No. _____

In The
Supreme Court of the United States

REYNALDO GONZALEZ, *et al.*,

Petitioners,

v.

GOOGLE LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 203(c)(1) of the Communications Decency Act immunizes an "interactive computer service" (such as YouTube, Google, Facebook and Twitter) for "publish[ing] ... information provided by another" "information content provider" (such as someone who posts a video on YouTube or a statement on Facebook). This is the most recent of three court of appeals' decisions regarding whether section 230(c)(1) immunizes an interactive computer service when it makes targeted recommendations of information provided by such another party. Five courts of appeals judges have concluded that section 230(c)(1) creates such immunity. Three court of appeals judges have rejected such immunity. One appellate judge has concluded only that circuit precedent precludes liability for such recommendations.

The question presented is:

> 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?

PARTIES

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

DIRECTLY RELATED CASES

Gonzalez v. Google LLC, No. 18-16700, Ninth Circuit Court of Appeals, judgment entered January 11, 2022

Gonzalez v. Google LLC, No. 4:16-CV-03282-DMR, Northern District of California, judgment entered August 31, 2018

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Petitioners Reynaldo Gonzalez, *et al*., respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on June 22, 2021.

OPINIONS BELOW

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

JURISDICTION

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

STATUTORY PROVISION INVOLVED

The statutory provision involved is set out in the Appendix.

Section 230 of the Communications Decency Act was enacted in 1996 at the dawn of the internet age. 47 U.S.C. § 230. Section 230 was prompted in particular by the need to protect internet companies from being held strictly liable in state law defamation actions because they had permitted other parties to post defamatory materials on the companies' websites. The wording of section 230, however, was sufficiently general to invite arguments that it preempted application of a wide range of state and federal non-criminal statutes. "[In] the ... years since [its enactment], [this Court] have never interpreted this provision. But many courts have construed the law broadly to confer sweeping immunity on some of the largest companies in the world." *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, 141 S.Ct. 13 (2020) (Statement of Justice Thomas respecting the denial of certiorari).

This case concerns the most controversial application of section 230. Under at least most circumstances, the protections of section 230 will apply to an "interactive computer service" (such as YouTube, Google, Facebook, or Twitter) insofar as it permits another party to post on the service's website material created by another party. Mere posting on bulletin boards and in chat rooms was the prevalent practice when section

230 was originally enacted. But over the last two decades, many interactive computer services have in a variety of ways sought to recommend to users that they view particular other-party materials, such as written matter or videos. Those recommendations are implemented through automated algorithms, which select the specific material to be recommended to a particular user based on information about that user that is known to the interactive computer service. The public has only recently begun to understand the enormous prevalence and increasing sophistication of these algorithm-based recommendation practices.

This is the most recent of three federal court of appeals decisions raising the issue of whether section 230 applies to such recommendations of other-party created materials. 36a-44a, 81a-92a, 92a-110a; *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019), *cert. denied*, 140 S.Ct. 2761 (2020); *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), *cert. denied*, 140 S.Ct. 2761 (2020). In each of these appeals, the majority held that an interactive computer service is entitled to the same protection under section 230 when the service itself affirmatively recommends other-party materials as when the service merely permits another party to post that material on the service's website. The majority opinions have offered differing explanations of why section 230 would apply to such recommendations, none notably grounded in the text of the statute. Two dissenting opinions and one concurring opinion in these appeals have rejected this broad interpretation of section 230. This is the only issue

regarding the interpretation of section 230 that has engendered such repeated, open, and thoroughly vetted judicial disagreement.

The nature of the panel decision below presents this Court with an extraordinary situation. A majority of the panel, regarding itself bound by Ninth Circuit precedent in *Dyroff*, held that section 230 immunizes an interactive computer service from liability for recommending other-party content, in this case for recommending ISIS proselytizing and recruitment videos, at least so long as the provider is dispensing recommendations even-handedly to terrorists and non-terrorists alike. 36a-44a. But a different majority, in two detailed separate opinions, argued at length that the majority's precedent-compelled interpretation of section 230, and that Ninth Circuit precedent itself, were inconsistent with the text and the legislative history of section 230. 81a-92a (Berzon, J., concurring), 92a-110a (Gould, J., concurring in part and dissenting in part). So although petitioners, as is common, ask the Court to overturn the judgment ordered by a majority of the court below, petitioners will also be urging the Court to actually affirm the interpretation of section 230 advanced by a different majority of that same panel.

The unusual division of the panel in this case was the direct and perhaps foreseeable result of the dissent of the late Second Circuit Chief Judge Katzmann in *Force v. Facebook, Inc*. In an exceptionally detailed and scholarly analysis, Judge Katzmann laid out a compelling explanation of why section 230 does not immunize recommendations, but instead is limited to protecting

traditional editorial functions. 934 F.3d at 76-89. That dissent was well-calculated to prompt other judges to reevaluate the ever broader manner in which section 230 was being construed, and it had precisely that effect. In the instant case, decided less than two years after *Force*, Judges Berzon and Gould both expressly endorsed Judge Katzmann's opinion in *Force*.

The upshot of the opinions in *Force*, *Dyroff* and the instant case is that the circuit court judges who have addressed this issue are divided in several ways. Five judges (Judges Dorney and Sullivan in the Second Circuit, and Judges Nelson, Rawlinson and Bea in the Ninth Circuit) have concluded that section 230 protects recommendations, although advancing divergent reasons for that conclusion. Three judges (Judge Katzmann in the Second Circuit and Judges Berzon and Gould in the Ninth Circuit) conclude that section 230 does not protect recommendations as such. And one judge (Judge Christen in the Ninth Circuit) has decided only that the decision in *Dyroff* is controlling on Ninth Circuit panels.

This disagreement has not resulted in a conflict in the precedents in the circuits at issue. But that is to some degree a matter of happenstance. *Dyroff* and the instant case were pending at the same time in the Ninth Circuit. If the instant case, rather than *Dyroff*, had been decided first in time, the interpretation of section 230 endorsed by Judges Berzon and Gould would have set the controlling Ninth Circuit precedent, and Google would be seeking rather than opposing certiorari.

When certiorari was sought in *Force*, the respondent assured this Court that the construction of section 230 was settled and uncontroversial, rendering action by this Court unnecessary. "The courts of appeals are in broad agreement about how to interpret § 230 of the Communications Decency Act."[1] Barely a year later, every member of the panel in this case commented that there was an increasing concern among lower court judges that the ever-broader interpretation of section 230 had gotten out of hand. "I join the growing chorus of voices calling for a more limited reading of the scope of Section 230 immunity." 82a (Berzon, J., concurring). "I believe that there is a rising chorus of judicial voices cautioning against an overbroad reading of the scope of Section 230 immunity." 110a n.9 (Gould, J., concurring in part and dissenting in part). "We share the dissent's concerns about the breadth of § 230. As the dissent observes, 'there is a rising chorus of judicial voices cautioning against an overbroad reading of the scope of Section 230 immunity'...." 42a (majority opinion by Judge Christen).

If the interpretation of section 230 in this regard were a minor technicality, with little practical impact, such judicial disagreements and concerns might not warrant action by this Court. But whether section 230 applies to these algorithm-generated recommendations is of enormous practical importance. Interactive computer services constantly direct such recommendations, in one form or another, at virtually every adult

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[1] Brief in Opposition, *Force v. Facebook, Inc.*, No. 19-859, available at 2020 WL 1479918 (capitalization and bold omitted).

and child in the United States who uses social media. To be sure, many of those recommendations, such as of a clever TikTok dance, are benign. But other recommendations suggest that users look at materials inciting dangerous, criminal or self-destructive behavior. In this case the defendants are alleged to have recommended that users view inflammatory videos created by ISIS, videos which played a key role in recruiting fighters to join ISIS in its subjugation of a large area of the Middle East, and to commit terrorist acts in their home countries. Application of section 230 to such recommendations removes all civil liability incentives for interactive computer services to eschew recommending such harmful materials, and denies redress to victims who could have shown that those recommendations had caused their injuries, or the deaths of their loved ones.

In *Malwarebytes*, Justice Thomas suggested that "in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms." 141 S.Ct. at 14 (statement of Justice Thomas). This is that case.

STATEMENT OF THE CASE

Background

The enactment of section 230 was prompted by a New York state-court decision that had held an internet service provider legally responsible for a

defamatory statement posted to one of its message boards. 19a-20a, 85a-86a, 146a-148a; *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 3233710 (N.Y. Sup. Ct. May 24, 1995). *Stratton Oakmont* concluded that the internet service provider "had become a 'publisher' under state law because it voluntarily deleted some messages from its message boards 'on the basis of offensiveness and bad taste,' and was therefore legally responsible for the content of defamatory messages that it failed to delete." 20a (quoting *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) and *Stratton Oakmont*, 1995 WL 323710, at *4). Under state defamation law, a "publisher" was strictly liable for the material that it published. By providing that an internet company could not be deemed a "publisher" for printing material created by others, section 230 precluded such defamation suits. As the court below acknowledged, "[t]he original goal of § 230 was modest." 20a.

Section 230(c)(1) provides: "No provider or user of an interactive computer service shall be treated as the publisher of or speaker of information provided by another information content provider." Whether a particular defendant is an "interactive computer service" is not usually in dispute, and is not at issue here. The considerable litigation that has arisen regarding the meaning of section 230(c)(1) has concerned whether a particular defendant is being "treated as [a] publisher," and if so whether the matter published was exclusively "provided by another information content provider."

In the decades since the enactment of section 230, the types of services being provided on the internet have changed dramatically. The issue in this case, as in *Force* and *Dyroff*, arose out of one of those fundamental changes. Today the income of many large interactive computer services is based on advertising, not on the subscriptions that in years past were the basis of the income firms such as Prodigy and CompuServe. Internet firms that rely on advertising have a compelling interest in increasing the amount of time that individual users spend at their websites. The longer a user is on a website, the more advertising the user will be exposed to; that in turn will increase the revenue of the website operator.

That financial structure has given rise to the now widespread practice of recommending (for want of any agreed upon better term) material to website users, in the hope of inducing them to look at yet more material and thus to remain ever longer on that website. Many of those recommendations are based on algorithms, which review all the information an interactive service provider has about each particular user, and selects for recommendation the material in which that user is most likely to be interested. "[A]lgorithms [are] devised by these companies to keep eyes focused on their websites.... '[T]hey have been designed to keep you online'...." App. 97a n.3 (Gould, J., dissenting) (quoting Anne Applebaum, *Twilight of Democracy—The Seductive Lure of Authoritarianism* (1st ed. 2020)). Algorithm-based recommendations have been enormously successful, and thus lucrative. As Judge

Katzmann noted, one analysis concluded that 70% of the time that users spend on YouTube is the result of YouTube's algorithm-based recommendations. 934 F.3d at 87.

Proceedings Below

District Court

In November 2015 Nohemi Gonzalez, a 23-year-old U.S. citizen studying in Paris, France, was murdered when three ISIS terrorists fired into a crowd of diners at La Belle Equipe bistro in Paris. This tragic event was part of a broader series of attacks perpetrated by ISIS in Paris, which included several suicide bombings and mass shooting. Ms. Gonzalez was one of 129 people killed during the murderous rampage.

Several of Ms. Gonzalez's relatives, as well as her estate, subsequently brought this action against Google, which owns YouTube, a global online service on to which individuals and groups can directly post videos. The plaintiffs alleged that Google, through YouTube, had provided material assistance to, and had aided and abetted, ISIS, conduct forbidden and made actionable by the AntiTerrorism Act. 18 U.S.C. § 2333; 3a-4a, 14a-16a.

The complaint alleged that that assistance and aid took several forms. Plaintiffs asserted that Google had knowingly permitted ISIS to post on YouTube hundreds of radicalizing videos inciting violence and recruiting potential supporters to join the ISIS forces

then terrorizing a large area of the Middle East, and to conduct terrorist attacks in their home countries.[2] Additionally, and central to the issue in this appeal, the complaint alleged that Google affirmatively "recommended ISIS videos to users." Third Amended Complaint, ¶ 535. Those recommendations were one of the services that Google provided to ISIS. Google selected the users to whom it would recommend ISIS videos based on what Google knew about each of the millions of YouTube viewers, targeting users whose characteristics indicated that they would be interested in ISIS videos. *Id*., ¶¶ 535, 549, 550. The selection of the users to whom ISIS videos were recommended was determined by computer algorithms created and implemented Google. Because of those recommendations, users "[we]re able to locate other videos and accounts related to ISIS even if they did not know the correct identifier or if the original YouTube account had been replaced...." *Id*., ¶ 549.

The complaint alleged that the services that Google provided to ISIS, including these recommendations, were critical to the growth and activity of ISIS. "[B]y recommend[ing] ISIS videos to users, Google assists ISIS in spreading its message and thus provides material support to ISIS ... " *Id*., ¶ 535. "Google's services have played a uniquely essential role in the development of ISIS's image, its success in recruiting members from around the world, and its ability to

[2] Petitioners do not challenge in this Court the Ninth Circuit's holding that section 230 immunizes Google from liability for permitting those postings.

carry out attacks...." *Id*., ¶ 14. A single ISIS video on YouTube, for example, had been viewed 56,998 times in a 24 hour period. *Id*., ¶ 231.

Videos that users viewed on YouTube were the central manner in which ISIS enlisted support and recruits from areas outside the portions of Syria and Iraq which it controlled. To utilize YouTube in this manner, ISIS established a series of sophisticated recording facilities. *Id*., ¶¶ 207-223.

Although the recommendations were made based on computer algorithms, the complaint alleged that Google officials were well aware that the company's services were assisting ISIS. The complaint asserted that "[d]espite extensive media coverage, complaints, legal warnings, congressional hearings, and other attention for providing online social media platform and communications services to ISIS, prior to the Paris attacks Google continued to provide those resources and services to ISIS and its affiliates, refusing to actively identity ISIS YouTube accounts and only reviewing accounts reported by other YouTube users." *Id*., ¶ 20. The complaint alleged that the assistance provided to ISIS by Google was a cause of the 2015 attack that killed Ms. Gonzalez.

Google moved to dismiss the complaint on the ground that section 230 barred all of the plaintiffs' claims. 224a. The district court agreed, and dismissed the complaint. 170a-259a. With regard to the plaintiffs' claim regarding Google's recommendations, the district court concluded that Google was protected by

section 230 because the videos it was recommending had been produced by ISIS, not by Google itself. 198a-203a.

Intervening Decisions in *Force v. Facebook, Inc.* and *Dyroff v. Ultimate Software Group, Inc.*

After the appeal in this case had been fully briefed, the Second and Ninth Circuits, respectively, decided *Force v. Facebook, Inc*. and *Dyroff v. Ultimate Software Group, Inc.* Those decisions shifted the legal landscape, and shaped the subsequent opinions of Judges Christen, Berzon and Gould in the instant case.

In *Force*, the plaintiffs alleged that recommendations by Facebook had led to several Hamas killings and attacks in Israel. Facebook, they asserted, had both recommended Hamas-related content, and recommended that users "friend" Hamas supporters or Hamas itself. A divided Second Circuit held that such recommendations were protected by section 230. In the view of the majority, the key factor was that the result brought about by Facebook recommendations—connecting users with content or other users—was the same type of result that was brought about when Facebook merely permitted Hamas and its supporters to post materials onto pages that Hamas, or its supporters, maintained on Facebook. 934 F.3d at 67.

Judge Katzmann, as Justice Thomas later noted, was "[u]nconvinced." *Malwarebytes*, 141 S.Ct. at 17. Judge Katzmann wrote a long, compelling dissent objecting to "how far we have strayed from the path on which Congress set us out...." 934 F.3d at 77; *see* 934

F.3d at 76-89. Extending the protections of section 230 to recommendations, he argued, was inconsistent with the text of the statute, which applies only to claims that seek to treat a defendant as a "publisher." 934 F.3d at 77, 80-81. The majority opinion, Judge Katzmann pointed out, was inconsistent with precedents in other circuits that limited the application of section 230 to a publisher's "traditional editorial functions." 934 F.3d at 81. A defendant's recommendation, he reasoned, conveyed a message from the defendant itself, and thus was not merely publishing content treated by another party. 934 F.3d at 82-83.

In *Dyroff*, the defendant's recommendations included an email which it had sent to a user, notifying him that new material had been posted by another party on the defendant's website, and informing the user of several ways in which the user could access that material. The Ninth Circuit held "[b]y recommending user groups and sending email notifications, [the defendant] ... was acting as a publisher of others' content." 934 F.3d at 1098. Thus, to hold the defendant liable for making such recommendations would "inherently require[ ] the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id*. (quoting *Barners v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)).

Court of Appeals

The court of appeals affirmed, with each member of the panel writing separately. A majority opinion, for two members of the court, was authored by Judge

Christen. 1a-80a. Judge Berzon wrote a concurring opinion (81a-92a), and Judge Gould wrote a separate opinion concurring in part and dissenting in part. 92a-169a. The three judges differed primarily about whether recommendations are within the scope of the protections of section 230.

Judge Christen's majority opinion noted that "[t]he Gonzalez Plaintiffs' theory of liability generally arises from Google's recommendations of content to users." 7a. It concluded that under the Ninth Circuit precedent in *Dyroff* a recommendation is protected by section 230 at least so long as the defendant's method for making recommendations (in this case, algorithms), did not treat harmful other-party content "differently than other other-party created content." 36a-44a. An algorithm-based recommendation system, Judge Christen reasoned, involved the "same" "core principle" as a "traditional search engine." 38a; 41a. Judge Christen explained that the panel could not adopt Judge Katzmann's proposed interpretation of section 230 because "Ninth Circuit case law forecloses his argument." 44a.

Judge Berzon argued at length that Judge Katzmann's construction of section 230 was the correct one. 81a-92a. Echoing Judge Katzmann's insistence that section 230 protects only traditional editorial functions, Judge Berzon explained that:

> [f]or the reasons compellingly given by Judge Katzmann in his partial dissent in *Force* ... , if not bound by Circuit precedent, I would hold that the term "publisher" under section

> 230 reaches only traditional activities of publication and distribution—such as deciding whether to publish, withdraw, or alter content—and does not include activities that promote or recommend content....

82a. "Targeted recommendations and affirmative promotion of connections and interactions ... are well outside the scope of traditional publication." 84a. Although Judge Berzon strongly criticized the earlier Ninth Circuit decision in *Dyroff* (87a), she concluded that the panel was bound by that erroneous interpretation of section 230. 86a-92a. Judge Berzon therefore joined Judge Christen's majority opinion, but called on the Ninth Circuit to grant rehearing en banc to reconsider the issue. 91a.

Judge Gould dissented with regard to the majority's holding that section 230 protects recommendations made by an interactive computer service. 96a-110a. He distinguished between YouTube's action in merely permitting ISIS to upload its videos to the YouTube server, and YouTube's use of recommendations to encourage viewing of ISIS videos by "those already determined to be most susceptible to the ISIS cause." 102a. Judge Gould expressly endorsed the reasoning of Judge Katzmann's dissent in *Force* (98a), and took the unusual step of appending to his own opinion the entirety of Judge Katzmann's dissent. 139a-169a.

Plaintiffs filed a timely petition for rehearing en banc, which urged the court of appeals to grant rehearing to adopt the narrower interpretation of section 230 that was advocated by Judges Berzon and Gould.

Although a member of the court of appeals called for a vote on the petition, the majority of the court of appeals voted to deny rehearing en banc. 261a-262a. Judges Berzon and Gould dissented from the denial of rehearing en banc. 261a. Judge Gould filed a brief opinion stating that he dissented from the denial of rehearing for the reasons set out in his dissent from the panel decision. 262a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE WHETHER SECTION 230 PROTECTS RECOMMENDATIONS MADE BY INTERACTIVE COMPUTER SERVICES

Rule 10(c) provides that certiorari is appropriate if "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court...." S.Ct. Rule 10(c). This Court only infrequently grants review on that basis, but this case presents the exceptional circumstances that warrant such unusual action.

Justice Thomas correctly warned that "[e]xtending immunity [under section 230] beyond the natural reading of the text can have serious consequences." *Malwarebytes*, 141 S.Ct. at 18. Before giving companies immunity from civil claims involving serious charges, he urged, the Court "should be certain that is what the law demands." *Id*. The complaint in this case depicts consequences and makes a charge of the utmost

gravity. The plaintiffs assert that Google, with full knowledge of the nature and consequences of its actions, repeatedly recommended ISIS videos to users likely to be susceptible to the calls for terrorism which those videos conveyed, and did so at a time when ISIS recruits were in combat with forces of the United States and its allies, were terrorizing civilians in a large portion of Syria and Iraq, and were perpetrating or attempting mass killings in the United States and Europe. This Court should heed Judge Gould's call for it to "take up the proper interpretation of Section 230 and bring its wisdom and learning to bear on this complex and difficult topic." 109a-110a.

Construing section 230 to protect recommendations made by interactive computer services would preempt virtually all non-criminal state and federal laws that might apply to and deter internet companies from making such recommendations. Recommendation algorithms have extraordinary impact; YouTube, for example, is used by a majority of the adult and teenage population of the United States,[3] and by hundreds of millions of others around the globe. As Judge Katzmann warned, "mounting evidence suggests that providers designed their algorithms to drive users toward content and people the users agreed with—and that they have done it too well, nudging susceptible souls ever further down dark paths." 934 F.3d at 88; *see id.* at 87 (noting that algorithm-based recommendations have been "a real boon" for extremist groups).

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[3] https://www.omnicoreagency.com/youtube-statistics/

Although the events giving rise to this action occurred in 2015, subsequent reports in the New York Times[4] and the Wall Street Journal[5] described the manner in which YouTube is still recommending extremist materials. A recent study of violent, graphic, hate speech and other objectionable videos on YouTube concluded that 71% of those types of videos that had seen by users were seen because such videos were recommended to them by the YouTube recommendation algorithm.[6]

Recommendations that encourage users to look at terrorist videos are particularly dangerous. As Judge Katzman noted, the decision in *Force*, as in the instant case, "immunized under § 230 ... social media's unsolicited, algorithmic spreading of terrorism." 934 F.3d at 85. Even the majority opinion below acknowledged that "the use of powerful algorithms by social media websites can encourage, support and expand terrorist networks." 79a. "[T]he terrorist group's deadly activities were, according to the complaints in these cases,

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[4] Zeynep Tufecki, YouTube, the Great Radicalizer, New York Times, March 10, 2018, available at https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html (last viewed April 1, 2022).

[5] Jack Nicas, How YouTube Drives People to the Internet's Darkest Corner, Wall Street Journal, February 7, 2018, available at https://www.wsj.com/articles/how-youtube-drives-viewers-to-the-internets-darkest-corners-1518020478 (last viewed April 1, 2022).

[6] Mozilla, YouTube Regrets: A Crowdsourced Investigation Into YouTube's Recommendation Algorithm, July 2021, pp. 12-18, available at https://mzl.la/regrets-research.

facilitated by recommending their gruesome message to potential recruits.... [T]he consequences of the service provider's recommendations were deadly." 87a-88a (Berzon, J.). The complaint alleges that the recommendation of ISIS videos was not an isolated oversight by Google, but a systemic practice, a practice which endangered the lives of American citizens anywhere that an ISIS terrorist might strike and the lives of American troops in the field. This case comes before the Court on a motion to dismiss; these exceptionally serious allegations have yet to be proven. But if they are true, the most significant recommendations of ISIS videos came not from Raqqa, Syria, but from San Bruno, California.

The exceptional importance of the question presented would not by itself be one which "should be ... settled by this Court" if the lower courts were in broad and confident agreement that section 230 should be construed to protect such recommendations by interactive computer services. But that emphatically is not the case. Two members of the panel below, as well as Judge Katzmann, concluded that section 230 should not be construed to immunize such recommendations. The majority opinion below acknowledged that "[t]here is no question § 230(c)(1) [as the majority construed it] shelters more activity than Congress envisioned it would." 80a. Every member of the panel below expressed misgivings about the increasing breadth with which section 230 has been construed by the lower courts. The three majority opinions favoring immunity for recommendations offer divergent

justifications for that interpretation of the statute. Judicial resolution of the meaning of section 230 on this exceptionally important question should not be left to the lower courts whose members are in such complex and insistent disagreement.

Those disagreements have now vetted in considerable detail the arguments for and against construing section 230 to protect recommendations made by interactive computer services. Judge Katzmann's detailed opinion, complemented by the opinions of Judges Berzon and Gould, thoroughly develops the argument against immunizing such recommendations. The majority opinions in *Force* and below responded in turn to Judge Katzmann's analysis, and in the instant case to the additional arguments of Judges Berzon and Gould. The six judicial opinions on this question provide a solid framework for identifying the textual and other issues that would need to be considered to resolve the question presented.

II. THE DECISIONS IN THIS CASE AND *FORCE* CONFLICT WITH DECISIONS IN SIX CIRCUITS HOLDING THAT THE PROTECTIONS OF SECTION 230 ARE LIMITED TO TRADITIONAL EDITORIAL FUNCTIONS

The protections of section 230 are expressly limited to claims which "treated [an interactive computer service] as the publisher" of content created by others. Prior to the 2019 decisions in *Force* and *Dyroff*, the courts of appeals had generally agreed that a claim

"treated [a defendant] as a publisher" of other-party created content when it would impose liability on that defendant because the defendant had engaged in a publisher's traditional editorial function, such as deciding to publish or edit content created by others.

In his *Force* dissent, Judge Katzmann emphasized that extending section 230 protection to targeted recommendations by interactive computer services was inconsistent with this prevailing interpretation of section 230.

> [O]ur precedent does not grant publishers CDA immunity for the full range of activities in which they might engage. Rather, it "bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" provided by another for publication.

934 F.3d at 81 (quoting *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016)). Judge Katzman cited decisions in the First,[7] Third,[8] Fourth,[9] Sixth,[10] Tenth[11]

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[7] *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20 (1st Cir. 2016).

[8] *Oberdorf v. Amazon, Inc.*, 930 F.3d 136, 151 (3d Cir.2019).

[9] *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[10] *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014).

[11] *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000).

and District of Columbia[12] Circuits that have adopted that traditional editorial functions standard. The recommendation practices in *Force*, Judge Katzmann pointed out, "[went] far beyond and differ[ed] in kind from traditional editorial functions." 934 F.3d at 82.

In light of Judge Katzmann's dissent in this regard, the plaintiffs in both *Force* and *Dyroff*, in seeking certiorari, argued that there was a circuit conflict regarding whether the protections of section 230 were limited to traditional editorial functions.[13] The respondents in these two cases took surprisingly different positions on that issue. In *Dyroff*, the respondent insisted that Judge Katzmann was wrong to suggest that any court had interpreted the protection in section 230 to be about traditional editorial practices. "The cases Dyroff cites merely happen to involve the defendant engaging in traditional editorial functions; no court has held that § 230(c)(1) applies only to publishers that engage in traditional editorial functions. Indeed, the cases Dyroff relies upon do not analyze the meaning of the term publisher...."[14] So it did not matter that recommendations were not a traditional editorial function.

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[12] *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

[13] Petition for A Writ of Certiorari, *Force v. Facebook, Inc.*, No. 19-859, 30-37 (available at 2020 WL 116158); Petition for A Writ of Certiorari, *Dyroff v. Ultimate Software Group*, No. 19-849, 29-35, available at 2020 WL 92187.

[14] Respondent The Ultimate Software Group, Inc.'s Brief in Opposition, No. 19-849, 2, available at 2020 WL 1486537.

In *Force*, on the other hand, the respondent agreed with Judge Katzmann that the traditional editorial functions standard is indeed the prevailing interpretation of what actions are protected by section 230.

> [T]he courts of appeals all agree that § 230(c)(1) applies to protect online service providers from liability for third-party content where the online service provider exercises "traditional editorial functions."... And the courts of appeals generally agree on what those activities encompass, including decisions about how and whether to publish, organize, display, promote, suggest, or remove third-party content.[15]

The respondent argued that recommendations are nonetheless protected under this standard because recommendations are "akin to traditional editorial functions."[16]

In the wake of the denial of certiorari in *Force* and *Dyroff*, this dispute as to the correctness of the traditional editorial function test has continued. In October 2020 in *Malwarebytes*, Justice Thomas set out the prevailing interpretation of section 230, that it protects traditional editorial functions. "[F]rom the beginning, courts have held that § 230(c)(1) protects the 'exercise of a publisher's traditional educational functions—such as deciding whether to publish, withdraw,

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[15] Brief in Opposition, No. 19-859, 15, available at 2020 WL 1479918 (quoting *Zeran*).

[16] Brief in Opposition, No. 19-859, 15, available at 2020 WL 1479918.

postpone or alter content'" *Malwarebytes*, 141 S.Ct. at 16) (emphasis omitted) (quoting *Zeran*, 129 F.3d at 330). In *Doe v. Facebook, Inc*., the respondent, whose practices clearly did satisfy the traditional editorial functions standard, expressly endorsed that standard. Brief in Opposition, *Doe v. Facebook, Inc*., No. 21-459, 25, available at 2021 WL 5585797.

The decision in the instant case highlights this continuing inconsistency between the traditional editorial functions standard, which is accepted in most other circuits, and the Ninth and Second Circuit holdings that a recommendation is also protected by section 230. Judge Berzon expressly recognized that recommendations are outside the scope of the traditional standard, endorsing Judge Katzman's opinion, which pointed to that very conflict. "For the reasons compellingly given by Judge Katzmann in his partial dissent in *Force* ... , if not bound by Circuit precedent I would hold that the term 'publisher' under section 230 reaches only traditional activities of publication and distribution.... [T]argeted recommendations ... are well outside the scope of traditional publication." 81a-82a. Judge Gould, signaling his complete agreement with Judge Katzmann, appended to his own dissent the entire Katzmann dissent, including its discussion of the traditional editorial functions precedent in other circuits. 98a, 152a-153a, 156a.

What is particularly telling about Judge Christen's majority opinion below is what it does not say. The majority opinion does not dispute Judge Katzmann's insistence that other circuits apply the traditional

editorial functions test in determining what activities are protected by section 230. And the majority opinion does not dispute Judge Berzon's assertion that making recommendations is not a traditional publisher's function. Instead, the majority opinion explained, the controlling legal issue in the Ninth Circuit is not whether a targeted recommendation is a traditional editorial function, but whether it is comparable to a "traditional search engine." 38a, 41a.

III. THE NINTH CIRCUIT'S INTERPRETATION OF SECTION 230 IS CLEARLY INCORRECT

In *Malwarebytes*, Justice Thomas expressed concern that "[c]ourts have long stressed nontextual arguments when interpreting § 230, leaving questionable precedent in their wake." 141 S.Ct. at 14.[17] Judge

[17] The breadth of the lower court interpretations of section 230 has been widely criticized. *See* 1 R. Smolla, Law of Defamation § 4:86, p. 4-380 (2d ed. 2019); Rustad & Koenig, Rebooting Cybertort Law, 80 Wash.L.Rev. 335, 342-43 (2005); Danielle Keats Citron & Benjamin Wittes, The Problem Isn't Just Backpage: Revising Section 230 Immunity, 2 Geo.L.Tech. 453, 454-55 (2018); Danielle Keats Citron, Cyber Civil Rights, 89 B.U.L.Rev. 61, 116 (2009); Jaime E. Freilich, Note, Section 230's Liability Shield in the Age of Online Terrorist Recruitment, 83 Brook.L.Rev. 675, 679 (2018); Anna Elisabeth Jayne Goodman, Note and Comment, When You Give a Terrorist a Twitter: Holding Social Media Companies Liable for their Support of Terrorism, 46 Pepp.L.Rev. 147, 189 (2018); Nicole Phe, Note, Social Media Terror: Reevaluating Intermediary Liability Under the Communications Decency Act, 51 Suffolk U.L.Rev. 99, 116 (2018); Ryan J.P. Dyer, Note, The Communications Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption, 37 Seattle U.L.Rev. 837, 842 (2014).

Gould shares that view, explaining, "I agree with Justice Thomas that Section 230 has mutated beyond the specific legal backdrop from which it developed, and I cannot join a majority opinion that seeks to extend this sweeping immunity further." 110a n.9. The majority opinions below, and in *Force* and *Dyroff*, are just such questionable precedents. The unpersuasive and divergent nature of the justifications offered by the lower courts for interpreting section 230 to protect recommendations, an interpretation with sweeping and grave consequences, weighs heavily in favor of reassessment of that issue by this Court.

(1) Judge Katzmann explained why the text of section 230 cannot be read to provide protection for recommendations. Section 230 only applies if a plaintiff's claim seeks to "treat[] [the interactive computer service] as the publisher" of content created by another. But as Judge Katzmann pointed out, "it strains the English language to say that in ... recommending ... writings to users ... [an entity] is acting as 'the *publisher* of ... information provided by another information content provider.'" 934 F.3d at 76-77 (quoting 47 U.S.C. § 230(c)(1)) (emphasis in opinion). Countless organizations and individuals recommend books or videos whom no one would describe as the "publisher" of those materials: the New York Review of Books, private book clubs, movie reviewers for Rotten Tomatoes, and millions of users of TikTok, to name but a few. If YouTube were to post on user home pages a favorable review of Carl Berstein's latest book, YouTube

could not on that account claim to be the publisher of the book, or expect to be paid royalties.

It is common for an interactive computer service to both permit another party to post content on the service's servers, and also to recommend that content; the very purpose of those recommendations is to induce users to visit other content on the service's own website, thus enabling the interactive computer service to earn additional advertising revenue. But the posting of other-party content, and the recommending of that content, are different acts; only insofar as it permits the posting (and engages in related traditional editorial functions) is the interactive computer service acting as a publisher. The recommendations at issue in *Dyroff*, for example, included an email—written by the defendant itself—notifying a user that new material had been posted onto the defendant's website. Drafting and sending that email were clearly different actions, with different status under section 230, than permitting another party to post the material at issue on the defendant's website.

Suppose, for example, that YouTube were to recommend content that was available on only the website of *different* social media company, such as by writing and posting on YouTube a glowing review of an ISIS video on Vimeo. The review would not constitute itself publishing the ISIS video. That YouTube-prepared recommendation would not turn into publication of the video if, after the review had been distributed to YouTube users, ISIS also posted the video in question on YouTube itself. That fact that in this case YouTube, in addition

to making the allegedly actionable recommendations of ISIS videos, *also* permitted the posting of ISIS videos on its website did not somehow immunize a recommendation that otherwise would clearly fall outside the scope of section 230.

It does not matter that publishers do at times recommend their own publications, such as when book publishers advertise their books. As Judge Katzmann explained, "[b]y its plain terms, § 230 does not apply whenever a claim would treat the defendant as 'a publisher' in the abstract, immunizing defendants from liability stemming from any activity in which one thinks publishing companies commonly engage." 934 F.3d at 80-81. "§ 230 does not necessarily immunize defendants from claims based on promoting content ... , even if those activities might be common among publishing companies nowadays." 934 F.3d at 81. Recommending books is not an inherently "publisher" function because, although only whoever prints a book is its publisher, anyone can recommend a book.

Equally importantly, as Judges Katzmann, Berzon and Gould all pointed out, recommendations by an interactive computer service (of other-party content or anything else) are communications by and from service itself, not by and from some other party. "[R]ecommendation[s] ... involve communication by the service provider, and so are activities independent of simply providing the public with content supplied by others." (Berzon, J., concurring); *see* 105a-106a (Gould, J.); *Force*, 934 F.3d at 82-83 (Katzmann, J.). The suggestion that a user access some text, image, or other content

may be made in so many words (as are some recommendations on Facebook), or may simply take the form of hypertext or a hyperimage chosen to interest a particular user and displayed before a user by the interactive computer service. A sentence such as "To see this video, click here" conveys "information provided by" the interactive computer service (how to access a particular video), not information provided by whoever created the video itself.

(2) The majority below reasoned that targeted recommendations directed at a particular user are protected by section 230 because they are essentially the same as search engines.

> This [YouTube] system is certainly more sophisticated than a traditional search engine, which requires users to type in textual queries, but the core principle is the same: Google's algorithms select the particular content provided to a user based on that user's inputs. *See Roommates*, 521 F.3d at 1175 (observing that search engines are *immune* under § 230 because they provide content in response to a user's queries....).

38a (emphasis added). This is a new explanation for why recommendations are protected by section 230, different from the reasoning in the earlier decisions in *Dyroff* and *Force*.

The decision below has two fatal flaws.[18] First, section 230 applies only when a claim would in effect treat the interactive computer service as the "publisher" of content provided by another, not when it would treat the service as a "search engine." Whatever the state of Ninth Circuit precedent regarding search engines, proffering an analogy between recommendations and search engines does not connect the court's holding to the actual text of the statute. Second, although a company providing a search engine would at least usually be an interactive computer service, section 230 does not "immun[ize]" interactive computer services. Section 230 does not apply to everything an interactive computer service (including a search engine) does, but accords protection only insofar as a particular complaint seeks to treat that service as a publisher. The court below argued that both search engines and algorithm-based recommendations involving matching (the former matching responses with a user's query, the latter matching suggestions with information the interactive computer service has about the user) (38a), but that does not establish that all (or even any) uses of matching constitute publishing.

The text of section 230 clearly distinguishes between a system that provides to a user information that the user is actually seeking (as does a search engine) and a system utilized by an internet company to direct at a user information (such as a

[18] The majority acknowledged that "[t]here is no question § 230(c)(1)"—as interpreted by the panel and other courts—"shelters more activity than Congress envisioned it would." 80a.

recommendation) that the company wants the user to have. Section 230(b) states that "[i]t is the policy of the United States ... to encourage the development of technologies which maximize *user control* over what information is received by individuals, families, and schools who use the internet and other computer services." 47 U.S.C. § 230(b) (emphasis added). Congress found that "[t]he developing array of Internet and other interactive computer services ... offers *users a greater degree of control* over the information that they receive, as well as the potential for even greater control in the future as technology develops." 47 U.S.C. § 230(a) (emphasis added). The core function of a search engine advances that policy, because it enables a user to select what information he or she will receive; on the other hand, when an interactive computer service makes a recommendation to a user, it is the service not the user that determines that the user will receive that recommendation.

(3) The majority opinion in *Dyroff* took a different approach, one which never refers to search engines. The justification offered in *Dyroff* for immunizing recommendations (as well as email notifications about third party content) consists of three somewhat enigmatic sentences:

> By recommending user groups and sending email notifications, [the interactive computer service] ... was acting as a publisher of others' content. These functions—recommendations and notifications—are tools meant to

> facilitate the communication and content of others. They are not content in and of themselves.

934 F.3d at 1098.

This analysis cannot be reconciled with the text of the statute, or with ordinary English. The first sentence is the operative one, but is difficult to understand. One who recommends or sends notification about material created by another is not by so doing ipso facto "acting as publisher" of that material, at least as those words are ordinarily understood. If a member of this Court were to comment "John Grisham's latest novel is terrific," or send an email announcing that "Maria Yovanovitch's new book is in stock at Politics and Prose," he or she would not by so doing be transformed into the publisher of either book. Recommending something is different from creating or being that object; writing a restaurant review is not cooking, and a dietician is not a kale salad.

The second two sentences suggest a different argument. Because recommendations and notifications are "meant to facilitate the communication and content of others," they can only be understood and function solely as an ancillary part of the process of the publication of that other-created content. But in ordinary English, a person who takes actions "meant to facilitate the communication and content of others" would not usually be described, in the words of section 230, as the "publisher" of that content. The official of the Clerk's office who brought this petition to your

chambers "meant to facilitate the communication and content of [the petitioners' argument in favor of certiorari]," but was not the "publisher" of the petition.

(4) The complaint in *Force* alleged that Facebook made two types of recommendations. Facebook both recommended content and recommended "friends," who could be individuals or groups. 934 F.3d at 65. If a user opted to "friend" a person or group, the user typically would then receive matter related to content which that person or group had put in a public posting. The plaintiff in *Force* alleged that the result of these recommendations was to connect users with terrorists or terrorist groups, leading them to join or support Hamas, a terrorist organization which had killed relatives of the plaintiffs. 934 F.3d at 57, 65.

The majority in *Force* reasoned that recommendations are protected by section 230 because the type of *consequences* of the recommendations about which the plaintiffs complained, connecting users to individuals, organizations or materials, were also consequences of publishing.

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

> organizing and displaying content exclusively provided by third parties.

934 F.3d at 66 (footnote omitted).

This analysis has several clear flaws. First, the text of section 230 applies only to claims that seek to treat an interactive computer service "as a publisher," not far more broadly to claims that seek to treat an interactive computer service as an entity which brought about "an essential result of publishing." Many individuals and organizations bring about such results whom no one would call a publisher. A skilled librarian brings about a connection between a patron and a book; a mutual friend who suggests a blind date brings about a connection between the two parties. But neither the librarian nor the mutual friend is a "publisher." Second, the terms of section 230 expressly apply only to transmitting to a user the actual "information provided by another information content provider." An interactive computer service that instead gives a user a recommendation or suggestion *about* that other-party content is outside the literal terms of the statute.

(5) The decision below insisted it was holding only that recommendations by an interactive computer service are protected by section 230 if those recommendations are made in a "neutral" manner. "We only reiterate that a website's use of content-neutral algorithms, without more, does not expose it to liability...." 41a. "[The complaint does not] allege that Google's algorithms treated ISIS-created content differently than

any other third-party created content." *Id.* The Second Circuit majority in *Force* also stressed that the recommendations there were formulated in a neutral manner. 934 F.3d at 69-70. But if making recommendations falls within the functions of a "publisher" under section 230, there would be no basis for distinguishing between neutrally formulated and deliberately pro-terrorist recommendations. The core consequence of a claim treating a defendant as a "publisher" of content created by another is that the defendant is protected from liability when it decides whether or not to publish that content. Under the terms of section 230, YouTube would unquestionably be protected if it chose to widely distribute a favorable review of ISIS videos that was taken from a terrorist publication and yet were to refuse to permit the United States Department of Defense to upload an analysis condemning those videos.

That was exactly the problem in *Sikhs for Justice, Inc. v. Facebook*, 697 Fed.Appx. 526 (9th Cir. 2017), discussed in *Malwarebytes*, 141 S.Ct. at 17 (statement of Justice Thomas). The plaintiff in that case sought to place on its Facebook page materials strongly critical of the role of Indian Prime Minister Narendra Modi in condoning the 2002 massacre of hundreds of Muslims in riots in Gujarat. Facebook removed that criticism of Prime Minister from the plaintiff's Facebook page in India, although not elsewhere in the world, an action evidently intended to curry favor with the Indian government. When Sikhs for Justice sought an injunction to restore those materials to its Facebook page, Facebook successfully argued that section 230 gave it an

absolute right to censor such anti-terrorist materials.[19] There is no possible textual basis for distinguishing between non-neutral posting policies and non-neutral recommendation algorithms, and no conceivable justification for distinguishing between the murder of Muslims in India and the murder of Nohemi Gonzalez in France.

IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents an excellent vehicle for deciding the question presented. The issue was squarely decided in the court of appeals below, and with the addition of the decision in the instant case is now the subject of six detailed and thoughtful judicial opinions. Although the litigation in this case below raised a number of other issues, petitioners seek review of only the question that divided the panel and the Second Circuit, whether section 230 protects recommendations, or is limited to traditional editorial functions.

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[19] Defendant Facebook, Inc.'s Notice of Motion and Motion to Dismiss, *Sikhs for Justice, Inc. v. Facebook*, 144 F.Supp.3d 1088 (N.D. Cal. 2015), N.D. Ca. No. 5:15-CV-02442-LHK ("SFJ's claim that Facebook blocked access to the SFJ Page in India for discriminatory reasons is irrelevant to the CDA analysis. An online provider's rationale for publisher decisionmaking has no bearing on Section 230(c)(1) immunity. *Levitt* [*v. Yelp! Inc.*], 2011 WL 5079526 at *8-*9 (N.D. Cal., Oct. 26, 2011) (finding the motive behind Yelp's editorial decisions regarding whether to publish or de-publish reviews irrelevant for purposes of Section 230(c)(1) immunity").

The case comes to the Court on review of a motion to dismiss the complaint for failure to state a claim on which relief could be granted. In this context, the case presents the clean issue of whether the claim set out in the complaint, that Google recommended ISIS-created videos, is barred by section 230. The panel majority held broadly that Ninth Circuit precedent "immunize[s] websites' friend- and content-suggestion algorithms" (44a), at least so long as they are generated in a neutral manner. This appeal does not present, as might a motion for summary judgment or a decision after trial, disputes of fact, disagreements about evidence sufficiency, or fact-bound issues that might arise about particular types of recommendations.

Petitioners will urge the Court to adopt the interpretation of section 230 advanced by Judge Katzmann in *Force* and Judges Berzon and Gould below: the protections of section 230 are limited to a publisher's traditional editorial functions, such as whether to publish, withdraw, postpone or alter content provided by another, and do not additionally include recommending writings or videos to others.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

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