

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**

—◆—
REPLY BRIEF FOR PETITIONERS

—◆—
ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

ROBERT J. TOLCHIN
THE BERKMAN LAW
OFFICE, LLC
829 East 15th St.
Brooklyn, NY 11230
(718) 855-3627
rtolchin@berkmanlaw.com

KEITH L. ALTMAN
THE LAW OFFICE OF
KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885
keithaltman@
kaltmanlaw.com

Counsel for Petitioners

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ARGUMENT

I. INTRODUCTION

The complaint alleges that in the period leading up to the 2015 terrorist murder of petitioner's decedent Nohemi Gonzalez respondent made targeted recommendations of ISIS recruiting and fundraising videos. In the district court respondent chose not to develop a record by offering evidence as to what its recommendation practices actually were, or to argue that its particular practices were protected by section 230(c)(1). Instead, respondent filed a motion to dismiss the complaint on its face, pursuant to Fed. R. Civ. P. 12(b)(6), asserting the complaint failed to state a cause of action because any targeted recommendations would be necessarily protected by section 230(c)(1).

The court below held, as respondent contended, the section 230(c)(1) defense would indeed bar any claim based on targeted recommendations, regardless of the form or type of recommendation at issue. Because of the nature of respondent's motion, the reasoning of the court of appeals was exceptionally far reaching. Unless this Court adopts the broad holding of the court below that all recommendation practices are protected by section 230(c)(1), it should remand this case to the lower courts to determine the nature of respondent's actual practices in the time period at issue in this case, and to evaluate whether the practices thus identified are protected by section 230(c)(1) as construed by this Court. (*See* U.S.Br. 32).

The Court should not undertake to fashion a special legal rule about recommendations as such. The word is sufficiently ambiguous that it could be used to refer to some practices that would be protected by section 230(c)(1), as well as to other practices that respondent may agree would not. (*See* R.Br. 28, 37-38). The term “recommendation” itself does not appear in the statute, and the question before the Court is not what the correct definition of “recommendation” should be. Rather, the resolution of this case turns on the general meaning of the language in section 230(c)(1). The opening briefs frame three specific disputes about the interpretation of the statute. *See* pp. 2-20, *infra*.

Petitioners’ opening brief also argued that section 230(c)(1) should be not broadly construed (Pet.Br. 47-52), and that recommendations would not be protected by section 230(c)(1) simply because they were dispensed in a neutral manner. (Pet.Br. 40-42). Respondent does not appear to argue otherwise, or to defend the lower court decisions which do.

II. NOT ALL RECOMMENDATION-BASED CLAIMS TREAT THE DEFENDANT AS A PUBLISHER

Petitioners argued in the petition and in our opening brief that many recommendation-based claims do not treat the defendant “as a publisher or speaker.” (Pet. 22-26; Pet.Br. 19-33). The parties disagree about the meaning of this phrase. The Court

should hold that “treat[] as a publisher or speaker” refers to the imposition of liability for conduct that would constitute publication under defamation law, adopting the interpretation of that phrase in *Henderson v. Source For Pub. Data, L.P.*, 53 F.4th 110, 121 (4th Cir. 2022).¹

Respondent urges the Court to instead hold that the term “publisher” in section 230(c)(1) refers to entities in the general business of publishing. (R.Br. 22-27). Respondent qualifies that proposed interpretation, listing a number of activities commonly engaged in by publishers that it states should not be deemed “publish[ing]” under the statute, and referring to other activities which “may” not be “publish[ing]” under the law. (R.Br. 26). Lower courts interpreting “publisher” to refer to the business of publishing have advanced divergent views as to which publisher business practices would be covered. (*See* R.Br. 25 n.3) (noting that although some courts describe “treat[] as a publisher” as referring to the “business[of] publication,” those courts

¹ At the time the petition was filed, decisions interpreting “treat[] as a publisher” were divided between opinions construing the phrase very broadly to encompass things a publishers generally might do, and opinions construing the phrase more narrowly to refer to what were termed “traditional editorial functions.” Petitioners argued in the petition that the narrower interpretation was preferable. *After* certiorari was granted, the Fourth Circuit decided *Henderson*, setting out a third interpretation of the phrase, which we supported in our opening brief. (Pet.Br. 19-29). *See Henderson*, 53 F.4th at 121 (“A claim treats the defendant ‘as the publisher or speaker’ ... when it (1) makes the defendant liable for publishing certain information to third parties, and (2) seeks to impose liability based on that information’s improper content.”).

in practice mean something different); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014) (criticizing interpretation of “publisher” in other circuits as “overly inclusive”).

Respondent emphasizes that one publisher activity that would be covered by section 230(c)(1) is disseminating third-party content. If respondent maintained that displaying third-party videos and text is the *only* publisher practice covered by the statute, there might be little practical difference between interpreting section 230(c)(1) to refer to the business of publishing and construing it to refer to publication under defamation law. Playing a third-party video or displaying third-party text would clearly constitute publishing that video or text under defamation law.

But respondent does not restrict its proposed interpretation of “treat[] as a publisher” to merely playing videos. Under the standard proposed by respondent, section 230(c)(1) would also apply to any claim based on action by a defendant making third-party content easier to find. “[T]he [plaintiffs] claim ‘treat[s]’ YouTube as the ‘publisher’ of third-party ISIS video because it faults YouTube for allegedly ... making ISIS-related videos easier to locate...” R.Br. 4. “Section 230(c)(1)[] ... applies to claims challenging the defendant’s communication of third-party speech. That ... forecloses petitioners’ claims that YouTube helped disseminate ISIS’s speech by making ISIS videos easier to find.” R.Br. 33; *see* R.Br. 18 (“easier-to-locate”), 29 (“easier to find”), 30 (“making [third-party] content easier to find), 38 (“publishing third-party content ...

[includes] making [its] videos easier to find”) (emphasis omitted), 44 (“find ... more easily”).² Respondent insists on thus defining publication in this manner because, as it acknowledges, one of its central recommendation practices is to provide not actual videos but links to show a user how to find suggested videos. (R.Br. 12). On the other hand, helping others find a libelous statement would not be publication under defamation law.

Interpreting “treat[] as a publisher” in that expansive manner would easily encompass all activity by which a website is promoting third-party materials. A website which in some manner encourages a user to look at a video or other file will invariably include in that message a ready means of “find[ing]” the recommended material, typically by including a hyperlink. If “treat[] as a publisher” had the meaning urged by respondent, that phrase would include the email in *Dyroff*, because that email included two URLs for the referenced new post about how to buy heroin. (Pet.Br. 27).³ Respondent itself draws just that conclusion. The email at issue in *Dyroff* was protected by section 230(c)(1), respondent argues, because “the email made the tortious third-party speech easier to discover.” (R.Br. 38). If that is what “treat[] as a publisher” means, it would apply to a website that created and

² “Related” means related to the content that a user *did* actually request to see; this additional proposed standard is about making it easier to find unrequested videos.

³ In the quotation of that email at Pet.Br. 27, the inclusion of the word “client” is a typographical error.

displayed a specially-selected list of ISIS recruiting videos, or a list of postings about where to buy heroin at various locations around the country.

Respondent's argument that Congress ratified various lower court decisions (*see* R.Br. 30-32) has several fatal flaws. First, this Court has made clear that occasional congressional amendments to a statute do not constitute an endorsement of even the decisions of this Court that remain unaltered by those amendments. *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting)). The legislation on which respondent relies did not constitute a "comprehensive[] revis[on] [of] the statutory scheme." *Alexander*, 532 U.S. at 292.

Second, although respondent asserts that lower courts have generally "ratified respondent's interpretation" (R.Br. 19), the passage respondent quotes actually refers only to interpreting the statute to protect decisions about "whether to publish, withdraw, postpone or alter content." (R.Br. 30) (quoting *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997)). That list does not include the other interpretations of "treat[] as a publisher" respondent urges this Court to adopt, such as actions to make it easier for users to find particular unrequested videos. *Zeran* itself held that section 230(c)(1)

was limited to “traditional editorial functions” (129 F.3d at 330) a phrase which respondent noticeably omits from its quotation from *Zeran*, and a standard respondent deliberately does not endorse. As we explained in our opening brief, and respondent has not (yet) disputed, traditional editorial functions do not include engaging in promotional efforts to persuade customers to buy a publication or to read a particular story, or to the dissemination of materials to people who did not request them. (*See* Pet.Br. 29-33).⁴

III. NOT ALL RECOMMENDATION-BASED CLAIMS INVOLVE ONLY THIRD-PARTY CONTENT

In petitioner’s opening brief, petitioners explained that section 230(c)(1) would not apply to a recommendation practice to the extent that the practice involved content created by the defendant itself, such as words written by that defendant itself.⁵ (Pet.Br. 33-34, 35, 40). *Dyroff* presented precisely this situation, because the email in that case had been written (at least largely)

⁴ Petitioners argued in our opening brief that recommendations would fall outside the traditional-editorial-functions standard. (Pet.Br. 29-33). Publishers may purchase advertisements promoting purchases of a book, but doing so is not an editorial function. Rather than merely choosing between the publisher-business and traditional-editorial-function standards, however, the Court should hold that the Fourth Circuit’s new *Henderson* standard is the proper interpretation of the statute. (Pet.Br. 19-29).

⁵ *See* J.A. 170, ¶ 535 (number of views, number of thumbs up and thumbs down, “new”).

by the defendant. The Ninth Circuit held that the email was nonetheless protected by section 230(c)(1). *Dyroff*, 934 F.3d at 1098; (Pet. App. 37a).

Respondent seems to agree that “[w]ebsites remain liable for their own speech...” (R.Br. 28); (see R.Br. 37 (“defendants ... publishing [their] own content ... would not be covered by Section 230(c)(1)”)). But respondent effectively nullifies this apparent concession by insisting that recommendations written by a website are inherently non-actionable, because the real harm comes from the recommended video or other recommended material.

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

(R.Br. 38). This account includes respondent’s view that “ma[king] ... third-party speech easier to discover” is part of publication of third-party speech.⁶

⁶ Respondent also insists that topic headings, even though written by a website itself, are protected by section 230(c)(1).

But whether such an email (or other defendant speech) would be tortious does not involve the interpretation of section 230(c)(1); it would turn on the substantive state or federal law at issue. Although section 230(c)(1) would at least usually preclude a state from imposing liability for hosting a dangerous video, that provision would not bar a state from imposing liability for the separate conduct of encouraging a user to look at or download such a video. State tort law might declare it a tort to urge someone to look at a text or video likely to lead that person to engage in dangerous or self-destructive behavior. A state could, for example, choose to make it a tort to encourage impressionable teenagers to watch videos about “blackout challenge,” or to urge users who had earlier viewed videos about depression to watch videos about how to commit suicide. As the government correctly points out, “[e]ncouraging a user to watch a selected video is conduct distinct from the video’s publication (*i.e.*, hosting)” (U.S.Br. 27); a state may make such encouragement actionable even if section 230(c)(1) would preempt a cause of action for hosting. That distinction between hosting and recommending makes practical sense. The sheer volume of materials posted by third parties would often be beyond the ability of many websites to monitor. (*See* R.Br. 1). But a website can limit the number of videos or texts it recommends, and could choose

(R.Br. 28, 42). Although topic headings are usually benign, respondent does not explain why, for example, a defamatory topic heading would not constitute a website’s “own speech.”

to promote only as many videos or texts as it has the capacity to review.

Elsewhere respondent argues that a recommendation of dangerous third-party content, even if a but-for cause of subsequent harm, would be protected by section 230(c)(1) because the claim would “focus on the substance of the third-party content” and “target” the defendant’s decision to display it. (R.Br. 37). However, as the government notes, if under the applicable substantive law a website would be liable for recommending that dangerous content when it was on another website, it is impossible to understand how section 230(c)(1) alters the result merely because the content at issue was on the defendant’s own website. (U.S.Br. 28).

The Ninth Circuit in *Dyroff* (and below) held that the email in that case was protected by section 230(c)(1) because “recommendations ... are tools meant to facilitate the communication and content of others. They are not content in and of themselves.” *Dyroff*, 934 F.3d at 1098; (Pet. App. 37a). Petitioners’ opening brief explained that this analysis is inconsistent with the text of section 230(c)(1). (Pet.Br. 35, 38-39). Respondent seeks to defend the Ninth Circuit’s decisions by recharacterizing *Dyroff* and the decision below, describing them as follows:

The display of recommended content results from algorithms that are merely “tools meant to facilitate the communication and content of others,” and ‘not content in and of themselves.’” Pet. App. 37a (quoting *Dyroff v.*

Ultimate Software Grp., 934 F.3d 1093, 1098 (9th Cir. 2019)).

(R.Br. 16). But what *Dyroff* and the decision below actually said was:

These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves.

Pet. App. 37a (quoting *Dyroff*, 934 F.3d at 1098). The subject of the verb “are [tools]” in *Dyroff* and the decision below was “recommendations and notifications,” not “algorithms,” as respondent suggests. Respondent does not appear to defend the Ninth Circuit’s statement that recommendations “are not content.”

Respondent repeatedly insists that section 230(c)(1) protects any decision regarding the “grouping” of third-party content. (R.Br. 4, 23, 26, 43). But that would not invariably be true. Respondent itself notes that placing two items adjacent to one another on a page (a photograph of a plaintiff and a salacious headline) can communicate a message not contained in either. (R.Br. 25-26). If YouTube were to compile a list⁷ of videos available on YouTube about a particular topic (e.g., videos of playful kittens, or ISIS videos urging the murder of infidels), that list would constitute information provided by YouTube itself: a selected catalogue of videos available on YouTube. That would be true even if each entry in the list had been excerpted verbatim from content

⁷ See R.Br. 4 (“list”); J.A. 170, ¶ 535 (right panel compiling thumbnails).

provided by other parties. The whole would be greater than, indeed different than, the sum of its parts. Only YouTube, not those other parties, would have that information about the overall availability of the videos in question, and YouTube would be the party providing that information.

Copyright law provides a useful analogy. Neither materials in the public domain, nor facts, can be copyrighted. But one may qualify as an author of copyrightable material by selecting and arranging such non-copyrightable materials in a compilation. Title 17 U.S.C. § 101 defines a copyrightable compilation as “a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Id.* “The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers.... [E]ven a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.” *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 348 (1991). NetChoice describes certain activities of websites in terms that would easily meet the standard for an authored compilation. “Websites ‘invest significant time and resources into editing and organizing’—that is, ‘curating’—‘users’ posts into collections of content that they then disseminate to others.’” Petition for Writ of

Certiorari, *NetChoice, LLC v. Paxton*, No. 22-555, 3 (quoting *NetChoice, LLC v. Att’y Gen., Fla.*, 34 F.4th 1196, 1204-05 (11th Cir. 2022) (emphasis in petition)). Respondent argues that “[p]ublishers ... ‘engage[] in protected speech’ when they ... ‘present[] an edited compilation of speech.’” (R.Br. 24) (quoting *Hurley v. Irish Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 570 (1995)). But in such a case the speech, protected or not, would be the speech of the publisher, not (or, at least, not solely) the speech of the authors of the compiled speech.

IV. THE REASONS WHY A SEARCH ENGINE IS USUALLY PROTECTED BY SECTION 230(c)(1) WILL NOT APPLY TO SOME RECOMMENDATIONS

A key basis of the decision below was the court of appeals’ contention that recommendations are indistinguishable from search engines. (Pet. App. 38a). Petitioner’s opening brief identified two aspects of many recommendations that distinguish them from traditional search engines. *First*, a search engine provides material in response to a request from the viewer; many recommendations, on the other hand, send the viewer unrequested material. Sending unrequested material is outside the protection of section 230(c)(1), because a website which did so would not be acting as an interactive computer service. (Pet.Br. 15, 44, 47; Pet. 31-32). *Second*, although the material provided by a search engine is almost always limited to third-party content, including any embedded URLs, a URL

embedded in a recommendation would often be from the defendant itself, and thus would not constitute third-party content. (Pet.Br. 15-16, 39). Respondent disagrees with both distinctions. (R.Br. 4 (“no coherent theory” for a distinction), 32 (“no meaningful textual or technological distinction”)).

A. Petitioners’ opening brief explained that to be protected by section 230(c)(1) YouTube must have been *acting* as an interactive computer service when it engaged in the conduct at issue. Respondent asserts that contention is inconsistent with petitioners’ recognition that YouTube *is* an interactive computer service. (R.Br. 35). But there is no inconsistency. The first statement describes what YouTube would be doing at a particular moment in a specific transaction; the second statement refers to what type of services YouTube generally offers. An individual whose occupation is serving food at a restaurant is a waiter (or server) by profession, but is only acting as a waiter (or as a server) while on the job. The distinction is similar to the difference between recognizing that a particular judicial official is a judge and determining whether in a specific circumstance that official was acting in a judicial capacity. See *Forrester v. White*, 484 U.S. 219 (1988).

Neither respondent nor the government necessarily disagrees that section 230(c)(1) requires a defendant to be acting as an interactive computer server in connection with the claim in question. Both use language referring to what a defendant is doing, not to what type of entity it is. (U.S.Br. 33 (“act as an information content provider”)); (R.Br. 18 (“[a]cting as a

‘publisher’ includes disseminating ... speech”), 26 (“[a] magazine does not act as a ‘publisher’ when hiring or firing editors....”). YouTube asserts it “provides an ‘interactive computer service’” (R.Br. 22) (bold and capitalization omitted). But respondent does not contend, for example, that it would be protected by section 230(c)(1) if it played a third-party video on national television during Super Bowl half time. The government emphasizes that YouTube “provides the recommendations at issue on its online platform,” which it asserts is “what the statute requires.” (U.S.Br. 33). That at least suggests the government agrees that section 230(c)(1) would not apply if the recommendation were made at a press conference, or in an email blast.

B. Section 230(f)(2) defines “interactive computer service” as a system “that provides or enables computer access by multiple users to a computer server.” The term “user” clearly indicates that the customer will be in control of the computer server, determining what that computer disseminates, as well as what is uploaded. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) this Court accurately described how Congress understood the role of a user in interacting with a website.

A user may either type the address of a known page or enter one or more keywords into a commercial “search engine” in an effort to locate sites on a subject of interest. A particular Web page may contain the information sought by the “surfer,” or, through its links, it may be an avenue to other documents located

anywhere on the Internet. Users generally explore a given Web page, or move to another, by clicking a computer “mouse” on one of the page’s icons or links.

Reno, 521 U.S. at 852. But not every interaction between an individual and a computer involves “use[]” of that computer by the individual. In Stanley Kubrick’s classic 2001: A Space Odyssey, Dr. Dave Bowman was not a “user” of the self-aware HAL 9000 when he was trying to outwit the computer’s homicidal schemes. Similarly, a customer is only acting as a “user” of the server, and the website is only acting as an interactive computer service, when the customer—not the website—is determining what material will be sent by the server to the customer.

Respondent insists that to the extent its recommendations take the form of sending unrequested materials, it is selecting materials which it believes the recipient will find interesting. But if section 230(c)(1) applies to the dissemination of unrequested materials, there would be no basis for limiting that statute to benign materials sent with an innocent intent. Were that the meaning of the statute, it would protect YouTube if on a given day, disregarding whatever videos viewers actually requested, the company instead played for tens of millions of them a defamatory third-party video.

Respondent raises a related factual dispute which cannot be resolved at this stage of the litigation. Respondent’s brief asserts that the web pages that

viewers see when they access YouTube are all pre-existing files.⁸ If that is the case, YouTube would be sending each viewer only files he or she had specifically requested, and would not be creating *after* receiving user requests new web pages that include unrequested material. Petitioners dispute that characterization of how YouTube functions, and there is at least some evidence this is not what is occurring. YouTube elsewhere describes the web pages viewers see when visiting the YouTube website as being specially created for each viewer, and states that the web page a viewer sees upon selecting a video has been fashioned to take into account not only which particular video has been selected, but also numerous other factors, including the time of day. (R.Br. 12). It seems unlikely that all those viewer-specific and video-specific web pages are actually being created in advance of any viewer request. If the Court concludes, as petitioners urge, that the dissemination of unrequested material falls outside the scope of section 230(c)(1), whether YouTube actually was doing so in the relevant time period would have to be resolved as a factual matter on remand. On the other hand, there is no dispute that YouTube's

⁸ R.Br. 36 (“webpages are files stored on servers.... By allowing YouTube users to access content stored on YouTube servers, YouTube (in the words of Section 230) ‘enables’ ‘multiple users’ to ‘access’ YouTube’s ‘computer server[s].’ 47 U.S.C. § 230(f)(2).... When users visit a webpage, their browsers ... communicate with the website’s servers and request and receive the entire webpage as a package.”), 37 (“YouTube displays ... third-party video thumbnails on its home page....”).

autoplay function plays videos that a viewer has not requested be displayed.

C. The material provided by a search engine usually consists entirely of matter from a third party. The text or image is generally excerpted from a third-party file, and the URL included by the search engine will have come from the server on which that file was located.

In the case of YouTube recommendations, however, that often would not be the case. As YouTube itself notes, it most often promotes videos on its website by sending a user “thumbnails.” (R.Br. 37). Thumbnails typically include a still from the third-party video in question. YouTube contends that the text accompanying the thumbnail image also is from the third-party that created the video. (Br.Opp. 20; *but see* Pet.Rep. 7). Like a search engine result, the thumbnail also has an embedded “link” (R.Br. 27), but the URL included by YouTube is from YouTube itself, not from some other website. (Pet.Br. 35-40). The technology at issue (a hyperimage) does not appear to be disputed.

Because the URL attached to the thumbnail comes from YouTube itself, that URL clearly is not “information provided by another information content provider.” Thus, in the case of a thumbnail about an ISIS video, section 203(c)(1) would be inapplicable to a claim that YouTube assisted ISIS by providing viewers with the technical information (the URL) needed to find the ISIS video. Providing an embedded URL to a

potential ISIS supporter is no different than the email in *Dyroff*, which provided a spelled-out URL.

The government argues that YouTube’s action in providing such a URL does not matter because creating a URL does render YouTube an information content provider. (U.S.Br. 33). But under section 230(c)(1) it is not sufficient that the defendant was not itself an information content provider; the material at issue must affirmatively be “information provided by *another* information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). So even if, as the government appears to suggest, a URL is not “information” within the meaning of the statute, that would still be insufficient. The government also argues that by creating the URL YouTube did not become the creator of the related video. (U.S.Br. 34). That is correct, but irrelevant. Plaintiffs’ claim is not that YouTube provided the video itself, but rather that it provided the information about how to find the video. The fact remains that the URL which YouTube embeds in the thumbnail is not third-party content; whatever a URL is, it is not provided by a third party.

Respondent argues it cannot be held liable for creating the URL associated with a video, because doing so is not inherently wrongful. “Petitioners’ [Anti-Terrorism Act] claims are not based on the content of any YouTube URLs. The random string of numbers and letters that make up YouTube URLs are not independently wrongful; they merely specify how users can access webpages.” (R.Br. 37-38). But plaintiffs’ claim, like the claim in *Dyroff*, is based on the website’s action

in *providing* that URL to a recipient, not in creating the URL. If YouTube had provided to a potential terrorist the URL for an ISIS video on some other website, that could indeed have been actionable under the Anti-Terrorism Act. Doing so would be no different than giving a potential terrorist the email or telephone number of the Islamic State’s self-proclaimed “Caliph” Abu Bakr al-Baghdadi. Such an act of assistance does not acquire immunity because the URL provided referred to a video on YouTube’s own website. (*See* U.S.Br. 28).

V. A TEXTUALIST INTERPRETATION OF SECTION 230(c)(1) WILL NOT WREAK HAVOC

Respondent and a number of amici contend that unless this Court holds that recommendations (however defined) are always protected by section 230(c)(1) the Internet will become unmanageable, and websites will be forced either to engage in draconian self-censorship or (conversely) to abandon all forms of content moderation. These dire predictions are largely unrelated to the specific issues of statutory interpretation addressed by the parties’ briefs.

Respondent does not predict that any catastrophic harm to Internet companies if “treated as the publisher” were interpreted in the manner adopted by the Fourth Circuit in *Henderson*, or if those firms were held responsible for injuries caused by their “own speech.” Nor does respondent argue that social media could not function unless section 230(c)(1) is extended

to the dissemination of unrequested materials. If the automatic playing of unrequested videos were outside the scope of section 230(c)(1), YouTube might choose to limit which videos it auto-played,⁹ but the company does not contend it could not survive without that feature. At least most Internet firms have thrived without resort to the sort of email at issue in *Dyroff*.

Respondent does argue that the Internet and the firms which use it would be severely impacted if the Court were to hold that section 230(c)(1) does not apply to the dissemination of requested materials, or to traditional search engine functions. But the interpretation of section 230(c)(1) which petitioners advance would not preclude such applications of the statute. YouTube also argues that if the protections of section 230(c)(1) apply to such dissemination and searches, then the law should *also* be interpreted to apply to other more promotional practices. YouTube earnestly argues that the distinction which petitioners urge is legally unsound, but it does not claim that a decision by this Court adopting that distinction would have catastrophic consequences.

In a number of passages, respondent's brief uses language which is broad enough to include several different types of practices, such as both search engines and disseminating unrequested materials, and then argues that the conduct so lumped together is essential

⁹ In the wake of the Russian invasion of Ukraine, Facebook ceased recommending Russian State media. <https://www.theverge.com/2022/3/1/22956532/facebook-russian-state-media-global-recommendation-suspension> visited February 4, 2023.

to the internet. (*E.g.*, R.Br. 2 (“Recommendation algorithms [used in what way by whom?] are what make it possible to find the needles in humanity’s largest haystack”). Or it objects that if users could not request specific items, *and* there were neither search engines nor promotional practices, then users would find it hard to locate desired materials. (*E.g.*, R.Br. 11 (“Virtually no modern website would function if users [lacking both search engines and recommendations?] had to sort through content themselves.”)).¹⁰ But such passages do not establish, or even actually assert, that if users could make such requests, and search functions continued to exist, a viable Internet would still be impossible without the addition of promotional practices. Respondent argues that “[w]ithout algorithmic sorting, Google Search would display an unordered, spam-filled list of every website.... YouTube would play every video ever posted in one infinite sequence—the world’s worst TV channel.” (R.Br. 32). That is true if the ambiguous phrase “without algorithmic sorting” means “search functions or sorting to find a requested file,” but incorrect if that phrase does not. In some instances it is unclear what aspect of the law respondent is asserting is essential. (*E.g.*, R.Br. 52 (“[j]ettisoning Section 230’s protections would threaten the Internet’s core functions”) (bold and capitalization removed)).

¹⁰ See R.Br. 18 (“Instead of showing a random series of music, educational, and home-improvement videos, YouTube organizes content, in part by recommending videos that it predicts users might find relevant.”). Instead of showing such a random series, YouTube could instead show users the videos that they asked for.

Predictions that a particular decision of this Court will have dire consequences are easy to make, but often difficult to evaluate. The United States Reports contain quite a few opinions which did not have the harmful consequences predicted by the losing party. When lower courts have rejected overly-broad interpretations of section 230(c)(1), despite warnings of ensuing disruption, the feared difficulties have not arisen. *See, e.g., Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1176-89 (9th Cir. 2008) (en banc) (McKeown, J., dissenting in part). A decision by this Court that particular conduct is unprotected by section 230(c)(1) does not declare that activity unlawful. As respondent itself points out, many things that a website does would not be actionable in any event under either federal or state law, and defendants still have resort to other legal safeguards, including in appropriate cases the First Amendment.

There is, on the other hand, no denying that the materials being promoted on social media sites have in fact caused serious harm, a result documented in painful detail by a large number of amicus briefs. People have died as a result of material recommended by social media, and will continue to do so. The email in *Dyroff* led the recipient to a drug dealer who sold him deadly fentanyl-laced heroin. Teenage girls have suffocated while trying to make videos of the often-deadly “blackout challenge” found on TikTok. *See, e.g., Anderson v. TikTok, Inc.*, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022). The terrorist recently convicted of murdering eight people on a bike path in New York City

explained that he “was inspired to carry out the attack by Islamic State videos he watched on his phone...”¹¹ Respondent predicts a parade of horrors if there is any limitation on the defense provided by section 230(c)(1). But for countless victims of an unduly indulgent interpretation of that law, and for their families, a tragic parade of horrors has already arrived.

Any limitation on the scope of the section 230(c)(1) defense has some potential to shape the conduct of Internet firms. But it was inevitable that in the years after the enactment of section 230(c)(1), Internet firms would devise profitable practices that at times fell outside the original text of the statute, and it is certain that those firms will do so in the years ahead. Congress did not establish a regulatory agency with authority to create, continually update, and modify regulations to adapt to changes in the industry. Rather, Congress enacted in section 230(c)(1) a specific and finite defense, one which addressed the Internet, and interactive computer services, as they existed in 1996. The adoption of the particular language of section 230(c)(1) was not and could not be a guaranty that every subsequently-devised social media technique would fall within the terms of that law. The text and meaning of the statute do not constantly evolve to encompass whatever new practices may come along. Section 230(c)(1) is not a living document.



¹¹ New York Times, January 27, 2023, A18 col. 1.

CONCLUSION

The courts below erred in holding that a complaint asserting that a defendant recommended third-party content is barred by the defense in section 230(c)(1), regardless of the nature of the recommending practices. The decision of the court of appeals should be vacated, and the case remanded for further proceedings consistent with the decision of the Court.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
829 East 15th St.
Brooklyn, NY 11230
(718) 855-3627
rtolchin@berkmanlaw.com

KEITH L. ALTMAN
THE LAW OFFICE OF KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885
keithaltman@kaltmanlaw.com
Counsel for Petitioners