

No. 19-849

**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**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

| | Page |
|---|------|
| Argument | 1 |
| I. There Is An Important Conflict Regarding Whether § 230(c)(1) Applies Only to Claims of Which Proof That The Defendant Was A Publisher of Third-Party Content Is A Necessary Element | 1 |
| II. There Is An Important Conflict Regarding Whether A Defendant Acts As A Publisher Under § 230(c)(1) To The Extent That It Engages In Activities Other Than Traditional Editorial Functions | 7 |
| III. The Court Should Invite The Solicitor General To File A Brief Expressing The Views of The United States | 10 |
| Conclusion..... | 13 |
| Appendix: | |
| “Editorial Functions” Standard Decisions: Third, Sixth, Eighth and Tenth Circuits | 1a |

TABLE OF AUTHORITIES

| | Page |
|--|---------------|
| CASES | |
| <i>Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.</i> , 519 F.3d 666 (7th Cir. 2008)..... | 1, 2, 3, 4, 5 |
| <i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 1919)..... | 7, 8, 13 |
| <i>F.T.C. v. Accusearch, Inc.</i> , 2007 WL 4356786 (D. Wyo. Sept. 28, 2007) | 12 |
| STATUTES | |
| 42 U.S.C. § 3602(c) | 3, 4 |
| 47 U.S.C. § 206(c) | 4 |
| 47 U.S.C. § 230 | <i>passim</i> |
| Fair Housing Act..... | 3 |

ARGUMENT**I. THERE IS AN IMPORTANT CONFLICT REGARDING WHETHER § 230(c)(1) APPLIES ONLY TO CLAIMS OF WHICH PROOF THAT THE DEFENDANT WAS A PUBLISHER OF THIRD-PARTY CONTENT IS A NECESSARY ELEMENT**

The Seventh Circuit’s interpretation of § 230(c)(1) is fundamentally and deliberately different from the interpretation of the Ninth Circuit and other courts of appeals.

In *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the Seventh Circuit explained in detail why it rejected the interpretation of § 230(c)(1) that was “the view in other circuits.” 519 F.3d at 669. First, the court of appeals pointed out that the broader interpretation of the statute in other circuits “expand[s] § 230(c)(1) beyond its language.” 519 F.3d at 670; see *id.* at 669 (interpreting § 230(c)(1) to provide broad immunity does not “find[] much support in the statutory text. Subsection (c)(1) does not mention ‘immunity’ or any synonym”). Second, it explained that the interpretation in other circuits was inconsistent with the title of § 230 (“Protection for ‘Good Samaritan’ blocking and screening of offensive material”), which the court of appeals reasoned was “hardly an apt description” of the provision as broadly construed. 519 F.3d at 670. Third, the Seventh Circuit reasoned that this Court’s own interpretation of the statute was “incompatible with treating § 230(c)(1) as a grant of

comprehensive immunity from civil liability for content provided by a third party.” *Id.*

Based on that analysis, the Seventh Circuit concluded that § 230(c)(1) should be interpreted in a deliberately more “limited” manner. Correctly understood, it held, “§ 230(c)(1) forecloses any liability that depends on deeming the [interactive computer service] a ‘publisher.’” 519 F.3d at 670. There was, the court explained a “difference between this reading and the [broader interpretation].” *Id.*; see *id.* (Seventh Circuit construction and that in other circuits represent different “possib[le]” constructions).

Respondents, however, insist that the Seventh Circuit standard adopted in *Chicago Lawyers’ Committee*, and repeatedly applied in that circuit, is actually identical to the broader interpretation of § 230(c)(1), utilized in other circuits, which the Seventh Circuit expressly rejected in 2008. According to respondents, the Seventh Circuit inadvertently adopted the very standard it thought it was rejecting. Any distinction between the Seventh Circuit standard, and the standard that circuit thought it was disapproving, is according to respondents merely “a debate about semantics.” Br. Opp. 2. In practice, respondents insist, the standards are exactly the same. Br. Opp. 2 (“the application is the same”), 12 (“the outcome is always the same”), 17 (no difference about “how § 230(c)(1) is . . . applied”).

But the Seventh Circuit did not misunderstand the standard that it adopted in *Chicago Lawyers’ Committee*, or mistakenly adopt the very standard it

intended to reject. Under the Seventh Circuit standard, because § 230(c)(1) is a limitation on when an interactive computer service can be deemed a publisher, that provision would only matter—and could only have any operative effect—with regard to a cause of action that requires a plaintiff to establish that the defendant *is* a publisher. Where (as here) a plaintiff can establish liability without showing that the defendant is a publisher, § 230(c)(1) would not affect the outcome of the case. Defamation is not the only type of action to which § 230(c)(1) would apply—the Seventh Circuit simply describes it as “a good example.” 519 F.3d at 670. But defamation is an example of the type of claim to which the statute (as construed by the Seventh Circuit) applies; civil actions in which proof that the defendant was a publisher is an *element* of the claim asserted.

Respondents nonetheless insist that the Seventh Circuit standard cannot mean that § 230(c)(1) only applies when publication is an element of the claims at issue, because if it did the Seventh Circuit would not have held that § 230(c)(1) applied in *Chicago Lawyers’ Committee* itself. “[T]he Seventh Circuit in [*Chicago Lawyers’ Committee*] . . . applied § 230(c)(1) to a housing discrimination claim, and publication is not an element of that claim.” Br. Opp. 33. But publication emphatically was an element of the specific claim in that case. That action was brought under the provision of Fair Housing Act that prohibits publication of discriminatory advertisements. 42 U.S.C. § 3602(c) (declaring it unlawful “[t]o . . . publish . . . any notice, statement, or advertisement . . . that indicates any . . .

discrimination. . .”). The Seventh Circuit emphasized that under that provision of the Fair Housing Act it was “only in a capacity as publisher could Craigslist be liable under § 3602(c).” 519 F.3d at 671.

Respondents contend that there cannot be a circuit conflict because

[t]he 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.”

Br. Opp. 8-9 (quoting *Chicago Lawyers’ Committee*); see Br. Opp. 14. But there is agreement on that only because the operative phrase in this quotation—“treated as the publisher of speaker of any information”—is the actual text of § 206(c)(1) itself. The courts of appeals of course agree about what the words of the statute are; that does not mean that the courts of appeals agree about what those words mean.

The petition sets out quotations from nine federal and state court opinions describing the difference between the standard in the Seventh Circuit and the standard in several other circuits. (Pet. 24-28). The brief in opposition responds primarily by discussing the circumstances of the quoted cases. Respondents argue, for example, that the defendants won some of these cases, that decisions in favor of plaintiffs involved different circumstances, and that in several instances the court did not decide whether § 230(c)(1) applied to the case. Br. Opp. 17-19. But the particular

circumstances of the quoted cases are beside the point. The petition quotes these decisions, not because of the outcome (if any) in each, but because of the manner in which those decisions describe the disparity between the standards in the Seventh Circuit and in other circuits.

Respondents rely on several lower court decisions, issued *prior* to the key 2008 Seventh Circuit decision in *Chicago Lawyers' Committee*, which suggest the absence of a conflict. Br. Opp. 22, 28. Those earlier decisions obviously do not undermine the post-2008 decisions recognizing the conflict created by that Seventh Circuit decision. The brief in opposition asserts in pointed but conclusory terms that the petition “distorts” decisions or quotes them “out of context” (Br. Opp. 19), without explaining the nature of the claimed distortion or the manner in which any context would have altered the meaning of the quoted passages.

This is precisely the type of case in which the difference between the Seventh Circuit interpretation of § 230(c)(1) and the Ninth Circuit construction is of controlling importance. Plaintiff contends that Ultimate Software was negligent when it recommended, steered Greer to, and sent Greer an email encouraging him to visit a website where drug dealers were peddling unlawful and highly dangerous narcotics. Defendant’s liability does not depend on whether the website to which Greer was being directed was operated by defendant rather than some other entity. Plaintiff could prevail at trial without ever mentioning, and without any jury finding, that the defendant itself operated—

was the publisher of—the website which the defendant was pressing Greer to visit. If that destination website had been operated by a different entity, such as the infamous drug bazaar Silk Road, § 230(c)(1) obviously would not provide Ultimate Software with a defense.

In the Seventh Circuit, because proof that Ultimate Software operated the destination website would not be a necessary element of plaintiff’s claim, § 230(c)(1) would not be a defense, regardless of who operated that website. But the rule in the Ninth Circuit is otherwise. Although Ultimate Software would be liable for recommending or otherwise directing Greer to a third-party drug-dealing website such as Silk Road, in the Ninth Circuit the defendant is entitled to immunity because it sought to induce Greer to instead visit a website operated by the defendant itself.

Respondents assert that “Dyroff seeks to hold Ultimate Software liable as the publisher of third-party content.” Br. Opp. 33. To the contrary, Dyroff seeks to hold Ultimate Software liable as the party which used steering, recommendations and emails to induce people like Greer to visit a website (by whomever operated) where unlawful narcotics were being peddled. It was employees of Ultimate Software, not any third party, that wrote the recommendations and the emails, and it is for their actions that Dyroff seeks to hold Ultimate Software liable. See Br. Opp. 13 (“an internet service provider can be liable for content it authors.”). Respondents contend that “the gravamen of the plaintiff’s allegations is to hold the defendant liable as publisher of third-party content.” Br. Opp. 33. To

the contrary, the gravamen of those allegations is to hold the defendants liable for having used steering, recommendations and emails to induce Greer to visit a website where heroin was being sold. The defendant's liability does not turn on whether the defendant itself operated the website to which it lured Greer.

II. THERE IS AN IMPORTANT CONFLICT REGARDING WHETHER A DEFENDANT ACTS AS A PUBLISHER UNDER § 230(c)(1) TO THE EXTENT THAT IT ENGAGES IN ACTIVITIES OTHER THAN TRADITIONAL EDITORIAL FUNCTIONS

Respondents contend that no circuit holds that the traditional editorial function test is the standard for determining when a defendant is acting as a publisher under § 230(c)(1). Br. Opp. 26-32. In *Force v. Facebook*, (No. 19-859), the respondent insists, to the contrary, that the “traditional editorial functions [test] . . . is precisely the analysis that every other court of appeals undertakes when determining whether an online service provider is acting as a publisher. . . .” *Force* Br. Opp. 13. Both respondents cannot be right; in this instance, neither is.

The petition sets out decisions in four circuits which hold that § 230(c)(1) is a prohibition against holding interactive computer service liable for “traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content” provided by third parties. Pet. 32-34. Chief Judge Katzman, in

his opinion in *Force*, correctly understood these cases to delineate *the* prohibition in § 230(c)(1), not to merely describe one of several prohibitions.

[This] precedent does not grant publishers [of third-party content] [§ 230(c)(1)] immunity for the full range of activities in which they might engage. *Rather*, it “bars lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions . . . [regarding] content” provided by another for publication.

Force v. Facebook, Inc., 934 F.3d 53, 81 (2d Cir. 1919) (dissenting opinion) (emphasis added). Making suggestions and recommendations, Chief Judge Katzman explained, is not a traditional editorial function like deciding whether to publish third-party content. 934 F.3d at 82.

Respondents do not contend that recommendations, steering or emails are traditional editorial function like deciding whether to publish content. Nor do respondents even attempt to suggest that the Ninth Circuit standard is consistent with Judge Katzman’s view that the cases cited in his opinion, and in the petition, limit the protections of § 230(c)(1) to the exercise of traditional editorial functions with regard to third-party material.

Instead, respondents contend that Chief Judge Katzman completely misunderstood this line of cases. According to respondents, the decisions cited by Judge Katzman and detailed in the petition do not delineate

the meaning of § 230(c)(1). Rather, the phrase “traditional editorial functions” in these cases was just a description of the defendant’s protected activity in each. “The cases Dyroff cites merely happen to involve the defendant engaging in traditional editorial functions. . . .” Br. Opp. 2. Respondents maintain that even though these decisions consistently refer only to the exercise of traditional editorial functions as activity protected by § 230(c)(1), what those opinions meant was that the exercise of those functions is just one example of the many different kinds of activities protected by the statute.

But respondents cannot identify a single appellate or district court decision in the Third, Sixth, Eighth or Tenth Circuits which holds that § 230(c)(1) protects anything other than traditional editorial functions. Nor can respondents point to a single instance in those circuits in which a district or appellate court described the exercise of traditional editorial functions as being only one of several the activities protected by the statute, e.g., by using language like “protects activities *such as* traditional editorial functions.” There are dozens of decisions in those circuits which utilize the phrases “traditional editorial functions” or “editorial functions” in connection with § 230(c)(1); all of them carefully describe only those functions as being within the protection of the statute. See Brief App., pp. 1a-7a.

The argument in the brief in opposition illustrates how far the Ninth Circuit strayed from the text of the statute. Respondents endorse the Ninth Circuit’s holding that “Ultimate Software acted as a publisher of

others' content by recommending user groups and sending email functions.” Br. Opp. 7 (emphasis added). But the email in question was written by Ultimate Software employees, as were the recommendations; neither Hugo Martgenat-Castro nor any other third party created that material. It is impossible to understand, and respondents make no attempt to explain, how Ultimate Software was acting as a publisher of “others’ content” when Ultimate Software itself wrote and sent to Greer an email which no other party authored or knew anything about. In an equally baffling assertion, respondents state that the recommendations, emails and steering “were not content in and of themselves” (Br. Opp. 7), reiterating the Ninth Circuit’s statement that “[t]hese . . . recommendations and notifications . . . are not content in and of themselves.” Pet. App. 10a. It is impossible to understand, and respondents do not explain, in what sense the 43-word email which Ultimate Software sent to Greer on August 17, 2015, had no “content.”

III. THE COURT SHOULD INVITE THE SOLICITOR GENERAL TO FILE A BRIEF EXPRESSING THE VIEWS OF THE UNITED STATES

In February 2020, the Attorney General announced that the Department of Justice had an “interest in Section 230.”¹ Although § 230 does not limit the ability of the Department to bring criminal

¹ Available at <https://www.doj.gov/opa/speech/attorney-general-william-p-barr-delivers-opening-remarks-doj-workshop-section-230>

prosecutions, the government believes that private civil enforcement is a vital complement to its own actions.

[C]ivil tort law can act as an important complement to our law enforcement efforts. Federal criminal prosecution is a powerful, but necessarily limited tool that addresses only the most serious conduct. The threat of civil liability, however, can create industry-wide pressure and incentives to promote safer environments. . . . Civil liability can work hand-in-hand with the department's law enforcement efforts to promote a safer environment, both online and in the physical world.

Immunizing internet companies from civil liability, the Attorney General warned, not only leaves victims without any remedy, but significantly reduces incentives those firms have to prevent harms to the public.

[I]mportantly, Section 230 immunity is relevant to our efforts to combat lawless spaces online. We are concerned that internet services, under the guise of Section 230, can . . . prevent victims from civil recovery. . . . Giving broad immunity to platforms that purposely blind themselves . . . to illegal conduct on their service does not create incentives to make the online world. . . . In fact, it may do just the opposite.

The Attorney General noted that a number of major changes since the early days of the internet raised difficult and important issues regarding the meaning of § 230.

The early days of online bulletin boards, like AOL, have been replaced by platforms with sophisticated content moderation tools, algorithms, recommendation features, and targeting. With these new tools, the line between passively hosting third-party speech and actively curating or promoting speech starts to blur. What these changes mean for the scope of Section 230 immunity is another important issue to consider.

In *F.T.C. v. Accusearch, Inc.*, 2007 WL 4356786 at *4 (D. Wyo. Sept. 28, 2007), the Federal Trade Commission “argue[d] that to ‘treat’ a person as a publisher within the meaning of the CDA is to hold that person civilly liable on a theory that ‘turns on that person being a publisher.’”² That is precisely the Seventh Circuit standard, under which § 230 would not apply to the instant action. As that case illustrates, the scope of the defense created by § 230 is important to the United States because it limits civil actions by federal agencies.

Under these circumstances, it would be appropriate for the Court to invite the Solicitor General to file a brief in this case expressing the views of the United States.



² Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendants’ Summary Judgment Motion, available at 2006 WL 6501337 (“The case law makes clear that to ‘treat’ a person as a publisher is to hold that person civilly liable on a theory that turns on that person being a publisher”).

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.* In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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