No. 19-859

In The Supreme Court of the United States

STUART FORCE, *et al.*,

Petitioners,

v.

FACEBOOK, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

Plaintiffs' complaint asserted two distinct types of claims: that Facebook permitted Hamas supporters and proxies to post terrorist-related materials on Facebook, and that Facebook itself promoted Hamas content, by affirmatively suggesting that its users look at or "friend" (link to) those pro-Hamas pages, and by notifying users of Hamas events. The petition only seeks review of the second claim. Pet. 10-12.

Respondent objects to the narrow scope of the petition, suggesting that by failing to seek review of all the claims in the original complaint, petitioners have somehow "shifted" their contentions. Br. Opp. 8, 27 n.6. But limiting a petition for certiorari to a subset of the issues decided by a court of appeals is normal and entirely appropriate. There is no dispute that the second claim was presented in the complaint, or that it was considered and rejected by the court of appeals.

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

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

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir. 2008), the Seventh Circuit explained in detail why it rejected their interpretation of § 230(c)(1) that was "the view in other circuits." 519 F.3d at 669. First, it explained that the broader interpretation of the statute "expand[s] § 230(c)(1) beyond its language." 519 F.3d at 670; see *id.* at 669 (interpreting § 230(c)(1) to provide broad immunity does not "find[] much support in the statutory text. Subsection (c)(1) does not mention 'immunity' or any synonym"). Second, the court of appeals reasoned that the interpretation in other circuits was inconsistent with the title of § 230 ("Protection for 'Good Samaritan' blocking and screening of offensive material"), which it reasoned was "hardly an apt description" of the provision as broadly construed. 519 F.3d at 670. Third, the Seventh Circuit concluded that this Court's own interpretation of the statute in *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005), was "incompatible with treating § 230(c)(1) as a grant of comprehensive immunity from civil liability for content provided by a third party." *Id*.

Based on that analysis, the Seventh Circuit concluded that § 230(c)(1) should be interpreted in a deliberately more "limited" manner. Correctly understood, it held, "§ 230(c)(1) forecloses any liability that depends on deeming the [interactive computer service] a 'publisher.'" 519 F.3d at 670. There was, the court explained a "difference between this reading and the [broader interpretation]." *Id*.

Respondent insists, however, that the Seventh Circuit standard adopted in *Chicago Lawyers' Committee*, is actually identical to the broader interpretation of § 230(c)(1), utilized in other circuits, which the Seventh Circuit expressly rejected. According to respondent, the Seventh Circuit inadvertently adopted the very standard it thought it was rejecting. Any distinction between the Seventh Circuit standard, and the standard that circuit thought it was disapproving, is according to respondent "a matter of semantics." Br. Opp. 18; see Br. Opp. 19 ("nothing more than a difference in wording").

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

defendant was a publisher is an *element* of the claim asserted.

Respondent insists that this case would be decided the same way even under the Seventh Circuit standard. "[T]he Seventh Circuit's approach would result in exactly the same outcome as that reached by the Second Circuit in this case." Br. Opp. 12. To the contrary, this is precisely the type of case in which the difference between the Seventh Circuit's interpretation of § 230(c)(1) and the Second Circuit's construction is of controlling importance. Plaintiffs contend that Facebook violated the Anti-Terrorism Act, 18 U.S.C. § 2333, ("ATA"), when it suggested to users that they visit and "friend" (link to) websites maintained by Hamas supporters, and when it notified users of events sponsored by Hamas. Defendant's violation of the ATA, and its liability in this case, do not depend on whether the websites to which Facebook users were being directed were operated by Facebook itself, rather than by some other entity. If the destination websites had been operated by a different entity, such as the Iranian Republican Guard, § 230(c)(1) obviously would not provide Facebook with a defense. In the instant case, plaintiff could prevail at trial without ever mentioning, and without any jury finding, that the defendant itself operated—was the publisher of—the websites which Facebook recommended that members of the public visit.

In the Seventh Circuit, because proof that Facebook hosted and operated the destination websites would not be a necessary element of plaintiff's ATA claim, § 230(c)(1) would not be a defense, regardless of

who operated the destination websites. But the rule in the Second Circuit is otherwise. Although Facebook would be liable for recommending that its users visit Hamas websites hosted and operated by some other interactive computer service, the Second Circuit held that Facebook was entitled to immunity because the websites it sought to induce users to visit were operated by Facebook itself.

The petition quotes nine federal and state lower court opinions describing the conflict between the Seventh Circuit standard and the standard in other circuits. Pet. 25-29. The brief in opposition simply ignores all but one of the federal court decisions. Respondent suggests that the state court opinions recognizing the conflict "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." Br. Opp. 21 n.5. But the petition quoted those state court opinions, not because the decisions reached a result (if any) in conflict with another court, but because those opinions described the existence of that conflict. Respondent notes that one of the articles quoted in the petition observed that "the Seventh Circuit's decisions *to date* have remained consistent with [other courts] in their basic holdings." Br. Opp. 21 (emphasis added). But that article was published in 2012, five years before the 2017 district court decisions in this case, and in *Dyroff v. Ultimate Software*.

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

Respondent contends that all circuits agree that the traditional editorial function test is the standard for determining when a defendant is acting as a publisher under § 230(c)(1). Br. Opp. 2, 13. But in *Dyroff v. Ultimate Software*, No. 18-859, the respondent advances the opposite argument, insisting that no court of appeals holds that this is the standard. *Dyroff*. Br. Opp. 26-32. Both respondents cannot be right; in this instance, neither is.

The specific question in this case is whether § 230(c)(1) protects Facebook from liability for recommending a website of Hamas supporters or proxies if the website in question is hosted and operated by Facebook itself. The complaint asserts that the recommendations and suggestions were written and disseminated, not by a terrorist hiding somewhere in the Middle East, but by Facebook employees and a Facebook-created algorithm. The Department of Justice has expressed concern about according § 230(c)(1) protections to such recommendations, noting that they differ significantly from merely hosting a website.

> The early days of online bulletin boards, like AOL, have been replaced by platforms with sophisticated content moderation tools, algorithms, recommendation features, and

> targeting. With these new tools, the line between passively hosting third-party speech and actively curating or promoting speech starts to blur. What these changes mean for the scope of Section 230 immunity is another important issue to consider.

Attorney General William P. Barr Delivers Opening Remarks at the DOJ Workshop on Section 230: Nurturing Innovation or Fostering Unaccountability?, Feb. 19, 2020 ("Attorney General Barr Remarks on Section 230").[1]

The traditional editorial functions standard is important because it delineates the activities that constitute publishing under § 230(c)(1). Deciding what submissions to accept or reject, and if accepted where to display them, are decidedly editorial functions. But publishers often do a wide variety of things to promote their publications: they write and purchase advertisements, schedule book signings, send authors on book tours, contact reviewing publications, and issue press releases. Not everything a publisher writes or does is an editorial function. The issue here is whether § 230(c)(1) applies only to traditional editorial functions, and if so what those functions include.

Respondent asserts the Second Circuit held that making recommendations (even in the words written by the interactive computer service) is a traditional editorial function, and that all circuits which apply the

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

traditional editorial function standard agree with the Second Circuit that such recommendations or suggestions are a traditional editorial function and thus protected by § 230(c)(1). Neither assertion is correct.

Respondent states that "the Second Circuit held . . . that Facebook's . . . suggestion of third-party content was akin to traditional editorial functions, such as arranging and highlighting content. . . ." Br. Opp 12-13. This assertion is not accompanied by any citation to the opinion below. The brief in opposition further asserts that "[t]he Second Circuit . . . conclude[d] that Facebook was exercising traditional editorial functions when it . . . suggested third-party content." Br. Opp. 28. That assertion too is not accompanied by any citation to the opinion below. The Second Circuit's discussion of Facebook's recommendation practices is actually at Pet. App. 34a. There the court of appeals does not characterize such suggestions as an editorial functions, but instead describes them as "vigorously fulfilling [Facebook's] role as a publisher."

Respondent asserts that courts of appeals agree that making suggestions or recommendations is a traditional editorial function.

> [T]he courts of appeals generally agree on [t]hat [traditional editorial functions] encompass . . . decisions to . . . promote [or] suggest . . . third party content. Pet. App. 34a; *Zeran* [*v. Am. Online, Inc.*], 129 F.3d [327,] 330 [4th Cir. 1997)] (§ 230 bars liability for the "exercise of

> a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content."

Br. Opp. 15. But the list of traditional editorial functions quoted from *Zeran* does not include recommendations or suggestions. And while the court of appeals opinion at Pet. App. 34a does refer to suggestions, it does not characterize them as traditional editorial functions. The brief in opposition states that

> [t]he courts of appeals . . . generally agree that a website's provision of tools to . . . recommend third-party content does not rob a website of § 230 immunity. *See, e.g.*, *Dowbenko v. Google Inc.*, 582 Fed. 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* [*Serv. Inc. v. Google, LLC*], 925 F.3d [1263,] 1269-71 [D.C. Cir. 2019)]; *Kimzey* [*v. Yelp!, Inc.,*] 836 F.3d [1263,] 1269-70 [9th Cir. 2016)]).

Br. Opp. 15-16. But none of the cited cases refers to such recommendations.

Respondent places particular emphasis on the Sixth Circuit decision in *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014). Br. Opp. 23. The plaintiff in that case alleged, *inter alia*, that the defendant had engaged in "the posting of comments concerning third-party posts." 755 F.3d at 415-16. Because the defendant prevailed in *Jones*,

respondent argues, the meaning of "traditional editorial functions" must be broad enough to include comments written by an interactive computer service. Br. Opp. 23. And recommendations, it reasons, are indistinguishable from comments. But the Sixth Circuit in *Jones* did not hold that the defendant's comments were traditional editorial functions. To the contrary, it held that tortious comments by an interactive computer service are *not* protected by § 230(c)(1). The defendant in *Jones* prevailed only because the plaintiff had not alleged that the comments themselves were actionable.[2] The Sixth Circuit decision in *Jones* interprets the § 230(c)(1) reference to "publisher" in precisely the narrower manner urged by Chief Judge Katzman's dissent below, but rejected by the Second Circuit.

Facebook joined an amicus brief in *Jones* which expressly acknowledged that the defendant's comments in that case (referred to as "taglines") were not protected by § 230.

> To be sure, if the plaintiff had established that the taglines themselves were tortious, Section 230 would not bar imposition of liability for those taglines, because they were not 'provided by *another* information content

[2] 755 F.3d at 416 ("the CDA bars claims lodged against website operators for . . . the posting of comments concerning third-party posts, so long as those comments are not themselves actionable. . . . To be sure, [the defendant] was an information content provider as to his comment. . . . But Jones did not allege that [its] comments were defamatory. And the district court did not hold that Richie's comments were themselves tortious.").

> provider.' The court below, however, did not hold that the taglines were tortious.

Brief for Amici Curiae AOL, Inc., et al., *Jones v. Dirty World Entertainment Recordings, LLC*, No. 13-5946 (6th Cir. 2013), 2013 WL 6409350 at *17 (emphasis in original). Plaintiffs advance in this case the interpretation of § 230 which the Facebook itself advanced in *Jones*.

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

Respondent correctly observes that the scope of the protections afforded by § 230(c)(1) is a matter of great importance to online service providers. But the scope of the defense provided by § 230(c)(1) is of equal and countervailing importance to members of the public who are injured as a result of negligence or misconduct by those internet companies, or who would be at risk if the certainty of immunity reduced the incentive to avoid actions that could harm others. As the Attorney General recently warned,

> importantly, Section 230 immunity is relevant to our efforts to combat lawless spaces online. We are concerned that internet services, under the guise of Section 230, can . . . prevent victims from civil recovery. . . . Giving broad immunity to platforms that purposely blind themselves . . . to illegal conduct on their service does not create incentives to make the

> online world safer. . . . In fact, it may do just the opposite.

Attorney General Barr Remarks on Section 230.

Respondent objects that "[p]etitioners' effort to convert the provision of an online forum into material support of, or substantial assistance to, terrorism would chill online service providers. . . ." Br. Opp. 26. But the petition concerns recommending terrorist websites, not providing an online forum. Whether such recommendations constitute "material support of, or substantial assistance to, terrorism" turns not on the meaning of § 230(c)(1), but on the interpretation of the phrase "material assistance" in the Anti-Terrorism Act. 18 U.S.C. § 2333(d)(2). Respondent's motion to dismiss did not ask the lower courts to hold that the ATA does not apply to its actions. If Facebook's actions violate the ATA, § 230(c)(1) would not protect Facebook from prosecution, because § 230 expressly does not limit criminal prosecutions. 47 U.S.C. § 230(e)(1).

The issue here regarding § 230(c)(1) is whether, if the ATA indeed forbids Facebook's conduct, Facebook is subject not only to prosecution, but also to civil liability. The Attorney General has explained that in this context civil litigation is a vital adjunct to criminal prosecution.

> [C]ivil tort law can act as an important complement to our law enforcement efforts. Federal criminal prosecution is a powerful, but necessarily limited tool that addresses only the most serious conduct. The threat of civil

> liability, however, can create industry-wide pressure and incentives to promote safer environments. . . . Civil liability can work hand-in-hand with the department's law enforcement efforts to promote a safer environment, both online and in the physical world.

Attorney General Barr Remarks on Section 230. In light of the concerns that the Department of Justice has expressed regarding these issues, it would be appropriate to invite the Solicitor General to file a brief expressing the views of the United States.[3]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit. The case should be consolidated for oral argument with *Dyroff v. The Ultimate Software Group*, No. 19-849. In the alternative,

[3] Respondent argues that this Court has in the past denied petitions raising questions about section 230. It does not, however, contend that any of those petitions presented the legal issues raised by the recommendation practices at issue in this case.

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

Respectfully submitted,

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