

In The
Supreme Court of the United States

KRISTANALEA DYROFF, individually and
on behalf of the estate of Wesley Greer, deceased,
Petitioner,

v.

THE ULTIMATE SOFTWARE GROUP, INC.,
Respondent.

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

**RESPONDENT THE ULTIMATE SOFTWARE
GROUP, INC.'S BRIEF IN OPPOSITION**

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**RESTATEMENT OF THE
QUESTION PRESENTED**

Whether the Ninth Circuit properly determined that 47 U.S.C. § 230(c)(1), part of the Communications Decency Act (CDA) of 1996, bars plaintiff’s action against defendant, a provider of an interactive computer service that published the material of a third party?

Defendant and Respondent, The Ultimate Software Group, Inc. (“Ultimate Software”) asserts that the answer to this question is “yes.”

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, the direct parent of defendant and respondent The Ultimate Software Group, Inc. is Unite Intermediate Corporation. There is no public entity that holds a ten percent or more interest in The Ultimate Software Group, Inc.

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BRIEF IN OPPOSITION**INTRODUCTION**

Since its passage in 1996, courts throughout the United States have consistently interpreted section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1), to bar actions against interactive computer service providers that publish content generated by third parties. This approach is consistent with Congress' declaration that "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens" and Congress' corresponding intent "to promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(a)(1), (b)(1)-(2).

Petitioner Kristanalea Dyroff mistakenly contends there is a split among the circuit courts regarding whether § 230(c)(1) is a broad immunity or some lesser form of a defense that applies only to claims that require the plaintiff to show the defendant is a publisher. Dyroff creates a mountain out of a mole hill and attempts to manufacture a split among the circuits where no such split exists. In reality, the cases suggest that there may be, at best, differentiation regarding whether § 230(c)(1) is characterized as an immunity, affirmative defense, definitional clause or protection.

Dyroff’s “circuit split” is not a split at all, but merely application of § 230(c)(1) using differing nomenclature. This is a debate about semantics and is not the type of circuit split this Court needs to resolve.

Indeed, the cases most relied upon by Dyroff applied § 230(c)(1) to bar claims against an internet service provider for publishing third-party content. Thus, all of the circuits reach the same result the Ninth Circuit reached here. Regardless of how § 230(c)(1) is viewed or described or what it is called, the application is the same.

Dyroff also contends there is a split among the circuits as to whether the definition of a publisher under § 230(c)(1) includes any activity in which a publishing business might engage or whether “publishing” is limited to traditional editorial functions such as deciding whether to accept or reject third-party content. There is no such conflict. The cases Dyroff cites merely happen to involve the defendant engaging in traditional editorial functions; no court has held that § 230(c)(1) applies only to publishers that engage in traditional editorial functions. Indeed, the cases Dyroff relies upon do not analyze the meaning of the term publisher and they all uphold § 230(c)(1) immunity.

Dyroff overstates the holdings in the cases she cites and selectively references cases out of context in an attempt to create a circuit split. Simply put, there is no circuit split for this Court to resolve.



RESTATEMENT OF THE CASE

A. Greer's drug addiction.

Wesley Greer had a long history of drug use and addiction, which began after he suffered a knee injury in 2007. (App. 23a.) In 2015, Greer conducted a Google search to find heroin in Jacksonville, Florida, and was directed to "Experience Project." (App. 24a.)

B. The Experience Project website.

Experience Project was a social networking website that operated from 2007 until March 2016. (App. 3a.) It consisted of various online communities or groups in which users could anonymously share experiences, post and answer questions, and interact with others about any subjects that were important to them. The experiences shared were diverse, with topics such as "I like dogs," "I have lung cancer," "I'm going to Stanford," and "I Am a Drug Addict." (App. 2a-3a, 22a.) Although users registered for the website, they picked anonymous user names. The principle underlying Experience Project was that users would be more willing to share their experiences if they were assured anonymity. (App. 3a, 22a-23a.) By 2016, the website had more than 67 million "experiences shared," 15 million "friendships made," and 5 million "questions asked." (App. 3a, 23a.)

Users could join groups and the website's interface also included links to other groups that users could view based on the contents of their posts, which were obtained by the website via algorithms. When a user

posted a new message or response in a group, the website automatically sent an email to inform other users in the group. Ultimate Software, the owner of Experience Project, utilized data acquired from such posts for commercial purposes and to direct users to additional groups through a proprietary recommendations functionality, which was based on the user's activity on the website. (App. 3a, 23a.)

C. Greer uses Experience Project to purchase heroin and then dies from an overdose.

After his Google search for heroin directed him to Experience Project, Greer created an account with the website under the handle "Gaboy5224" and purchased tokens to ask questions to other users. Greer posted to the group called "where can i [sic] score heroin in jacksonville, fl." Ultimate Software subsequently sent Greer an email stating that "Someone posted a new update to the question 'where can i [sic] score heroin in jacksonville, fl'" and provided a hyperlink and URL directing Greer to the update. Hugo Margenat-Castro, an Orlando-based drug dealer that purported to sell heroin, had posted the update under his handle "Pothead-juice." (App. 4a, 24a.)

After seeing Margenat-Castro's post, Greer arranged to meet him. Greer purchased drugs from Margenat-Castro, which he did not know contained a lethal dose of fentanyl. (App. 4a, 24a.) Greer died the next day from fentanyl toxicity from the drugs he purchased from Margenat-Castro. (App. 4a, 25a.) Margenat-Castro was

arrested a few months later. (App. 4a.) He entered into a plea agreement and acknowledged that he sold heroin laced with fentanyl while he was active on Experience Project. (App. 4a, 25a-26a.) He had been previously arrested for doing so. (App. 25a.)

D. Dyroff's lawsuit.

Dyroff, Greer's mother, sued Ultimate Software asserting claims for: (1) negligence; (2) wrongful death; (3) premises liability; (4) failure to warn; (5) civil conspiracy; (6) unjust enrichment; and (7) violation of California's Drug Dealer Liability Act. (App. 20a.)

Dyroff alleged that Ultimate Software: (1) allowed users to traffic anonymously in illegal, deadly narcotics and to create groups dedicated to their sale and use; (2) steered users to additional groups dedicated to the sale and use of narcotics; (3) sent users alerts to posts within groups that were dedicated to the sale and use of narcotics; (4) permitted users to remain active account holders despite evidence they openly engaged in drug trafficking; and (5) demonstrated antipathy toward law enforcement efforts to stop illegal activity on Experience Project. (App. 4a-5a, 20a-21a, 26a-27a.)

E. The district court grants Ultimate Software's motion to dismiss Dyroff's complaint.

Ultimate Software moved to dismiss Dyroff's claims based upon § 230(c)(1) and on the ground that it did not have a duty to warn. (App. 20a-21a.) The

district court granted the motion with leave to amend, finding Ultimate Software was immune from liability pursuant to § 230(c)(1). (App. 21a, 30a.) The court found that: (1) Ultimate Software is an interactive computer service provider under § 230(c)(1); (2) Dyroff’s claims “at their core” seek to hold Ultimate Software liable for publishing third-party content; and (3) Ultimate Software is not an information content provider because only third parties posted on Experience Project and it did not solicit unlawful information or otherwise create or develop content. (App. 36a, 38a, 41a.) Dyroff could not plead around immunity by basing liability on a website’s tools. (App. 37a.) According to the court, Ultimate Software’s alleged functionalities, including anonymity, algorithms, recommendations and emails, were content-neutral tools that facilitated communications between users without creating or developing content. (App. 44a.)

Rather than filing an amended complaint, Dyroff requested that the court enter judgment and appealed. (App. 5a.)

F. The Ninth Circuit affirms.

The Ninth Circuit affirmed, holding that under the three-prong test for § 230(c)(1) immunity: (1) Ultimate Software was a provider of an interactive computer service, (2) whom Dyroff sought to treat as a publisher or speaker, (3) of information provided by another. (App. 9a-14a.)

The court explained that Ultimate Software did not create or publish its own content on Experience Project. (App. 7a, 9a.) Rather, it published users' posts and did not materially contribute to its users' posts. (App. 9a.) In addition, "its functions, including recommendations and notifications, were content-neutral tools used to facilitate communications." (App. 7a.) Dyroff could not plead around § 230(c)(1) immunity by framing these website features as content. Such features were not content in and of themselves. Rather, Ultimate Software acted as a publisher of others' content by recommending user groups and sending email notifications. (App. 11a.) The recommendation and notification functions helped facilitate user-to-user communication, but it did not materially contribute to the alleged unlawfulness of the content. There were no allegations that Ultimate Software required users to post specific content, made suggestions regarding the content of potential user posts or contributed to making unlawful user posts. (App. 14a.)

The court also held that a website does not owe a duty of care to its users when it facilitates communications in a content-neutral fashion. (App. 17a.)



REASONS FOR DENYING THE PETITION

"Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." S. Ct. R. 10. One such reason is where "a United States

court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]” S. Ct. R. 10(a). This case, however, does not involve a conflict or split among the circuits. Rather, a few of the decisions use different nomenclature in describing § 230(c)(1). Notably, all of these cases conclude that an internet service provider cannot be held liable for publishing third-party content it did not author.

I. Petitioner’s Description of a Circuit Split Regarding the Scope of § 230(c)(1) Immunity Is Not Accurate.

A. The Seventh Circuit cases Dyroff cites do not support a circuit split.

Dyroff contends there is a conflict regarding whether § 230(c)(1) “creates a broad immunity or only limits the definition of ‘publisher’ under certain other laws.” (Pet., 18.) She asserts that a majority of the circuits—the First, Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—hold that § 230(c)(1) creates an immunity that applies to all types of civil claims if the defendant can show it was acting as a publisher. (*Id.* at 18-21.)

Dyroff erroneously claims this interpretation “has been repeatedly rejected by the Seventh Circuit,” which holds that § 230(c)(1) does not create an immunity, but is a defense limited to claims that require a plaintiff to show the defendant was a publisher. (Pet., 19, 21.) Dyroff is incorrect. The circuit courts, including the

Seventh Circuit, uniformly hold that “an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else.” *Chi. Lawyers’ Comm. for Civ. Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008); *Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 638 (Ill. App. Ct. 2012) (“We, like the Seventh Circuit, read subsection 230(c)(1) to do exactly what it says, and what it says is that an ICS [interactive computer service] user or provider like defendant must not ‘be treated as the publisher or speaker of any information provided by’ someone else”). The decisions reveal a consistent approach throughout the federal judiciary that Congress intended the CDA to prevent state causes of action where a provider of an interactive computer service disseminates information provided by a third party. *Barrett v. Fonorow*, 799 N.E.2d 916, 923-24 (Ill. App. Ct. 2003); *Craigslist*, at 668-71 (immunizing Craigslist from liability for hosting racist housing ads posted by third parties); *Doe v. GTE Corp.*, 347 F.3d 655, 659-61 (7th Cir. 2003) (rejecting claim against internet service provider for customer’s posting of images of athletes who were unknowingly recorded unclothed).

Dyroff cherry picks language from § 230 case law to make it appear as though there is some sort of circuit split and conflict. But the reality is that all of the circuits uniformly apply § 230 and the results are the same—§ 230 bars liability if the internet service provider is not the author of the allegedly harmful material. Every circuit finds the internet service provider immune unless it authored the allegedly harmful

content or materially contributed to the alleged illegality. In the course of arriving at their decisions, some of the opinions discuss different interpretations of § 230, which are the sections Dyroff relies upon. In the few cases in which § 230 did not apply because the internet service provider was also an information content provider and authored the allegedly harmful material, the courts explained why § 230 was not all encompassing. Dyroff references this language to make it appear as though there are discrepancies in application of § 230. However, there is no circuit conflict, but merely a debate about whether to describe § 230(c)(1) as an immunity, a form of protection or a defense. Dyroff overstates and misconstrues what the cases say.

In support of an alleged conflict in the Seventh Circuit, Dyroff cites to four cases, two of which upheld § 230(c)(1) as a bar to the plaintiffs' claims and thus reached the same result the Ninth Circuit reached here, and two of which found § 230(c)(1) did not apply to the specific, materially distinguishable facts of the case. The cases Dyroff cites do not support a circuit split.

Dyroff first cites *Doe*, 347 F.3d 655. In *Doe*, the Seventh Circuit affirmed the district court's dismissal of claims against internet services and webhosting services for hosting images of athletes who were unknowingly recorded unclothed in a locker room. *Id.* at 656, 662. A third party provided the offensive material, the webhost was not a speaker and thus the district court determined the webhost could not be liable to those harmed by the third party's material. The Seventh

Circuit explained that “[t]his approach has the support of four circuits” and “[n]o appellate decision is to the contrary.” *Id.* at 659-60. The court stated that just because “web hosting services . . . may be used to carry out illegal activities does not justify condemning their provision whenever a given customer turns out to be crooked.” *Id.* at 659. The webhosting services had no duty to investigate their clients’ activities or to prevent potential injury that results therefrom. *Id.* at 661-62.

The *Doe* court stated in dicta, “Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability[?]” *Doe*, 347 F.3d at 660; *Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 691 (N.D. Ill. 2006) (describing the court’s language as “(self-acknowledged) *dicta*”). The *Doe* court continued, “[o]n this reading, an entity would remain a ‘provider or user’” and eligible for “immunity” “as long as the information came from someone else; but it would become a ‘publisher or speaker’ and lose the benefit of § 230(c)(2) if it created the objectionable information.” *Doe*, at 660. The court stated, “[t]here is yet another possibility: perhaps § 230(c)(1) forecloses any liability that depends on deeming the ISP [internet service provider] a ‘publisher’—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries.” The court, however, did not determine which construction of § 230(c)(1) was proper. *Id.*

The court’s dicta in *Doe* does not reveal a circuit split. It does not matter how § 230(c)(1) is characterized

or whether it is called an immunity or a definition. The same result was obtained in *Doe* as reached here—§ 230(c)(1) bars claims that treat an interactive computer service provider as a publisher of third-party content. Indeed, the *Doe* court noted that even if § 230(c)(1) is read as a definitional clause, § 230(c)(1) would bar liability so long as the information came from someone else. *Doe*, 347 F.3d at 660. Dyroff overstates the dicta in *Doe*. See *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 966 (N.D. Ill. 2009) (the *Doe* court “suggest[ed] alternative statutory interpretations before ultimately concluding that the defendant was not liable under state law, whatever the proper interpretation of § 230(c)(1) might be”). Thus, the way § 230(c)(1) is characterized is irrelevant because the outcome is always the same—immunity is upheld.

Dyroff also relies upon *Craigslist*, 519 F.3d 666, but *Craigslist* does support a circuit split. In *Craigslist*, 519 F.3d 666, the plaintiffs sued the defendant for violation of the federal Fair Housing Act. The plaintiff alleged certain housing and rental postings on defendant’s website discriminated based on race, religion or familial status. *Id.* at 668. The court held that under § 230(c)(1), “an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else.” *Id.* at 671. Craigslist was not liable for allowing third parties to place discriminatory ads on its website because only in a capacity as a publisher could Craigslist be liable. It was not the author of the ads. *Id.* Craigslist could not be liable if it did not induce the third party to place discriminatory

ads. *Id.* at 671-72. The court concluded that “given § 230(c)(1) [plaintiff] cannot sue the messenger just because the message reveals a third party’s plan to engage in unlawful discrimination.” *Id.* at 672.

Quoting extensively from dicta in *Doe*, 347 F.3d 655, the *Craigslist* court stated that “§ 230(c) as a whole cannot be understood as a general prohibition of civil liability for web-site operators and other online content hosts[.]” *Craigslist*, 519 F.3d at 669; *Dart*, 665 F. Supp. 2d at 966 (stating that *Craigslist* quoted the dicta in *Doe*). “However, while the Seventh Circuit construes § 230(c)(1) to permit liability for ISPs, it limited that liability to ISPs that intentionally designed their systems to facilitate illegal acts, such as stealing music.” *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Craigslist*, at 670; see also *Collins v. Purdue Univ.*, 703 F. Supp. 2d 862, 880 (N.D. Ind. 2010) (“Although *Craigslist* concerns the Fair Housing Act, the implication for the website is clear: if the website does not influence the content of the posts in any way, there can be no liability attached.”).

In other words, the cases that allegedly “narrow” the scope of § 230(c)(1) merely explain that an internet service provider can be liable for content it authors:

Even recent Seventh and Ninth Circuit decisions that have shied from the label ‘immunity’ to describe section 230’s effect, have narrowed their interpretation of section 230 only to clarify that it applies when an interactive computer service provider acts as a publisher for third-party content—and not

against liability over content it has created or is responsible for. . . . Thus, if a state treats an interactive computer service provider as a ‘publisher or speaker,’ then simply ‘section 230(c)(1) precludes liability.’

Backpage.com, LLC v. Cooper, 939 F. Supp. 2d 805, 822 n.1 (M.D. Tenn. 2013). Here, Ultimate Software did not intentionally design its website to facilitate illegal acts and it did not author the posts that led to Greer’s death. (App. 7a, 9a-14a.)

Moreover, the Seventh Circuit in *Craigslist* “squarely refute[d]” the argument Dyroff makes here that § 230(c)(1) applies primarily to defamation cases. *Dart*, 665 F. Supp. 2d at 967 n.7. The court noted that “a law’s scope often differs from its genesis.” *Craigslist*, 519 F.3d at 671; *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009) (“Both parties make a lot of sound and fury on the congressional intent of the immunity under section 230, but such noise ultimately signifies nothing. It is the language of the statute that defines and enacts the concerns and aims of Congress; a particular concern does not rewrite the language.”); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1179 (9th Cir. 2007) (McKeown, J., dissenting) (“the background leading up to enactment of the CDA is no substitute for the language of the statute itself”); *Craigslist*, at 671 (citing *Reg’l Rail Reorganization Act Cases*, 419 U.S. 102, 126-27 (1974) (“Congress need not think about a subject for a law to affect it; effect of general rules continues unless limited by superseding enactments”)).

The remaining Seventh Circuit cases Dyroff cites are irrelevant to the issues before this Court and have no bearing on the purported circuit split. In *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), the City of Chicago sued StubHub!, an Internet auction site, claiming StubHub! was responsible for an amusement tax. The parties disputed whether Chicago had the authority to tax the resale of tickets by Internet auction services. StubHub! improperly argued that § 230(c)(1) creates a tax immunity. The Seventh Circuit noted that § 230’s “title, ‘Protection for private blocking and screening of offensive material’, does not suggest that it limits taxes that have nothing to do with the content of any speech[.]” *Id.* at 365. The court stated that § 230(c)(1) does not create an immunity, but rather “limits who may be called the publisher of information that appears online.” Chicago’s amusement tax did “not depend on who ‘publishes’ any information or is a ‘speaker’” and thus the court found § 230(c)(1) “irrelevant.” *Id.* at 366.

Contrary to Dyroff’s contention, the court did not hold that § 230(c)(1) “can only be invoked as a bar to claims which require a showing of publication.” (Pet., 23.) Indeed, the issue before the court was “the extent, if any, to which Defendant was required to remit certain taxes rather than the extent, if any, to which Defendant was liable for allegedly unlawful third party content.” *Hill v. StubHub, Inc.*, 727 S.E.2d 550, 563, n.4 (N.C. Ct. App. 2012). The facts in *City of Chicago* were entirely different than those here.

The final Seventh Circuit case Dyroff cites—*Huon v. Denton*, 841 F.3d 733, 742 (7th Cir. 2016)—held that content creators are not entitled to § 230(c)(1) immunity. Gawker, an online tabloid operator, allowed its employees to author comments on the site about a person who had been acquitted of a criminal sexual assault to drive online traffic to its article about the acquittee. *Id.* at 737, 742. The court found that the added comments by Gawker employees made Gawker an “information content provider,” and thus not entitled to § 230(c)(1) protection. *Id.* at 742-43. A website is not immune where it contributes materially to the alleged illegality of the conduct. *Id.* at 742.

Dyroff contends that *Huon* “made clear” that § 230(c)(1) “limits only claims that require a showing of publication.” (Pet., 24.) The *Huon* court did no such thing. The court merely quoted § 230(c)(1) and stated that this section “means that for purposes of defamation and other related theories of liability, a company like Gawker cannot be considered the publisher of information simply because the company hosts an online forum for third-party users to submit comments.” *Id.* at 741. Dyroff once again misconstrues the holding in a case where § 230(c)(1) was improperly invoked by the defendant in circumstances where it clearly was inapplicable.

Next, Dyroff claims the circuit split was described in *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316 (11th Cir. 2006) and *Nemet Chevrolet, Ltd. v. Consumer Affairs.com, Inc.*, 591 F.3d 250 (4th Cir. 2009). (Pet., 24-25.) She takes a quote from page 1321 of *Almeida* and

a quote from footnote three and conflates them to make it appear as though *Almeida* described a circuit conflict. The court did not. Indeed, the court did not even rule on the plaintiff's challenges to the district court's application of § 230(c)(1). *Id.* at 1324.

In addition, although the court in *Nemet* noted “[t]here is some disagreement as to whether the statutory bar under § 230 is an immunity or some less particular form of defense,” and stated that the Seventh Circuit prefers to read “§ 230(c)(1) as a definitional clause rather than as an immunity from liability,” the court described the difference in language as an “academic” distinction and suggested the distinction may not have a practical effect. 591 F.3d at 254 n.4; *Yue v. Miao*, No. 3:18-3467-MGL-PJG, 2019 U.S. Dist. LEXIS 200404, at *9 n.5 (D. S.C. June 27, 2019). Moreover, the *Nemet* court held that § 230(c)(1) barred the plaintiff's claims against a website that allegedly solicited its customers' complaints and steered them into specific categories designed to attract attention by consumer class action lawyers. *Id.* at 256, 260. The court thus reached the same result the Ninth Circuit reached here.

B. The remaining cases Dyroff cites demonstrate, at most, a disagreement in how § 230(c)(1) is viewed, not how it is applied.

Dyroff contends several federal district courts have described the circuit conflict. (Pet., 25.) Again,

these cases demonstrate that, at most, there might be disagreement in how § 230(c)(1) is described or characterized, but there is no split in how § 230(c)(1) is applied. For example, Dyroff relies upon *Dart*, 665 F. Supp. 2d 961, in support of her circuit split theory, even though the *Dart* court applied § 230(c)(1) to bar the plaintiff's claims. The court construed the plaintiff's public nuisance claim as one for negligent publishing and held that a website that provided user-created classified services was entitled to § 230(c)(1) immunity for postings of its users. *Id.* at 967-70.

In *Florida Abolitionist v. Backpage.com, LLC*, No. 6:17-cv-218-Orl-28TBS, 2018 U.S. Dist. LEXIS 55560 (M.D. Fla. Mar. 31, 2018), at *11, the court merely noted that the broad immunity *characterization* is not universal as some courts characterize § 230(c)(1) as a protection, others as a broad immunity and some regard it as an affirmative defense. The court concluded that even if it is an immunity, it could not be resolved on a motion to dismiss because the plaintiffs alleged facts suggesting the defendant materially contributed to the content of the advertisements.

In *Craigslist*, 461 F. Supp. 2d 681, the court explained that the language in *Doe*, 347 F.3d 655, questioning whether § 230(c)(1) is a broad immunity was "(self-acknowledged) *dicta*[".]” *Id.* at 691. The court stated that “[n]ear-unanimous case law holds that Section 230(c) affords immunity to ICSs against suits that seek to hold an ICS liable for third-party content.” The court applied § 230(c)(1) to an operator of an Internet

bulletin board carrying notices of jobs, housing services, and goods for sale. *Id.* at 688.

Thus, the district court cases Dyroff cites demonstrate that courts consistently apply § 230(c)(1) when the alleged illegal conduct originated from a third party and the defendant did not materially contribute to the illegality as is the case here.¹

Dyroff also claims state courts have recognized the circuit split. Once again, she takes quotes from cases out of context, and the cases she cites either apply § 230(c)(1) immunity in favor of the internet service provider or involve facts not present here. (Pet., 26-28.) For example, in *Miller v. Federal Express Corp.*, 6 N.E.3d 1006, 1016-18 (Ind. Ct. App. 2014), the court applied § 230(c)(1) to bar the plaintiff's claims against an interactive computer service for comments written by third parties. Dyroff distorts a quote in *Miller* to make it appear as though the court described a circuit split. (Pet., 27.) In reality, the court stated:

And even those courts which have not interpreted Section 230(c)'s protection as broadly as the Fourth Circuit in [*Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997)] have still

¹ Even the law review article Dyroff cites in support of the purported circuit split notes that the Seventh Circuit's "decisions to date have remained consistent with *Zeran* in their basic holdings." 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, 292; *id.* at 301 ("the Fourth Circuit believes the distinction drawn in *Craigslist* and [*Doe*] to be practically meaningless").

acknowledged that a provider of an interactive computer service cannot be liable as a publisher or speaker of information provided by someone else.

Id. at 1016.

In *Daniel v. Armslist, LLC*, 913 N.W.2d 211, 218 n.5 (Wis. Ct. App. 2018), the Wisconsin appellate court merely stated in a footnote that the Seventh Circuit in *Craigslist*, 519 F.3d 666, questioned whether § 230(c)(1) should be *called* an immunity. Dyroff relies upon this footnote to support her circuit split theory, but omits that the Wisconsin Supreme Court reversed the appellate court's refusal to apply § 230(c)(1). *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 727 (Wis. 2019). The Supreme Court held that § 230(c)(1) barred the plaintiff's claims, including claims for negligence and wrongful death (like Dyroff alleges here), against a website that allowed individuals to purchase firearms. *Id.* at 716, 725.

The remaining state court cases Dyroff cites found that § 230(c)(1) did not apply because the defendant deliberately designed its website to facilitate illegal conduct or because the defendant had an independent duty—circumstances that do not exist here. Because § 230(c)(1) did not apply, the courts explained that § 230(c)(1) does not create a blanket immunity. While Dyroff references select portions of these opinions, the holdings of these cases do not support her circuit split theory.

For example, in *Lansing*, 980 N.E.2d 630, the court held that the plaintiff's negligent supervision claim against an airline whose employee used company email and text messaging systems to harass the plaintiff was not barred by § 230(c)(1) because the defendant's duty derived from the defendant's status as an employer, not from its status as a publisher. *Id.* at 639-40. The court stated that § 230(c)(1) does not provide a blanket immunity, which made sense in the context of that case where the defendant had an independent duty to supervise its employee's conduct after receiving notice of the employee's misconduct. *Id.* at 638-40. No such independent duty is involved here.

In *J.S. v. Village Voice Media Holdings, LLC*, 359 P.3d 714, 717-18 (Wash. 2015), the court denied a website's motion to dismiss where the plaintiffs alleged the defendant intentionally designed its website and content requirements to encourage illegal sex trafficking. Because of these distinguishable facts, Justice Wiggins, in his concurring opinion, questioned whether § 230(c)(1) is a broad immunity. *Id.* at 719-21. But this was merely in the context of explaining that claims of flagrant criminal complicity or inducement by website hosts that do not treat the webhost as a publisher or speaker of third-party content are not barred by § 230(c)(1). *Id.* at 724 (Wiggins, J., concurring). In this case, Experience Project was not deliberately designed to facilitate illegal conduct. (App. 15a-16a.) Neither *Lansing* nor *J.S.* support Dyroff's circuit split theory.

Dyroff's citation to the dissent in *J.S.* actually demonstrates Ultimate Software's position that there

is, at most, a distinction about how to characterize § 230(c)(1):

Most courts *characterize* subsection 230(c)(1)’s *language* treating Internet service providers as “publisher[s] or speaker[s]” of the content that they display as providing an “*immunity*” from suit. A few courts say that this *language* creates a *protection from suit*, rather than an absolute immunity. . . . [T]he difference in *terminology* is irrelevant.

Id. at 727 (McCloud, J., dissenting) (emphasis added).

The alleged conflict among cases is merely a difference in the language the cases use to describe § 230(c)(1). Cases have recognized that the distinction in nomenclature—describing § 230(c)(1) as an immunity, protection, definition or affirmative defense—is merely a “theoretical debate” and a distinction that does not have practical effect. *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 804 n.22 (2006) (“The Seventh Circuit Court of Appeals has acknowledged that there is no appellate decision contrary to *Zeran’s* holding. . . . The *Doe* court . . . recognized that there was a *theoretical debate* on the issue and concluded that it did not need to decide the question.”); *Yue*, 2019 U.S. Dist. LEXIS 200404, at *9 n.5 (“suggesting the distinction may not have a practical effect”) (citing *Nemet*, 591 F.3d at 254 n.4 (“Of whatever academic interest that distinction may be, our Circuit clearly views the § 230 provision as an immunity”)).

It simply does not matter whether § 230(c)(1) is phrased as an immunity or a defense. It is a dispute about semantics, not a circuit split this Court should resolve.

II. There Is No Split Among the Circuits Regarding the Meaning of the Term “Publisher” in § 230(c)(1).

A. Dyroff cites cases that construe § 230(c)(1) immunity broadly, but do not analyze the term “publisher.”

Dyroff claims a further division exists regarding what types of activities render an interactive computer service provider a “publisher.” According to Dyroff, some circuits interpret the term broadly as “any activity in which a publishing business might engage,” while other circuits hold publishing is limited to core editorial functions, such as deciding what third-party content to accept and reject. (Pet., 29-30.)

Dyroff claims five circuits construe publisher broadly, but of the cases she cites, only one analyzed the definition of the term “publisher.” (Pet., 30.) In *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), the plaintiffs alleged that Facebook unlawfully provided a terrorist organization with a communications platform that enabled terrorist attacks in Israel. *Id.* at 57. The plaintiffs argued their claims did not treat Facebook as a publisher of information. The court observed that § 230(c)(1) does not define the term publisher, but other courts have looked to the “term’s ordinary meaning:

‘one that makes public,’; ‘the reproducer of a work intended for public consumption,’; and ‘one whose business is publication[.]’” *Id.* at 65 (citations omitted). The plaintiffs sought to hold Facebook liable for providing the terrorist organization with a forum within which to communicate, for actively bringing their messages to interested parties and for failing to delete content. This conduct fell “within the heartland of what it means to be the ‘publisher’ of information” under § 230(c)(1). *Id.*

The plaintiffs also alleged that Facebook used algorithms to suggest content to users, resulting in “match-making,” which did not constitute publishing. *Id.* The court rejected this argument, stating that “arranging and distributing third-party information inherently forms ‘connections’ and ‘matches’ among speakers, content, and viewers of content, whether in interactive internet forums or in more traditional media. That is an essential result of publishing.” *Id.* at 66. Facebook simply organized and displayed content exclusively provided by third parties. *Id.* It made editorial choices regarding the display of third-party content. *Id.* at 67. Thus, plaintiffs’ claims relied upon Facebook’s status as a publisher of information and were barred by § 230(c)(1). *Id.* at 68.

Contrary to Dyroff’s argument, *Force* did not hold “that the protections afforded by section 230(c)(1) are as all-encompassing as the wide variety of practices of the publishing industry.” (Pet., 31.) Rather, the court found that Facebook engaged in “editorial decisions regarding third-party content that interactive computer

services have made since the early days of the Internet”—organizing, arranging, transmitting and displaying content. *Force*, 934 F.3d at 66. According to the court, forming connections or matchmaking “has been a fundamental result of publishing third-party content on the Internet since its beginning.” *Id.* at 67. “The services have always decided, for example, where on their sites (or other digital property) particular third-party content should reside and to whom it should be shown.” *Id.* at 66. Facebook’s algorithms made it more adept at performing these functions of publishers, but this did not mean it was any less entitled to immunity. *Id.* at 67. The court concluded that making information more available is an essential part of traditional publishing. *Id.* at 70. *Force* did not announce an all-encompassing definition of the term “publisher.”²

The remaining cases Dyroff cites merely note that § 230(c)(1) immunity is construed broadly. The cases did not analyze or construe the meaning of the term

² Dyroff contends that *Force* held that § 230(c)(1) would immunize an interactive computer service provider that “brokers a connection between two published authors and facilitates the sharing of their works.” (Pet., at 32.) Dyroff takes a quote from *Force* out of context. The court merely stated that it disagreed that its “holding would necessarily immunize the dissent’s hypothetical phone-calling acquaintance who brokers a connection between two published authors and facilitates the sharing of their works.” The court explained that this is not true because “Section 230(c)(1) immunizes publishing activity only insofar as it is conducted by an ‘interactive computer service’” and because “the third-party information must be ‘provided through the Internet or any other interactive computer service.’” *Force*, 934 F.3d at 67 n.23.

publisher. *See, e.g., Doe v. MySpace Inc.*, 528 F.3d 413, 417-18 (5th Cir. 2008) (§ 230(c)(1) immunity is construed broadly and applied to claim that MySpace should have taken reasonable safety precautions to protect minor’s safety); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“§ 230(c) provides broad immunity” for publishing third-party content and applied to suit involving a third party creating a Matchmaker.com profile for an actress that divulged her home address); *Almeida*, 456 F.3d at 1321, 1324 (court noted that the CDA establishes broad immunity, but did not even rule on plaintiff’s challenges to the district court’s application of the CDA); *Marshall’s Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1267-68, 1270 (D.C. Cir. 2019) (Congress intended “to confer broad immunity for the re-publication of third-party content” and such immunity applied to case involving “scam locksmiths” that provided Google, Microsoft and Yahoo!’s internet mapping services with false locations). There is simply no split of authority on the meaning of the term publisher.

B. All of the cases Dyroff cites as narrowly interpreting the term “publisher” uphold § 230(c)(1) immunity.

Dyroff also contends that “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.” (Pet., 32.) She cites four cases, all of which upheld

§ 230(c)(1) immunity and reached the same result reached here.

Dyroff claims this purported “narrower editorial function standard” was first announced in *Green v. America Online (AOL)*, 318 F.3d 465 (3d Cir. 2003). (Pet., 32.) The court in *Green* did no such thing. In *Green*, the plaintiff claimed he received a computer virus from a third party and derogatory comments from others in an AOL chat room. *Id.* at 469. The plaintiff sued AOL contending it negligently failed to take action against the third parties and negligently failed to police its services. *Id.* at 468-69. The Third Circuit held that § 230(c)(1) barred the plaintiff’s claims, which attempted to treat AOL as the publisher or speaker of third-party comments. *Id.* at 471. The court quoted *Zeran*, 129 F.3d 327, 330, for the proposition that § 230(c)(1) “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*, at 471. The plaintiff could not hold AOL liable for decisions relating to monitoring, screening, and deletion of content from its network as these are “actions quintessentially related to a publisher’s role.” *Id.*

Green did not announce a “narrower editorial function standard.” The court merely quoted a sentence in *Zeran* that an internet service provider cannot be liable for its exercise of a publisher’s traditional

editorial functions. *Green* happened to involve a claim that the defendant failed to monitor, screen and delete content, but the court did not hold that § 230(c)(1) protects only such actions. The definition of a publisher was not at issue in the case. A case is not authority for a proposition not considered. *Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1231 (10th Cir. 2004); *People v. Alvarez*, 27 Cal. 4th 1161, 1176 (2002).

Next, Dyroff relies on *Johnson*, 614 F.3d 785, arguing that the Eighth Circuit applied an identical narrow publisher standard as in *Green*. (Pet., 33.) Dyroff is again incorrect. In *Johnson*, the plaintiffs sued the owner of an internet message board, InMotion, after someone posted allegedly defamatory statements about their exotic cat breeding business on InMotion’s website. *Id.* at 787-88. The Eighth Circuit concluded that “the CDA provides ISPs like InMotion with federal immunity against state tort defamation actions that would make service providers liable for information originating with third-party users of the service such as the other defendants in this case.” *Id.* at 792. There was no evidence InMotion designed its website to be a portal for defamatory material or did anything to induce defamatory postings. Thus, the court declined plaintiffs’ “invitation to construe § 230(c)(1) as permitting liability against InMotion for material originating with a third party.” In support of this statement, the court quoted the same sentence in *Zeran* that *Green* quoted that § 230(c)(1) bars actions “seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions[.]” *Id.* (quoting *Zeran*,

129 F.3d at 330). The court concluded that because InMotion was merely an ISP host and not an information content provider, plaintiffs claims failed as a matter of law. *Johnson*, at 792.

The *Johnson* court did not announce a new narrow standard for the term publisher under § 230(c)(1) or even analyze the definition of a publisher. The court simply quoted a sentence from *Zeran*. The court did not hold that internet service providers are only entitled to immunity if they engage in traditional editorial functions.

Dyroff also contends that the Tenth Circuit in *Ben Ezra, Weinstein, & Co. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), interpreted the term publisher narrowly. Not so. In *Ezra*, the plaintiff sued AOL for allegedly publishing incorrect information concerning the plaintiff's stock price and share volume. *Id.* at 983. The plaintiff argued AOL was not immune from suit because it participated in the creation and development of the stock quotation information. *Id.* at 984. The Tenth Circuit explained that although AOL communicated with the stock quote providers when errors in the stock information came to its attention, its communications did not constitute the development or creation of the stock quotation information. *Id.* at 985. Furthermore, even though AOL deleted some stock symbols and other information from the database in an attempt to correct errors, in doing so AOL simply made the data unavailable; it did not develop or create the stock quotation information displayed. *Id.* at 985-86.

The court concluded that AOL could not be held liable for content created by third parties. *Id.* at 986.

The court also stated that “Congress clearly enacted § 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Id.* According to the court, “[b]y deleting the allegedly inaccurate stock quotation information, Defendant was simply engaging in the editorial functions Congress sought to protect.” *Id.* Dyroff takes this “editorial and self-regulatory function” language to mean the court announced a new standard regarding the definition of a publisher. The court did not announce a new standard. Indeed, the “principal issue” in the case was whether AOL was an information content provider. *Id.* at 983. The court did not analyze the meaning of the term “publisher” or hold that only a defendant that engages in editorial functions is immune from suit.

The same is true of the final circuit case Dyroff cites—*Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014). *Jones* involved a “user-generated, online tabloid” where users could anonymously post comments, photographs and video, which the operator selected and published along with his own editorial comments. The Sixth Circuit concluded that § 230(c)(1) barred the plaintiff’s claims because defendants were not the creators or developers of the challenged defamatory content published on the website. *Id.* at 401-02. The defendants did not materially contribute to the defamatory statements by selecting them for publication or by deciding not to remove

them. *Id.* at 413. The court quoted the same sentence in *Zeran* that *Green* and *Johnson* quoted that “[t]he CDA 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.’” *Id.* at 416 (quoting *Zeran*, 129 F.3d at 330).

Dyroff takes this quote out of context. The court did not hold that immunity is limited to core editorial functions such as deciding what third-party content to accept or reject. Rather, the *Jones* court analyzed whether the website was an information content provider. *Id.* at 402. The court emphasized that the website operator “did not require users to post illegal or actionable content as a condition of use,” but instead instructed users to “[t]ell us what’s happening” and “‘who, what, when, where, why.’” *Id.* at 416. As is the case here, the website provided “neutral tools”—“labels by which to categorize the submission”—as to what third parties submit. These tools did not constitute a material contribution to any defamatory speech that was uploaded. *Id.* at 411, 416. The court did not analyze the definition of a publisher or announce a new “editorial function” standard.

Finally, Dyroff cites *Shiamili v. Real Estate Group of N.Y., Inc.*, 17 N.Y.3d 281 (2011), as another example of a case purportedly applying the narrow publisher standard. (Pet., 34.) In *Shiamili*, a lengthy comment was added to a discussion thread on a website by a third party that made allegedly defamatory statements about the plaintiff. The defendant “moved the

comment to a stand-alone post, prefacing it with the statement that ‘the following story came to us as a . . . comment, and we promoted it to a post.’” *Id.* at 285. The court held that “[t]he defendants did not become ‘content providers’ by virtue of moving one of the comments to its own post. Reposting content created and initially posted by a third party is well within ‘a publisher’s traditional editorial functions.’” *Id.* at 291 (citing *Zeran*, 129 F.3d at 330).

Once again, the court merely cited a sentence in *Zeran* and did not adopt a new test for the definition of a “publisher” under § 230(c)(1). None of the cases Dyroff cites support a circuit split regarding the meaning of the term publisher. Dyroff is grasping at straws and takes statements in these cases out of context to justify a purported circuit split. No such split exists.

III. This Case Does Not Present an Appropriate Vehicle for Review.

Dyroff argues that the alleged conflict between the Seventh Circuit’s definitional interpretation and the majority’s immunity interpretation of § 230(c)(1) is dispositive in this case. According to Dyroff, proof that Ultimate Software was a publisher is not an element of her negligence or wrongful death claims. Thus, § 230(c)(1) would not be available in the Seventh Circuit. (Pet., 35.) Dyroff is incorrect. Courts, including the Seventh Circuit, “have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action, including housing discrimination,

negligence, and securities fraud and cyberstalking[.]” *Doe v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (citations omitted). Indeed, the Seventh Circuit in *Craigslist*, 519 F.3d 666, 671-72, applied § 230(c)(1) to a housing discrimination claim, and publication is not an element of that claim. *See also Dart*, 665 F. Supp. 2d at 968-70 (applying § 230(c)(1) to public nuisance claims).

As mentioned herein, the Seventh Circuit in *Craigslist* “squarely refute[d]” the argument that § 230(c)(1) applies primarily to defamation cases. *Dart*, 665 F. Supp. 2d at 967 n.7 (citing *Craigslist*, 519 F.3d at 671 (“[A] law’s scope often differs from its genesis.”)). When the gravamen of the plaintiff’s allegations is to hold the defendant liable as publisher of third-party content, § 230(c)(1) applies. *Craigslist*, at 671. In other words, when the duty the plaintiff alleges the defendant violated derives from the defendant’s status as a publisher or speaker of third-party content, § 230(c)(1) precludes liability. *Dart*, at 967-68. “[W]hat matters is whether the cause of action inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided by another.” *Lansing*, 980 N.E.2d at 639.

Here, Dyroff seeks to hold Ultimate Software liable as the publisher of third-party content. As the Ninth Circuit aptly noted, her “claims at their core seek liability for publishing third-party content.” (App. 38a.) The gravamen of her claims is that Greer’s death resulted from his access to unlawful and harmful drug-related content posted by Experience Project users.

The duty Ultimate Software allegedly violated derives from its role as a publisher. Dyroff's claims, regardless of the labels used, would be barred in the Seventh Circuit.

Dyroff has not cited one case from the Seventh Circuit, or, any circuit for that matter, holding a message board such as Experience Project liable for the third-party content of its users. Even if this case was venued in the Seventh Circuit, under the Seventh Circuit's reasoning in *Craigslist*, 519 F.3d 666, and *Doe*, 347 F.3d 655, Dyroff's claims would be dismissed pursuant to § 230(c)(1) because Ultimate Software did not facilitate the allegedly unlawful acts or induce third parties to post particular harmful content, such as by “offer[ing] a lower price to people who include discriminatory statements in their postings.” *Craigslist*, at 672.

Rather, as the Ninth Circuit correctly recognized here, Ultimate Software provided content-neutral tools to its users on the Experience Project website, as “the site's ‘blank box’ approach to user content resulted in an array of topics and forums ranging from ‘I like dogs’ and ‘I am going to Stanford’ to ‘I have lung cancer’ and ‘I Love Heroin.’” (App. 2a-3a.) Ultimate Software did not create or develop the posts that led to Greer's death. “[R]ather, it was Greer, himself, who posted ‘where can i [sic] score heroin in jacksonville, fl’ and ‘the drug dealer, Margenat-Castro, who posted in response to Greer's post.’” (App. 10a.)

Dyroff also claims the alleged conflict regarding the meaning of the term publisher in § 230(c)(1) is

dispositive here. According to Dyroff, under the Ninth Circuit’s broad interpretation of “publisher,” Ultimate Software was acting as a publisher when it emailed Greer about Margenat-Castro’s post, but under the narrow standard, Ultimate Software’s emails, recommendations and steering are not traditional editorial functions. (Pet., 35.) Even assuming, *arguendo*, that the Third, Sixth, Eighth, and Tenth Circuits announced a new standard for the term publisher, which they did not, it is not a narrow standard. All of the cases Dyroff relies upon for this proposition cited *Zeran*’s language that § 230(c)(1) 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[.]” *Zeran*, 129 F.3d at 330. The words “such as” are words of expansion not words of limitation. *See United States v. Condo*, 741 F.2d 238, 239 (9th Cir. 1984) (word “includes” is one of expansion, not limitation); *Flanagan v. Flanagan*, 27 Cal. 4th 766, 774 (2002) (“The ‘statutory definition of a thing as ‘including’ certain things does not necessarily place thereon a meaning limited to the inclusions’”); *Townsend v. Townsend (In re Townsend)*, 809 N.W.2d 424, 428 (Mich. Ct. App. 2011) (“the phrase ‘for reasons such as’ is one of enlargement rather than limitation”). Thus, deciding whether to accept or reject third-party content is not an exclusive list of what constitutes publishing.

Here, by facilitating communication and website use through content-neutral tools amongst its users and providing a forum for third parties to post content,

Ultimate Software acted as a publisher. Whether by reproducing or supplying links to third-party content, the recommendation process necessarily involves the decision to make such content available to others, which is inherently a publishing function. Moreover, Dyroff based her claim on Ultimate Software’s editorial decisions. She alleged below that Ultimate Software’s “recommendation and notification functions were ‘specifically designed to make subjective, editorial decisions about users based on their posts.’” (App. 6a.) This case involves Ultimate Software acting as a publisher under any circuit’s alleged definition of that term.

As a result, under either purported interpretation of § 230(c)(1) and the term publisher, the result here would be the same and thus this case does not present an appropriate vehicle for review.

Finally, as the dissent recognized in *Force*, 934 F.3d 53, 88, revising § 230(c)(1) is a task for Congress, rather than for the courts. (Katzmann, J., dissenting). Indeed, on April 18, 2018, Congress amended § 230 to exclude certain civil and criminal sex-related claims from its immunity provisions. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018). Congress has not enacted any additional amendments clarifying § 230(c)(1), reflecting its approval of the thirteen circuits’ application of the statute. *Cf. Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488 (1940) (“The long time failure of Congress to alter the [Sherman] Act after it had been judicially construed, and the enactment by

Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.”); *Force*, at 80 n.4 (Katzmann, J., dissenting) (“the language of § 230(c)(1) remained untouched from introduction to passage. Nor is there any evidence from the legislative record that interest groups altered the statutory language”).

In this case, the Ninth Circuit properly applied § 230(c)(1) as Congress intended and the Court should deny the petition as there is no split among the circuits.



CONCLUSION

For the foregoing reasons, defendant/respondent, The Ultimate Software Group, Inc. respectfully submits that the petition for a writ of certiorari should be denied.

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