

No. 19-859

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In the  
**Supreme Court of the United States**

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STUART FORCE, *et al.*,

*Petitioners,*

v.

FACEBOOK, INC.,

*Respondent.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Second Circuit**

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**BRIEF IN OPPOSITION**

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### **QUESTION PRESENTED**

Whether §230 of the Communications Decency Act bars claims by plaintiffs seeking to hold an online service provider liable for third-party content posted on its site.

**CORPORATE DISCLOSURE STATEMENT**

Facebook, Inc. is a publicly traded company and has no parent corporation. No publicly held company owns 10% or more of its stock.

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## INTRODUCTION

Facebook has zero tolerance for terrorism on its platform. It condemns terrorist actions, prohibits terrorist content, and swiftly removes terrorist content it discovers. Yet petitioners accuse Facebook of not doing enough, and indeed go so far as to allege that Facebook actively supports terrorists in their deplorable actions. Those allegations are implausible and unsupportable. They are also plainly barred by §230 of the Communications Decency Act (“CDA”), 47 U.S.C. §230, which prohibits online service providers from being held liable for third-party content posted on their sites. The Second Circuit below correctly applied §230 to bar petitioners’ claims, holding that they sought to hold Facebook liable for traditional editorial decisions like arranging and displaying content and thus fall comfortably within the scope of §230. That decision aligns with outcomes in every other circuit, which have in numerous cases rejected efforts to hold online service providers liable for the allegedly harmful effects of third-party content.

Petitioners nonetheless ask this Court to grant *certiorari* to resolve two claimed conflicts among the courts of appeals over the meaning of §230. Those purported conflicts are illusory. All of the courts of appeals are in general agreement about how to interpret and apply §230. That is so even though the Seventh Circuit calls the liability bar in §230 a “definitional” limitation while every other court of appeals calls it an “immunity.” The Seventh Circuit’s different choice of wording has not made a substantive difference—indeed, petitioners do not point to a single case, much less a case remotely similar to this one,

where the Seventh Circuit’s choice of terminology affected the outcome. Nor is there any division among the courts of appeals over what kinds of activities subject an online service provider to liability. The courts of appeals all generally follow the approach that the Fourth Circuit articulated only a year after the passage of §230: “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) (Wilkinson, C.J.), *cert. denied*, 524 U.S. 937 (1998). And this Court has repeatedly denied petitions for *certiorari* on this issue.

In short, the decision below was correct and consistent with the decisions of every other court of appeals. To the extent petitioners raise concerns about the policy consequences of §230, those concerns are better addressed to Congress, as Chief Judge Katzmann suggested below. There is no reason for this Court to grant plenary review.

## STATEMENT OF THE CASE

### A. Legal Background

Congress passed the CDA as part of the Telecommunications Act of 1996. Section 230 of the CDA sought to recognize the “extraordinary advance in the availability of educational and informational resources” and “[t]he rapidly developing array of Internet ... services” brought to Americans, finding that online service providers “offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. §230(a). And

Congress acknowledged that “interactive computer services have flourished, to the benefit of all Americans,” in part due to a “minimum of government regulation.” *Id.* Accordingly, Congress declared it “the policy of the United States ... to promote the ... development of the Internet” and “to preserve the vibrant and competitive free market that presently exists for the Internet ... , unfettered by Federal or State regulation.” *Id.* §230(b).

To effectuate these purposes, Congress provided in §230 that online service providers may not be treated as the speaker or publisher of third-party content on their platforms. As relevant here, §230(c)(1) provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” In other words, Congress said that an online service provider cannot be held liable for third-party content posted on its site, so long as the third party was the “information content provider” of that content and the cause of action advanced by the plaintiff seeks to hold the online service provider liable as a publisher of that content.

One year after §230 became law, the Fourth Circuit explained that, by rejecting “liability on service providers for the communications of others,” §230 was an important component of Congress’ efforts to eliminate “intrusive government regulation of speech” on the Internet. *Zeran*, 129 F.3d at 330–31. As that court explained, §230 “maintain[s] the robust nature of Internet communication” by eliminating “the threat that tort-based lawsuits pose to freedom of

speech.” *Id.* at 330. Recognizing that “[i]t would be impossible for service providers to screen each of their millions of postings for possible problems,” “Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid” the possibility that “interactive computer service providers might choose to severely restrict the number and type of messages posted” to limit liability. *Id.* at 331. The balance Congress struck, the Fourth Circuit explained, is that “lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.” *Id.* at 330–31.

The Fourth Circuit also explained that another “important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services.” *Id.* at 331. Congress “responded to” a state court decision holding that an online service provider was liable for allegedly “screen[ing] and edit[ing] messages posted on its bulletin boards,” enacting §230 “to remove the disincentives to selfregulation created by [that] decision.” *Id.* (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)). Congress wanted to ensure that “the specter of liability” would not “deter service providers from blocking and screening offensive material.” *Id.* Accordingly, §230 “forbids the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.” *Id.*

In the two decades since *Zeran*, the courts of appeals have developed an extensive and uniform

body of case law interpreting §230. Legislative history indicates congressional recognition of this uniform authority. See H.R. Rep. No. 107-449, at 13 (2002) (providing that *Zeran* “correctly interpreted section 230(c)” and that the interpretation from *Zeran* should apply to the new “kids.us” subdomain, established in 47 U.S.C. §941); 28 U.S.C. § 4102(c)(1) (extending §230). And where Congress has disapproved of judicial application of §230, it has not hesitated to act. For example, after the First Circuit held that §230 barred claims against an online site that assisted in drafting advertisements for underage sex-trafficking, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), Congress amended §230 to create an exception for civil actions brought under the federal anti-trafficking laws, as well as related exceptions for state criminal and state civil enforcement actions. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, §4, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§1591, 1595, 2421A, and 47 U.S.C. §230). Other amendments to §230 are currently pending before Congress. See EARN IT Act, S. 3398, 116th Cong. (2020).

## **B. Factual and Procedural Background**

1. Facebook’s social media platform enables people, businesses, and organizations to connect and share content with the over two billion Facebook users around the world. See C.A.App.A29–A30 ¶¶91-94; C.A.App.A366.<sup>1</sup> Users must comply with Facebook’s

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<sup>1</sup> “C.A.App.” refers to the appendix petitioners filed with the Second Circuit on August 22, 2018.

terms of service, which include a set of Community Standards.

The Community Standards outline what is and is not allowed on Facebook.<sup>2</sup> The Community Standards state that Facebook “do[es] not allow any organizations or individuals that proclaim a violent mission or are engaged in,” among other things, “[t]errorist activity” or “[m]ass murder” to “have a presence on Facebook.” Facebook, *Community Standards*, [https://www.facebook.com/communitystandards/dangerous\\_individuals\\_organizations](https://www.facebook.com/communitystandards/dangerous_individuals_organizations) (last accessed Mar. 22, 2020). Facebook also “remove[s] content that expresses support or praise for [terrorist] groups, leaders, or individuals.” *Id.* And it provides that “coordination of support for any of [those] organizations or individuals or any acts committed by them” is “not allow[ed].” *Id.* Facebook further prohibits “content that praises, supports, or represents events that Facebook designates as terrorist attacks, hate crimes or mass shootings.” *Id.*

Facebook enforces its policies using a “multilayered strategy” involving both artificial intelligence and human review. Pet.App.11a; C.A.App.A373–A375. Facebook uses artificial intelligence to block violent content before it even appears on the platform. C.A.App.A373–A375. Facebook blocks the upload of images and video that match known terrorist content. *Id.* The company regularly updates its technical solutions to identify and remove terrorist content, including artificial

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<sup>2</sup> The Community Standards are incorporated by reference into the Amended Complaint. See C.A.App.A114 ¶¶506–07; C.A.App.A115–A116 ¶¶511–12.

intelligence analysis of text-based signals. *Id.* Additionally, Facebook employs a team of more than 150 counterterrorism specialists to identify and review terrorism-related content, and also relies on the community of Facebook users who report accounts or content that violate Facebook’s policies, with review by the Community Operations team. *Id.* Moreover, when Facebook finds terrorism-related content that violates its standards, it uses artificial intelligence to identify interconnected accounts that also contain that content. C.A.App.A373–A374; Pet.App.11a–12a. This multilayered, comprehensive approach is designed to prevent terrorist organizations from maintaining accounts, pages, or groups on Facebook, and to identify and remove content that praises or supports terrorists, terrorist groups, or terrorist actions. C.A.App.A373–A374; *see* Pet.App.11a–12a.

Petitioners are relatives of American citizens killed or injured in terrorist attacks connected to HAMAS and an American citizen who survived an attack, and they sued Facebook for those injuries. C.A.App.A15–A17 ¶¶5–18. Petitioners describe HAMAS as “among the most widely-known Palestinian terrorist organizations in the world” and as having “gained notoriety for carrying out numerous terrorist bus bombings and dispatching suicide bombers across Israel, and more recently for firing thousands of missiles at Israel’s civilian population centers.” C.A.App.A14 ¶2.

2. Petitioners’ theory of liability is that Facebook violated the Antiterrorism Act (“ATA”), 18 U.S.C. §2333, by allegedly allowing HAMAS supporters to maintain and post content on Facebook accounts, and



by promoting terrorism-related content. Petitioners sued Facebook under the ATA for direct liability and for secondary liability as an aider and abettor or co-conspirator. In support of these claims, they alleged that Facebook violated the ATA by “providing Hamas and its operatives with a communications platform” and by taking “affirmative steps of its own,” through its use of algorithms to recommend and suggest content to other Facebook users. Pet.10–13 & n.6.

As petitioners concede, their principal allegations against Facebook have shifted over the course of this litigation. Pet.11–13. “The complaint faulted Facebook for permitting Hamas to upload its content, for failing to remove that content, and for permitting Hamas to have a Facebook page at all.” Pet.10. For example, the complaint alleged that HAMAS supporters “openly maintained and used official Facebook accounts with little or no interference,” and that Facebook allowed HAMAS supporters to “register for Facebook accounts and use Facebook’s Services.” C.A.App.A14–A15, A32 ¶¶3, 115; *see also, e.g.*, C.A.App.A37 ¶130 (“HAMAS has used Facebook to disseminate propaganda and messages to its followers and the public.”); C.A.App.A37–A38 ¶¶127–34 (alleging that HAMAS has used Facebook accounts to “shar[e] operational and tactical information with its members and followers,” “recruit followers,” and post “graphic images, videos, and music”); C.A.App.A32 ¶113 (“HAMAS uses Facebook’s Services to actually carry out the essential communication components of HAMAS’s terror attacks.”); C.A.App.A32 ¶112 (“HAMAS ... uses Facebook to issue terroristic threats, attract attention to its terror attacks, instill

and intensify fear from terror attacks, intimidate and coerce civilian populations, take credit for terror attacks, [and] communicate its desired messages ....”).

The focus of the petition, however, is on Facebook’s actions connecting users with each other and with particular content. Pet.11–12 & n.6, 13. According to petitioners, Facebook collected user data to “match-make[]”—suggesting friends, groups, and events to users who have liked or shared pages with similar content. Pet.11 n.6; C.A.App.A119–A120 ¶¶530–37. Facebook also allegedly “move[d] posts that are likely to be of interest ... to the top of a user’s newsfeed” and “actively encourage[d]” users to engage with content through notifications of suggested events, friends, and groups. Pet.11–12 n.6; C.A.App.A119–A120 ¶¶530–37.

The district court dismissed petitioners’ complaint as barred by §230 of the CDA,<sup>3</sup> Pet.App.151a, and the Second Circuit affirmed, Pet.App.46a. The Second Circuit noted that “the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.” Pet.App.19a–20a (collecting cases). Consistent with that consensus approach, the court held that petitioners’ claims sought to treat Facebook as a publisher and that the content at issue was created by supporters of HAMAS, not Facebook. Pet.App.29a, 35a. Accordingly, the court held that §230 of the CDA barred petitioners’ claims.

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<sup>3</sup> The district court also dismissed the claims of a separate set of plaintiffs for lack of Article III standing. Pet.App.128a. Those plaintiffs did not appeal and are not parties to the petition.

With respect to the first holding—that petitioners’ claims sought to treat Facebook as the publisher of the challenged content—the court rejected petitioners’ theory that their case could proceed because they sought to hold Facebook liable for organizing and suggesting content in a way that “matched” users. Pet.App.23a–25a. The court reasoned that “arranging and distributing third-party information,” as Facebook does, “inherently forms ‘connections’ and ‘matches’ among” consumers of content, an activity that “is an essential result of publishing.” *Id.* To hold otherwise, the court noted, would “deny immunity for the editorial decisions regarding third-party content that interactive computer services have made since the early days of the Internet,” including what type of third-party content to allow, where to put that content, and to whom it should be shown. Pet.App.25a. “[I]t would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” Pet.App.26a.

As for the court’s second holding—that supporters of HAMAS, not Facebook, created the content at issue—the Second Circuit explained that “[m]erely arranging and displaying” content does not make Facebook a creator or developer of the content itself. Pet.App.33a–34a. “[M]aking [content] more available” to users is a traditional editorial function and does not transform an online service provider into a creator or developer of that information. Pet.App.34a–35a.

The court also rejected petitioners' alternative (and now abandoned) arguments that §230 does not apply to the ATA or when the alleged content was posted overseas. Pet.App.39a, 43a. And the court declined to exercise diversity jurisdiction over petitioners' Israeli-law claims. Pet.App.46a.

Chief Judge Katzmann concurred in part and dissented in part, calling on “Congress to reconsider the scope of §230.” Pet.App.46a–47a, 66a (Katzmann, C.J., dissenting in part). In his view, §230 should not apply where a platform like Facebook makes friend and content suggestions—activities that Chief Judge Katzmann thought had the effect of “forging connections” and “developing new social networks.” Pet.App.48a. As he viewed the complaint, it sought to “hold Facebook liable for its affirmative role in bringing terrorists together.” Pet.App.50a. The dissent also noted that “Congress grabbed a bazooka” to address the concerns that led to §230, suggesting that Congress may “engage in a broader rethinking of the scope of CDA immunity.” Pet.App.57a, 66a, 77a.

Petitioners filed a petition for rehearing or rehearing *en banc*, which the Second Circuit denied. Order, *Force v. Facebook, Inc.*, No. 18-397 (2d Cir. Aug. 29, 2019), ECF No. 216. This petition followed.

### **REASONS FOR DENYING THE PETITION**

The Second Circuit's decision does not create or implicate any conflict among the courts of appeals and was correctly decided. Indeed, the decision is entirely consistent with how every other court of appeals has approached the application of §230 to online service providers like Facebook. As the Second Circuit explained, “the Circuits are in general agreement that

the text of Section 230(c)(1) should be construed broadly in favor of immunity.” Pet.App.19a (majority op.).

Petitioners’ two purported circuit splits do not withstand scrutiny. On the first, petitioners try to manufacture a circuit conflict by capitalizing on the Seventh Circuit’s use of different terminology. Pet.21–30. But the Seventh Circuit’s different choice in wording—preferring “definitional” bar to “immunity”—does not produce different outcomes. Pet.25. Petitioners did not identify a single case where the difference in terminology actually resulted in a different outcome. And the Seventh Circuit’s approach would result in exactly the same outcome as that reached by the Second Circuit in this case.

The second purported circuit split is even more far-fetched. Petitioners assert that some courts of appeals broadly interpret the kinds of activities that render an “interactive computer service provider” a “publisher,” sweeping in “any activity in which a firm in the publishing business might engage,” while other courts of appeals take a narrower view, limiting the meaning of publisher only to “core editorial functions, primarily deciding what third-party content to accept and reject.” Pet.30 (emphasis omitted). But in reality the courts of appeals are in agreement about what it means to be a publisher. And no court of appeals—including the Second Circuit—has taken the position that petitioners try to attribute to the “broad” side of the split. This case is illustrative. Petitioners exaggerate the breadth of the Second Circuit’s holding, but all the Second Circuit held is that Facebook’s organization and suggestion of third-party

content was akin to traditional editorial functions, such as arranging and highlighting content and placing advertisements near related information. That is precisely the analysis that every other court of appeals undertakes when determining whether an online service provider is acting as a publisher, and the test applied by every other court of appeals would dictate the same result. Indeed, this Court has denied numerous petitions asking this Court to review the scope of §230.

At the end of the day, petitioners' real plea is for this Court to rewrite §230 to narrow its scope. But whatever the merits of the dissent's view that "Congress may wish to revisit the CDA" to change the consensus approach of the courts of appeals and "better calibrate the circumstances where such immunization is appropriate," Pet.App.50a (Katzmann, C.J., dissenting in part), the perceived need for Congress to undertake that task is just an additional reason to deny the petition.

#### **I. The Courts Of Appeals Are In Broad Agreement About How To Interpret §230 Of The Communications Decency Act.**

There is no material conflict among the courts of appeals over how to interpret and apply §230 of the CDA. The Seventh Circuit's choice of different terminology does not translate into different results, and the purported split about the scope of publishing is illusory.

1. The courts of appeals generally agree about how to interpret §230. As the court below explained, "[i]n light of Congress's objectives, the Circuits are in general agreement that the text of Section 230(c)(1)

should be construed broadly in favor of immunity.” Pet.App.19a; accord *Marshall’s Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1267 (D.C. Cir. 2019) (“Congress[] inten[ded] to confer broad immunity for the re-publication of third-party content ....”); *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (“[C]lose cases ... must be resolved in favor of immunity.” (ellipsis in original) (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc))); *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010) (“following majority circuit precedent” extending “broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service” (internal quotation marks and citation omitted)); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.) (“Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.”), *cert. denied*, 555 U.S. 1031 (2008); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“The majority of federal circuits have interpreted [§230] to establish broad ... immunity ....” (internal quotation marks and citation omitted)); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (“[Section] 230(c) provides broad immunity for publishing content provided primarily by third parties.” (citation omitted)); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.”), *cert. denied*, 524 U.S. 937 (1998).

The courts of appeals also take the same approach in applying §230. “The Communications Decency Act mandates dismissal if (i) [the defendant] is a ‘provider or user of an interactive computer service,’ (ii) the information for which [the plaintiff] seeks to hold [the defendant] liable was ‘information provided by another information content provider,’ and (iii) the complaint seeks to hold [the defendant] liable as the ‘publisher or speaker’ of that information.” *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir.) (quoting 47 U.S.C. §230(c)(1)), *cert. denied*, 574 U.S. 1012 (2014); *see also Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016); *Jones*, 755 F.3d at 409; *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418 (1st Cir. 2007); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 985 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); *Zeran*, 129 F.3d at 330.

With respect to the third requirement, the courts of appeals all agree that §230(c)(1) applies to protect online service providers from liability for third-party content where the online service provider exercises “traditional editorial functions.” *Zeran*, 129 F.3d at 330; *Klayman*, 753 F.3d at 1359 (collecting cases). And the courts of appeals generally agree on what those activities encompass, including decisions about how and whether to publish, organize, display, promote, suggest, or remove third-party content. Pet.App.34a; *Zeran*, 129 F.3d at 330 (§230 bars liability for the “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content”). The courts of appeals also generally agree that a website’s



provision of tools to prioritize or recommend third-party content does not rob a website of §230 immunity. *See, e.g., Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (per curiam) (concluding that the “allegation that Google manipulated its search results to prominently feature” challenged content did not “change th[e] result”); *Marshall's Locksmith*, 925 F.3d at 1269–71; *Kimzey*, 836 F.3d at 1269–70.

The Second Circuit followed this settled approach in interpreting §230 and applying it to petitioners' claims, including in determining that the alleged conduct by Facebook constituted a traditional editorial function. Consistent with other courts of appeals, the Second Circuit held that “simply organizing and displaying content exclusively provided by third parties” puts Facebook comfortably within the scope of §230. Pet.App.25. And the automated nature of Facebook's alleged conduct did not change that calculus. As the court explained, “so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific edit[orial] or selection process.” Pet.App.27a (alteration in original) (quoting *Carafano*, 339 F.3d at 1124).

The Second Circuit's analysis aligns with every other court of appeals that has considered the question. For instance, the D.C. Circuit, reviewing allegations that Facebook failed to remove terrorist content from its platform, concluded that a “website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing

online.” *Klayman*, 753 F.3d at 1358. Similarly, the Eleventh Circuit considered allegations that “Google purportedly used algorithms to manipulate its search results,” which allegedly resulted in defamatory content appearing prominently in searches, and held that §230 applies where the content at issue was created by a third party. *Dowbenko*, 582 F. App’x at 803–05. Numerous other courts have reached the same conclusion. *See Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (“By recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others’ content. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves.”); *Herrick v. Grindr LLC*, 765 F. App’x 586, 591 (2d Cir.) (“To the extent that [plaintiff’s claims] are premised on Grindr’s [user-profile] matching and geolocation features, they are ... barred.”), *cert. denied*, 140 S. Ct. 221 (2019); *Kimzey*, 836 F.3d at 1270–71 (“Yelp’s rating system, which is based on rating inputs from third parties and which reduces ... information into a single, aggregate metric is [no]thing other than user-generated data” and “does not equal creation or development of content.”); *Jones*, 755 F.3d at 416 (categorizing third-party submissions did not “material[ly] contribut[e]” to the unlawful activity); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 256–57 (4th Cir. 2009) (“structure and design of [defendant’s] website,” which “steered” customer complaints into specific categories, did not amount to developing content); *Universal Commc’n*

*Sys.*, 478 F.3d at 422 (§230 covers “decisions regarding the ‘construct and operation’ of ... web sites”); *Carafano*, 339 F.3d at 1124–25 (website did not develop content by “classif[ying] user characteristics” and “structur[ing] the information provided by users ... to offer additional features”); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (finding that “choice to publish [certain content] (while rejecting other [content] for inclusion in the listserv)” did not amount to developing content), *cert. denied*, 541 U.S. 1085 (2004), *superseded by statute on other grounds as stated in Breazeale v. Victim Servs., Inc.*, 878 F.3d 759 (9th Cir. 2017).

Petitioners do not and cannot point to a single contrary authority. No court of appeals has held that the sorting, prioritization, and promotion of content—whether through automated means or otherwise—deprives an online publisher of §230’s protections. There is no disagreement among the circuits and no material prospect that this case would be decided any differently if it had been brought in a different circuit.

2. Petitioners’ two purported circuit splits regarding the scope of §230 and the meaning of “publisher” are illusory.

a. Petitioners’ first split is quite literally a matter of semantics. While most courts of appeals (including the Second Circuit) describe §230’s bar on liability as an “immunity,” *e.g.*, *Almeida*, 456 F.3d at 1321–24, the Seventh Circuit has rejected that terminology and instead prefers the term “definition,” *e.g.*, *Chi. Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008). That difference, petitioners argue, creates a lopsided

circuit split that purportedly merits this Court's review.

Petitioners identify nothing more than a difference in wording that has not resulted in a different outcome in any circuit. The Seventh Circuit no less than any other circuit holds that §230 bars any cause of action that seeks to hold an online service provider liable as a publisher of third-party content. The Seventh Circuit has clearly stated that “[w]hat § 230(c)(1) says is that an online information system must not ‘be treated as the publisher or speaker of any information provided by’ someone else.” *Chi. Lawyers’ Comm.*, 519 F.3d at 671. Accordingly, it has made clear that §230(c)(1) “limits who may be called the publisher of information that appears online.” *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010).

Indeed, respondent is aware of no case, and petitioners have cited none, where the Seventh Circuit's preference for calling §230 a definitional provision made any substantive difference. To the contrary, the Seventh Circuit has reached the same conclusions as other courts of appeals facing similar facts. In some cases, the Seventh Circuit and other courts of appeals similarly find liability barred. *Compare, e.g., Doe v. GTE Corp.*, 347 F.3d 655, 657–60, 662 (7th Cir. 2003) (defendant not liable for videos posted by a user), *with Zeran*, 129 F.3d at 330–33 (defendant not liable for statements made by a user); *compare Chi. Lawyers’ Comm.*, 519 F.3d at 671 (barring claims under the Fair Housing Act based on third-party content), *with Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d

1157, 1164–75 (9th Cir. 2008) (en banc) (similar). In other cases, the Seventh Circuit and other courts of appeals similarly hold that §230 does not bar potential liability. *Compare, e.g., Huon v. Denton*, 841 F.3d 733, 742–43 (7th Cir. 2016) (declining to dismiss action where plaintiff “plausibly alleged that [the defendant’s] employees created the defamatory comments”), *with FTC v. LeadClick Media, LLC*, 838 F.3d 158, 176 (2d Cir. 2016) (declining to dismiss action where defendant “participated in the development of the deceptive content”). And in cases where the Seventh Circuit held that §230 did not apply because of the nature of the defendant’s conduct, other courts of appeals have reached similar results. *Compare, e.g., City of Chicago*, 624 F.3d at 366 (§230 did not bar claims involving allegations irrelevant to online content management), *with HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683–84 (9th Cir. 2019) (§230 did not preempt local ordinance regulating short-term rentals).<sup>4</sup>

As the Fourth Circuit has explained, any distinction between the Seventh Circuit’s approach

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<sup>4</sup> Moreover, several district courts within the Seventh Circuit have held that §230 applies to and protects a range of website features. For example, the Northern District of Illinois applied §230 to bar public nuisance claims alleging that Craigslist “causes or induces its users to post unlawful ads” by categorizing content and allowing users to “search through the ads ‘based on their preferences.’” *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 968–69 (N.D. Ill. 2009); *see also Stayart v. Yahoo! Inc.*, 651 F. Supp. 2d 873, 885–86 (E.D. Wis. 2009) (Yahoo’s search results), *aff’d*, 623 F.3d 436 (7th Cir. 2010); *Stayart v. Google Inc.*, 783 F. Supp. 2d 1055, 1056–58 (E.D. Wis. 2011) (similar; further holding that CDA protects search engine auto-complete feature), *aff’d*, 710 F.3d 719 (7th Cir.), *cert. denied*, 571 U.S. 825 (2013).

and that of the other courts of appeals is merely “academic.” *Nemet Chevrolet*, 591 F.3d at 254 n.4. Even one of petitioners’ own cited authorities ultimately concludes that the Seventh Circuit “has never issued a holding inconsistent with” the Fourth Circuit and that the Seventh Circuit’s “decisions to date have remained consistent with [other courts] in their basic holdings.” Mark D. Quist, “*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, 277, 292 (2012).<sup>5</sup>

b. Nor is there any conflict among the courts of appeals over “what types of activities by an interactive computer service provider render it ... a ‘publisher,’” Pet.30. Petitioners assert that some circuits—the Second, Fifth, Ninth, Eleventh, and District of Columbia—have held that an online service provider is immune under §230 for “any activity in which a firm in the publishing business might engage,” while other circuits—the Third, Fourth, Sixth, Eighth, and Tenth—limit the meaning of publishing to “core

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<sup>5</sup> The state court decisions cited by petitioners do not suggest the presence of a split, as none turned on whether the court considered §230 to be an immunity or a definitional bar. See *Daniel v. Armslist, LLC*, 382 Wis. 2d 241, 913 N.W.2d 211 (Ct. App. 2018), *rev’d*, 386 Wis. 2d 449, 926 N.W.2d 710 (reversing lower court decision because §230 barred plaintiff’s claims), *cert. denied*, 140 S. Ct. 562 (2019); *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wash. 2d 95, 102, 359 P.3d 714, 717 (2015) (allowing case to proceed based on sufficient allegations of content development by defendant); *Miller v. Fed. Express Corp.*, 6 N.E.3d 1006, 1018 (Ind. Ct. App. 2014) (§230 barred liability); *Lansing v. Sw. Airlines Co.*, 2012 IL App (1st) 101164, ¶45, 980 N.E.2d 630, 639 (§230 did not bar negligent supervision claim).

*editorial* functions, primarily deciding what third-party content to accept and reject.” Pet.30–31, 33–36.

But no court of appeals has taken either the so-called “broad” approach that petitioners describe, or the “narrower” approach that petitioners apparently would prefer. The “broad” approach, according to petitioners, is “all-encompassing” and extends §230 to bar liability for all of the “widely varying practices of the publishing industry.” Pet.31–32. But no court of appeals has actually held that §230 reaches all manner of activities of the publishing business, from payroll to catering a company lunch.

In reality, the courts of appeals—including the Second Circuit—interpret the term “publisher” just as the Fourth Circuit (which petitioners count on the *other* side of the supposed circuit split) interpreted that term in *Zeran*, 129 F.3d at 330. *See, e.g., LeadClick Media*, 838 F.3d at 174–75 (applying *Zeran*); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (same). The Fourth Circuit in *Zeran* held that §230 bars claims seeking to hold an online service provider liable for the “exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content” provided by another for publication. 129 F.3d at 330; Pet.App.59a–60a (Katzmann, C.J., dissenting in part) (citing cases applying the *Zeran* standard).

That language from *Zeran*—which has been adopted nearly verbatim by courts of appeals on both sides of the purported split—is the very formulation that petitioners adopt to describe its “narrower” view of the term publisher. Pet.33–34. Petitioners describe

the narrower approach as limited to the four specified acts listed in *Zeran* (*i.e.*, publishing, withdrawing, postponing, or altering content). But neither *Zeran* nor the multiple courts on both sides of the purported split that quote its formulation have limited the reach of §230 in that way. Instead, they read that language as setting forth illustrative (and non-exclusive) examples of traditional publishing activity—“*such as*” publishing, withdrawing, postponing, or altering content—as opposed to four narrow and exclusive functions. *Zeran*, 129 F.3d at 330 (emphasis added); *see, e.g., Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir.), *cert. denied*, 540 U.S. 877 (2003); *Barnes*, 570 F.3d at 1102.

The Sixth Circuit’s decision in *Jones v. Dirty World Entertainment Recordings LLC*, is instructive. Petitioners put that decision in the “narrow” category, Pet.36, but the facts at issue there, including that the defendant itself engaged in “the posting of comments concerning third-party posts” plainly did not fall within the four functions enumerated in *Zeran*, as the online service provider selected, edited, and commented on the allegedly defamatory content. *Jones*, 755 F.3d 398, 415–16 (6th Cir. 2014). And it is hard to see how a “broad” interpretation of §230 is required to cover the mere suggesting of third-party content to users (as here) when, according to petitioners, affirmatively selecting, editing, and commenting on content (as in *Jones*) represents the “narrow” view.

Moreover, as with petitioners’ first purported split, petitioners failed to identify a single case where the courts of appeals reached different outcomes on



materially similar facts based on the allegedly different interpretations of the term “publisher.” Indeed, many of the cases that petitioners place in the *narrow* category actually held that §230 precluded liability. See Pet.35–36; *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016), *cert. denied*, 137 S. Ct. 639 (2017); *Jones*, 755 F.3d at 416–17; *Johnson v. Arden*, 614 F.3d 785, 792 (8th Cir. 2010); *Green*, 318 F.3d at 471; *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir.), *cert. denied*, 531 U.S. 824 (2000); *Shiamili v. Real Estate Grp. of N.Y., Inc.*, 17 N.Y.3d 281, 291–92, 952 N.E.2d 1011, 1019 (2011). And many of the circuits that petitioners place in the *broad* category have not hesitated to hold that §230 is inapplicable to activities falling outside traditional publishing functions. See, e.g., *HomeAway.com*, 918 F.3d at 682–84 (§230 inapplicable to ordinance that regulated *transactions resulting from* on-line listings, rather than the listings themselves); *LeadClick Media*, 838 F.3d at 176–77 (active participation in deceptive scheme through advertisements not protected).

With no actual conflict to draw on, petitioners focus on general statements about publishing in an effort to exaggerate a tension that does not actually exist. For instance, petitioners suggest that the Second Circuit decision here creates a conflict with the Third Circuit, which has noted that “decisions relating to the monitoring, screening, and deletion of content from its network—[are] actions quintessentially related to a publisher’s role.” See Pet.35 (quoting *Green*, 318 F.3d at 471). But the Second Circuit has not held to the contrary, and certainly did not do so here. And no decision from the Third Circuit suggests

that the facts at issue here—suggesting content to users—fall outside of that role.

The most petitioners can point to is a possible *intracircuit* division within the Second Circuit regarding how broadly to interpret the term publisher under §230. Petitioners cite Chief Judge Katzmann’s dissent as “point[ing] to a very different line of circuit court decisions, which establish a substantially narrower definition of ‘publisher.’” Pet.33. But the “very different line” the dissent cited was an earlier *Second Circuit* decision, *LeadClick Media*, 838 F.3d at 174. Pet.App.59a. Even assuming there were some tension between the reasoning of the decision below and *LeadClick Media*, such intracircuit tensions would not warrant review by this Court. *Cf. Jones v. Bock*, 549 U.S. 199, 220 n.9 (2007).

c. Reflecting the lack of disagreement among the circuits over §230, this Court has repeatedly denied petitions for *certiorari* seeking reconsideration of *Zeran* and the scope of §230—including as recently as this Term. *See, e.g., Daniel v. Armslist, LLC*, 140 S. Ct. 562 (2019); *Herrick v. Grindr LLC*, 140 S. Ct. 221 (2019); *Beckman v. Match.com, LLC*, 139 S. Ct. 1394 (2019); *Jane Doe No. 1 v. Backpage.com, LLC*, 137 S. Ct. 622 (2017); *Klayman v. Zuckerberg*, 574 U.S. 1012 (2014); *Doe v. MySpace, Inc.*, 555 U.S. 1031 (2008); *Delfino v. Agilent Techs., Inc.*, 552 U.S. 817 (2007); *Batzel v. Smith*, 541 U.S. 1085 (2004); *Green v. Am. Online (AOL)*, 540 U.S. 877 (2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 531 U.S. 824 (2000); *Zeran v. Am. Online, Inc.*, 524 U.S. 937 (1998). One of those petitions, *Klayman v. Zuckerberg*, involved similar allegations to those here, including

that Facebook “failed to remove a page posted on its website” by terrorists, and advanced the same purported split. Pet. for Writ of Cert. at 6, 24, *Klayman*, 574 U.S. 1012 (No. 14-312), 2014 WL 4631228 (filed Sept. 11, 2014); *see also* Pet. for Writ of Cert. at 11, *Doe*, 550 U.S. 1031 (No. 08-340), 2008 WL 4263552 (filed Sept. 12, 2008) (describing conflict “with the Seventh Circuit’s interpretation of §230(c)(1)”; Pet. for Writ of Cert. at 16–17, *Delfino*, 552 U.S. 817 (No. 06-1561), 2007 WL 1520982 (filed May 22, 2007) (similar).

The decision below did not change the legal landscape implicated in the numerous petitions that this Court has seen fit to deny. There was no conflict among the circuits then, and the decision below did not create one.

## **II. There Is No Other Reason To Grant The Petition.**

The decision below was correctly decided. Indeed, petitioners’ effort to convert the provision of an online forum into material support of, or substantial assistance to, terrorism would chill online service providers and punish the very efforts to limit dangerous content that §230 was enacted to protect and incentivize. To the extent petitioners disagree with the breadth of the statute as uniformly construed by the courts of appeals, their policy arguments are better directed to Congress and provide no basis for this Court to intervene.

1. The decision below is not just consistent with decisions elsewhere but is eminently correct. Petitioners alleged that Facebook provided supporters of HAMAS a communication platform, moderated

content that users shared, failed to delete content, and made suggestions to users, including about content in which they might be interested and users with whom they might want to connect. As the Second Circuit correctly concluded, those actions “fall[] within the heartland of what it means to be the ‘publisher’ of information under Section 230(c)(1).” Pet.App.22a.

There can be no serious dispute that providing a communication platform, moderating it, and developing and implementing policies regarding permissible content is a core editorial function. Congress expressly sought to incentivize that conduct when it enacted §230. *See Zeran*, 129 F.3d at 331. And Facebook’s suggestion of content and users is no different.<sup>6</sup> According to petitioners, Facebook analyzes users’ data to suggest content “that will be ‘as relevant and interesting’ as possible to each individual user” thus “customiz[ing] its services to the specific likes and interests of each of its users.” C.A.App.A119 ¶530. And Facebook allows advertisers to target their promotions to users most likely to be interested in them. C.A.App.A120 ¶538. In light of these allegations, petitioners asked the courts below to hold that their claims relating to promoting and arranging content did not seek to treat Facebook as a

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<sup>6</sup> Petitioners acknowledge that their principal allegations against Facebook have shifted over the course of this litigation. Pet.11–13. Their allegations initially focused on the mere provision of social media services to supporters of HAMAS and the failure to remove terrorist content. Pet.App.142a. But the focus of the petition and the decision below is petitioners’ argument that Facebook’s actions connecting users with each other and with particular content constituted material assistance under the ATA. Pet.11–13.

“publisher” of such information. C.A.App.A119–A120 ¶¶530–37.

The Second Circuit correctly rejected that argument. The court considered the ordinary meaning of the term “publisher,” the full text of §230, and case law interpreting §230 to conclude that Facebook was exercising traditional editorial functions when it arranged and suggested third-party content. As the court explained, “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.” Pet.App.24a–25a (footnote omitted); *see* Pet.App.33a (“Plaintiffs’ allegations likewise indicate that Facebook’s algorithms are content ‘neutral’ ... : The algorithms take the information provided by Facebook users and ‘match’ it to other users—again, materially unaltered—based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers.”).

That holding was eminently correct. Facebook’s efforts to highlight or suggest content is part of its general and overall approach to alert users to content that is likely to be of interest and useful to them. Just as Facebook moderates third-party content and highlights or suggests certain user content over other material, a local newspaper decides what content will appear on the front page, and whether to locate an advertisement for sporting goods in the sports section or feature a human interest story on a sports celebrity in the entertainment or sports section.

To be sure, and as the court below acknowledged, “Facebook’s algorithms might cause more such ‘matches’ than other editorial decisions.” Pet.App.26a. But as the court below also correctly explained, “it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability.” *Id.* That reasoning is consistent with how courts of appeals across the country have interpreted §230 in similar circumstances. *See supra* at 13–18.

2. To the extent petitioners believe that the protections of §230 are too broad, that is an issue better suited for Congress, as Chief Judge Katzmann acknowledged in dissent. As he put it, “[a] healthy debate has begun both in the legal academy and in the policy community about changing the scope of § 230.” Pet.App.75a–76a (Katzmann, C.J., dissenting in part) (footnotes omitted). Amendments to §230 have been introduced as recently as this Congress. *See EARN IT Act*, S. 3398, 116th Cong. (2020). And recent scholarship has addressed the issue, including the need to guard the protections of §230, which “help[] keep ... legitimate content online,” including content from communities “more likely to be targeted by people in positions of power,” by providing “legal certainty at a relatively low cost.” Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 *Notre Dame L. Rev. Reflection* 33, 41–42 (2019).

Moreover, Congress has made changes to §230 when it perceives a need, including in response to judicial decisions. Section 230 itself was a response to

judicial decisions. See Pet.App.18a. (majority op.) (discussing “[t]he addition of Section 230 to the proposed CDA” to “assuage[] Congressional concern regarding the outcome of two inconsistent judicial decisions” (citations omitted)). And Congress recently revisited §230 after the First Circuit’s decision in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), following this Court’s denial of *certiorari*, *Jane Doe No. 1*, 137 S. Ct. 622 (2017). The First Circuit had held that §230 barred claims against the operator of an online classified advertisement forum that allegedly allowed third-party traffickers’ draft advertisements to be posted on its classified site. Congress acted to address that and similar judicial holdings, amending §230 to create specific exceptions for civil trafficking claims brought under the federal anti-trafficking laws, and parallel state criminal prosecutions. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. §§1591, 1595, 2421A, and 47 U.S.C. §230).

As Chief Judge Katzmann opined, “[p]erhaps Congress will engage in a broader rethinking of the scope of CDA immunity. Or perhaps Congress will decide that the current regime best balances the interests involved.” Pet.App.77a. But “[w]hether, and to what extent, Congress should allow liability” ultimately “is a question for legislators, not judges.” Pet.App.75a. There is no reason for this Court to grant plenary review.

**CONCLUSION**

For the foregoing reasons, this Court should deny the petition for *certiorari*.

Respectfully submitted,

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