No. _____

In The
Supreme Court of the United States

KRISTANALEA DYROFF, Individually and
On Behalf of The Estate of Wesley Greer,

Petitioner,

v.

THE ULTIMATE SOFTWARE GROUP,
Experience Project, and Kanjoya, Inc.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 230(c)(1) of Title 47 states that no provider of interactive computer service (such as a website) "shall be treated as the publisher of any information provided by another information content provider [such as a user who posts something on the website]." The questions presented are:

(1) Is section 230(c)(1) a limitation on the definition of a publisher under certain other prohibitions, or a broad grant of immunity to covered publishers, and

(2) Is "publisher" in section 230(c)(1) limited to the exercise of traditional editorial functions, such as deciding to accept or reject a submission?

The same questions are presented in *Force v. Facebook, Inc.*, No. 19- . The petition in *Force* is being filed simultaneously with the petition in the instant case.

PARTIES

The parties are set out in the caption.

RELATED PROCEEDINGS

Dyroff v. The Ultimate Software Group, 934 F.3d 1093 (9th Cir. 2019)

Dyroff v. The Ultimate Software Group, 2017 WL 5665670 (N.D.Cal. Nov. 26, 2017)

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OTHER AUTHORITIES

Petitioner Kristanalea Dyroff respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on August 20, 2019.

OPINIONS BELOW

The August 20, 2019, opinion of the court of appeals, which is reported at 934 F.3d 1093, is set out at pp. 1a-18a of the Appendix. The November 26, 2017, Memorandum and Order of the district court, which is unofficially reported at 2017 WL 5665670 (N.D.Cal. Nov. 26, 2017), is set out at pp. 19a-58a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on August 20, 2019. On November 12, 2019 Justice Kagan extended the time for filing the petition to January 2, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 320(c)(1) of 47 U.S.C. provides: "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." The balance of the statute involved is set out in the Appendix.

INTRODUCTION

The Internet, and the social media which it has fostered, have both an unequaled capacity to enrich our lives, and an unprecedented ability to cause harm. At 4:53 p.m. on August 17, 2015, one such social media company, the Experience Project, sent an email to Wesley Greer which read in part as follows:

> Someone posted a new update to the question "where can i [stet] score heroin in Jacksonville, fl" If your email won't let you go straight to the link, it can be found here [URL] ... If you cannot visit this link, please go to [different URL]

(Complaint, Ex. 3) (Underlining in original). Greer clicked on that link, which led him to a message from Hugo Margenat-Castro, a well-known drug dealer, on the Experience Project website, offering heroin for sale. Greer purchased narcotics from Margenat-Castro on August 18, but the drugs proved to be fentanyl. On August 19, two days after receiving the fatal email from Experience Project, Greer died of a drug overdose. The Ninth Circuit below held that Experience Project enjoyed immunity for its actions because of section 230(c)(1) of the Communications Decency Act. That decision of the court of appeals rested on an

interpretation of section 230(c)(1) that has been rejected by several other circuits.

STATEMENT OF THE CASE

Historical and Legal Background

The Communications Decency Act of 1996 ("CDA") was adopted in particular response to the danger that the then emerging Internet would lead to the transmission of sexually explicit materials and solicitations to minors. The nature of the Internet and the increasing pervasiveness of computers made it difficult for parents to control the materials to which their children had access, at home or elsewhere. Congress sought to address that problem in two distinct ways, only one of which is relevant here.

Congress attempted to limit directly the degree to which sexually explicit materials would be sent over the Internet, by adopting two criminal provisions forbidding the knowing transmission of obscene or sexually explicit materials or messages to any person under 18 years of age. 47 U.S.C. §§ 223(a), 223(d). This Court held those prohibitions violated the First Amendment. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

The CDA also sought to enable and encourage internet companies to take voluntary action to protect children from exposure to sexually inappropriate matters. That purpose was embodied in section 230,

entitled "Protection for private blocking and screening of offensive material." Section 230(c)(2) achieved this most directly, by providing that an interactive computer service provider (such as a website) could not be held liable because of voluntary action to limit or bar access to such offensive material. 47 U.S.C. § 230(c)(2).

Section 230(c)(1), the specific provision at issue here, was enacted to deal with a very specific legal problem that was already facing interactive computer service providers which might seek to limit the material displayed on their websites or through their services. The ability of interactive computer service providers to restrict access to offensive material was seriously threatened by the decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). There Prodigy had attempted to affirmatively screen for offensive language and insulting remarks the bulletin board postings that were displayed on its website. 1995 WL 323710 at *2. Prodigy's efforts to limit the content on its bulletin boards, the court held, rendered it a publisher rather than merely a distributor, and thus strictly liable for any defamatory material posted on its website. *Id*. at *5.

Congress immediately recognized that this same principle of defamation law would deter interactive computer service providers from attempting to remove sexually offensive materials from their websites. Even if, under section 230(c)(2), interactive computer services provider could not be held liable by a user that sought, unsuccessfully, to post such offensive material,

a provider's efforts to do so would render the provider a publisher for defamation purposes as to all other users. Thus providers would be likely to refrain from limiting sexually offensive materials to avoid defamation liability for matters unrelated to obscenity.

Congress directly addressed this problem in the twenty-six words of section 230(c)(1): "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." Under section 230(c)(1), so long as the allegedly defamatory material at issue had been created solely by a third party, an interactive computer service provider could not be treated as a publisher for defamation purposes, even if, like the defendant in *Stratton Oakmont*, the provider did exercise control over the content of some third-party material.

Although section 230(c)(1) was adopted to deal in particular with a specific problem in defamation law, the terms "defamation" and "libel" do not appear in the text of or expressly limit the statute. Because section 230(e)(3) preempts any state or local law to which section 230(c)(1) applies, an interactive computer service provider which successfully invokes section 230(c)(1) can often obtain effective exemption from a law, potentially gaining a considerable financial benefit, including comparative advantage over its non-internet competitors. For that reason, interactive computer service providers have aggressively sought to invoke section 230(c)(1) as a defense to the application of state and local laws on subjects entirely unrelated to

defamation, including taxes on scalper ticket prices[1], regulation of local apartment-sharing Airbnb listings[2], the obligation to warn users about dangerous products,[3] and responsibility for defective consumer products.[4] Countless commercial firms now have on-line computer capacity that renders them, at least for certain purposes, interactive computer service providers.

Despite its enormous importance, section 230(c)(1), speaks neither in detail nor with any precision. Rather, like section 1 of the Sherman Act, section 230(c)(1) is written in broad generalities, and courts have been left to develop more specific meanings in light of emerging economic and technical developments.

> Section 230's simplicity is one of its greatest strengths. Other U.S. laws ... occupy hundreds of pages in the United States Code and require teams of specialized lawyers to parse. Section 230, on the other hand, packs most of its punch in twenty-six words and contains few exceptions or caveats. But its brevity also has left room for some courts to set important limits on the scope of its immunity.... The text of Section 230 does not provide many answers. Courts are left to rely on competing dictionary

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[1] *City of Chicago, Illinois v. Stubhub!, Inc*., 624 F.3d 363 (7th Cir. 2010).

[2] *Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019).

[3] *Doe No. 14 v. Internet Brands, Inc*., 767 F.3d 894 (2014).

[4] *Oberdorf v. Amazon.com, Inc*., 930 F.3d 136, 150-53 (3d Cir. 2019); *Erie Ins. Co. v. Amazon.com, Inc*., 925 F.3d 135, 139-40 (4th Cir. 2019).

> definitions and commonsense interpretations....

Jeff Kosseff, The Twenty-Six Words That Created The Internet, 167-68 (2019).

In the absence of more detailed congressional language, for "two decades ... courts[ ] [have] struggle[d] to apply the law in tough cases." *Id.* at 6. The lower courts, unsurprisingly, have disagreed about the basic legal standards established by section 230(c)(1). In some civil cases, the differences among those standards have not mattered; all circuits agree, for example, that an internet company would not be liable for merely creating a bulletin board or chat room, or for permitting a third party to post statements that proved to be defamatory. But as internet companies have expanded beyond the bulletin boards and chat rooms that were more common a generation ago, and have increasingly provided additional services and sought to attract greater usage, cases have arisen in which those differences in standards are of controlling importance. The controversies in this instant case, and in the companion petition in *Force v. Facebook, Inc.*, No. 19- , illustrate the circumstances in which those circuit differences are dispositive.

Factual Background

Unlawful Drug Sales at Experience Project

Experience Project is a now dormant social-network site consisting of various "online communities" or "groups" where users could share their personal

experiences, and exchange messages. The website was live from 2007 to 2016, and its users shared 67 million experiences. The site generated revenue through advertisements and the sale of tokens that users purchased to post questions to other users in their groups.

The complaint alleged that the website was a focal point for extensive illegal drug sales.

> [A] virulent culture of drug trafficking emerged on the website. Specifically, dealers would openly advertise in groups with names such as "I Am a Drug Addict," "I Can Help With Connect In Orlando FL," "I Am a Heroin Addict," "I miss Using Heroin," and "Heroin, Heroin and more Heroin."

Complaint ¶ 3. The website even provided "reviews" of drug dealers who trafficked on Experience Project's website.[5] App. 26a.

"Experience Project explicitly acknowledged ... [that] it was the recipient of myriad requests f[or] information from law enforcement regarding illegal activity on the website, which fact should also [have] alerted Experience Project to the deadly risk posed to its members." Complaint ¶ 5; *see* App. 27a. The

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[5] Complaint, ¶ 26 ("a substantial portion of the website became devoted to illegal activity, including but not limited to the blatant trafficking of illegal drugs such as heroin"), ¶ 27 ("Experience Project is replete with groups and stories whose entire purpose is the sale of heroin and other drugs. For example, a screenshot of the following group, titled 'I Need Heroin,' contains numerous posts in which members offer contact information to sell opiates in and around the Orlando area.").

complaint alleged that Experience Project had demonstrated antipathy toward law enforcement efforts to stop illegal activity on its website. *Id*. When the Experience Project finally shut down in 2016, it complained in an open letter that "[g]overnment and their agencies are aggressively attacking the foundations of internet privacy with a deluge of information requests, subpoenas, and warrants." Complaint, Ex. 4.

One drug dealer who trafficked on the Experience Project website was Hugo Margenat-Castro, who went by the name "Potheadjuice."

> When he finally pled guilty in 2017, Margenat-Castro estimated that he sold ten bags of fentanyl-laced heroin every day (seven days a week) between January 2015 and October 2015 *via Experience Project*. He estimated selling 1,400 bags of heroin laced with fentanyl.

App. 25a-26a (emphasis added). Margenat-Castro sold heroin on parts of the Experience Project website titled "where can I score heroin in jacksonville, fl," I love heroin," and "heroin in Orlando."[6] App. 25a. In March and April 2015, "[b]ased on his activity on Experience Project," law enforcement made two controlled buys of heroin from Margenat-Castro, and he was arrested for

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[6] In *Daniel v. Armslist, LLC*, ___ S.Ct. ___ (2019), the respondent assured the Court that under the decision of the Wisconsin Supreme Court in that case a website would face liability, notwithstanding section 230(c)(1), if it were named "illegaldrugs.com." Opposition to Petition for A Writ of Certiorari, No. 19-153, pp. 12-13.

possession with intent to sell fentanyl, among other drugs, "stemming from his sale of drugs on Experience Project's website." App. 27a. The complaint alleged that Experience Project actually knew, or should have known, of Margenat-Castro's drug dealing, because the drug buys were likely based on information about Margenat-Castro that law enforcement had obtained from Experience Project itself.[7]

The plaintiff alleged that Experience Project did far more than merely permit drug dealers like Margenat-Castro to post messages advertising their wares. The complaint asserted that the defendant took three distinct types of steps, separate from those postings, which facilitated the online drug bazaar on its website.

First, if the "experiences" posted by a particular Experience Project website user indicated that he or she had a problem with drugs, Experience Project allegedly would "steer" the user to a specific portion of the website devoted to illegal drugs.[8] Experience Project based this steering on advanced data-mining

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[7] Complaint ¶ 70 ("[T]he website had or should have had knowledge of Margenat-Castro's lethal drug sales in the form of information requests from law enforcement associated with the controlled buys, arrests, or court proceedings that pre-dated Wesley's purchase of fentanyl and subsequent fatal overdose.").

[8] *See* Answering Brief of Appellee The Ultimate Software Group, Inc., 2018 WL 4522553 at *15 ("Experience Project grouped its users based on shared experiences and attributes by utilizing algorithms to identify the content of its users' posts.").

algorithms that analyzed posts and other data about its users.[9]

Second, Experience Project "recommended" groups where illegal drugs were lauded or sold to website users whose posts indicated a possible interest in such drugs.[10] One way Experience Project did so was to place on various parts of its website hyperlinks to particular drug-focused groups, with wording such as "More People Who Need Heroin," "More People Who Shoot Up Heroin," "More People Who [sic] Heroin Addiction," "More People Who Miss Using Heroin," "More People Who Can Help With Connect [sic] in Orlando FL." Complaint ¶ 27, ¶ 31, ¶ 33, Ex. 1.

Third, when new posts appeared on a group site devoted to illegal narcotics, Experience Project would send "push notifications" or emails about that development to Experience Project users. Complaint ¶ 70 ("Experience Project went the further step of alerting

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[9] Complaint, ¶ 3 ("Experience Project's functionality would ... steer vulnerable addicts to *additional* pages devoted to the sale of drugs [from groups where drugs were being marketed].") (emphasis in original), ¶ 6 ("manipulate individual users and funnel them into pockets of activity on the website, including harmful, drug-trafficking activity...."), ¶ 73 ("intentionally steering users to *additional* groups that were obviously dedicated to the sale and use of ... narcotics") (emphasis in original).

[10] Complaint, ¶ 38 ("Experience Project would recommend further groups to its vulnerable users, containing additional content devoted to the trafficking of drugs...."), ¶ 70 ("Experience Project's recommendations functionality had the lethal effect of guiding heroin addicts from drug trafficking group to drug trafficking group, helping this vulnerable population find additional forums for lethal drugs; as was the case for Wesley.").

vulnerable addicts—through emails and other push notifications—every time a new post or response occurred in groups devoted to the sale of heroin."), ¶ 73 ("sending alerts to posts within groups that were obviously dedicated to the sale and use of deadly narcotics"), ¶ 114 ("Defendants' prodding of heroin addicts with push notifications and emails alerting them to new posts in drug-trafficking groups, in an effort to return them to the Experience Project website").

The steering, recommendations, notices and emails were not limited to or focused exclusively on narcotics. Experience Project used these tactics more generally in an effort to increase usage of the website and thus to enhance its advertising revenue. Plaintiff alleged that the defendant was well aware of the impact those practices were having on the many website users struggling with drug addiction.

The Death of Wesley Greer

In 2007, when he was a college student, Wesley Greer suffered a knee injury. During his recovery, he was prescribed opioid painkillers and became addicted, first to opioids and then to heroin. He began treatment in 2011, but relapsed. Finally, in February 2015, Greer moved to Brunswick, Georgia, hoping to live in a drug-free environment. App. 23a-24a.

In August 2015, however, Greer went online looking for heroin; a Google search directed him to the Experience Project website. Greer created an account with Experience Project, and purchased "tokens,"

which enabled him to pose questions to other users. "Greer ... was steered, by the website's functionality, to myriad heroin-trafficking groups." Complaint ¶ 7. He posted to a group titled "where can i [stet] score heroin in jacksonville fl." App. 24a.

On or about August 2015, Margenat-Castro, despite having twice been arrested for drug-sales through the Experience Project, posted on the group titled "where can i [stet] score heroin in Jacksonville fl" a message again offering heroin for sale. On August 15, 2015, Experience Project sent an email to Greer:

> **Experience Project** support@experience project.com
>
> To: wesleygreer@yahoo.com
>
> Hello Gaboy5224,
>
> Someone posted a new update to the question "where can i score heroin in jacksonville fl"
>
> If your email client won't let you go straight to the link, it can be found here: [URL]
>
> You won't get any more email about this question until you log in and check it, but you can also stop following at any time
>
> If you no longer wish to receive messages from Experience Project please click here to prevent us from emailing to you again
>
> If you cannot visit this link, please go to [different URL]

(Complaint, Ex. 3) (Underlining in original). "[A]fter having been steered to multiple heroin-trafficking groups on Experience Project and receiving emails from Experience Project alerting him to post in those groups, Wesley Greer contacted Margenat-Castro...." Complaint ¶ 8. Mr. Greer called Margenat-Castro, and on August 18, 2015, Greer drove from Brunswick, Georgia to Orlando, Florida, where he bought what he thought was heroin from Margenat-Castro. He then returned to Brunswick. Unbeknownst to Greer, the narcotics were fentanyl. On August 19, 2015, Mr. Greer died from fentanyl toxicity. App. 25a.

Proceedings Below

District Court

The plaintiff in this action is Kristanalea Dyroff, who sues on her own behalf and on behalf of the estate of her son, Wesley Greer. Dyroff filed suit in state court against Experience Project and its corporate owners, including The Ultimate Software Group. The plaintiff asserted several state law claims, including as relevant here negligence and wrongful death. The defendants removed the action to federal court, based on diversity, and moved to dismiss, asserting that section 230(c)(1) constituted a defense to those claims. App. 5a.

The complaint asserted two different types of actions by Experience Project, which raised different issues under section 230(c)(1), only one of which is relevant here. First, the complaint asserted that the Experience Project was partially responsible for the

content of the messages that had been posted by Margenat-Castro and other drug dealers, which if true would bar invocation of the section 230(c)(1) defense. That contention raised a fact-bound dispute about the degree to which Experience Project was involved in the creation of those messages, an issue which is outside the scope of this petition.

Second, the complaint sought to hold Experience Project liable for the range of activities by Experience Project that were separate from the creation and posting of those drug-dealer messages. Those activities, all of which had affected Greer, included steering potential drug users to groups dedicated to the sale and use of drugs, recommending such groups to potential drug users, and sending potential drug users push-notifications and emails regarding new information related to drug use or sale. App. 26a. The messages contained in these recommendations and other activities were created by Experience Project, not by Margenat-Castro or any other drug dealers. Thus the section 230(c)(1) defense could only apply to these activities if as a matter of law Experience Project, insofar as it engaged in those activities, was somehow acting as the "publisher" of messages from Margenat-Castro or other drug dealers. That turned on the proper construction of section 230(c)(1), including of the interpretation of the term "publisher," which are the subjects of the instant petition.

Applying established Ninth Circuit law, the district court held that section 230(c)(1) creates immunity from liability for any action by an interactive computer

service provider that constitutes "publish[ing]" matter created by a third party. App. 29a-36a.

With regard to the recommendations, steering, emails, and push-notifications by Experience Project itself, the dispositive legal issue was whether, under section 230(c)(1), those activities somehow constituted "publish[ing]" the messages of Margenat-Castro and the other drug dealers. The district court held they did. Experience's actions in these regards, the trial judge ruled, were "at their core ... publishing third-party content." App. 38a; *see id*. at 37a ("Ms. Dyroff seeks to treat Ultimate Software as a ... publisher"), *id.* (the plaintiff's claim was based on "the website operator's role as a publisher of third-party content"), 41a ("making recommendations to website users and alerting them to posts are ordinary ... functions of social-network websites").[11]

With regard to the messages from Margenat-Castro and other drug-dealers, there was no dispute that Experience Project had published them. The district court held that the allegations of the complaint did not show that Experience Project was legally responsible for the content of those messages themselves. App. 38a-47a.

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[11] Experience Project argued that such recommendations and emails were the "exercise of traditional publishing functions" Answering Brief of Appellee The Ultimate Software Group, Inc., 2018 WL 4522553 at *43.

Court of Appeals

The court of appeals applied established Ninth Circuit precedent, which construed section 230(c)(1) as creating immunity for any entity that is a "publisher" of third-party content. The appellate court held that Experience Project's various activities that recommended or publicized sites with messages from drug dealers constituted, as a matter of law, "publish[ing]" those (third party) messages, and thus were within the scope of the defense created by section 230(c)(1). App. 10a-12a.

> By recommending user groups and sending email notifications, Ultimate Software, through its Experience Project, was *acting as a publisher of others' content*. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others.

App. 11a (emphasis added). Thus, the Ninth Circuit reasoned, by attempting to impose liability on Experience Project for its recommendations, notifications, emails and steering, "plaintiff treats [Experience Project] as a publisher ... of other's information/content." App. 10a (bold and capitalization omitted). Imposing liability because of Experience Project's efforts to publicize third-party (here, drug dealer) messages, the court of appeals insisted, would "inherently require[ ] the court to treat the defendant as the 'publisher ... ' of content provided by another." App. 11a (*quoting Barnes v. Yahoo! Inc*., 570 F.3d 1096, 1102 (9th Cir. 2009)). The

petition seeks review of only this portion of the Ninth Circuit opinion.

The court of appeals rejected plaintiff's separate contention that Experience Project was partially responsible for the creation of the drug dealers' messages. App. 38a-47a.

REASONS FOR GRANTING THE WRIT

There are two deeply entrenched and fundamental conflicts among the circuits regarding the meaning of section 230(c)(1). The courts of appeals disagree not only about when section 230(c)(1) bars liability, but also about what type of defense it is.

I. There Is A Conflict Regarding Whether Section 230(c)(1) Creates A Broad Immunity Or Only Limits The Definition of "Publisher" Under Certain Other Laws

The courts of appeals are divided as to whether (as the Ninth Circuit held) section 230(c)(1) creates a form of immunity applicable to all possible civil claims, or only precludes (in certain circumstances) treating interactive computer service providers as "publishers" with regard to claims that specifically require a plaintiff to establish that the defendant *is* a publisher. The scope of the resultant defense is considerably different.

A majority of the courts of appeals hold that section 230(c)(1) creates a species of immunity. On this

view, the immunity turns on the nature of the defendant's conduct, and if available would apply to all types of claims. Whether this immunity exists depends on whether a defendant can show it was acting as a publisher. That interpretation was applied by the Ninth Circuit in the instant case, and by the Second Circuit in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), but it has been repeatedly rejected by the Seventh Circuit.

The view that section 230(c)(1) creates a form of immunity for publishers originated in the Fourth Circuit decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).

> §230 creates federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role.

129 F.3d at 330.

Several other circuits have also held that section 230(c)(1) creates a form of immunity for publishers, although differing as to when an interactive computer service provider is acting as a "publisher" for the purposes of the Act. *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007) ("section 230 immunity"); *Force v. Facebook, Inc.*, 934 F.3d at 64 (Second Circuit) ("the text of Section 230(c)(1) should be construed broadly in favor of immunity"); *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d

Cir. 2003) ("[b]y its terms, § 230 provides immunity to ... a publisher ... of information originating from another information content provider"); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Congress provided broad immunity under [section 230] to Web-based service providers for all claims stemming from their publication of information created by third parties.... "); *Jones v. Dirty World Entertainment Recordings, LLC*, 755 F.3d 398, 406-07 (6th Cir. 2014) ("Section 230 ... immunizes providers of interactive computer services against liability arising from content created by third parties"); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (*quoting Almeida*); *Fair Housing Council of San Francisco Valley v. Roommates.com LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) ("Section 230 ... immunizes providers of interactive computer services against liability arising from content created by third parties"); *Ben Ezra, Weinstein, and Co., Inc. v. America Online Inc.*, 206 F.3d 980 984-85 (10th Cir. 2000) ("§230 creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party"); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [section 230] to establish broad 'federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.' ") (*quoting Zeran*); *Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("§230 immunizes internet services for third-party

content that they publish ... against causes of actions of all kinds.").

The Seventh Circuit, on the other hand, has repeatedly insisted that section 230(c)(1) should be construed very differently. The Seventh Circuit holds that section 230(c)(1) does not create a form of immunity at all, and that the defense provided by section 230(c)(1) is limited to claims which require a plaintiff to show that the defendant was a publisher. Section 230(c)(1) creates that defense, the Seventh Circuit holds, by defining "publisher" to *exclude* certain such providers. Rejecting the majority view that section 230(c)(1) precludes liability for certain interactive computer services because they *are* publishers, the Seventh Circuit holds that under section 230(c)(1) certain interactive computer services are not liable because they may *not* be deemed publishers, a literal reading of the statute.

In *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003), the Seventh Circuit first indicated its view that section 230(c)(1) is "a definition rather than ... an immunity." 347 F.3d at 659. The district court in that case had treated section 230 as creating an immunity, which the Seventh Circuit acknowledged "has the support of four circuits." 347 F.3d at 659-60 (*citing* decisions in the Third, Fourth Ninth and Tenth Circuits). But that broad interpretation of section 230(c)(1), the Seventh Circuit reasoned, created an incentive for interactive computer services "to do nothing about the distribution of indecent and offensive materials via their services." 347 F.3d at 660. Such an interpretation seemed to the Seventh Circuit inconsistent with the

caption of the statute, "Protection of 'Good Samaritan' blocking and screening of offensive material." *Id*. That caption was "hardly an apt description" of the Fourth Circuit's interpretation in *Zeran*. "Why should a law designed to eliminate [interactive service providers'] liability to the creators of offensive material end up defeating claims by the victims of tortious or criminal conduct?" The more plausible interpretation of section 230(c)(1), the Seventh Circuit reasoned, was as a definition limiting who is a publisher, and thus a defense that only "forecloses any liability that depends on deeming the [interactive computer service provider] a 'publisher'—defamation law would be a good example of such liability...." *Id*.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the Seventh Circuit squarely rejected *Zeran* and similar decisions.

> As [C]raigslist understands this statute, § 230(c)(1) provides "broad immunity from liability for unlawful third-party content." That view has support in other circuits. *See Zeran*.... We have questioned whether § 230(c)(1) creates any form of "immunity," *see Doe v. GTE Corp*.... [Craiglist's] argument [does not] find[] much support in the statutory text. Subsection (c)(1) does not mention "immunity" or any synonym. Our opinion in *Doe* explains why § 230(c)(1) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts....

519 F.3d at 668.

> To appreciate the limited role of § 230(c)(1), remember that "information content providers" may be liable for contributory infringement if their system is designed to help people steal music or other material in copyright.... *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) ... is incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party.... [C]raigslist wants to expand § 230(c)(1) beyond its language....

519 F.3d at 670. Utilizing this narrower interpretation of section 230(c)(1), the Seventh Circuit held that the provision's limiting definition applied in that case precisely because the specific statute on which the lawsuit was based (like a defamation claim) expressly made publication an element of the underlying claim; "only in a capacity as publisher could [C]raigslist be liable...." *Id*. at 671.

In *City of Chicago, Illinois v. Stubhub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), the Seventh Circuit reiterated its holding that section 230(c)(1) does not create a form of immunity, and can only be invoked as a bar to claims which require a showing of publication.

> As earlier decisions in this circuit establish, subsection (c)(1) does not create an "immunity" of any kind.... It limits who may be called the publisher of information that appears online. That might matter to liability for

> defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who "publishes" any information or is a "speaker." Section 230(c) is irrelevant.

624 F.3d at 366. In *Huon v. Denton*, 841 F.3d 733 (7th Cir. 2016), the Seventh Circuit again made clear that section 230(c)(1) potentially limits only claims that require a showing of publication, and does so by precluding certain interactive service providers from being treated as publishers. "[Section 230(c)(1)] means that for purposes of defamation and other related theories of liability, a company ... cannot be considered the publisher of information simply because the company hosts an online forum for third-party users to submit comments." 841 F.3d at 741.

The circuit split is well recognized. The Seventh Circuit itself expressly rejected the interpretation of the Fourth Circuit and several other circuits in *Chicago Lawyers Committee*, having earlier questioned those conflicting interpretations in *Doe v. GTE Corporation*. The Eleventh Circuit described the circuit conflict in *Almeida v. Amazon.com*, 456 F.3d 1316, 1321 (11th Cir. 2006).

> The majority of federal circuits have interpreted [section 230(c)(1)] to establish broad "federal immunity...." ... In contrast, the Seventh Circuit determined that [section 230(c)(1)] is not necessarily inconsistent with state laws that create liability for interactive service providers that refrain from filtering or censoring content.

456 F.3d at 1321 n.3 (*quoting* the Fourth Circuit decision in *Zeran* and *citing* the Seventh Circuit decision in *Doe v. GTE Corp.*). The Fourth Circuit has expressly rejected the Seventh Circuit interpretation of section 230(c)(1).

> There is some disagreement as to whether the statutory bar under § 230 is an immunity or some less particular form of defense for an interactive computer service provider. The Seventh Circuit, for example, prefers to read "§ 230(c)(1) as a definitional clause rather than as an immunity from liability." *Doe v. GTE Corp*., 347 F.3d [at] 660 ... ; *see also* [*Chicago Lawyers Committee for Civil Rights v*.] *Criagslist, Inc.*, 519 F.3d at 669.... [O]ur Circuit clearly views the § 230 provision as an immunity....

Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Ind., 591 F.3d 250, 254 n.4 (4th Cir. 2009).

> Several federal district courts have described the conflict.
>
> Craigslist contends that § 230(c)(1) "broadly immunizes providers of interactive computer services from liability for the dissemination of third-party content." *See*, *e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). That appears to be the majority view, ... but our Court of Appeals has not adopted it.

Dart v. Craigslist, 665 F.Supp.2d 961, 965-66 (E.D. Ill. 2009) (*citing Doe v. GTE Corporation* and *Chicago Lawyers' Committee*).

> Some courts characterize the "protection" of § 230(c)(1) as "a broad immunity," but this view is not universal. *Compare, e.g., Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009) *with Chicago Lawyers' Committee for Rights under Law, Inc. v. Craigslist*, 519 F.3d 666, 669 (7th Cir. 2008).

Florida Abolitionist v. Backpage.com LLC, 2018 WL 1587477 at *4 (M.D.Fla. March 31, 2018); *see Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F.Supp.2d 681, 689-90 (N.D.Ill. 2006), *aff'd*, 519 F.3d at 666 ("several courts have [followed *Zeran* and] concluded that Section 230(c) offers [interactive computer services] a 'broad,' 'robust' immunity. In *Doe v. GTE Corp*., 347 F.3d 655, 659-70 (7th Cir. 2003), however, the Seventh Circuit called *Zeran*'s holdings into doubt.") (footnote omitted).

> State courts have also recognized this disagreement among the federal courts of appeals.
>
> Defendant contends that subsection 230(c)(1) ... grants an [interactive computer service] provider broad immunity from any potential liability that is derived from content posted on or transmitted over the Internet by a third party. Defendant's contention has support in other state courts and federal circuits [*citing* decisions in the First, Fourth, Ninth and Tenth Circuits].... Other courts, however, disagree with or question the proposition that subsection 230(c)(1) provides such broad immunity from liability deriving from

> third-party content. [*citing* Seventh Circuit decisions].... We agree with the analysis of the Seventh Circuit that section 230(c)(1) "as a whole cannot be understood as granting blanket immunity to a[ ] ... provider from any civil cause of action that involves content posted on or transmitted over the Internet by a third party." [*Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v.*] *Craigslist, Inc*., 519 F.3d at 669, 671.

Lansing v. Southwest Airlines Co., 2012 Il. App. (1st) 101, 104, 980 N.E.2d 630, 637-38 (App. Ct. Ill. 1st Dist. 2012).

> [T]he federal Fourth Circuit Court of Appeals in *Zeran* ... noted that § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.... Other courts have adopted this broad reading of the protections afforded by Section 230 [*citing* decisions in the First, Third, Fifth, Ninth and Tenth circuits] ... [Other] courts ... have not interpreted Section 230(c)'s protection as broadly as the Fourth Circuit in *Zeran ... Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*....

Miller v. Federal Express Corp., 6 N.E.3d 1006, 1016 (Ct. App. Ind. 2014); *see Daniel v. Armslist, LLC*, 382 Wis.2d 241, 255 n.5 (Ct.App. 2018), *rev'd on other grounds*, 386 Wis.2d 449 (2019) ("At least one court has questioned whether it is appropriate to use the term 'immunity' in connection with the Act.") (*citing*

Chicago Lawyers' Committee); *J.S. v. Village Voice Media Holdings*, 184 Wash. 2d 95, 109, 359 P.3d 714, 714 (2015) (Madsen, J., concurring) (disagreeing with the "many courts" that have held that section 230 provides "broad immunity," and relying on the contrary authority in the Seventh Circuit opinion in *Chicago Lawyers' Committee*), 184 Wash. at 121-22, 359 P.2d at 727 and nn.18-19 (McCloud, J., dissenting) ("Most courts characterize subsection 230(c)(1)'s language ... as providing "immunity" from suit. A few courts say that this language creates protection from suit, rather than an absolute immunity.") (footnotes omitted; contrasting language in decisions in the Fourth, Sixth, Eighth and Eleventh Circuits with language in a Seventh Circuit decision).

Commentators have called for a "resolution of this circuit conflict." Comment, "Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of The Communications Decency Act, 20 Geo. Mason L. Rev. 275, 298 (2012)

> The *Zeran* standard is the one most commonly upheld nationwide, with other circuits—notably the First, Third, and Tenth—widely embracing the Fourth Circuit's reading of Section 230(c)(1). The Seventh Circuit, after its opinion in *Craigslist*, has departed definitively from the broad reading of Section 230(c)(1)....

20 Geo. Mason at 292 (footnotes omitted).

> In *Craigslist* ... [the court] referenced [the] *GTE Corp*. decision and explicitly challenged the *Zeran*-derived interpretation of Section 230 advocated by Craigslist. According to the Seventh Circuit, the application of the *Zeran* standard was precluded in *Craigslist* by the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd*....

Id. at 295; *see id.* at 298 ("The Fourth Circuit flatly rejected the Seventh Circuit's analysis in 2009 in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Ind*.") (footnote omitted). "Since the enactment of § 230, some courts have taken an expansive view of the immunity that the statute affords to interactive computer services. Other courts have more narrowly construed the terms of § 230, limiting the scope of its protections." Note, As Justice So Requires: Making The Case For A Limited Reading of § 230 of the Communications Decency Act, 86 Geo. Wash. L. Rev. 257, 267 (2018) (footnote omitted); *compare id.* at 268-69 (*citing* decisions in the Fourth and Sixth Circuits) *with id*. at 272 (*citing* decision in the Seventh Circuit); *see* Brief in Opposition of Respondents MySpace, Inc. and News Corp., *Doe v. MySpace, Inc*., No. 08-340, 2008 WL 4650528 at *10 (labeling the Seventh Circuit standard an "outlier").

II. There Is A Conflict Regarding The Meaning of The Term "Publisher" In Section 230(c)(1)

Among the circuits (outside the Seventh) which hold that section 230(c)(1) creates a form of immunity, a further division exists regarding what types of

activities by an interactive computer service provider render it (in that regard) a "publisher." One group of circuits, like the court below, accord that immunity to any activity in which a publishing business might engage; this interpretation of publisher, and the resulting immunity, is avowedly "broad." "By recommending user groups and sending e-mail notifications, ... Experience Project ... was acting as a publisher of others' content." App. 11a. Other circuits hold, to the contrary, that publishing, and thus immunity, are limited to core *editorial* functions, primarily deciding what third-party content to accept and reject. A provider which (like Experience Project) engages in a non-editorial activity related to some third-party content would not be entitled to immunity in the latter circuits, but could (as here) be entitled to immunity in the former.

Five circuits construe "publisher," and thus the resulting immunity, "broadly." The Second Circuit holds that "section 230(c)(1) should be construed broadly in favor of immunity." *Force v. Facebook, Inc*., 934 F.3d at 64. The Fifth, Ninth, Eleventh and District of Columbia Circuits take the same approach. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content."); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) ("§ 230(c) provides broad immunity for publishing content provided primarily by third parties."); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [Section 230] to establish

broad ... immunity."); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) ("Congress inten[ded] to confer broad immunity for the re-publication of third-party content.").

Relying on that principle of broad immunity, the Second Circuit holds that the protections afforded by section 230(c)(1) are as all-encompassing as the wide variety of practices of the publishing industry.

> Certain important terms are left undefined by Section 230(c)(1), including "publisher." 47 U.S.C. § 230(c)(1). This Circuit and others have generally looked to that term's ordinary meaning: "one that makes public," *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (*citing* Webster's Third New International Dictionary 1837 (1981)); "the reproducer of a work intended for public consumption," *LeadClick*, 838 F.3d at 175 (*citing Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (*quoting* Webster's Third New International Dictionary 1837 (Philip Babcock Gove ed., 1986))); and "one whose business is publication[.]" [I]d.

934 F.3d at 65. Under this interpretation, if an interactive computer service provider publishes the content of a third party, the provider then is generally free to take whatever other types of related actions in which a publisher might conceivably engage as part of its "business." Applying that broad definition of a section 230(c)(1) "publisher," the Second Circuit has concluded that a website acts as a publisher when it recommends content on its website.

> Plaintiffs assert that Facebook's algorithms *suggest* third-party content to users "based on what Facebook believes will cause the user to use Facebook as much as possible" and that Facebook intends to "influence" consumer responses to that content.... This does not describe anything more than Facebook vigorously fulfilling its role as a publisher.

934 F.3d at 71 (emphasis added); *see id.* at 67 n.23 (section 230(c)(1) would immunize an interactive computer service provider which, through the Internet or any interactive computer service, "brokers a connection between two published authors and facilitates the sharing of their works.").

But the Third, Sixth, Eighth and Tenth Circuits hold that a website only acts as a "publisher" under section 230(c)(1) insofar as it is engaging in "traditional editorial functions," such as deciding whether to publish a particular submission. In *Green v. America Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003), the Third Circuit set out this narrower editorial function standard.

> By its terms, § 230 ... "precludes courts from entertaining claims that would place a computer service provider in a publisher's role," and therefore bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content." ... Green ... attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion

> of content from its network—actions quintessentially related to a publisher's role.

(Internal quotations omitted). In *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010), the Eighth Circuit applied the identical standard.

> § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.

The Tenth Circuit interprets section 230(c)(1) in the same way.

> Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory function.... By deleting [certain disputed information], Defendant was simply engaging in the editorial functions Congress sought to protect.

Ezra, Weinstein, and Company, Inc. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000). Several Sixth Circuit decisions utilize that editorial function test. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014) ("[section 230(c)] expressly bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content."). The New

York Court of Appeals applied this limitation in *Shiamili v. Real Estate Group of New York, Inc.*, 17 N.Y. 3d 281, 291-92 (2011).

In his well-reasoned dissenting opinion in *Force*, Chief Judge Katzmann, explained that under this narrower interpretation of "publisher," section 230(c)(1) "does not grant publishers ... immunity for the full range of activities in which they might engage." 934 F.3d at 81.

> § 230(c)(1) does not necessarily immunize defendants from claims based on promoting content ... , even if those activities might be common among publishing companies nowadays. A publisher might write an email promoting a third-party event to its readers, for example, but the publisher would be the author of the underlying content and therefore not immune from suit based on that promotion.

Id.

There is an obvious and critical difference between immunizing only traditional editorial functions, such as deciding whether to accept or remove a third-party submission, and more broadly immunizing any activity that could fall within the "business [of] publication." Publishers often recommend their publications, such as through advertisements in newspapers and magazines. But that is not an editorial function. Nor is it a function limited to publishers; bookstores, good friends and best sellers lists also recommend publications.

III. This Case Is An Excellent Vehicle for Deciding The Exceptionally Important Questions Presented

This case presents an excellent vehicle for resolving these important conflicts.

The conflict between the Seventh Circuit "definition" interpretation of section 230(c)(1), and the majority (and Ninth Circuit) "immunity" interpretation, would be dispositive in the instant case. Unlike in a defamation action, proof that the defendant was a "publisher" is not an element of plaintiff's negligence or wrongful death claims. Thus the section 230(c)(1) defense successfully asserted in this case would not be available in the Seventh Circuit.

Similarly, the circuit conflict regarding the meaning of "publisher" in section 230(c)(1), reflected in the warring Second Circuit opinions in *Force*, would be dispositive here as well. Under the Ninth Circuit's broad interpretation of immunity and "publisher," Experience Project was "acting as a publisher [of Marenat-Castro's post]" when it emailed Greer about the post, and "was acting as a publisher of others' content" when it recommended that drug-related content to website users, or steered users to it. Clearly, on the other hand, such emails, recommendations and steering are not traditional editorial functions. The section 230(c)(1) defense applied by the court below could not be invoked in any of the circuits that use the narrower "editorial function" standard.

In the Ninth Circuit, the defendant advised the court of appeals, "This appeal raises a crucial issue of our times." Answering Brief of Appellee The Ultimate Software Group, Inc., 2018 WL 4522553 at *11. That is quite correct. Over the last decade, as a tidal wave of addictive painkillers swept across the country, an increasing portion of unlawful drug trafficking moved online. Internet-based drug dealing poses vexing problems for local law enforcement, because of the ease with which criminals can conceal their identities online, and because unlawful internet transactions often straddle jurisdictional boundaries. Narcotic-hawking algorithms promote toxic drugs and drug dealers with grim efficiency. And judicial opinions like the Ninth Circuit decision in the instant case greatly reduce any incentive that websites might have to avoid involvement in this deadly trade.

Certiorari will come too late for Wesley Greer. But action by this Court to save future lives is always timely.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit. The case should be consolidated for oral argument with *Force v. Facebook, Inc.*

Respectfully submitted,

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