

In The
Supreme Court of the United States

WORD OF GOD FELLOWSHIP
D/B/A DAYSTAR TELEVISION NETWORK,

Petitioner,

v.

VIMEO, INC., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of The
State Of New York, Appellate Division**

BRIEF FOR RESPONDENTS IN OPPOSITION

MICHAEL A. CHEAH
Counsel of Record
VIMEO, INC.
330 West 34th St., 5th Floor
New York, New York 10001
(212) 314-7400
michael@vimeo.com

JOHN R. CUTI
ALEXANDER GOLDENBERG
CUTI HECKER WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
jcuti@chwllp.com
agoldenberg@chwllp.com

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Counsel for Respondents

QUESTIONS PRESENTED

Section 230(c)(2) of the Communications Decency Act of 1996 provides:

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

The questions presented are:

1. Could Vimeo consider materials that spread false or misleading information on matters of public health and safety to be “otherwise objectionable” under Section 230(c)(2)(A)?
2. Did Section 230(c)(2)(A) bar petitioner’s breach of contract claim where Vimeo did not commit to hosting any particular content and had the unambiguous right to remove the materials containing false or misleading vaccine safety information under the parties’ agreement?

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court’s Rule 29.6, Respondents Vimeo, Inc., Livestream LLC and VHX Corporation (collectively, “Vimeo”) state as follows: Vimeo, Inc. is a publicly traded company. Livestream LLC and VHX Corporation are wholly owned indirect subsidiaries of Vimeo, Inc. No publicly held company owns more than 10% of Vimeo, Inc.’s stock.

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INTRODUCTION

This case concerns Section 230(c)(2)(A) of the Communications Decency Act, which protects providers and users of interactive computer services from civil liability when they, in good faith, remove or restrict materials that they “consider[] to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2)(A). This statute allows online providers like Vimeo to self-regulate a wide variety of materials on their services without government supervision.

The petition does not warrant certiorari. *First*, there are no conflicting appellate decisions on the questions presented, and neither of them implicate issues of national importance. In the more than quarter century since Section 230’s passage, only a handful of appellate cases have ever applied Section 230(c)(2)(A) on the merits, and none (save the decision below) have reached the petition’s questions. This dearth of caselaw combined with the low stakes presented by this private contract dispute dispel any notion of cert-worthiness.

Second, the petition would provide a poor vehicle for review. Petitioner’s questions are divorced from the record and challenge the lower court’s state-law findings about the terms of the parties’ agreement. In addition, petitioner failed to present its key arguments below—including a backhanded First Amendment challenge to Section 230(c)(2)(A)—and has thereby

forfeited them. This Court should decline to hear these issues in the first instance.

Third, the lower court’s decision is correct. The court properly concluded that Vimeo could consider as “objectionable” six of petitioner’s videos that espouse the widely debunked theory that vaccines cause autism. This fully comports with Section 230(c)(2)(A)’s text, which gives service providers (and users) discretion to remove materials that they “consider” to be “objectionable.” By granting private parties discretion, Congress freed itself from having to set standards and catalog every offensive category of content—a challenging and constitutionally suspect task.

The canon *ejusdem generis* does not dictate otherwise. The enumerated categories preceding the “otherwise objectionable” catchall lack commonality and therefore do not supply a limiting principle. Petitioner’s newfound argument that the statute covers only those materials that Congress itself could censor fails because Section 230(c)(2)(A) expressly applies “whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A).

Petitioner’s unpreserved First Amendment argument likewise fails. As a private party, Vimeo may selectively exclude speech from its service. Section 230(c)(2)(A) does not require or direct Vimeo to take any action; it simply provides protection from civil liability when it undertakes “voluntary” removal actions in good faith. This is insufficient to create state action warranting First Amendment scrutiny.

Finally, Section 230(c)(2)(A) applies to petitioner’s contract claim. The statute broadly bars “liability” arising from the act of removing objectionable content in good faith and does not exclude contract claims.

The petition should be denied.

COUNTERSTATEMENT

A. Statutory Background

Section 230 of the Communications Decency Act, also known as the Cox-Wyden Amendment, keeps the government out of the online speech regulation business. In 1995, Congress recognized that the burgeoning Internet presented unprecedented opportunities for speech and self-expression, but worried that adoption of this new medium would suffer if websites were flooded with objectionable content like pornography. *See Jeff Kouseff, The Twenty-Six Words that Created the Internet* 61-64 (2019). Eschewing an agency regulatory approach,¹ Congress decided to address this problem by “empower[ing] interactive computer service providers to self-regulate.” S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.); 141 Cong. Rec. 22,045 (statement of Rep. Cox).

At the same time, Congress sought to respond to a recent decision of the New York courts, *Stratton*

¹ The competing Exon Amendment would have authorized the Federal Communications Commission (FCC) to regulate obscene materials online. *See* 141 Cong. Rec. 3,203.

Oakmont, Inc. v. Prodigy Services Co., No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995), which held that the PRODIGY service could be held liable for defamatory user posts where it had removed certain types of content to foster a family-friendly online community. As Section 230's authors saw it, *Stratton Oakmont* represented a “legal system [that] provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. 22,045 (statement of Rep. Cox)).

These objectives—empowering self-regulation and clarifying intermediary liability—are addressed by two provisions in Section 230(c), titled, “Protection for ‘Good Samaritan’ blocking and screening of offensive material”:

(1) Treatment of publisher or speaker

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.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.]

47 U.S.C. § 230(c). A separate provision states that “[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* § 230(e)(3).

B. Factual Background

Vimeo operates the Vimeo online video sharing service, available at <https://vimeo.com>. Pet. App. 2-3. Vimeo welcomes a wide variety of content, subject to a detailed set of content restrictions set forth in its online terms of service agreement. *Id.* 3, 76-78. In June 2019, Vimeo updated these restrictions to prohibit content that “[m]akes false or misleading claims about vaccination safety” and published a blog post announcing the new restriction. *Id.* 3, 78, 89-90. This followed “the worst outbreak of measles in decades, a disease which had been declared eliminated from the United States in 2000.” *F.F. v. State*, 66 Misc. 3d 467, 477 (N.Y. Sup. Ct. 2019), *aff’d*, 194 A.D.3d 80 (N.Y. App. Div. 2021), *cert. denied*, 142 S. Ct. 2738 (2022).

In October 2019, petitioner, a Christian media company, purchased a two-year subscription to Vimeo’s “OTT (over-the-top)” service. Pet. App. 3. The purchase agreement, *id.* 60-62, incorporated Vimeo’s enterprise agreement, *id.* 63-68, which in turn incorporated by reference Vimeo’s terms of service agreement, *id.* 69-88. After signing the contract, petitioner uploaded over 3,000 videos to Vimeo’s platform, *id.* 3, for public distribution via Daystar.tv, *id.* 53.

Petitioner uploaded several videos featuring primarily secular speakers expressing hesitancy about vaccines. *Id.* 3-4. Among these were six videos that drew a causal connection between the vaccine for measles, mumps, and rubella (MMR) and childhood autism. *Id.* This claim has been widely debunked: The CDC has declared definitively that “[v]accines do not cause autism.” *Vaccine Safety, Centers for Disease Control and Prevention*, <https://www.cdc.gov/vaccinesafety/concerns/autism.html> (last visited Dec. 15, 2022). *See also* Pet. App. 117 n.5. In these proceedings, petitioner has never (1) disputed that the six videos link vaccines to autism, or (2) expressly defended the claim that vaccines cause autism.

On June 23, 2020, Vimeo contacted petitioner and raised concerns about these videos. Pet. App. 53. On July 17, 2020, Vimeo sent a letter demanding that petitioner remove six videos and setting forth its grounds. *Id.* 116-21. When petitioner did not comply, Vimeo removed the videos itself a week later. *Id.* 55. After doing so, Vimeo continued to host and deliver petitioner’s 3,000-plus other videos. *Id.* 4. This included several other “vaccine programs.” *Id.* 47 (referring to 14 videos total). In September 2020, petitioner purchased additional bandwidth to deliver more video plays from Vimeo’s platform. *Id.* 3.

C. Proceedings Below

Petitioner’s complaint. In August 2020, petitioner filed a complaint against Vimeo in New York

Supreme Court for New York County, asserting claims for breach of contract and unjust enrichment based upon Vimeo’s removal of the videos in question. Pet. App. 56-57. Vimeo moved to dismiss.

The trial court’s decision. On February 5, 2021, the trial court granted Vimeo’s motion. The court determined that Section 230(c)(2)(A) applied because Vimeo “removed content that it found objectionable based upon its written policies prohibiting the posting of misleading information about vaccines.” Pet. App. 16. The court also found that petitioner had no valid contract claim because Vimeo was entitled to determine, under its agreement, and “consistent with the generally accepted view, that it was misleading to suggest that vaccines cause autism.” *Id.* 17. Last, the court dismissed petitioner’s unjust enrichment claim as duplicating its contract claim. *Id.*

The Appellate Division’s decision. On March 22, 2022, the Appellate Division of the New York Supreme Court for the First Department unanimously affirmed. The court concluded that Section 230(c)(2)(A) barred petitioner’s claims and that petitioner’s unjust enrichment claim could not be maintained. *Id.* 12. The Appellate Division did not specifically address the trial court’s dismissal of petitioner’s contract claim on state-law grounds, though its reasoning aligned with that holding.

The court began its decision with the facts, finding, *inter alia*, that under the parties’ contract, “Vimeo had the right to remove false or misleading claims on

vaccine safety.” *Id.* 3 & n.1. It then turned to the merits, where it addressed each of petitioner’s arguments seeking to escape Section 230(c)(2)(A):

1. The Appellate Division first rejected petitioner’s argument that Section 230(c)(2)(A) “does not apply to breach of contract claims,” finding no basis in the statute’s text for such an exclusion. *Id.* 5. The court further concluded that even if there were an exception for contractual obligations to host specific content, “such an exception would not apply when a contract unambiguously authorizes one party to remove the type of content at issue.” *Id.* 5.

2. The court next rejected petitioner’s argument that “otherwise objectionable” material “must resemble the other categories of material listed in section 230(c)(2).” *Id.* 6. “Given the differences between these categories . . . , the broad final term need not have anything in common with the narrower—but varied—earlier terms.” *Id.*

3. In response to petitioner’s argument that its videos did not make “false or misleading claims,” the court explained that under Section 230(c)(2)(A), “whether content is objectionable is a subjective determination that is reserved to the service provider.” *Id.* 8.

4. Last, the Appellate Division rejected petitioner’s assertions of bad faith, *id.* 10-11, finding that petitioner “has alleged only that Vimeo attempted to comply with its acceptable use policy, which was set forth in the terms of service and which it had publicly

announced before [petitioner] signed the purchase order at issue,” *id.* 11. The court ended its opinion by stating that it had considered and rejected all of petitioner’s remaining arguments. *Id.* 12.

Petitioner’s motion for leave to the New York Court of Appeals. On April 21, 2022, petitioner moved for leave to appeal to the New York Court of Appeals based upon only two questions: a generic question about whether Section 230(c)(2) provides immunity for removal of any content that a service provider deems “objectionable,” and a question about the standard for pleading that a provider acted in bad faith. On July 19, 2022, the court denied petitioner’s motion.

Petitioner timely filed its petition for certiorari on October 19, 2022.

REASONS FOR DENYING THE WRIT

The petition does not warrant review for three independent reasons: (1) it does not involve a conflict or issues of national importance; (2) it would be a poor vehicle for review; and (3) the Appellate Division’s decision is correct.

I. THE PETITION DOES NOT MEET THE CRITERIA FOR CERTIORARI.

The petition presents no opportunity to resolve either a conflict or issue of national importance. The

Appellate Division’s decision does not conflict with any decision of this Court, any federal court of appeals, or any state court of last resort. *See* Sup. Ct. R. 10(a). Indeed, there are *no* other appellate cases that directly address the questions presented. The dearth of appellate authorities even addressing Section 230(c)(2)(A),² belie petitioner’s assertion that the issues presented here will have “wide-reaching consequences” warranting this Court’s intervention. Pet. 3.

A. The Petition Does Not Involve a Matter of National Importance.

Unable to demonstrate a genuine issue of national importance arising from Section 230(c)(2)(A), petitioner tries to hitch its wagon to recent petitions involving Section 230(c)(1) and the First Amendment. *See* Pet. 3 & n.1, 17. But these cases involve vastly different legal issues and circumstances. *Google v. Gonzalez LLC*, 2 F.4th 871, 894-95 (9th Cir. 2021), *cert. granted*, involves the question of whether content suggestions are protected “publisher” activities under Section 230(c)(1) in the context of civil claims under the federal Anti-Terrorism Act. And *NetChoice, LLC v. Attorney General, Florida*, 34 F.4th 1196 (11th Cir. 2022), *pet. filed*, and *NetChoice L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), *pet. filed*, are conflicting decisions on

² The bulk of Section 230(c)(2)(A) cases are non-precedential district court opinions, most of which involve unsolicited emails or other forms of “spam,” which courts consider analogous to “harrassing” content. *See Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052 (9th Cir. 2019) (citing cases).

whether state laws restricting platforms' editorial decisions over user speech abridge the First Amendment. That this Court granted certiorari in *Gonzalez* and may do so in the *NetChoice* cases reflects their potentially broad impact.

The stakes presented here are practically *de minimis* in comparison. This is a private contract dispute between sophisticated parties over six videos, representing 0.16% of the videos uploaded by petitioner to Vimeo's platform. Notably, petitioner does not (and cannot) assert a First Amendment claim. Nor does petitioner allege that Vimeo removed any videos based upon political or religious bias. Vimeo removed the videos because they made specific misstatements of fact about vaccine safety in violation of its rules. Vimeo left intact the bulk of petitioner's vaccine-questioning programming and its extensive library of faith-based content. Tellingly, petitioner has abandoned its unsubstantiated claim of bad faith.

B. There Are No Conflicting Appellate Decisions.

There is no conflict for this Court to resolve for none of petitioner's appellate cases decide the questions presented. Instead, they all turn on different statutory provisions within Section 230 or do not apply Section 230 at all.

1. Petitioner cites no appellate cases conflicting with the Appellate Division's construction of "otherwise objectionable" under Section 230(c)(2)(A). Indeed,

the only cited appellate decisions applying Section 230(c)(2) on the merits are two Ninth Circuit decisions: *Zango Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169 (9th Cir. 2009), and *Enigma Software Group USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040 (9th Cir. 2019). Both apply Section 230(c)(2)(B)—a distinct immunity for blocking and filtering tools not relevant here—and both are fully consistent with the decision below.

In *Zango*, the Ninth Circuit held that a developer of anti-malware software could be considered a “provider” of an “interactive computer service” under Section 230(c)(2)(B). 568 F.3d at 1175-77. The court did not, however, reach the question of how to interpret “otherwise objectionable.” *Id.* at 1176-77 (“Zango has waived any argument on appeal that Kaspersky does not consider Zango’s software to be ‘otherwise objectionable’ . . . ”). In *Malwarebytes*, another case involving anti-malware software, the Ninth Circuit held that Section 230(c)(2)(B) does not allow developers of blocking and filtering tools to block software of other developers for anti-competitive reasons. 946 F.3d at 1052.

The *Malwarebytes* court touched upon the meaning of Section 230(c)(2)(A)’s catchall³ in response to the argument that it was confined to “only material that is sexual or violent in nature,” 946 F.3d at 1051, and thus did not reach malware or spyware. The court observed that “[i]f the enumerated categories are not similar, they provide little or no assistance in interpreting the

³ The subject matter covered by Section 230(c)(2)(A) is incorporated by reference into Section 230(c)(2)(B).

more general category.” *Id.* Here, “the specific categories listed in § 230(c)(2) vary greatly: Material that is lewd or lascivious is not necessarily similar to material that is violent, or material that is harassing.” *Id.* This analysis fully accords with the Appellate Division’s reasoning. *See Pet. App. 6-8* (discussing *Malwarebytes*).

Petitioner erroneously argues that *Malwarebytes* and the decision below conflict with the Fifth Circuit’s recent decision in *NetChoice*. *See Pet. 17 & n.3.* But *NetChoice* is a First Amendment case, not a Section 230 case. 49 F.4th at 444. Because plaintiffs did not assert preemption under Section 230, the Fifth Circuit had no occasion to apply the statute. Instead, it cited the statute as evidence that content moderation is “not speech under the First Amendment.” 49 F.4th 466. Elsewhere and in a footnote, the court suggested that *ejusdem generis* ought to apply to the “otherwise objectionable” catchall but did not identify any commonality among the enumerated terms or explain why the statute might not apply to the materials at issue here. *Id.* at 468 n.23. This cursory and advisory analysis plainly does not create an actual conflict.

2. Petitioner also cites no appellate cases conflicting with the Appellate Division’s ruling that Section 230(c)(2)(A) may bar contract claims. Indeed, we are aware of no other appellate cases that have decided this issue.

Petitioner’s cases, Pet. 39-40, concern whether a contract or quasi-contract claim “treats” a service provider “as a publisher” under Section 230(c)(1) alone.

See, e.g., Barnes v. Yahoo, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009) (explaining that Section 230(c)(1) did not bar plaintiff’s promissory estoppel claim because it “does not seek to hold Yahoo liable as a publisher or speaker of third-party content, but rather as the counter-party to a contract, as a promisor who has breached”); *Teatotaller, LLC v. Facebook, Inc.*, 173 N.H. 442, 449, 452 (2020) (observing that “Facebook ‘relies exclusively’ on section 230(c)(1)” and holding that “to the extent that Teatotaller’s claim is based upon specific promises that Facebook made in its Terms of Use, Teatotaller’s claim may not require the court to treat Facebook as a publisher”); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 35 (Ct. App. 2021) (distinguishing *Barnes* and holding that Section 230(c)(1) barred breach of contract claim alleging that Twitter violated its terms of service).

None of these cases examines whether Section 230(c)(2)(A) may bar contract claims. And because Section 230(c)(2)(A) does not contain a “publisher” requirement, the statutory analyses performed therein have no bearing here. Accordingly, no conflict exists on this point either.

II. THIS CASE PRESENTS A POOR VEHICLE.

Even assuming, *arguendo*, that petitioner’s Section 230(c)(2)(A) questions met the criteria for certiorari, this case still would be a poor vehicle for addressing them because (1) the questions framed by petitioner are not supported by the record or the

decision below; and (2) petitioner’s principal arguments were neither presented nor decided below.

A. The Record Does Not Support the Questions Framed by Petitioner.

The petition’s framing of the questions presented is entirely divorced from the record and the lower court’s decision. Petitioner constructs a strawman by asking whether Section 230(c)(2)(A) allows service providers to “breach with impunity their self-imposed undertakings to host particular content.” Pet. i. But nothing in the governing contract required Vimeo to host any “particular content” without restriction; instead, it expressly “authorized Vimeo to remove videos that failed to comply with its acceptable use policy,” Pet. App. 3, and “gave Vimeo the right to remove false or misleading claims on vaccine safety,” *id.* 3 & n.1. Consequently, the Appellate Division correctly concluded that the governing contract “unambiguously authorize[d] [Vimeo] to remove the type of content at issue.” *Id.* 5.

Given this, the Appellate Division manifestly did not hold that “Section 230 confers immunity *even if* the providers censor content that they *agreed* to host and only later claim is subjectively ‘objectionable.’” Pet. 15 (emphasis in original). On the contrary, the court held that Vimeo acted in good faith, Pet. App. 10-11—a finding the petition does not dispute—and in accordance with the express and unambiguous terms of the parties’ agreement, *id.* 3, 5. Based upon these findings, it

logically follows that Vimeo did not breach that agreement, thus negating the premise of petitioner's questions altogether.

Perhaps recognizing this problem, petitioner tries to challenge the Appellate Division's fact findings. For example, it asserts that the purchase order did "not place any restrictions" on petitioner's content, Pet. 10, despite the Appellate Division's contrary (and correct) conclusion. Pet. App. 3 & n.1. Similarly, petitioner assails the court's finding, on a motion to dismiss, that the contract unambiguously allowed Vimeo to remove the six videos at issue. *See* Pet. 38. Even if these gripes had merit (which they do not), they present no federal issues. *See Volt Information Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review").⁴

B. Petitioner Has Forfeited Its Principal Arguments.

Central to the petition is a new challenge to Section 230(c)(2)(A)'s constitutionality. *See* Pet. i, 29-35. Petitioner asks whether the term "otherwise objectionable" permits "removal of viewpoint-based speech on matters of public concern," Pet. i—as if Vimeo were a

⁴ Because Vimeo sought dismissal based on a defense "founded upon documentary evidence," New York Civil Practice Law and Rules 3211(a)(1), it was appropriate for the state courts to reach the merits of petitioner's claims.

governmental provider of a public forum. It then argues that “otherwise objectionable” must be cabined to avoid conflict with the First Amendment. *See* Pet. 29-35. Beyond the fatal lack of state action presented by a statute providing civil immunity for “voluntary” actions by private entities, *see* Part III.C, *supra*, this argument was “never presented to any lower court” and is “therefore forfeited.” *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015) (rejecting new argument); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 n.6 (2021) (same).⁵

Further, we are not aware of any appellate decision reviewing the constitutionality of Section 230(c)(2)(A)—either in a direct facial or as-applied challenge or in the guise of statutory interpretation. This Court should decline to be the first because it sits as “‘a court of final review and not first view,’ and it does not ‘[o]rdinarily . . . decide in the first instance issues not decided below.’” *City of Austin, Texas v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022).

III. THE DECISION BELOW IS CORRECT.

The petition should be denied for the further reason that the Appellate Division’s decision is correct.

⁵ Petitioner also failed to argue below that Section 230(e)(3) (the statute’s express preemption clause) does not extend to “self-imposed undertakings,” Pet. 36, or that “otherwise objectionable” means “regulable” subject matter, *id.* 20.

A. Section 230's Text Supports the Appellate Division's Decision.

The Appellate Division correctly determined that Vimeo considered petitioner's videos to contain materials—false or misleading statements on vaccine safety—that were “otherwise objectionable.”

Section 230 is framed in discretionary terms from the perspective of providers and users of interactive computer services: It protects their “*voluntary*,” “*good faith*” actions to remove or restrict access to material that they “*consider[]* to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). The statute thus assigns responsibility for making content-related decisions exclusively to providers and users. As a result, removed content need not actually be “lewd” or “objectionable”; it is enough that the provider or user “*consider[ed]*” it so.

The plain meaning of “otherwise objectionable” reinforces this discretionary framework. “*Objectionable*” means “undesirable” or “offensive”⁶ and is a broad and subjective term, to be evaluated by the provider or user. *See Malwarebytes*, 946 F.3d at 1051 (“[W]e cannot, as Enigma asks us to do, ignore the breadth of the term ‘objectionable’ by construing it to cover only

⁶ *Objectionable*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/objectionable> (last visited Dec. 15, 2022). Congress appears to have viewed “objectionable” (47 U.S.C. § 230(b)(4) & § 230(c)(2)(A)) as interchangeable with “offensive” (*id.* § 230 (short title) & § 230(c) (section heading)) and “inappropriate” (*id.* § 230(b)(4)).

material that is sexual or violent in nature.”). The modifying word “otherwise” generally means “in a different way or manner.” *Begay v. United States*, 553 U.S. 137, 145 (2008) (quoting Webster’s Third New Int’l Dictionary (1961)), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). Thus, “otherwise objectionable” material is that which produces objection in a manner *different* from obscene, lewd, lascivious, filthy, excessively violent, or harassing material.

Section 230(c)(2)(A) ends by clarifying that providers and users may remove content “whether or not such material is constitutionally protected.” 47 U.S.C. § 230(c)(2)(A). This guarantees that providers and users are not restricted by First Amendment concerns. Thus, a service provider may remove a digital copy of James Joyce’s *Ulysses* as lewd or filthy notwithstanding its obvious free speech value as an artistic work. This forecloses petitioner’s argument that Congress could not have intended to grant “private actors a power that the government itself may not exercise.” Pet. 33; *see also* Part III.B, *infra*.

Reading the entirety of the text harmoniously, Section 230(c)(2)(A) confers broad freedom on providers and users to set standards for online speech and to remove and restrict any materials that they consider to be objectionable—all without government supervision. This reading dovetails with Congress’s express policy to keep the Internet “unfettered by Federal or State regulation,” 47 U.S.C. § 230(b)(2), and to encourage the development of blocking and filtering technologies to “maximize user control” over what users see online, *id.*

§ 230(b)(3). *See also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (identifying one purpose of Section 230 as “encourag[ing] service providers to self-regulate the dissemination of offensive material over their services”).

Experience shows that Congress made the right policy choice to stay out of online content regulation. It would have been impossible—both practically and constitutionally—for Congress to have foreseen and cataloged every category of offensive content at the dawn of the Internet. *See Malwarebytes*, 946 F.3d at 1052 (“We think that the catchall was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s.”). The Appellate Division’s correct reading ensures that providers and users have the freedom to tackle an ever-evolving stream of objectionable content.

B. Petitioner’s *Eiusdem Generis* Arguments Are Deeply Flawed.

Petitioner ignores most of Section 230(c)(2)(A)’s text and instead focuses myopically on its six enumerated terms, arguing that they somehow limit the catchall “otherwise objectionable.” *See* Pet. 19-29. But this Court does not “woodenly apply limiting principles every time Congress includes a specific example along with a general phrase,” *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 227 (2008), especially when the rest of the text points to a different meaning.

1. *Eiusdem generis*, the “canon meaning literally ‘of the same kind’ has no application to provisions directed toward dissimilar subject matter.” *CSX Transp., Inc. v. Ala. Dep’t of Revenue*, 562 U.S. 277, 295 (2011). Below, petitioner identified no commonality among the enumerated terms and thus failed to present any “relevant limiting characteristic.” *Ali*, 552 U.S. at 225 (canon requires a court to identify the common theme unifying the enumerated terms).

2. After three levels of court proceedings, petitioner now claims to have unearthed the hitherto secret limiting characteristic. Armed with an academic paper, petitioner argues that the enumerated terms refer to materials “which Congress believed it could regulate.” Pet. 35; *see also id.* 20 (quoting Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. Free Speech L. 175, 181 (2021)). This fanciful theory, which no court has ever accepted, wages war with the text of Section 230(c)(2)(A).

To start, providers and users cannot possibly be limited to removing materials that Congress had “the power to censor,” Pet. 35, because Section 230(c)(2)(A) expressly covers materials “whether or not constitutionally protected.” 47 U.S.C. § 230(c)(2)(A). To construe the statute as petitioner proposes would delete these five words. *See Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass’n*, 499 U.S. 117, 129 (1991) (“The canon [of *eiusdem generis*] does not control, however, when the whole context dictates a different conclusion.”).

Further, regulable materials cannot supply commonality because one enumerated term—violent materials—has never been regulable. This Court repeatedly has held that the First Amendment protects violent materials. *See, e.g., Brown v. Ent'mt Merchants Ass'n*, 564 U.S. 786, 804-05 (2011) (striking down California law banning the sale of certain violent video games to children without parental supervision); *Winters v. New York*, 333 U.S. 507, 510 (1948) (magazines vividly portraying crime and bloodshed were “as much entitled to the protection of free speech as the best of literature”). Petitioner’s reliance on the “v-chip” provision of the Telecommunications Act of 1996, Pet. 21-22, is misplaced because it did not “censor,” *id.* 35, any speech; instead, it merely created a framework to help parents select appropriate programming for their children. *See* Pub. L. No. 104-104 § 551(b)(1)(w). If anything, this effort reflects a tacit admission by Congress that it cannot suppress violent materials as private parties may.

Finally, even if petitioner’s newfound theory had merit, a provider or user could still “consider” false or misleading statements on public health issues to be analogous to regulable materials. False and misleading statements have long been regulated via, *inter alia*, the federal mail and wire fraud statutes, laws banning false advertising, and the FCC’s prohibition on “broadcast hoaxes” about crimes and catastrophes.⁷ The

⁷ Broadcast hoaxes are banned in 47 C.F.R. § 73.1217; *In re Amendment of Part 73 Regarding Broadcast Hoaxes*, MM Docket No. 91-314, Report and Order, 7 FCC Rcd No. 13, p. 4106 (1992).

federal government has also regulated the dissemination of slanted materials like foreign propaganda and “news distortion.”⁸ And state common law has banned (*i.e.*, regulated) defamation since the Founding. Consequently, there is no basis to argue that Section 230(c)(2)(A) cannot cover materials that “Vimeo may deem false or misleading.” Pet. 19.

3. Petitioner alternatively argues that the enumerated terms concern materials that are facially “indecent” or “morally” defective, *id.* 24-26, but this too fails. Adding such a judicial gloss would merely swap one broad, open-ended term for another, while adding ambiguity and uncertainty. *See Part III.C, supra.* “Indecency” is so devoid of any limiting principle that this Court held that it rendered a different section of the statute impermissibly vague. *See ACLU v. Reno*, 521 U.S. 844, 871-74, 882-83 (1997) (striking down unrelated parts of Communications Decency Act for vagueness based upon restriction of “indecent” materials to those under 18 years old).

“Moral affront” supplies an even less workable candidate, as it is laden with subjective values and at odds with petitioner’s own “regulable” materials theory. Plainly, a federal statute or FCC regulation restraining materials that pose “an affront to public morals,” Pet. 26, would not stand. In any case, these definitions would not change the result here: Vimeo

⁸ News distortion involves “deliberate news distortion, staging, or slanting.” Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 Wash. U. L. Q. 1005, 1008 (2000).

certainly could *consider* materials that perpetuate a hoax about vaccine safety and threaten the resurgence of a deadly disease to be the public health equivalent of shouting fire in a crowded theater—and therefore indecent and morally wrong.

Petitioner's shifting and contradictory interpretations highlight the futility of trying to draw commonality from dissimilar subject matter and imposing an interpretive canon where all other textual guideposts point away from its application. Ultimately, the most "consistent and coherent" reading of the entire text, *Ali*, 552 U.S. at 227, is that Section 230(c)(2)(A) broadly confers discretion on providers and users to decide what is objectionable, while the enumerated terms make "doubly sure," *Barton v. Barr*, 140 S. Ct. 1442, 1453 (2020), that certain types of problematic materials of concern in the mid-1990s were captured beyond doubt.

C. Petitioner's New Constitutional Avoidance Argument Fails.

Far from supporting petitioner's interpretation, the canon against unconstitutional interpretations supports the Appellate Division's decision.

1. Petitioner erroneously argues that a broad interpretation of "otherwise objectionable" abridges the First Amendment, Pet. 29-35, by deputizing private actors to remove "not-otherwise censorable" speech. Pet. 31. But no state action occurs when a private party takes voluntary actions. "[W]hen a private entity

provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.” *Manhattan Comm. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019). “The private entity may thus exercise editorial discretion over the speech and speakers in the forum.” *Id.*

This right to exclude speech and speakers existed before Section 230, as evidenced by PRODIGY’s editorial efforts as recounted in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) (observing that PRODIGY “utiliz[ed] technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and ‘bad taste’”). Moreover, “Section 230(c)(2) does not require [a provider] to restrict speech; rather it allows [the provider] to establish standards of decency without risking liability for doing so.” *See Green v. Am. Online (AOL)*, 318 F.3d 465, 472 (3d Cir. 2003) (emphasis in original) (rejecting First Amendment challenge). Accordingly, the Appellate Division’s reading of the statute does implicate the First Amendment.

2. Petitioner’s cases, Pet. 29-34, do not hold otherwise. Petitioner’s principal authority, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), Pet. 30, merely holds that “state action exists when ‘Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted.’” *Roberts v. AT&T Mobility LLC*, 877

F.3d 833, 840-41 (9th Cir. 2017) (quoting *Denver Area*’s controlling opinion, 518 U.S. at 782). The decision below does not offend this holding because (i) its interpretation of “otherwise objectionable” does not single out any speech; and (ii) Vimeo was free to restrict speech on its platform without Section 230. If anything, it is petitioner’s reading of Section 230(c)(2)(A) that clashes with *Denver Area* by singling out “indecent” and “immoral” materials. Petitioner’s remaining cases are irrelevant.⁹

3. Far from resolving constitutional doubt, petitioner creates First Amendment problems through its idiosyncratic readings of “otherwise objectionable.” Notably, petitioner would have a court determine whether materials offend “public morals,” Pet. 26, and yet somehow exempt “political speech” from removal, *id.* 31. Not only is this nonsensical—speech may simultaneously offend public morals and possess strong free speech value—but it also would require courts to make content-based judgments on the removed materials and the provider’s reasons for removing them. That would cause Section 230(c)(2)(A) to favor certain types of editorial decisions—while burdening others—based upon content.

⁹ *Railway Employment Department v. Hansen*, 351 U.S. 225 (1956), Pet. 31, involves the commerce clause and the takings clause and does not represent the current law on First Amendment state action. See *Janus v. Am. Fed. of State, County & Municipal Employees*, 138 S. Ct. 2448, 2479 (2018). Petitioner’s other cases, Pet. 31-34, are inapposite because they involve direct government regulation of speech.

Such a content-based regulation would trigger strict scrutiny and therefore almost certainly abridge the First Amendment. *See Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (amendment that “exempted robocalls to collect government debt” from law regulating telephone calls violated First Amendment); *see also* Adam Candeub, *Reading Section 230 as Written*, 1 J. Free Speech L. 139, 160 (2021) (explaining that “the *ejusdem generis* reading of section 230(c)(2) seems less likely to survive First Amendment scrutiny than the *non-ejusdem-generis* reading”). The Appellate Division’s decision avoids this problem by reading Section 230(c)(2)(A) in a content-neutral manner.

D. Section 230(c)(2)(A) Applies to Contract Claims.

Nothing in the statute excludes contract claims from Section 230’s scope. Petitioner’s belated argument to the contrary misreads the statute’s text.

1. While petitioner focuses on Section 230(e)(3) (*see* Pet. 36), the real preemptive action takes place in Section 230(c)(2)(A), which states that “no provider or user . . . *shall be held liable*” for taking “any action” voluntarily to remove objectionable materials. 47 U.S.C. § 230(c)(2)(A) (emphasis added). As the Appellate Division correctly found, a contract claim premised upon Vimeo’s removal of objectionable materials qualifies because it targets a protected “action” under the

statute. Pet. App. 5-6. Petitioner does not dispute this conclusion.

2. Section 230(e)(3) plays a supporting role, ensuring that “[n]o cause of action may be brought” and “no liability may be imposed” under any “State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). Here, the inconsistency is between a state-law contract claim and Section 230(c)(2)(A), so that provision remains the focal point. But even standing alone, Section 230(e)(3) does not aid petitioner. Its argument that Section 230(e)(3) “preempts *laws*, not contracts,” Pet. 36 (emphasis in original), fails because the clause covers “cause[s] of action . . . brought . . . under any State or local law.” Here, petitioner’s contract claim is a cause of action under New York state law; and were petitioner to be successful in prosecuting this claim, a judgment against Vimeo would impose liability under state law.

Further, Section 230(e)’s savings clauses refute any special treatment for contract claims. There, Congress exempted myriad federal and state laws, claims, and charges from Section 230’s reach—but not contract claims. *See* 47 U.S.C. §§ 230(e)(1) (federal criminal law), (e)(2) (intellectual property law), (e)(4) (communications privacy law) & (e)(5) (sex trafficking law). This omission confirms Congress’s intent not to categorically exempt contract claims. *See POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 114 (2014) (“By taking care to mandate express pre-emption of some state laws, Congress if anything indicated it did

not intend . . . to preclude requirements arising from other sources.”).

3. Petitioner’s cases, Pet. 37-40, are inapposite: They either address questions unique to Section 230(c)(1) (*see Part I.B, supra*) or involve markedly different preemption clauses. For example, the clause in *American Airlines, Inc. v. Wolens*, merely prohibited states from “enact[ing] or enfor[cing]” laws. 513 U.S. 219, 221-22 (1995) (quoting statute). And *Cipollone v. Liggett Group, Inc.*, examined whether various common law causes of action were based upon a “requirement or prohibition . . . imposed under State law with respect to the advertising or promotion of any cigarettes.” 505 U.S. 505, 515 (1992) (quoting statute) (emphasis added) (plurality). Whereas these clauses provided a textual hook for excluding “voluntary undertakings,” Section 230 covers any civil liability for any cause of action arising from the good faith removal of objectionable materials.

4. Finally, petitioner’s policy argument about encouraging service providers to capriciously apply their content restrictions, Pet. 39, is meritless because Section 230(c)(2)(A) requires that removal actions be taken in “good faith.” The Appellate Division properly determined that petitioner had failed to allege bad faith, Pet. App. 10-11, and the petition does not challenge that conclusion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. CHEAH
Counsel of Record
VIMEO, INC.
330 W. 34th St., 5th Floor
New York, New York 10001
(212) 314-7457
michael@vimeo.com

JOHN R. CUTI
ALEXANDER GOLDENBERG
CUTI HECKER & WANG LLP
305 Broadway, Suite 607
New York, New York 10007
(212) 620-2600
jcuti@chwllp.com
agoldenberg@chwllp.com

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