

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 THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA AS AMI-
CUS CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interest of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

This case involves the interpretation of Section 230 of the Communications Decency Act, which prevents liability for certain activities by interactive computer service providers in their presentation of third-party content. The Chamber has a strong interest in the Court's striking the proper balance in addressing this provision. The Court should hold that Section 230 protects the specific conduct challenged in this case—arranging third-party content in a useful way to meet perceived user interests—in order to safeguard core and ubiquitous conduct in a vital sector of the economy. At the same time, the Court need not and should not reach beyond the factual context of

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party has authored this brief in whole or in part, and no entity or person aside from *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs.

this case to address other interpretive issues raised by Section 230.

Although Section 230 protects the specific website practices challenged here, that liability protection does not detract from the importance of responsible content-moderation practices. The Chamber's members recognize the need for such practices. The Chamber and its members likewise strongly condemn all acts of terrorism. Individuals and organizations that commit these heinous acts, and those who collaborate with them, should be brought to justice and required to compensate their victims. But concerns about content moderation and online terrorist propaganda cannot be resolved by weakening Section 230's protections as applied to the conduct at issue. Weakening those protections would seriously threaten the health of the internet economy.

SUMMARY OF THE ARGUMENT

A. The vibrancy of the modern internet owes much to Section 230. Enacted at the dawn of the internet, the statute reflects Congress's recognition that the manifold benefits of widespread hosting by websites of third-party content would be lost if websites could be held liable for third-party expression on their sites. Accordingly, Congress provided that "[n]o 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).

B. This case raises a question of statutory interpretation: how does the ban on treating a website as the "publisher" of third-party content apply to what

petitioners call “targeted recommendations”? Pet. i. Because Section 230(c)(1) applies only when a claim “treat[s]” a website as a publisher, and because “targeted recommendation” is not a self-defining term, the first step is to determine what specific website practices a particular claim challenges. Only then can analysis proceed to say whether the claim treats the website as a publisher of third-party content. Here, analysis of the claim and the statute reveals that petitioners’ claim treats YouTube as a publisher.

1. Petitioners’ claim focuses on YouTube’s “Up next” feature, which presents a side bar with videos that a user may find of interest based on a variety of inputs, including what the user is watching. Petitioners purport not to predicate their claim directly on the display of these videos—a claim that would plainly treat YouTube as a publisher. Instead, they seemingly target the implied message conveyed by “Up next” that “this video may interest you.”

2. For two reasons, Section 230(c)(1) bars petitioners’ claim predicated on that implied message. First, implied messaging is inherent in publishing any diverse content. Without some scheme of organization, a set of information would be unusable or meaningless. Newspapers, periodicals, radio and television stations, magazine stands, bookstores, libraries, and websites all group or feature content based on presumed reader, listener, and viewer interest. They thereby convey an implied message: “we think this will interest you.” That inherent feature of publishing cannot be the very feature that exposes a website to liability. The text and structure of the statute con-

firm that conclusion: Congress defined an “interactive computer service” to include a provider of software tools that, *inter alia*, function to “search, subset, organize, [or] reorganize . . . content.” 47 U.S.C. § 230(f)(2), (f)(4)(C). Congress did not define protected websites under Section 230(c)(1) in a way that, according to petitioners, automatically deprives them of protection for “organiz[ing] or “reorganiz[ing]” the display of third-party content.

3. Whatever the status in general of implied messages through organization of third-party content, petitioners’ claim here depends on proving that YouTube published that third-party content. Petitioners assert that YouTube’s “targeted recommendations” of videos created by the Islamic State of Iraq and Syria (ISIS) on YouTube served as the central means by which ISIS recruited supporters outside of Syria and Iraq. Pet. 12. But petitioners do not claim that they were harmed simply because YouTube placed ISIS videos in users’ sidebars. And they do not assert that the implied recommendations themselves—separate and apart from the content of the ISIS videos that users watched on YouTube—caused their injury. Their theory is that YouTube is liable because it recommended videos that it published on its site and people watched them there. Section 230(c)(1) thus bars petitioners’ claim in this case because the claim treats YouTube as the “publisher or speaker” of content provided by a third party. 47 U.S.C. § 230(c)(1).

C. Petitioners’ interpretation of Section 230 threatens to defeat Congress’s stated purposes in en-

acting the provision. Petitioners would expose to liability every company that hosts third-party content—in practice, virtually every company operating on the internet. The threat of such suits—asserting theories that “implied messages” recommending third-party content inflicted harm—would create powerful incentives for websites to offer content in a less organized, less personalized, and less accessible way, directly contrary to Congress’s goals.

D. The Court should thus hold that Section 230(c)(1) shields the specific practices challenged here. But the Court should not venture farther afield to address other questions under Section 230. The Court need not resolve such ongoing debates about Section 230 to decide this case. The importance of the statute counsels special adherence to the Court’s usual practice of limiting its decision to the specific context at issue. The issue here is of surpassing importance to the vitality of the internet; other issues implicating the scope of Section 230 should be reserved for cases that squarely present them.

ARGUMENT

SECTION 230(c)(1) PROTECTS THE ORGANIZATION AND PRESENTATION OF THIRD-PARTY CONTENT AT ISSUE IN THIS CASE

Today's internet is a prolific source of information on virtually every topic. It also affords a dynamic venue for businesses of every description. That flourishing marketplace of ideas and commerce has developed in no small measure because of Section 230's protections. Section 230 is correctly interpreted to shield the inevitable organization and presentation of third-party content at issue in this case—*i.e.*, actions that websites use to arrange and make accessible third-party content to meet perceived user interests. Treating such inevitable activity as falling outside of Section 230(c)(1)'s scope runs counter to statutory text and structure, would defeat Congress's purpose, and would have deep and deleterious effects. This Court should therefore hold that Section 230 covers the practices at issue here and leave other questions about Section 230's scope for another day.

A. Congress Enacted Section 230 To Foster The Growth Of The Internet, Including Internet Commerce, By Shielding Websites From Liability For Publication Of Third-Party Content

1. Enacted in 1996, Section 230 represented one of Congress's first forays into internet regulation. Although the internet of 1996 was embryonic, Congress recognized even then that "[t]he rapidly developing array" of services available through the internet "represent[ed] an extraordinary advance in the availability of educational and informational resources." 47

U.S.C. § 230(a)(1). By 1996, the internet had “flourished, to the benefit of all Americans, with a minimum of government regulation,” *id.* § 230(a)(4), and “offer[ed] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity,” *id.* § 230(a)(3).

As one of Section 230’s sponsors later explained, by 1996, “user-generated content was already ubiquitous on the internet.” Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, UNIV. RICHMOND J. L. & TECH ¶ 58 (Aug. 27, 2020). So was internet commerce. “The creativity being demonstrated by websites and users alike made it clear that online shopping was an enormously consumer-friendly use of the new technology.” *Id.* Congress specifically had “internet commerce in mind when” it enacted Section 230. *Id.*

To ensure that websites could freely allow an abundance of third-party content while screening objectionable materials, Section 230 enacted two complementary protections. Section 230(c)(2) protects good-faith content moderation restricting access to, *inter alia*, obscene, violent, or “otherwise objectionable” material. 47 U.S.C. § 230(c)(2). Although this case does not involve content moderation, encouraging it was one of the statute’s key effects. And Section 230(c)(1)—the provision at issue here—protects websites from liability for presenting third-party content by stating that “[n]o 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.” *Id.* § 230(c)(1).

2. “One of the specific purposes of [Section 230 was] to overrule” *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). H.R. REP. NO. 104-458, at 194 (1996). The provider in that case, Prodigy, hosted the “most widely read financial computer bulletin board in the United States.” *Stratton Oakmont*, 1995 WL 323710, at *1. Stratton Oakmont, an investment bank, sued Prodigy for libel based on an unidentified third party’s post accusing the firm of fraud. *Id.* Although Prodigy did not create that post, Stratton Oakmont claimed that Prodigy could be held liable as the post’s “publisher,” thus relieving Stratton Oakmont of the burden to prove that Prodigy knew or should have known of the post’s libelous nature. *Id.* at *3.

Stratton Oakmont held that Prodigy was indeed the post’s “publisher” because, like a newspaper, Prodigy exercised “editorial control and judgment” over the online bulletin board. *Id.* Prodigy had held itself out to the public as exercising editorial control and it had done so by screening out some objectionable third-party content. *Id.* at *2-4. According to *Stratton Oakmont*, Prodigy had thus “exercised sufficient editorial control over its computer bulletin boards to render it a publisher with the same responsibilities as a newspaper.” *Id.* at *3.

While overruling *Stratton Oakmont* was one of the purposes of Section 230, it was not the only one. As Congress made clear in Section 230’s statement of policy, the statute was also designed to “promote the continued development of the” internet, “preserve the vibrant and competitive free market that presently exists for the [internet], unfettered by Federal or State

regulation,” and “encourage the development of technologies which maximize user control over what information” they receive. 47 U.S.C. § 230(b)(1)-(3). Section 230(c)(1) implements that goal by assuring that the ordinary, beneficial presentation of third-party content does not subject a website to liability in actions treating it as “the publisher or speaker”—*i.e.*, the communicator—of information provided by a third party. *Id.* § 230(c)(1), (e)(3).

3. Consistent with Congress’s goals, Section 230 has contributed to the explosive growth of the internet. Section 230 has not only spurred the development of internet content “as diverse as human thought,” *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (internal quotation marks omitted); it has also encouraged vast realms of commercial activity that have transformed the economy. “Today, virtually every substantial brick-and-mortar business of any kind . . . has an internet presence . . . through which it conducts e-commerce. The same is true for the vast majority of even the smallest businesses.” Cox, *supra*, ¶ 60.

As was true when Congress enacted Section 230, user-generated content plays an integral role in the online economy. More than 85% of U.S. businesses with websites rely on user-generated content. Cox, *supra*, ¶ 46. Section 230 is important to all of these businesses. For many businesses large and small, user-generated content takes the form of online re-

views, which research shows are vital to online commerce² and central to modern consumer decisionmaking.

Beyond customer reviews on a business’s website, entire businesses rely on user-generated content—from Wikipedia, a free online encyclopedia written and maintained by its users; to Yelp, a directory of business reviews written by its users; to social networking sites like Facebook, Twitter, and Snapchat. All of these companies, as well as the internet ecosystem that has developed over the last quarter century, depend on the protections afforded by Section 230 in welcoming diverse third-party content.

4. As demonstrated above, Congress designed Section 230 to promote this type of development, while also serving competing policy goals like encouraging restricted access to obscene materials on the internet. Because Section 230 balances competing considerations, careful adherence to its text and structure is imperative. Accordingly (and contrary to the arguments presented by some of petitioners’ *amici*), the Court cannot “simplistically . . . assume that *whatever* furthers the statute’s primary objective”—whatever that might be—also “must be the law,” for “no legislation pursues its purposes at all costs.” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). Instead, Section 230(c)(1) must be enforced “according to its terms,” *Lamie v. U.S. Trustee*, 540 U.S. 526, 534

² See, e.g., Leigh-Anne Truitt, *The Inside Scoop on Ecommerce Reviews*, Big Commerce, <https://tinyurl.com/57zc64t9> (last visited Jan. 12, 2023); Sonja Utz et al., *Consumers Rule: How Consumer Reviews Influence Perceived Trustworthiness of Online Stores*, 11 ELEC. COM. RSCH. & APPLICATIONS 49, 55 (2012).

(2004) (internal quotation marks omitted), reading those terms “in their context and with a view to their place in the overall statutory scheme,” accounting also for the statute’s “history and purpose.” *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (internal quotation marks and bracket omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* 24 (2012).

B. Section 230(c)(1) Bars Petitioners’ Claim Because It Treats YouTube As A Publisher Or Speaker Of Third-Party Content

This Court granted certiorari to decide whether Section 230(c)(1) applies when a website makes “targeted recommendations” of third-party content. Pet. i. That question implicates an issue of statutory construction: when is a website the “publisher or speaker of any information provided by another information content provider”? 47 U.S.C. § 230(c)(1). But the starting point for analysis must be on petitioners’ *claim*: the statute provides that no website “shall be treated” as a publisher or speaker. *Id.* Here, a precise description of how petitioners’ claim “treats” respondent reveals that their theory targets YouTube’s implied messages inherent in any presentation of third-party content. In light of the text, structure, and purpose of Section 230, the statute bars petitioners’ attempt to base liability on such implicit messages.

1. *Petitioners’ claim turns on implied messages about YouTube’s videos*

According to petitioners, a “targeted recommendation” refers to the practice of “recommending (for want of any agreed upon better term) material to website users” based on their perceived interests, “in the hope

of inducing them to look at yet more material and thus to remain ever longer on that website.” Pet. 9; *see* Pet. Br. 16-17. But “targeted recommendation” is not a term with a fixed, uniform meaning; the term may apply to practices in many shapes and forms, with different implications for the applicability of Section 230(c)(1) in diverse causes of action. Petitioners themselves recognize the variation. Pet. Br. 15. So it is necessary to focus on the specific practices and claim at issue.

The “targeted recommendations” at issue in this case involve YouTube’s “Up next” feature. J.A. 169-71; *see also* Pet. Br. 9. YouTube’s “Up next” feature is not an explicit recommendation. It does not state, for example, that “YouTube strongly recommends that you watch this video,” or even that a video is “recommended.” Pet. Br. 33. Instead, the “Up next” feature is a way that YouTube organizes the billion-plus videos on its site to make immediately available to users those videos that might appeal to them. Specifically, the feature displays a sequence of videos in a side bar next to the video the user is watching and automatically plays the first such video on completion of the video that is playing. *See* J.A. 169-70. Videos are selected for the queue by an algorithm based on the user’s perceived preferences, inferred from (among other information) her watch history and subject matter related to the video the user is currently watching. J.A. 169; *see also* Pet. Br. 9.

By itself, the act of placing certain videos on the side of a user’s screen or playing one video after another is protected by Section 230(c)(1). Petitioners do

not argue otherwise. Using petitioners' own definition, the presentation of third-party videos, on its own, unquestionably involves publishing—that is, “communicating”—information provided by another information content provider. Pet. Br. 20; *see also infra* at 16. So petitioners' theory must identify something else about the “Up next” feature in order to claim that YouTube's actions fall outside the scope of Section 230(c)(1).

Petitioners' primary theory seems to be that the “Up next” feature conveys an implicit message: “You, the viewer, will like these videos.” *See* Pet. Br. 17, 33-34; Gov't Br. 27-28. That implicit message, according to this theory, falls outside of Section 230(c)(1) because YouTube is not merely publishing content created by third parties. Rather, under this theory, YouTube is conveying its *own* implicit message, and it can be held liable for that message under Section 230(c)(1) to the extent it gives rise to a viable cause of action.³

³ While petitioners do not expressly state the theory this way, it is the logical understanding of their arguments. Pet. Br. 17-18. Their express contention appears to be that YouTube's provision of URLs is what falls outside the scope of Section 230(c)(1) because those URLs are created by YouTube, not the poster of the video. *Id.* at 35-39. That theory fails for at least two reasons. First, neither petitioners' complaint nor their brief claims that YouTube is *liable* for the provision of URLs; they do not claim that the URLs themselves caused any harm. For example, petitioners do not claim that YouTube aided and abetted terrorism by conveying the message: “to download or stream this file, type this URL into your browser.” Pet. Br. 38; *see also id.* at 26 (admitting that liability can result only when “the recommendation itself was a cause of the injury”). Second, the technical act of

That is an unreasonable reading of Section 230(c)(1) for two reasons. First, the implied message that “you may be interested in this content” is an inherent feature of *all* publication of third-party content, both on and off the internet—no matter how narrowly the concept of “publication” is construed. “It would make little sense for Congress,” Gov’t Br. 23, to enact a liability protection statute with such a gaping hole at its center. Second, petitioners’ claim necessarily treats YouTube as the publisher of content created by ISIS—and not created by YouTube itself—because the publication of that third-party content is an integral factual element of petitioners’ claim.

2. Section 230(c)(1) protects implied messages inherent in publishing third-party content

a. Any publication of content conveys an implied message about that content. That is because content must be organized, and the publisher’s organizational choices will always communicate something about the content it publishes.

Newspapers, radio stations, and television channels are classic examples. An inherent aspect of displaying a newspaper’s contents is organizing those contents. Typically, sports stories are placed in the sports section, arts stories in the arts section, local stories in the local section, and so on. Newspapers group similar articles together on the natural assumption that a subscriber who reads one article is

repackaging URLs to make third-party content accessible is protected by Section 230(c)(1), as the government explains. Gov’t Br. 33-34. Petitioners also suggest that website-generated “notifications” fall outside Section 230(c)(1), Pet. Br. 40, but this case does not involve any “notifications” either.

likely to be interested in reading another article on the same topic. Likewise, radio stations and television channels group similar shows together in consecutive timeblocks based on the same assumption about listeners and viewers. These organizational choices necessarily convey an implied message: “If you like this sports story or show, you may also like this other one.”

Periodicals make similar choices and convey their own implied messages—whether they publish their own content (like *The Economist*) or feature others’ submissions (like *The New Yorker*). The topics may be labeled (“International”; “Economics”; “Culture”) but the groupings would be obvious even without the label. The same is true of magazine stands and bookstores. They organize periodicals and books based on reader interest. In doing so, they convey to passersby and customers: “This prominently featured magazine or book will most appeal to you.” Libraries are likewise organized based on the Dewey Decimal system, which classifies books by genre and subject matter and, accordingly, conveys an implied message about each book’s contents. The same inevitability of implied messaging through organizational choice is true of anyone else who publishes diverse information in an accessible form.

Websites that publish third-party content online fit the same mold. Any website that hosts third-party content must make choices about how to present it to users, and those choices convey implied messages. For example, a website must have a homepage. Unless a website’s homepage is blank, it will convey implicit messages about the content available on the

website. If the homepage features the website’s most popular stories, images, or videos, it implicitly communicates: “you may like this content because it is the most popular on the site.” Similarly, many websites have search functionality, and those search results must be organized. Doing so implicitly conveys a message: “Based on your query, you will like this content, in this order.”

b. Section 230(c)(1) protects implied messages like these because they are an inherent feature of *all* publication—both on or offline—whether the term “publisher” is defined through its ordinary meaning or as a common-law term of art. The ordinary meaning of “publisher” is one engaged in the activity of publishing. *See* Pet. Br. 19; Gov’t Br. 14. As just discussed, an inherent feature of publishing is organization, which always carries with it an implied message about the published content. Alternatively, petitioners argue that the term “publisher” in Section 230(c)(1) bears its common-law meaning from the law of defamation: one who communicates a message to another. Pet. Br. 20-24; *see* Gov’t Br. 14. This too covers implied messages from presentation: at common law, conveying implied messages through organizational layout and juxtaposition constituted publishing. *See* Resp. Br. 25-26. Under either definitional framework, the act of arranging and organizing third-party content on a website is publishing, and that publication will always communicate an implied message about that content.

YouTube’s “Up next” feature therefore falls within Section 230(c)(1)’s scope of protection for publishing third-party content. YouTube’s selection of certain

videos to display in the sidebar may be more sophisticated than a newspaper’s placement of stories into labeled sections or a television channel’s grouping of related shows into a consecutive timeblock: YouTube personalizes the selection algorithmically. But the side bar is analogous to these organizational choices—showing the viewer content in sequence based on suppositions about interest. YouTube’s auto-play feature is likewise analogous to a television or radio station broadcasting multiple news or sports shows one after another based on suppositions that its audience will want to see more of the same. YouTube’s technological enhancements via algorithm make no difference to the Section 230 analysis. “[I]t would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” *Force v. Facebook, Inc.*, 934 F.3d 53, 67 (2d Cir. 2019); *cf. Reno*, 521 U.S. at 870 (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [internet speech].”).

The takeaway is clear: the “Up next” feature remains core publication activity notwithstanding any claim that it communicates an implied message “recommending” the published third-party content. That is an inherent feature of publication under any proposed definition.⁴

⁴ Because the alternative proposed definitions make no difference here, the Court need not select a definition from either common usage or the common law to interpret “publisher” in Section

c. In shielding internet service providers from liability for hosting third-party content, Congress could hardly have intended to leave providers liable for organizational choices inherent in hosting that content. Congress does not give with one hand what it takes away with another, *Atl. Marine Constr. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 57 (2013), and this Court does “not lightly conclude that Congress enacted a self-defeating statute,” *Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019); *see also* SCALIA & GARNER, *supra*, at 4 (explaining the presumption against an interpretation that would render a statute ineffective). Congress cannot be presumed to have protected only a random display of content with no implied message (other than randomness) when no such publication exists in the real world—or on the internet.

To the contrary, the statute’s structure confirms Congress’s understanding that organizing third-party content is integral to hosting it online. A threshold question under Section 230(c)(1) is whether the website is an “interactive computer service.” An interactive computer service is defined to include an “access software provider,” 47 U.S.C. § 230(f)(2), which is in turn defined as a provider of software or enabling tools that (among other things) “search, subset, organize, [or] reorganize content,” *id.* § 230(f)(4)(C). Congress cannot have defined the entities entitled to protection under Section 230(c)(1) by the very features that would expose them to liability. *Cf.* Gov’t

230(c)(1). Whether any relevant distinctions could affect the result in some other case, the two approaches lead to the same result here.

Br. 22-24 (making the same observation in arguing that organizing third-party content does not make a website responsible for the “development” of that content (quoting 47 U.S.C. § 230(f)(3)). Put differently, Congress did not shield websites from liability for their presentation of third-party content only to expose them to liability for the organizational choices inherent in presenting it.

Accordingly, in light of Section 230’s text and structure, the statute’s protection covers the features of YouTube challenged here. Selecting videos for a sidebar or playing certain related videos after others is content organization or reorganization. Holding YouTube liable for that conduct would treat it as a publisher of third-party content and is therefore barred by Section 230’s protection against being treated as the “publisher or speaker” of third-party content. 47 U.S.C. § 230(c)(1).

The analysis does not change by framing the claim as based on YouTube’s “implied messages” “recommending” third-party content in the “Up next” sidebar. YouTube is of course not shielded from liability for content *it* provides, as opposed to “information provided by another information content provider.” 47 U.S.C. § 230(c)(1). But the argument that the implied messages in “Up next” fall outside the scope of Section 230(c)(1)—and expose YouTube to liability on the premise that the messages are content created and developed by it (*see* 47 U.S.C. § 230(c)(1), (f)(3))—glosses over the fact that such messages are inherent in YouTube’s act of publishing. An interactive computer service is not “responsible for the creation or de-

velopment” of content (47 U.S.C. § 230(f)(3)) by conveying implicit messages about third-party content through the inevitable organizational choices in presenting it in the first place.⁵

3. Section 230(c) bars petitioners’ claim because liability depends on publication of third-party content

Even if an internet service provider could, in theory, be held liable for the implicit messages it inherently conveys when presenting third-party content, Section 230(c)(1) bars petitioners’ claim because the publication of third-party content is an integral factual element of petitioners’ claim. Absent proof that YouTube published ISIS videos on its site—and that users watched the ISIS videos YouTube published—petitioners have no claim at all.

⁵ The proper analysis of express website messaging is not presented here, but such messages may require a different analysis. The addition of website-drafted language that reviews, characterizes, or endorses third-party content would introduce a new element: the website’s *own* speech not inherent in the publication of that content. In some other legal contexts, implied and express communications may call for the same analysis. *Cf.* Fed. R. Evid. 801(a) (for purposes of the hearsay rule, a “statement” includes an “oral assertion” or “nonverbal conduct, if the person intended it as an assertion”); *see also United States v. Long*, 905 F.2d 1572, 1579-80 & n.12 (D.C. Cir. 1990) (Thomas, J.). But the inevitable “implied messages” that accompany any organizational scheme cannot be equated with that form of express website speech. *Contra* Gov’t Br. 27-28 (making this leap). Given Section 230(c)(1)’s design and context, that equation here would transform the statute into a hash, leaving exposed to liability the inevitable implied messages arising from the content presentation that Congress explicitly protected.

a. Section 230(c)(1) prohibits treating an interactive computer service as the publisher of third-party content. That is true whether or not the interactive computer service also supplies its own accompanying content. The statute does not deprive a website of protection simply because it expresses an implicit message; it bars any claim treating the website as a “publisher or speaker” of third-party content. Thus, even if Section 230(c)(1) does not protect “targeted recommendations” as such, it bars any claim where liability requires proving that an interactive computer service published third-party content.

Petitioners’ claim requires just that. Petitioners allege that YouTube aided and abetted ISIS in violation of the Antiterrorism Act (ATA) by “assist[ing] ISIS in spreading its message.” J.A. 169. YouTube did so, petitioners’ complaint asserts, because its “Up next” feature enabled users who had chosen to watch ISIS videos “to locate other videos and accounts related to ISIS” more easily—*i.e.*, on YouTube. J.A. 173. And by watching “recommended videos” on YouTube, the complaint alleges, users became radicalized, thus aiding and abetting ISIS. J.A. 169, 180.

That theory is barred by Section 230(c)(1) because it requires treating YouTube as the publisher of ISIS’s videos. Had YouTube not hosted, and users not watched, the videos YouTube recommended, petitioners would have no claim. Petitioners do not allege that YouTube is liable under the ATA merely for making terrorist content easier to find on the internet at large or for recommending ISIS videos in the abstract. Rather, the complaint explicitly alleges that “[b]y recommend[ing] ISIS videos to users [through the ‘Up

next’ feature, YouTube] assists ISIS in spreading its message and thus provides material support to ISIS.” J.A. 169. But YouTube’s recommendations would not spread ISIS’s message unless users *watched* the recommended videos. Holding YouTube liable for the fact that users could and did watch ISIS videos on YouTube would necessarily treat YouTube as the publisher of that material. Indeed, on petitioners’ theory, YouTube is liable *only* because it published the third-party content that it allegedly recommended.

Petitioners all but concede that their claim fails for this reason. They admit that a claim based on a website sending third-party material to users would fail under Section 230(c)(1) “[i]f the gravamen of [the] claim was that [the user] was injured by the content of that disseminated third-party material.” Pet. Br. 26. But that is petitioners’ theory. They allege that they were harmed because of the content of the ISIS videos that YouTube hosted on its site. That is fatal to their claim.

b. The government appears to agree with much of this analysis. It agrees that “determining Section 230(c)(1)’s application to a particular case is not an all-or-nothing choice.” Gov’t Br. 30. In the government’s view (as in petitioners’), some conduct can come within Section 230(c)(1), while other conduct falls outside its protections. And the government agrees that Section 230(c)(1) “preclude[s] the court from considering, as a possible form of assistance giving rise to ATA liability . . . YouTube’s provision of a platform for the posting of the [ISIS] videos.” *Id.* at 31.

Yet the government contends that the effect of Section 230(c)(1) in this case is not to extinguish petitioners' claim but to "preclude[] the court from giving weight to the fact that the recommended videos appear on YouTube's own site." Gov't Br. at 31. Under the government's test, the court "should analyze plaintiffs' claims as it would if YouTube had recommended ISIS videos on *other* sites." *Id.* That test is divorced from the facts. It impermissibly rewrites YouTube's "recommendation" and petitioners' claims and finds no support in the text of Section 230(c)(1).

Contrary to the government's suggestion, YouTube did not make "recommendations of videos on another platform." Gov't Br. 31. Nor did YouTube make "recommendations" in the abstract. YouTube "recommended" videos on *its* platform—its implicit message to users was that "you might like to watch these videos that are also available on our site." *See* Pet. Br. 16-17. Nor do petitioners allege that YouTube would have been liable had it recommended videos available on other platforms. Again, their theory is that YouTube spreads ISIS's message because it made ISIS videos easier to locate—and because users watched those videos—*on its uniquely popular site*. Pet. 11-12 (respondent played a "uniquely essential role" in the development of ISIS's branding and recruitment because "[v]ideos that users viewed on YouTube were the central manner in which ISIS enlisted support").

Section 230(c)(1) provides no license to disregard these allegations. Petitioners' claim links the targeted recommendations to a business strategy of "inducing viewers to spend more time on the site looking

at materials there, what YouTube refers to as ‘watch time.’” Pet. Br. 17. Section 230(c)(1) instructs courts not to treat interactive computer services as the publisher of third-party content. It does not permit courts to construct a fictional universe where the interactive computer service is *not* the publisher of third-party content and ask whether the service could be held liable under that imagined set of facts.

c. This does not mean that Section 230(c)(1) always places third-party content off limits in evaluating claims. In a different case, consideration of that content may not “treat” the website as the publisher for Section 230 purposes. For example, a claim based on a website’s express endorsement of third-party content may require consideration of that content to give context to the endorsement. The analysis may also be different where treatment of a website as a publisher of third-party content is not necessary to prove the claim, but the content plays a role in evaluating issues such as damages. But no such interpretive question is presented here. *See infra* Part D. Petitioners’ claim would squarely hold YouTube liable because it published ISIS videos on its site, and that claim is barred by Section 230(c)(1), regardless the statute’s applicability in any other context.

C. Petitioners’ Interpretation Of Section 230(c)(1) Would Jeopardize The Basic Functioning Of The Internet

Petitioners’ interpretation of Section 230 threatens dramatic consequences for the internet. Petitioners would expose to liability every company that hosts third-party content—which is to say, almost all com-

panies operating on the internet. In doing so, petitioners' interpretation would create powerful incentives for websites to make content less accessible, directly contrary to Congress's purpose in enacting Section 230.

1. The fundamental problem with petitioners' position is that it exposes websites to liability for an unavoidable consequence of publishing third-party content. As explained above, a website can hardly host third-party content without organizing it. And organizing content necessarily conveys an implied message that it may interest users. If that implied message falls outside the scope of Section 230(c)(1), then all websites that host and organize third-party content face potential liability. This approach has high costs. Section 230, properly interpreted, encourages essential aspects of the internet that make it versatile, functional, and consumer friendly.

YouTube is a prime example. As of 2020, more than 500 hours of video were uploaded to YouTube every minute.⁶ For the website to be usable, that content must be organized. YouTube's homepage thus must, by necessity, be highly selective. This will necessarily communicate an implied message about that content to the user—*e.g.*, “these are the most popular videos” or “these videos are similar to ones you’ve watched.” The same is true of YouTube search results. Whenever a user types in a query, YouTube “recommends” videos in response with the implied message, “you will like these videos in this order.”

⁶ L. Ceci, *Hours of video uploaded to YouTube every minute as of February 2020*, Statista (Apr. 4, 2022), <https://tinyurl.com/4tkmhpkj>.

Any organizational choice that YouTube makes conveys *some* implied message. So on petitioners' theory, every facet of YouTube that makes the website usable could give rise to liability.

This is true of every website that hosts third-party content. Search for “dinner” on Yelp and you can choose to organize the order of user-written results based on a restaurant’s physical location (“this restaurant is closest to you”) or highest user rating (“diners consider this restaurant better than other, lower-rated restaurants”). See Yelp, <https://yelp.com> (last visited Jan. 3, 2023). Visit Twitter and the homepage offers curated third-party tweets on tabs entitled “For you” (“you will like these tweets because of your past Twitter activity”) or “Trending” (“you will like these tweets because other Twitter users do”). See Twitter, <https://twitter.com> (last visited Jan. 3, 2023). Shop on Amazon and you’ll find a section of “top” user-written reviews on each product page (“this review may be especially helpful in your purchasing decision”). See Amazon, <https://amazon.com> (last visited Jan. 11, 2023). Etsy likewise by default presents customer reviews in a “suggested” order rather than in reverse chronological order. See Etsy, <https://etsy.com> (last visited Jan. 18, 2023). And so on. Product reviews are integral to online commerce, *supra* at 9-10 and note 2, and organizing those reviews also conveys an implied message that would be subject to liability under petitioners’ reading of Section 230(c)(1).

Petitioners’ theory likewise would expose search engines to suit. These websites convey implied messages through their organization of search results

(“based on your query, you will like the following websites, in this order”). Petitioners recognize the need to avoid exposing search engines to liability, but their efforts to distinguish search engines are unpersuasive. Petitioners first suggest that search engine results are protected by Section 230 because the URLs they include to identify the third-party sites are content “created by another.” Pet. Br. 39. But whether a website or a third party creates the URL for the third-party content is irrelevant. *See* Gov’t Br. 33 (“A website does not act as an information content provider by taking the technical steps necessary to render [third-party]-generated online content visible to others”). And ordering URLs in a search result conveys the same implied message regardless of who supplies the URL.⁷ Petitioners fare no better in suggesting that the user’s seeking information (through a search request) makes a difference. Pet. 31-32. The website still returns the results, along with the message their ordering implies. So petitioners’ theory, if adopted, could open the door to vast new realms of litigation: on Google alone, users conduct more than 99,000

⁷ Petitioners also argue that search engines do not “act as” interactive computer services when they respond to third-party queries. Pet. Br. 46-47. This argument is outside the question presented and misreads Section 230(f)(2). Whether a website qualifies as an “interactive computer service” is a question of status, not conduct. A website is an interactive computer service if it “provides or enables computer access by multiple users to a computer service,” *id.*, regardless of whether it did so on a particular occasion.

searches per second, amounting to more than 8.5 billion searches each day.⁸

The government remains opaque about how its theory applies to search engines. At times, the government seems to recognize that the ordinary operation of a search function does not make the website an information content provider. Gov't Br. 29-30 (“[A] website does not act as an information content provider by offering a method to search or filter third party content.”). But the government’s core theory is the implicit messages in “targeted recommendations” *can* give rise to liability. *Id.* at 30. That theory has no logical stopping point—certainly not before it reaches search engines. The internal tensions and ambiguity in the government’s approach thus create the same dangers to core internet functions as petitioners’ approach.

2. Petitioners’ regime would create dangerous incentives. To avoid potential liability, websites that host third-party content would need to fundamentally alter the way they operate. The only apparent options would be to cease organizing content altogether, making the internet an unusable and unnavigable place. Or cease organizing content in a way that users desire—to the same effect.

A website that does not organize content would not implicitly say anything about its content. But forgoing content organization is easier said than done. Imagine what this would mean for a website like YouTube. YouTube could either delete the “Up next”

⁸ Hazel Emnace, *23 Essential Google Search Statistics*, Fit Small Bus. (Oct. 25, 2022), <https://tinyurl.com/bdh8867b>.

feature or populate it with randomly selected videos. And YouTube’s search functionality would be a thing of the past. To fit all its activities within petitioners’ reading of Section 230(c)(1), YouTube would have to make itself unusable.

The sheer volume of activity on YouTube makes the point. YouTube has almost 2.6 billion monthly active users.⁹ They watch more than 1 billion hours of video each day.¹⁰ If YouTube is potentially liable every time it displays the “Up next” queue—*i.e.*, every time a user watches a video—would YouTube have to disable this feature, to the ultimate detriment of its users? And what would Google or Bing do if every search query exposed the site to liability for the ordering of results? *See supra* at 27-28. Petitioners’ theory thus threatens to reduce the internet to a jumble of unusable information—a digital state of entropy.

It is no answer to say that a website that hosts third-party content need not forgo organizing it altogether to avoid liability. Websites could dilute the messages they implicitly convey by organizing content less usefully, and some organizational choices are unlikely to expose websites to liability. YouTube, for instance, could organize videos chronologically. But just like newspapers, radio stations, television channels, and other traditional offline publishers, websites organize content to appeal to their users’ preferences—and consumer preferences are at the

⁹ S. Dixon, *Most popular social networks worldwide as of January 2022, ranked by number of monthly active users*, Statista (July 26, 2022), <https://tinyurl.com/yz8apr7a>.

¹⁰ *YouTube By the Numbers*, YouTube Official Blog, <https://tinyurl.com/yap58eec> (last visited Jan. 4, 2023).

heart of the modern internet. Providing disincentives to such content organization can only sap the modern internet of its appeal, flexibility, and utility in shopping, entertainment, and education. Yet if petitioners' theory were adopted, websites act at their peril by organizing content in the most useful way.

In enacting Section 230, Congress intended to make the internet more user friendly, not less. *See* 47 U.S.C. § 230(b). That is why Congress extended liability protection to the basic organizational choices inherent in presenting third-party content to users. *See supra* Part B. A contrary rule would have hamstrung the nascent internet in 1996—and would stifle the expanding universe of internet activity that Section 230 has nurtured today.

D. This Court Should Adhere To Its Usual Practice And Decide Only The Case Before It

This Court should affirm the decision below because Section 230(c)(1) shields websites from liability for organizing their display of third-party content, and certainly shields YouTube from petitioners' claim here. But the Court should go no further. This case involves a landmark federal statute that this Court has never before construed, and the statute has a vast range of applications to a vital sector of the economy. Especially because of the far-reaching consequences of how it is interpreted, the Court should adhere to its standard practice of deciding only the case before it. Thus, contrary to petitioners' open-textured reformulation of the question presented, Pet. Br. i, and their excursion into issues not explored below, *e.g., id.* at 34-40, this Court should refrain from commenting on

any other interpretive issues under Section 230(c)(1) that are unnecessary to resolve this case.

The Court should also refrain from commenting on any other context in which Section 230 has generated litigation. *See generally Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020) (Thomas, J., statement concurring in the denial of certiorari). For example, this case does not implicate how Section 230 applies when a website solicits content or adds meaning to third-party content it hosts. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008). Nor does this case involve an unsuccessful attempt to “de-publish” offensive third-party content. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir.), *as amended* (Sept. 28, 2009). Likewise beyond the scope of the question presented is whether Section 230 applies to product design choices that allegedly encourage illegal behavior. *See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1092 (9th Cir. 2021).

The Chamber takes no position on these questions or on any other context in which Section 230 has been invoked. And the Court need not take a position on these questions either to decide this case. Section 230 bars liability here. But that does not necessarily mean it will bar liability in distinguishable circumstances. The Court should decide the applicability of Section 230(c)(1) to the facts of this case—and only this case—and it should affirm.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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