No. 21-1333

In The Supreme Court of the United States

REYNALDO GONZALEZ, et al.,

Petitioners,

v.

GOOGLE LLC,

Respondent.

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

BRIEF OF AUTOMATTIC INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT GOOGLE LLC

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF AMICUS CURIAE[1]

Automattic Inc. is a company with a mission to make the web a better place. It is best known for WordPress.com, a service that empowers anyone to build a website, and Tumblr, a microblogging platform that serves as a home for a wide array of art, hobbies, political causes, and quirks. With three million new users registering each month across the Automattic ecosystem, the company has a strong interest in making sure that the law encourages the democratization of online publishing so that anyone with a story can tell it.

SUMMARY OF ARGUMENT

Section 230 gives platforms and their users the necessary breathing room to make moderation decisions as they see appropriate, as they are capable of, or—frankly—as they can afford.

Automattic is an intermediary that hosts a lot of user-generated speech—speech that spans (and debates and celebrates and criticizes) all ideologies and viewpoints. Its two biggest offerings—WordPress.com and Tumblr—serve billions of websites, pages, and posts that grow by the tens of millions each month. Automattic supplies the online infrastructure for not only popular newspapers and established websites, but also

[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus or its counsel, made a monetary contribution to the preparation or submission of this brief.

personal bloggers and anonymous posters—from visual artists and budding writers to whistleblowers and political dissidents.

As a company, Automattic isn't big. Its workforce is several orders of magnitude smaller than Google. But it can still manage and carry so much online expression—including speech that pushes boundaries—because of Section 230, which provides legal protection for intermediaries that host, moderate, and curate third-party content.

Section 230's protections for intermediaries translate into protections for users. For example, Automattic's choice to host critical or dissenting content (regardless of its ideology or point of view), in the face of actual or perceived legal threats, creates an environment where users—including those without means or other forms of recourse—can speak out.

Given the amount of speech online, Section 230 importantly lets intermediaries like Automattic use automated means to prioritize (or deprioritize) and recommend or remove third-party content. WordPress.com's algorithms recommend content to its users to make the growing expanse of online information accessible. And when given the choice, the majority of Tumblr users prefer its algorithmically enhanced home page that curates and serves content most likely to be relevant and interesting to a user. On both services, algorithms push down spam and other inappropriate content that would easily engulf the platforms if left uncontrolled.

Section 230 provides the most effective shield online intermediaries have to halt unfounded or misdirected claims early in litigation—or even before litigation begins. Without its robust protections, platforms would be inundated with costly lawsuits both in the United States and abroad. Plaintiffs worldwide would seek to domesticate foreign orders obtained in jurisdictions with less robust speech protections. Further, intermediaries that make prioritization decisions would be exposed to a patchwork of fifty different (and often incompatible) state laws.

To avoid being sued out of existence, companies like Automattic would be forced to adopt a notice-and-takedown policy—one that, unlike a similar regime mandated by copyright law, does not have any safeguards for abuse. Narrowing Section 230's procedural safeguards would give online intermediaries—especially smaller ones without large teams for manual review—little choice but to avoid legal risk by taking down any content alleged to be unlawful, regardless of the merits of the claim. Even if Section 230 stays in place, doubts about the law's scope could also lead small internet platforms to proactively block or remove content on controversial topics for fear of litigation.

There is no question that today, prioritization and recommendation algorithms govern the way we interact with the internet. And necessarily so. A service that could not exclude spam, security risks, or low-quality content would not keep many users. Nor would a service that couldn't respond to user preferences. People who expect a good experience online would

instead find relevant material drowned out by useless or hostile content.

Smaller companies like Automattic have made the choice to support and foster more online speech by developing and fine-tuning algorithms that shape our window into the online world. That choice is available because of Section 230. Gutting those algorithms by holding intermediaries responsible for user-generated speech merely because they made necessary choices of whether and how to present that speech would force them to take down speech that's bothersome or even mildly controversial.

Automattic respectfully urges this Court to affirm the Court of Appeals' decision. A narrow interpretation of Section 230 in this case that does not provide immunity for prioritizing and recommending certain content over others would threaten Automattic's ability to maintain its platforms and host so much diverse online speech. Users would take the biggest hit, finding an overly sterile online experience instead of one that invites expression, debate, and discussion of all kinds. Excluding prioritization decisions from Section 230 immunity would be a monumental step backwards for the internet as a place for the free exchange of ideas.

ARGUMENT

I. SECTION 230 PROTECTS ALL ONLINE INTERMEDIARIES—NOT JUST THE BIG ONES.

Section 230's rule is straightforward: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

The breadth of the law is purposeful. The statute does not say, "No large provider," nor does it begin, "Neither Google, Facebook, nor Twitter. . . ." Section 230's protections cover all online intermediaries, enabling each of them—big and small—to curate and prioritize user-generated and third-party content without the threat of legal liability.

Given the rapidly expanding volume of online speech, it has become normal—and, in fact, necessary—for platforms to use software algorithms to prioritize and moderate content. These automated means allow intermediaries to personalize experiences for each individual user, for instance by prioritizing content most likely to be of interest to each user. They also equip intermediaries with the necessary tools to address growing waves of spam, malicious software, and other similar types of clearly harmful and inappropriate content. Indeed, prioritization of content using algorithms has become critical to ensuring a safe and useful internet as it grows and evolves.

Relying on algorithms is especially critical to intermediaries that do not have the deep pockets to hire entire teams of content reviewers or legal professionals to perform manual review. Without such algorithms, smaller platforms would be more susceptible to devolving into an online free-for-all, inundated with clearly harmful and inappropriate content that would drive users away.

II. PRIORITIZING CONTENT IS ESSENTIAL TO THE OPERATION OF AUTOMATTIC'S ONLINE SPEECH PLATFORMS.

Automattic hosts everything from personal sites to business pages to websites for some of the most recognized press organizations in the country. Its services allow readers to discover blogs about niche subjects (*see*, *e.g.*, *Ten Things You Need to Know as In-House Counsel*, https://sterlingmiller2014.wordpress.com/) and peruse news sites in their areas of interest (*see*, *e.g.*, *TechCrunch*, https://techcrunch.com/).

Automattic is best known for WordPress.com, a website creation platform that enables users to create websites from scratch for free. WordPress.com is built on the WordPress open source software, upon which 43% of all websites on the internet are built. *Usage statistics of content management systems*, W3Techs, https://w3techs.com/technologies/overview/content_management. Each month, websites hosted on WordPress.com receive billions of views.

WordPress.com relies on Section 230 not only to host user-generated content, but also to make the platform's day-to-day experience better for users. For example, WordPress.com injects recommended posts throughout its Reader feed, a page that creates a chronological view of posts from all of the sites a user follows. The service also uses algorithmic prioritization at the end of each WordPress.com post, where it recommends other posts from the same website based on popularity, recency, and similarity.

Section 230 not only protects platforms, but it also protects small groups and individuals. For instance, WordPress.com's users engage in prioritization in managing the websites they create on WordPress.com. Many have robust comment sections where owners can choose to allow, disallow, or curate comments, including by automatically moderating comments that contain certain words. These tools give, for example, a neighborhood association blog the ability to foster robust debate and discussion about local issues while staying on-topic and reducing spam. Section 230 means that Automattic's users (and its competitors, for that matter) are free to make different choices about whether and how to prioritize content.

Tumblr, another Automattic platform, is a short-form microblogging platform that allows users to share small elements of content—short sentences, quotes, images, videos, and the like. It is home to (often anonymous) expressions of quirkiness and creativity. *See*, *e.g.*, *Notorious R.B.G.*, Tumblr, https://notoriousrbg.tumblr.com/. Tumblr has approximately 9 billion page

views per month, and 1 million new posts and 8 million reblogs *per day*. And it hosts an enormous archive of posted content.[2]

Tumblr, like WordPress.com, also relies on Section 230's protections for prioritization decisions based on third-party content. For instance, on a user's Tumblr home page, the user can choose between a reverse-chronological option or the default algorithmically enhanced option. The algorithmically enhanced feed improves the user experience by surfacing the most popular posts recently posted by people the user follows; inserting posts from people the user follows who make less frequent, but high-quality posts (as determined by an algorithm); and suggesting content the user might like based on their interests (also as determined by an algorithm driven by the user's activity on Tumblr). Among the millions of new posts every day, these features provide the essential ability for users to "train" their Tumblr home page to serve up content most relevant to them. In fact, when given the option, the vast majority of Tumblr users prefer algorithmic recommendations (79% overall, including 96% of users who signed up in 2022).

Aside from the enhanced home page, Tumblr also uses algorithmic prioritization to rank search results based on relevance and engagement and to deprioritize blogs with likely spam content. That ability to push content away from user screens protects users from

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[2] As long as a user account isn't closed, Tumblr continues to host all content ever posted by that account.

being bombarded with irrelevant solicitations, phishing attempts, and other harmful content that could mislead users and threaten the security of their devices and information.

Put simply, for Automattic, the use of algorithms to prioritize and deprioritize content is essential to providing the experience users expect—one where users can effectively and efficiently communicate in an online exchange of ideas.

III. DIMINISHING SECTION 230'S PROTECTIONS COULD PUT SMALLER INTERMEDIARIES OUT OF BUSINESS.

A. Automattic's history with foreign litigation shows the enormous costs of increasing intermediary liability.

Section 230's protections allow Automattic to handle a growing deluge of content-based legal threats, the vast majority of which are not credible.

Automattic receives thousands of defamation-related take down requests in the United States per year. But a mere request does not result in content removal. Automattic's current policy is to deny all such requests in favor of the user who posted the content unless there is a court order requiring the content to be removed. Automattic believes that approach best fosters free speech from all points of view. Section 230, which prevents complainants from treating Automattic as the publisher of the content at issue (and allows the company to quickly dispatch any lawsuit that attempts to

do so), enables Automattic to maintain such a policy without being driven out of business by litigation costs. These protections stop complainants from targeting intermediaries in an effort to censor speech, thus removing pressure on companies like Automattic from deciding whether the underlying complaints are credible. In turn, more user speech is protected: Section 230 lets Automattic err on the side of hosting speech by allowing those difficult merits decisions to be left to the courts.

By contrast, Automattic is sued frequently for claims of defamation in other jurisdictions such as Germany, France, and Brazil, which lack protections analogous to Section 230. At any given time, Automattic is defending against approximately twenty lawsuits worldwide. Without Section 230, that number could easily be orders of magnitude higher in the United States. Germany, France, and Brazil each have loser-pays-all rules that discourage frivolous litigation. *See* Zivilprozessordnung [ZPO] [Civil Code], § 91 (Ger.); Code Civil [C. Civ.] [Civil Code] art. 700 (Fr.); Código Civil [C.C.] [Civil Code of 1973] arts. 82 and 322 (Br.). And litigation costs and damages in those countries pale in comparison to the United States. *See International Comparisons of Litigation Costs*, U.S. Chamber Institute for Legal Reform (June 2013), https://instituteforlegalreform.com/wp-content/uploads/media/ILR_NERA_Study_International_Liability_Costs-update.pdf. Without Section 230, it is all but guaranteed that Automattic would be swamped with similar litigation that would threaten the company's

ability to continue to operate in the United States with its existing policy.

Moreover, limiting Section 230's protections would invite *en masse* attempts to domesticate international defamation orders against U.S. intermediaries like Automattic. In 2010, Congress enacted the SPEECH Act, 28 U.S.C. §§ 4101-4105, in response to growing libel tourism, in which libel plaintiffs would bring cases in jurisdictions with favorable defamation laws, only to seek enforcement of those judgments in less favorable but more lucrative jurisdictions like the United States. The SPEECH ACT prohibits the enforcement of foreign defamation judgments in United States courts unless the foreign court provided as much protection as the First Amendment would have provided. 28 U.S.C. § 4102(a). Section 4102(c)(1) expressly prohibits enforcement of a foreign defamation judgment that does not comport with the protections of Section 230 of the CDA. 28 U.S.C. § 4102(c)(1) ("[A] domestic court shall not recognize or enforce a foreign judgment for defamation against the provider of an interactive computer service, as defined in section 230 of the Communications Act of 1934 (47 U.S.C. § 230) unless . . . the judgment would be consistent with section 230 if the information that is the subject of such judgment had been provided in the United States."). In short, the SPEECH Act ensures that the most repressive jurisdictions with the least speech protections do not dictate what the internet looks like in the United States—and, realistically, in the rest of the world.

Doing away with Section 230's protections for any site that engaged in prioritization of third-party content would erode the SPEECH Act and invite the very type of predatory litigation the law was enacted to address. Without robust immunity under Section 230, foreign plaintiffs would surely seek to enforce foreign defamation judgements based on foreign law against U.S. intermediaries. *See*, *e.g.*, Order Granting Mot. for J. on the Pleadings, *Joude v. WordPress Found.*, No. C 14-01656 LB (N.D. Cal. Jul. 3, 2014), ECF No. 19 (dismissing a claim brought by French plaintiffs to enforce an order from the High Court of Paris directing Automattic and WordPress to remove a blog accusing plaintiffs' family of defrauding victims of millions of euros in support of the "Legionnaires of Christ").

B. Curtailing Section 230's protections exposes intermediaries to the liabilities and costs imposed by fifty different state laws.

Weakening Section 230's protections would also expose online intermediaries to a patchwork of state laws targeting expression. Online intermediaries with international user bases like Automattic must already navigate varying (and often inconsistent) laws from different countries—an already expensive and perilous task, as discussed above. A narrow interpretation of Section 230's immunities would bring a similar minefield closer to home.

Section 230 preempts state and local laws—both civil and criminal—that would treat a platform as the

speaker or publisher of third-party content. 47 U.S.C. § 230(e)(3). But as the statute clearly states, "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." *Id.*

Without Section 230's protections related to platforms' use of algorithms to prioritize content, an intermediary that does so would be faced with the costly task of complying with many potentially incompatible state regulations.

Consider, for instance, Florida and Texas, which recently passed laws that limit the ability of certain platforms to moderate or remove political content. Florida's law states: "A social media platform may not apply or use post-prioritization or shadow banning algorithms for content and material posted by or about . . . a candidate. . . ." Fla. Stat. § 501.2041(2)(h). Texas's law states: "A social media platform may not censor a user, a user's expression, or a user's ability to receive the expression of another person based on . . . the viewpoint of the user or another person. . . ." Tex. Civ. Prac. and Rem. Code § 143A.002. These laws essentially state that the affected platforms must carry certain speech.

Now imagine states that choose to pass laws that would create liability for social media companies for promoting or recommending offensive content.

Assuming any of those laws are at all constitutional, what is a platform like Automattic to do? Displaying content in some states but not others would fly in the face of a stated purpose of Section 230: to

promote online services and interactive media "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). But it is not outside the realm of possibility. When faced with orders to remove content in countries outside of the United States, Automattic currently makes every effort to limit the ripple effects of such an order by engaging in geoblocking—using technical means to block access to the targeted content in that particular jurisdiction but keeping that content up everywhere else. Importing the same procedures intermediaries currently use in repressive regimes into the United States would destroy the country's largely unfettered online landscape by creating fifty different internets. *See* Mark A. Lemley, *The Splinternet*, 70 Duke L. J. 1397–1427 (2021), https://scholarship.law.duke.edu/dlj/vol70/iss6/3.

C. Removing protections for automated recommendation and curation would effectively trample Section 230's procedural safeguards.

The United States argues that the use of recommendation algorithms communicates a message distinct from the underlying third-party content being recommended or promoted, and therefore claims based on such actions fall outside of Section 230's protections. *See* Br. for the United States as Amicus Curiae in Supp. of Vacatur at 26–32. This theory would not only curtail intermediaries' abilities to choose when and how third-party content is displayed, as there appears to be no meaningful difference between a "recommendation"

and the curation necessary to run a platform, but also would severely limit intermediaries' reliance on Section 230 as an essential procedural protection in litigation.

Should the government's interpretation prevail, any plaintiff would know to plead that a platform's prioritization of certain content contained some sort of implicit message and therefore Section 230's protections do not apply. That message, per the United States, could be as broad as: *you may be interested in this content*. *See id.* at 27. This theory treats the fundamental purpose of many platforms—to process tons of speech in order to provide users with relevant content—as a "message" somehow divorced from the underlying third-party material. Automattic would face charges that WordPress.com's recommendation of blog posts or Tumblr's algorithmic curation of posts on its front page had their own actionable meaning. Intermediaries—especially smaller intermediaries, like Automattic—would not be able to afford the onslaught of litigation that would breeze past the motion to dismiss stage on such trumped-up claims.

IV. WITHOUT SECTION 230'S STRONG PROTECTIONS, INTERMEDIARIES WOULD ERR ON THE SIDE OF CENSORSHIP.

A. Intermediaries would move toward adopting a notice-and-takedown regime that encourages abuse.

Intermediaries like Automattic would be inundated with growing legal suits and costs were Section 230 curtailed, as Automattic already sees in jurisdictions without strong protections for intermediaries. The threat of widespread legal liability could force Automattic and others to switch to a blunt notice and takedown policy across their platforms.

When Automattic currently receives a defamation complaint, for example, it has no way to determine whether the content is in fact defamatory or not. Automattic does not have authority to subpoena or depose witnesses. And Automattic—with a Trust and Safety team of less than forty people—does not have the resources to hire tens of thousands of reviewers, as do large companies like Google and Facebook.

Without the breathing room offered by Section 230, which lets a platform moderate as heavily or lightly as it sees fit, intermediaries like WordPress.com and Tumblr would have little choice but to remove content on demand, without vetting the complaints. That will encourage widespread abuse and severely restrict online expression, as anyone who does not like something written about them will be able to "threaten" it off the internet.

Indeed, in just the past five years, WordPress.com has received over 10,000 complaints about allegedly defamatory content. Assuming conservatively that WordPress.com received just twice the number of defamation complaints per year if Section 230's protections are curtailed, and assuming each complaint takes only two hours to address—also a conservative estimate given the amount of time it takes for a court of law to make a reasoned determination on the merits—Automattic would need to hire many more people to address the increase in complaints and puzzle through them without the aid of judicial process.

The Digital Millennium Copyright Act ("DMCA") provides a useful window into the world that could result if Section 230's protections are eroded. The DMCA provides a formal takedown process whereby copyright owners may submit to service providers a notice requesting the removal of material they believe infringes their copyrights. The DMCA dictates several statutory elements that must be included in the notice to warrant removal of the material, including identification of the copyrighted work infringed and signed statements that the information provided in the notice is accurate and that the notifier has a good faith belief that the material is not authorized. 17 U.S.C. § 512(c)(3). The law also provides for a counter-notice procedure, giving users a direct voice in whether the content remains up or not. *Id.* § 512(g)(2) & (3).

Even with those safeguards in place, however, DMCA takedown requests are fraught with abuse. In the past year alone, WordPress.com was targeted with

6,688 DMCA notices, and Tumblr received 6,919 DMCA notices.[3] Eighty percent of notices received by WordPress.com were rejected as incomplete or abusive. *See also Reforming the DMCA*, Automattic Transparency (June 26, 2020), https://transparency.automattic.com/2017/03/29/dmca-section-512-study/. That reflects a larger trend; studies show that a significant fraction of DMCA requests are improper and that millions appear to be generated without even the most cursory investigation. *See*, *e.g.*, Jennifer M. Urban et al., *Notice and Takedown in Everyday Practice*, U.C. Berkeley Pub. L. Rsch. Paper No. 2755628 at 81, 116 (Mar. 22, 2017), https://ssrn.com/abstract=2755628 (observing in a study of over 100 million DMCA notices that nearly a third were of questionable merit); Daniel Kiat Boon Seng, *Copyrighting Copywrongs: An Empirical Analysis of Errors with Automated DMCA Takedown Notices* at 48 (Jan. 23, 2015), https://ssrn.com/abstract=2563202 (observing that more than a year after Megaupload's websites were shut down by the U.S. government, reporting agents were still submitting DMCA takedown requests for Megaupload links). And larger platforms like YouTube and Facebook that have created automated systems to deal with the deluge of takedown notices get millions of notices a year. YouTube, *Access for all, a balanced ecosystem, and powerful tools* (Dec. 6, 2021) https://blog.youtube/news-and-events/access-all-

[3] Assessing DMCA notices—for example, determining whether one photo is truly duplicative of another—is far more straightforward than determining whether a user is making a false, reputationally damaging statement of fact.

balanced-ecosystem-and-powerful-tools/; Chris Sonderby, *Transparency Report, First Half of 2022*, Facebook (Nov. 22, 2022), https://about.fb.com/news/2022/11/transparency-report-h1-2022/.

Already, Automattic must sift through wide swaths of defamation and trademark claims disguised as copyright claims, as well as claims involving non-copyrightable material or entirely false author information. In many instances, Automattic has received DMCA requests aimed purely at obtaining the alleged infringer's personal information through the statutory counter-notice procedure, severely threatening their ability to make anonymous speech. Automattic has even received requests where the complainant republishes the accused content on their own website (critical content they don't agree with) and pretends their site was the original in order to have the content taken down.

Giving other causes of action, like defamation, a de facto notice-and-takedown regime—without any of the safeguards, however insufficient, of the DMCA—would lead to even more widespread abuse. *Cf.* Order Den. *Ex Parte* Appl. for TRO, *Murtagh v. Pardo*, No. 2:15-cv-05204-PSG-FFM (C.D. Cal. Aug. 17, 2015), ECF No. 20, (denying request for TRO and preliminary injunction sought by doctor against a website on WordPress.com disparaging plaintiff's medical practice); Complaint, *Sport Lisboa E Benfica—Futebol SAD v. Doe*, No. 2:18-cv-02978-RSWL-E (C.D. Cal. Apr. 9, 2018), ECF No. 1 (complaint brought by preeminent Portuguese football club seeking an order disabling all

websites hosted by WordPress.com displaying allegedly stolen information). But Automattic would risk legal liability every time it did anything other than take down disputed content.

B. Recent history shows that weakened Section 230 protections will lead to heightened censorship.

Undermining Section 230's protections could also pressure platforms to limit the posting of controversial content in order to avoid suit. Automattic hosts volumes of critical commentary, such as whistleblowers' posts about corporate corruption, complaints about pharmaceutical products, and questioning of political leadership. These types of content—speech that is often of the highest importance—can present the most perceived risk to intermediaries. For example, WordPress.com regularly hosts blogs written by opposing sides of an issue. In these situations, Automattic has received requests from both sides to take down the other side's content as defamatory. Today, as noted, the company has the flexibility to take a clear policy position that leaves speech from all sides up. But without clear safeguards from Section 230, intermediaries—especially smaller intermediaries—may be inclined to choose the path of least resistance, taking steps instead to block or remove all controversial content, even absent a takedown request.

This chilling effect is not hypothetical. In 2018, Congress passed and the President signed into law an amendment to Section 230 popularly known as FOSTA-SESTA (passed as the "Allow States and Victims to Fight Online Sex Trafficking Act," Pub. L. No. 115-164, 132 Stat. 1253 (2018); known as the "Stop Enabling Sex Traffickers Act" in the Senate). FOSTA-SESTA was aimed at penalizing websites that promote or facilitate prostitution or that knowingly assist, facilitate, or support sex trafficking. In reality, it created enough uncertainty and potential for unwanted legal liability that several platforms began censoring a broad set of sexual content, for fear of hosting potentially unlawful content, or shutting down portions of their websites entirely. The online classifieds website Craigslist, for instance, shut down its personals section. Certain dating sites couldn't afford the legal risk and collapsed. *See* Aja Romano, *A new law intended to curb sex trafficking threatens the future of the internet as we know it*, Vox (July 2, 2018, 1:08 PM), https://www.vox.com/culture/2018/4/13/17172762/fosta-sesta-backpage-230-internet-freedom.

Recent history teaches us that uncertainty and fear created by curtailing Section 230's protections will lead to heightened censorship of content, as well as the limiting of the availability of forums for speech—especially of smaller platforms with fewer resources.

CONCLUSION

For the foregoing reasons, Automattic urges this Court to affirm the decision of the Court of Appeals.

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