neibich v. Reddit, Inc.*, No. 20STCV10291 (Super. Ct. Los Angeles Cty., Mar. 12, 2020).

2. Should this Court hold that Section 230(c)(1) does not protect the individualized display of third-party content, the many websites that employ the relevant features—and, crucially, their users—would be exposed to an array of tort claims. Those would include not only defamation claims, but also (to name just a few examples) products-liability claims for websites that connect buyers and sellers of goods; privacy torts for websites that permit users to create and post

video content; and fraud and other economic torts for any websites that facilitate economic transactions.

Such a substantial increase in legal exposure for both small and large platforms, as well as for ordinary Internet users themselves, would inevitably degrade the user experience. For some platforms, the increased exposure may force them to charge user fees or present more frequent or more intrusive advertisements. Likewise, on certain platforms, ordinary users may be unable or unwilling to risk the enormous financial costs associated with exercising the core speech rights of creating and moderating their own online communities. Other platforms may be compelled to fundamentally change their operations to avoid liability. That would represent a major setback for the average American's experience using the Internet, making it that much harder for users to find the content that could enhance their lives.

Moreover, it is not only the usefulness of the Internet that would be degraded were this Court to adopt petitioners' constrictive view of Section 230(c)(1). Such a holding would also make the Internet a less safe place for all users, including children. For example, for websites that display videos, algorithms help ensure that the videos presented to younger users match their prior viewing history and prior search queries. But if a website simply displayed random videos or relied exclusively on word-match searches, younger viewers could be exposed to a vast amount of inappropriate content, such as images of violence or sexually explicit videos. Accordingly, notwithstanding the monstrous attacks that gave rise to the present dispute, the Court should not lose sight of the fact

that adopting an unduly narrow interpretation of Section 230(c)(1) would carry with it a host of serious dangers.

III. An Opinion That Ventures Beyond The Question Presented Could Even More Profoundly Disrupt Settled Expectations

For the reasons explained above, this Court should hold that the types of automated features at issue in this case, which do no more than present third-party content to users on an individualized basis, fall comfortably within the protection from liability afforded by Section 230(c)(1). But if the Court rejects that argument and holds that such displays lie outside of Section 230 immunity, amici respectfully urge the Court to limit its holding and analysis to that specific issue. Any holding or dicta from this Court that ventures beyond the question presented would threaten even more disruptive consequences for the entire Internet ecosystem—not just user-facing technology companies, but also providers of transmission services, content-delivery networks, web-hosting services, and other services that power the Internet. That could threaten untold consequences for the speed, reliability, and security of the Internet.

For example, as explained above, certain amici have advanced the view that Section 230(c)(1) preserves so-called “distributor” liability, which evidently would leave websites liable for harmful third-party content whenever they knew or should have known about the character of the content. *See supra* pp. 16–18. Taken to its logical extreme, that view would appear to make websites liable for merely hosting or transmitting third-party content, even without the

sort of individualized displays that petitioners and the Acting Solicitor General describe as “recommendations.”

Such a ruling, or even a suggestion to that effect by this Court, would work a sea change in the law governing Internet platforms and expose many platforms to potentially crushing liability. Even though in most cases platforms do not in fact have knowledge of the content of harmful third-party material (or else they would remove it), a mere allegation to that effect could suffice to advance a complaint past the motion-to-dismiss stage and thus trigger costly discovery. And even where it is clear that a website had no knowledge of the character of the content, litigation would inevitably ensue about what websites should have known about the content, perhaps dependent on fact-specific considerations or widely varying principles of state law.

Likewise, any hint from this Court that basic search features found on virtually all web platforms expose websites to liability for the content of the search results would threaten devastating consequences for both large and small platforms. As explained above, there appears to be no legal or practical basis to distinguish individualized search results in response to queries from the type of individualized displays of content at issue here, which are typically based both on a user’s prior search queries and on other interactions that the user has had with the platform. *See supra* p. 14. But petitioners have argued that search results are distinguishable, and if this Court were inclined to adopt their view with respect to putative “recommendations,” it should make every

effort to distinguish search results. Although adopting a hairsplitting distinction between implicit recommendations and search results could generate legal confusion, that would be far preferable to exposing websites to liability for such a basic feature of modern platforms, which would effectively eviscerate Section 230(c)(1) and sow chaos across a large sector of the economy.

Finally, to the extent that this Court rejects the position advanced by petitioners and the Acting Solicitor General on so-called implicit recommendations, it should not speak to the question of Section 230(c)(1)'s application to express recommendations. Express recommendations may present case-specific questions—such as whether a reasonable user would understand the language to reflect a curated or editorial judgment by the website—that should be addressed in a case where the question is properly presented.

In short, how this Court construes and applies Section 230(c)(1) could have far-reaching effects. Amici therefore respectfully urge the Court to employ a cautious approach in narrowly resolving the question presented.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

JOHN F. BASH

Counsel of Record

QUINN EMANUEL URQUHART
& SULLIVAN, LLP

300 W. 6th St., Suite 2010

Austin, TX 78701

(737) 667-6100

johnbash@quinnemanuel.com

January 19, 2023