

No. 21-1333

---

---

IN THE  
**Supreme Court of the United States**

---

REYNALDO GONZALEZ, *et al.*,  
*Petitioners,*

*v.*

GOOGLE LLC,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

**BRIEF OF TWITTER, INC. AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENT**

---

RISHITA APSANI  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
7 World Trade Center  
250 Greenwich St.  
New York, NY 10007

SETH P. WAXMAN  
*Counsel of Record*  
PATRICK J. CAROME  
ARI HOLTZBLATT  
CLAIRE H. CHUNG  
ALLISON M. SCHULTZ  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 663-6000  
seth.waxman@wilmerhale.com

---

---

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	6
I. REVERSAL IN <i>TAAMNEH</i> SHOULD PROMPT THE COURT TO DISMISS THE PETITION IN THIS CASE.....	6
II. SECTION 230 BARS ANY CLAIM THAT SEEKS TO HOLD INTERACTIVE COMPUTER SERVICE PROVIDERS LIABLE FOR DISSEMINATING OR MAKING AVAILABLE THIRD-PARTY CONTENT, INCLUDING BY SELECTIVELY DISPLAYING PARTICULAR CONTENT.....	7
A. Section 230(c)(1) Prohibits Holding A Service Provider Liable For Disseminating Third-Party Content .....	8
B. Section 230(c)(1) Bars Claims Seeking To Hold Service Providers Liable For Selectively Displaying Third-Party Content To Particular Users.....	12
III. VARIOUS CRITICISMS OF THE LONG- ACCEPTED CONSTRUCTION OF SECTION 230(C)(1) DO NOT WITHSTAND SCRUTINY.....	17
A. Section 230(c)(1)'s Protection Is Not Limited To Causes Of Action For Which Publishing Is A Necessary Element .....	18

**TABLE OF CONTENTS—Continued**

	Page
B. Section 230(c)(1)'s Protection Is Not Limited To Claims That Impose Strict Liability .....	22
CONCLUSION .....	30

## TABLE OF AUTHORITIES

### CASES

	Page(s)
<i>AMG Capital Management, LLC v. FTC</i> , 141 S. Ct. 1341 (2021) .....	20
<i>Banon v. Moran</i> , 12 Ky. L. Rptr. 989 (Ky. 1891).....	26
<i>Barnes v. Yahoo!, Inc.</i> , 570 F.3d 1096 (9th Cir. 2009) .....	20
<i>Barret v. Rosenthal</i> , 146 P.3d 510 (Cal. 2006) .....	24, 26
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003) .....	10
<i>Ben Ezra, Weinstein &amp; Co. v. America Online Inc.</i> , 206 F.3d 980 (10th Cir. 2000) .....	11, 24
<i>BP P.L.C. v. Mayor &amp; City Council of Baltimore</i> , 141 S. Ct. 1532 (2021) .....	8
<i>Chapadeau v. Utica Observer-Dispatch</i> , 38 N.Y.2d 196 (1975) .....	28
<i>Church of Scientology of Minnesota v. Minnesota State Medical Association Foundation</i> , 264 N.W.2d 152 (Minn. 1978) .....	27
<i>Cubby, Inc. v. CompuServe, Inc.</i> , 776 F. Supp. 135 (S.D.N.Y. 1991) .....	25
<i>Doe v. America Online</i> , 783 So.2d 1010 (Fla. 2001) .....	24, 27
<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413 (5th Cir. 2008).....	11
<i>Emo v. Milbank Mutual Insurance Co.</i> , 183 N.W.2d 508 (N.D. 1971) .....	10

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>Enigma Software Group USA, LLC v. Malwarebytes, Inc.</i> , 946 F.3d 1040 (9th Cir. 2019).....	19
<i>Fields v. Twitter, Inc.</i> , 881 F.3d 739 (9th Cir. 2018).....	7
<i>Force v. Facebook, Inc.</i> , 934 F.3d 53 (2d Cir. 2019).....	13
<i>Gertz v. Robert Welch, Inc.</i> , 418 U.S. 323 (1974).....	28
<i>Herrick v. Grindr LLC</i> , 765 F. App'x 586 (2d Cir. 2019).....	20
<i>Herbert v. Lando</i> , 441 U.S. 153 (1979).....	28
<i>Johnson v. Arden</i> , 614 F.3d 785 (8th Cir. 2010).....	11
<i>Jones v. Dirty World Entertainment Recordings LLC</i> , 755 F.3d 398 (6th Cir. 2014) .....	26
<i>Klayman v. Zuckerberg</i> , 753 F.3d 1354 (D.C. Cir. 2014).....	11, 20
<i>Layton v. Harris</i> , 3 Del. (3 Harr.) 406 (Super. Ct. 1842).....	27
<i>Loughrin v. United States</i> , 573 U.S. 351 (2014) .....	23
<i>Malwarebytes, Inc. v. Enigma Software Group USA, LLC</i> , 141 S. Ct. 13 (2020) .....	18, 27
<i>Marshall's Locksmith Service Inc. v. Google, LLC</i> , 925 F.3d 1263 (D.C. Cir. 2019).....	20
<i>Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.</i> , 591 F.3d 250 (4th Cir. 2009) .....	11

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<i>Osmond v. EWAP, Inc.</i> , 200 Cal. Rptr. 674 (Cal. Ct. App. 1984) .....	28
<i>Peck v. Tribune Co.</i> , 214 U.S. 185 (1909) .....	28
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997) .....	23, 26
<i>Sikhs for Justice, Inc. v. Facebook, Inc.</i> , 697 F. App'x 526 (9th Cir. 2017) .....	20
<i>Smith v. California</i> , 361 U.S. 147 (1959).....	26
<i>Stratton Oakmont, Inc. v. Prodigy Services Co.</i> , 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) .....	3, 9, 11
<i>Tacket v. General Motors Corp.</i> , 836 F.2d 1042 (7th Cir. 1987).....	26
<i>Texas Department of Housing &amp; Community Affairs v. Inclusive Communities Project, Inc.</i> , 576 U.S. 519 (2015) .....	20
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021) .....	7
<i>Zeran v. America Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997).....	10, 11, 24, 25, 27

**DOCKETED CASES**

<i>Cain v. Twitter, Inc.</i> , No. 3:17-cv-02506-JD (N.D. Cal.).....	2
<i>Twitter, Inc. v. Taamneh</i> , No. 21-1496 (U.S.) .....	2, 4, 6, 7

**TABLE OF AUTHORITIES—Continued**

	Page(s)
<b>STATUTES AND RULES</b>	
18 U.S.C.	
§§1460-1470 .....	19
§§2251-2260 .....	19
§2333.....	7
28 U.S.C. §4102 .....	21
35 U.S.C. §271 .....	19
47 U.S.C.	
§223.....	23
§230.....	5, 8, 10, 15, 16, 19, 22, 23, 24,-25
§941.....	21
Pub. L. No. 104-104, 110 Stat. 133 (1996) .....	23
Pub. L. No. 105-277, 112 Stat. 2681 (1998) .....	20
Pub. L. No. 107-317, 116 Stat. 2766 (2002) .....	21, 24
Pub. L. No. 111-223, 124 Stat. 2380 (2010) .....	21
Pub. L. No. 115-164, 132 Stat. 1253 (2018) .....	20
S. Ct. R. 37.6.....	1
<b>LEGISLATIVE MATERIALS</b>	
H.R. Rep. No. 107-449 (2002).....	21, 24
S. Rep. No. 104-230 (1996).....	9, 11
141 Cong. Rec. 22045 (1995) .....	25
<b>OTHER AUTHORITIES</b>	
57A Am. Jur. 2d Negligence §5 (2002) .....	22
<i>Black's Law Dictionary</i> (11th ed. 2019).....	9

**TABLE OF AUTHORITIES—Continued**

	Page(s)
Djuraskovic, Ogi, <i>Big Data Statistics 2023: How Much Data is in The World?</i> , First Site Guide (Dec. 26, 2022), <a href="https://tinyurl.com/hfpf9t3c">https://tinyurl.com/hfpf9t3c</a> .....	3
Keeton, W. Page, <i>et al.</i> , <i>Prosser &amp; Keeton on the Law of Torts</i> (5th ed. 1984) .....	26
Perrin, Andrew & Sara Atske, <i>About Three-In-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online</i> , Pew Research Center, (Mar. 26, 2021), <a href="https://tinyurl.com/yeyxrusa">https://tinyurl.com/yeyxrusa</a> .....	2
<i>Restatement (Second) of Torts</i> (1977) .....	10, 18, 28
Scipioni, Jade,, <i>How Bill Gates Described the Internet to David Letterman in 1995: ‘It’s Wild What’s Going On,’</i> CNBC.com (Dec. 8, 2019), <a href="https://tinyurl.com/2y3j8ejj">https://tinyurl.com/2y3j8ejj</a> .....	3
Speiser, Stuart M., <i>et al.</i> , 8A Am. Law of Torts §29:31 (2022) .....	28
Twitter, <i>About Your Home Timeline on Twitter</i> , <a href="https://tinyurl.com/4wk3tw3e">https://tinyurl.com/4wk3tw3e</a> (visited Jan. 18, 2023).....	14
<i>Webster’s Third New International Dictionary</i> (1993) .....	9, 18



## INTEREST OF AMICUS CURIAE<sup>1</sup>

Twitter, Inc. is a global communications company. It provides an Internet communications platform free of charge to hundreds of millions of individuals who use the platform to share their views, engage with the views of others, and follow current events. People who promise to follow Twitter’s rules and terms of use may post “Tweets,” short messages limited to 280 characters that can also contain images, videos, and links to other websites or media sources. The brevity of Tweets and the ability to react in real time to current events have made Twitter a popular online platform. On any given day, users post more than 500 million Tweets—5,700 Tweets per second.

Twitter has keen interests in the outcome of this case. For more than a quarter century, courts have construed Section 230(c)(1) to protect interactive computer service providers from liability arising from third-party content on their websites. Twitter has built its platform based on that construction. Notwithstanding the immense volume of content that users generate and share, Twitter has created a forum for instantaneous exchange of information, on the assumption that it would not face crippling litigation costs and liability whenever someone else’s content causes legal injury. Twitter has also created content moderation practices on the understanding—embodied in Section 230—that removal of harmful content would not perversely make

---

<sup>1</sup> Pursuant to this Court’s Rule 37.6, Twitter, Inc. affirms that no counsel for a party authored this brief in whole or in part and that no person or entity other than Twitter and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed letters indicating blanket consent to the filing of amicus briefs in this case.

Twitter liable for not removing some other allegedly harmful content.

Twitter has routinely relied on Section 230 in defending against myriad lawsuits, including in approximately a dozen suits brought under the Anti-Terrorism Act (ATA). Twitter is the petitioner in the companion case, *Twitter, Inc. v. Taamneh*, No. 21-1496 (U.S.), which involves an ATA claim that is materially identical to the aiding-and-abetting claims here. In that case, Twitter (along with Google and Facebook) raised a Section 230 defense in the lower courts, although the courts did not reach it. And even this case initially involved Twitter as a defendant, but Plaintiffs voluntarily dismissed their claims against Twitter, *see* Dist. Ct. Dkts. 74, 75, while some of the same plaintiffs litigated similar claims separately in *Cain v. Twitter, Inc.*, No. 3:17-cv-02506-JD (N.D. Cal. 2019), *appeal filed*, No. 19-16265 (9th Cir. June 26, 2019). Twitter therefore has a strong interest in explaining to the Court why, if the Court addresses the scope of Section 230 here, it should affirm the judgment below.

### SUMMARY OF ARGUMENT

Section 230 is pivotal to the modern Internet. Every day, more than eight out of ten Americans use the Internet to search for information, express and share their views, connect with others, stream content, engage in commerce, or live their lives in many other ways.<sup>2</sup> That frequent usage on a global scale yields staggering quantities of information. In 2020 alone, 40 zettabytes of online data were generated worldwide—

---

<sup>2</sup> Perrin & Atske, *About Three-In-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online*, Pew Research Center (Mar. 26, 2021), <https://tinyurl.com/ycyxrusa>.

1.7 megabytes *per user, per second*.<sup>3</sup> It would take an average user approximately 181 million years to download all data from the web today.<sup>4</sup>

Section 230 ensures that websites like Twitter and YouTube can function notwithstanding the unfathomably large amounts of information they make available and the potential liability that could result from doing so. When Section 230 was enacted in 1996, the Internet was in its infancy. Microsoft had just launched Internet Explorer to help computers access the Internet, which Bill Gates described as “[a] place where people can publish information.”<sup>5</sup> Meanwhile, a state court caused a stir by holding that an online service provider could be held liable for a third party’s defamatory speech posted on the provider’s bulletin board, on the theory that the provider removed some objectionable postings but not the allegedly defamatory material at issue and therefore could be held responsible as a publisher of the defamatory material. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Alarmed by the implications of that ruling, Congress enacted Section 230 to protect providers and users of interactive computer services from liability arising from publishing other people’s content. With the new law, Congress aimed both to spur the fledgling worldwide web and to encourage websites to self-police the third-party content they host, without fear that

---

<sup>3</sup> Djuraskovic, *Big Data Statistics 2023: How Much Data is in The World?*, First Site Guide (Dec. 26, 2022), <https://tinyurl.com/hfpf9t3c>.

<sup>4</sup> *Id.*

<sup>5</sup> Scipioni, *How Bill Gates Described the Internet to David Letterman in 1995: ‘It’s Wild What’s Going On,’* CNBC.com (Dec. 8, 2019), <https://tinyurl.com/2y3j8ejj>.

such efforts would make them liable for any allegedly harmful content that remains.

That balance worked. With Section 230, the Internet, operating largely through U.S.-based companies, has flourished. Despite the exponential growth of online content, American innovators founded websites like YouTube, Twitter, Facebook, Etsy, and Craigslist, on the statutory assurance—reinforced by courts’ consistent interpretation—that they would not face devastating liability whenever an injury was allegedly caused by some item among the immense volume of third-party content they host. In turn, those websites and many others brought the world closer. Instead of the largely static, gray-on-white text that typically appeared on web pages in the mid-1990s, today, people all over the world post and stream videos on YouTube, follow current affairs and report breaking news on Twitter, share ideas on Reddit or Pinterest, and expand their professional connections on LinkedIn.

This case asks the Court to answer a narrow question about Section 230’s reach: whether and to what extent Section 230(c)(1) applies when a website selectively displays particular third-party content to particular users. But this case is inapt for the Court to address Section 230 at all because, as Twitter explained in *Taamneh* and the United States agrees (U.S. Br 32 n.5), the aiding-and-abetting claims in this case—which are undisputedly materially identical to the claim in *Taamneh*—fail to state a claim. Thus, the Court should reverse in *Taamneh*, which would also resolve the claims in this case.

If the Court nonetheless addresses Section 230(c)(1), it should affirm. Section 230(c)(1) prohibits “treat[ing]” a service provider or user “as the publisher

or speaker of any information provided by another information content provider.” 47 U.S.C. §230(c)(1). Under both the ordinary meaning of this language and the meaning derived from the common law, this instruction prohibits holding providers or users liable for disseminating or making available content originated by others. Plaintiffs (petitioners here) agree with this basic understanding, and so does the United States. The plain meaning also achieves the statute’s overarching purposes of promoting the development of the Internet and encouraging self-regulation by websites and other online service providers, and it upholds decades of lower-court decisions that have been repeatedly ratified by Congress. This Court should not reach beyond the question presented to construe the statute otherwise.

Although Plaintiffs and the United States dispute the factual application of this framework to the selective display of particular content, those arguments fundamentally misunderstand the nature of Plaintiffs’ claims, the display of third-party content online, and the statute itself. What Plaintiffs style as “recommendations”—a sidebar displaying thumbnails of videos similar to what the user has watched previously—are simply a means of making particular content available to users, which both Plaintiffs and the United States acknowledge is protected by Section 230(c)(1). For example, a Twitter page that displays in reverse-chronological order all posts from accounts the user has opted to “follow” prioritizes (and thus implicitly “recommends”) newer content over older content, and content from followed accounts over all other content. But that does not mean Twitter is conveying any “information content” of its own through that display. And whether or not Twitter conveys some implicit message through its display is beside the point where, as here,

the claim is based on the selective display of specific, allegedly harmful third-party content. In such circumstances, any message implied by the selective display of content cannot be distinguished from its mere publication. And excluding so-called “recommendations” of particular content from the statute’s ambit would be highly impractical because it would curtail selective filtering and organizing of content, without which the deluge of online information would be overwhelming and therefore useless. Neither the statutory text nor its context supports that outcome.

Some amici (but not Plaintiffs or the United States) go further. To the extent the Court decides to address those arguments, they should be rejected. The statutory text, context, and purposes, as well as subsequent legislative actions, all affirm that Section 230(c)(1) protects service providers from all claims (other than those expressly excepted) that seek to hold them liable for disseminating third-party content, not merely claims that require publication as an element or strict liability claims that traditionally attached to certain types of publishers.

## ARGUMENT

### I. REVERSAL IN *TAAMNEH* SHOULD PROMPT THE COURT TO DISMISS THE PETITION IN THIS CASE

In the companion *Taamneh* case, Twitter, Google, Facebook, and the United States all explained that aiding-and-abetting liability under the ATA does not attach in that case because Defendants are not alleged to have knowingly and substantially assisted the act of international terrorism at issue. Twitter Br. 21-51, *Taamneh*, No. 21-1496 (U.S.) (“Twitter *Taamneh* Br.”); Facebook & Google Br. 20-50, *Taamneh*, No. 21-1496;

U.S. Br. 14-30, *Taamneh*, No. 21-1496; *see* 18 U.S.C. §2333(d)(2). If the Court agrees with that view, there will be no viable claim in this case, as the aiding-and-abetting claims here are materially identical, *see* Twitter *Taamneh* Br. 19, and thus no need for this Court to construe Section 230. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (“federal courts do not issue advisory opinions”). For all the reasons that Twitter explained in *Taamneh*, the Court should reverse the judgment there. If it does, the prudent course would then be to dismiss the petition in this case.<sup>6</sup>

**II. SECTION 230 BARS ANY CLAIM THAT SEEKS TO HOLD INTERACTIVE COMPUTER SERVICE PROVIDERS LIABLE FOR DISSEMINATING OR MAKING AVAILABLE THIRD-PARTY CONTENT, INCLUDING BY SELECTIVELY DISPLAYING PARTICULAR CONTENT**

If the Court decides to address Section 230, it should affirm the judgment below. The parties and the United States largely agree on the proper interpretation of the statute: Section 230(c)(1) bars claims that seek to hold interactive computer service providers or users liable for disseminating third-party content.

---

<sup>6</sup> Although this case includes direct liability claims under the ATA, those claims would likewise fail. If Defendants are not liable for aiding and abetting because they are disconnected from the “act of international terrorism” that injured Plaintiffs, Defendants *a fortiori* would not be directly liable because their conduct lacks a direct relationship to the injury required to satisfy proximate cause. *See Fields v. Twitter, Inc.*, 881 F.3d 739, 745-746 (9th Cir. 2018). The district court below so held, explaining that direct liability claims “fail for the independent reason that they do not satisfy the proximate causation standard announced in *Fields*.” Pet.App.209a-210a.

Although Plaintiffs and the United States resist applying that framework where a website selectively displays particular content, those arguments misapprehend the nature of the actions they challenge and the statute, and would debilitate the development and use of important tools that are essential to the functioning of today's Internet and the accessibility of the immense quantities of information it carries.

**A. Section 230(c)(1) Prohibits Holding A Service Provider Liable For Disseminating Third-Party Content**

1. Section 230(c)(1) states 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.” 47 U.S.C. §230(c)(1). It thus bars claims where three elements are met: (1) the defendant is a “provider or user of an interactive computer service,” and (2) the plaintiff’s claim seeks to “treat[]” the defendant as “the publisher or speaker” (3) of “information provided by another information content provider.” *Id.* Plaintiffs’ primary argument concerns the second element: what it means to “treat” a service provider or user as “the publisher or speaker.” Pet. Br. 18-33. The ordinary meaning of these words, as reinforced by the statute’s common-law background, is that the statute bars any claim that would hold the provider or its users liable for disseminating or otherwise making available third-party content.

Undefined terms like “treat,” “publisher,” and “speaker” in Section 230(c)(1) carry their “ordinary meaning.” *BP P.L.C. v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 (2021). To “treat” means “to deal with or bear oneself toward in some specified



way” or “to regard (as something or in a particular way) and act toward or deal with accordingly.” *Webster’s Third New Int’l Dictionary* 2434 (1993). Thus, to “treat” a website or another online service provider as the publisher or speaker is to regard the provider as if it were the publisher or speaker of particular content. In a legal claim, this means to hold it liable as the publisher or speaker of that content.

The phrase “publisher or speaker,” in turn, encompasses anyone who disseminates or makes available a writing or other communication. The term “publisher” means “one that makes public,” or “the reproducer of a work intended for public consumption.” *Webster’s Third New Int’l Dictionary* 1837; accord *Black’s Law Dictionary* (11th ed. 2019) (defining “publish” as “[t]o distribute copies (of a work) to the public”). “Speaker” means “one that speaks,” or “one who makes a public speech.” *Webster’s Third New Int’l Dictionary* 2185; accord *Black’s Law Dictionary* (“Speaker”). The plain meaning of Section 230(c)(1) therefore precludes any claim that seeks to hold a provider or user liable for making public, reproducing, distributing, or otherwise disseminating third-party content.

The statute’s common-law backdrop confirms this ordinary meaning. “One of the specific purposes” of Section 230 was to “overrule” *Stratton Oakmont v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), a state common-law case that “treated [service] providers as publishers or speakers of” the defamatory third-party content they disseminated, on the ground that the provider had “restricted access” to other “objectionable material,” thereby exercising editorial discretion and becoming a publisher of the defamatory material. S. Rep. No. 104-230, at 194 (1996). Thus, in forbidding treatment of websites as “publish-

er[s]” (and thereby overruling *Stratton Oakmont*), Section 230(c)(1) looked to the common law meaning of “publisher,” which is one who engages in “publication.” *Restatement (Second) of Torts* §577(1) (1977). “Publication” in turn means “communication intentionally or by negligent act to one other than the person defamed.” *Id.*; accord *Emo v. Milbank Mut. Ins. Co.*, 183 N.W.2d 508, 512-513 (N.D. 1971). As with the text’s ordinary meaning, therefore, common-law usage reaffirms that Section 230(c)(1) bars any claim that would hold a provider or user responsible for communicating third-party content.

This straightforward construction also achieves the statutory objectives. Congress articulated two overarching goals in the enacted preamble of Section 230: (1) “to promote the continued development of the Internet,” with its “vibrant and competitive free market” and (2) to “remove disincentives for the development and utilization of blocking and filtering technologies” that restrict objectionable content from the platform. 47 U.S.C. §230(b). In other words, the statute seeks to “encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce,” while also simultaneously limiting “obscenity and other offensive material.” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). But recognizing that tort liability for others’ offensive material could have a chilling effect that would hinder the Internet’s growth, Congress chose to “encourage service providers to *self*-regulate the dissemination of offensive material.” *Zeran v. America Online, Inc.*, 129 F.3d 327, 330-331 (4th Cir. 1997) (emphasis added).

Barring all claims (other than those expressly excepted) that seek to hold providers or users liable for disseminating third-party content reflects this careful

balance. On the one hand, it facilitates robust development of the Internet by preventing crippling liability for websites that disseminate “staggering” volumes of online communications, *Zeran*, 129 F.3d at 331; absent immunity, websites would be incentivized to severely restrict the content on their platforms to reduce their risk of liability, thereby chilling expression online. At the same time, this interpretation encourages self-policing of objectionable content by protecting a website regardless of whether it removes some but not all objectionable content. In this way, the ordinary meaning of the statute fulfills Congress’s objective of overruling the *Stratton Oakmont* decision, which perversely permitted liability *because* the service provider had removed some offensive content but not the allegedly defamatory post at issue. See S. Rep. No. 104-230, at 194; see also *Stratton Oakmont*, 1995 WL 323710, at \*4-5.

2. Courts have consistently construed Section 230(c)(1) to mean exactly what it says—it “bar[s] plaintiffs from holding [service providers or users] legally responsible for information that third parties created and developed.” *Johnson v. Arden*, 614 F.3d 785, 791 (8th Cir. 2010); see also *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358-1359 (D.C. Cir. 2014); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980, 984-985 (10th Cir. 2000).

Both Plaintiffs and the United States generally agree that Section 230(c)(1) prohibits claims that seek to hold a website liable for disseminating third-party content, though they misapply that principle to selective displays of content to particular users. Plaintiffs acknowledge, for example, that Section 230(c)(1)

precludes claims based on “the disseminat[ion]” of third-party content. Pet. Br. 24. The United States advocates the same interpretation, explaining that Section 230(c)(1) precludes claims seeking to hold a provider liable for displaying “unlawful third-party information” or otherwise “responsible for the content’s improper character.” U.S. Br. 15-16. As this case comes to the Court, therefore, the question presented does not ask the Court to upset that consensus interpretation of Section 230(c)(1), which Congress has repeatedly ratified. *See infra* pp.20-22. The Court should let the settled expectations regarding Section 230(c)(1) rest.

**B. Section 230(c)(1) Bars Claims Seeking To Hold Service Providers Liable For Selectively Displaying Third-Party Content To Particular Users**

This case instead concerns a subset of websites’ activities—selectively displaying third-party content to particular users. Plaintiffs and the United States argue that Section 230(c)(1) does not bar claims that purportedly seek to hold websites liable for a message implied by their selective display of particular content (which they refer to as a “targeted recommendation”). Pet. Br. 18-33; U.S. Br. 26-28. As the United States puts it, when YouTube’s algorithms selectively present videos to a particular user, such as by including thumbnail images in an “Up next” sidebar, that “communicate[s] a message from YouTube that is distinct from the messages conveyed by the videos themselves”—namely that “YouTube ‘thinks you, the [user]—you, specifically—will like this content.” U.S. Br. 27-28. But this misapprehends Plaintiffs’ claims, the nature of the conduct they purport to challenge, and the statute itself.

1. This case does not concern any standalone recommendation of third-party content. Plaintiffs did not allege any separate communication from YouTube endorsing any particular content; they alleged, instead, only that YouTube displays a sidebar with thumbnails for videos that are “similar” to what the user has previously watched, JA169-170, 173. That, however, reflects simply the kind of decision regarding how to display and arrange third-party content that is inherent to making such content available and thus falls within Section 230(c)(1)’s protection. When newspapers publish stories, for example, they necessarily decide both what stories are worthy of the readers’ attention and how to organize those stories to prioritize those most relevant to readers. A story above the fold on the front page will likely receive more attention than one buried deep in the pages. And a story relevant to only local readers might appear in a paper’s metro edition but not the national edition.

Highlighting certain content through placement is all the more important online because billions of people worldwide are constantly generating information. Filtering, sorting, and ranking—the functions that generate what Plaintiffs call “targeted recommendations”—are essential to making that information meaningfully accessible. As the Second Circuit noted, interactive computer services “have always decided ... where on their sites ... particular third-party content should reside and to whom it should be shown.” *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019). And “[p]lacing certain third-party content on a homepage ... tends to recommend that content to users more than if it were located elsewhere on a website.” *Id.* Some form of recommendation is thus inherent in displaying third-party information.

YouTube’s use of a sidebar to display particular video thumbnails is simply one kind of publishing choice about how to arrange third-party content, one that reflects changing technologies that allow for greater nuance and personalization. Take Twitter as an example. Traditionally, the feed of Tweets that Twitter presented to a user was populated by all Tweets from accounts followed by that user, organized in reverse-chronological order. That method of organization filtered and ranked content according to two metrics—followed accounts and time of post—and implicitly recommended to users that they would be more interested in seeing recent Tweets from accounts they follow rather than days-old Tweets from other accounts. But as the platform grew and over 500 million Tweets were posted per day on average, Twitter reorganized users’ feeds so as to also promote Tweets according to how popular they are and whether the user regularly interacts with the account originating the Tweets.<sup>7</sup> Such targeted selection and display—whether by account, popularity, geography, or otherwise—is necessary to prevent users from drowning in a tidal wave of content. Today, Twitter gives its users a choice between the original, two-factor format and the newer, multi-factor format.

Neither Plaintiffs nor the United States appear to suggest that a website forfeits Section 230’s protection by selecting for display in a user’s feed only content from accounts that the user follows or by ranking that content based on popularity. *See* U.S. Br. 22-23. Indeed, as Plaintiffs state (at 26), any “claim seeking to hold a defendant liable for sending a user harmful

---

<sup>7</sup> *See* Twitter, *About Your Home Timeline on Twitter*, <https://tinyurl.com/4wk3tw3e> (visited Jan. 18, 2023).

content posted by a third party” is barred, and selecting content for display in a particular user’s feed is merely a means of presenting that content to the user.

Although Plaintiffs and the United States try to distinguish YouTube’s use of a sidebar to display video thumbnails as targeted recommendations, there is no principled or administrable line between such displays and the selection of content for display in a users’ information feed based on, for example, what accounts the user follows and where the user lives. Both forms of selection entail filtering, ordering, and critically, displaying particular third-party content to particular users. Nor is there a coherent distinction between recommendations implicit in YouTube’s “Up next” sidebar and recommendations implicit in other longstanding Internet activities, like responding to search queries. Search engines return particular results in a particular order, thereby suggesting the top results are more relevant than the lower results, much as a newspaper highlights A1 stories over articles deep in the paper. If YouTube’s selective displays fall outside Section 230(c)(1), it is unclear how countless other publication choices that implicitly prioritize certain content are protected, including search engines returning ranked results, news feeds filtering based on geographical location, or information feeds displaying content from only followed accounts.

2. The statutory text and structure do not countenance such a drastic result. First, the statute’s definitional provisions indicate that Section 230(c)(1)’s protection covers filtering and selecting particular third-party content for display to particular users. Section 230(c)(1) protects a provider or user of an “interactive computer service.” 47 U.S.C. §230(c)(1). And though Plaintiffs conspicuously ignore it, the statute defines

“interactive computer service” to include certain providers of software or tools that (among other things) “filter, ... pick, choose, analyze, ... display, [or] forward” content. *Id.* §230(f)(2), (4). It therefore bars any claim seeking to hold websites that selectively “filter” or “pick” third-party content for display liable as the publishers of that content. Plaintiffs’ and the United States’ reading, however, would withdraw statutory protection if websites engaged in the very activities that made them covered by the statute in the first place—*i.e.*, “filter[ing],” “pick[ing],” “display[ing],” or “forwarding” third-party content, which is all that the so-called targeted recommendations at issue here are.

The United States all but recognizes this contradiction. Countering Plaintiffs’ argument that recommending content converts a service provider into a content provider (and thus beyond Section 230(c)(1)’s protection), the government acknowledges it would make “little sense” for the statute to specifically cover entities that enable “filter[ing],” “organiz[ing],” and “reorganiz[ing]” content, “only to categorically withdraw that protection through the definition of ‘information content provider.’” U.S. Br. 23. The same reasoning applies in construing what it means to “treat” a provider as the publisher or speaker. The Court should not construe Section 230(c)(1) to be categorically inapplicable to a subset of interactive computer services that Congress expressly chose to receive statutory protection.

Second, Section 230(c)(1) protects not only “provider[s]” but also “user[s]” from being treated as the publisher or speaker of third-party content. 47 U.S.C. §230(c)(1). But carving out selective recommendations of particular content from the statute’s protections would deprive users of almost any meaningful



protection. After all, a website user ordinarily disseminates third-party content only through a kind of targeted recommendation—*i.e.*, selecting particular content for dissemination to a particular audience. A Twitter user may, for example, repost another’s Tweet for her own followers to see or highlight it for a particular individual by name (*e.g.*, by “tagging” that individual in a comment to the third-party post by including his screen name prefaced by the “@” symbol, which causes that individual to be notified of the “tag”). Congress would not have expressly included “user[s]” within Section 230(c)(1)’s reach, only to then strip that protection by disabling the primary means by which most users disseminate third-party content—targeted recommendations.

### **III. VARIOUS CRITICISMS OF THE LONG-ACCEPTED CONSTRUCTION OF SECTION 230(C)(1) DO NOT WITHSTAND SCRUTINY**

As explained above, this case presents no challenge to the view that Section 230(c)(1) generally bars all claims that seek to hold an interactive computer service provider or user liable for disseminating third-party content. If, however, the Court were to address that fundamental understanding (which Plaintiffs did not include in the question presented and the United States agrees with on the merits), it should hold that the primary critiques of that view lack merit.

First, although some amici argue that Section 230(c)(1) is limited to causes of action for which publishing is a necessary element, *see, e.g.*, Sen. Cruz *et al.* Br. (“Cruz Br.”) 6-10; Cyber Civil Rights *et al.* Br. 4, the statutory language and structure, as well as Congress’s subsequent legislative enactments, reject that view. Second, some amici suggest that Section 230(c)(1)

prohibits only strict liability—as imposed in earlier eras on primary publishers—but not knowledge-based liability as imposed on secondary publishers (or distributors). See Sen. Hawley Br. 4-13; Cruz Br. 7-10; *accord Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14-16 (2020) (statement of Thomas, J. respecting denial of cert.). But, once again, that view contravenes the statute’s plain text and enacted statements of purpose and misunderstands the common law.

**A. Section 230(c)(1)’s Protection Is Not Limited To Causes Of Action For Which Publishing Is A Necessary Element**

Several amici, including Senator Cruz and fifteen other members of Congress (“Cruz amici”), argue that Section 230 applies only to defamation or other causes of action for which publication is a necessary element. See Cruz Br. 7-10; Cyber Civil Rights *et al.* Br. 4. The statutory text and structure, as well as subsequent legislation, preclude that view.

1. Section 230(c)(1) does not mention specific causes of action, much less indicate that its prohibition applies to only claims that require publishing as an element. Rather, the word “treat[]” encompasses every claim that “act[s] towards” or “deal[s] with” an interactive computer service provider or user as if it were the publisher or speaker of third-party content. *Webster’s Third New Int’l Dictionary* 2434; see *supra* pp.8-9. Holding a website liable for a tort such as defamation certainly satisfies that definition because an actionable claim for defamation must include “an unprivileged publication to a third party.” *Restatement (Second) of Torts* §558. But *any* claim that seeks to hold a website liable for third-party content “act[s] toward” or “deal[s] with” the provider as if it were “the publisher or

speaker” of that content—whether styled as defamation, negligence, unfair competition, discrimination, or some other cause of action—so long as the content came from a third party.

The statutory scheme confirms this reading. Section 230(e) contains several enumerated exceptions, none of which would have made sense to include if the Cruz amici were right. Subsection (e)(1), for example, provides that “[n]othing in [Section 230] shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.” 47 U.S.C. §230(e)(1). Subsection (e)(2) exempts “any law pertaining to intellectual property,” which courts have interpreted to exempt any claim involving copyright, patent, or trademark law. *Id.* §230(e)(2); *see, e.g., Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1052-1053 (9th Cir. 2019). And in 2018, Congress added subsection (e)(5) to clarify that Section 230 does not cover civil child sex trafficking claims if the “conduct underlying the claim” violated the federal criminal child sex trafficking laws. 47 U.S.C. §230(e)(5).

Publishing is not a necessary element of a violation of any of the laws within those exceptions. To take just a few examples, Title 18, Chapter 71, criminalizes mere possession with intent to sell obscene materials; there is no requirement that the defendant have published those materials. 18 U.S.C. §§1460-1470. Likewise, Chapter 110, which criminalizes the sexual exploitation of children, does not require publication. *Id.* §§2251-2260. And a defendant can be liable for patent infringement without any publication. 35 U.S.C. §271(a). If Section 230 applied only to claims for which publication is a formal element, none of these exceptions would

have been necessary because such claims already would be excluded from Section 230's scope. The Court should not adopt a reading of Section 230 that would make these exemptions effectively superfluous.

Unsurprisingly, nearly every court to construe Section 230(c)(1) has declined to adopt such a narrow view. Courts of appeals have instead construed the statute to apply to any claim that seeks to hold a service provider responsible for third-party content, irrespective of whether the cause of action requires publishing. *See, e.g., Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1272 (D.C. Cir. 2019) (Sherman Act, tortious interference, unfair competition); *Herrick v. Grindr LLC*, 765 F. App'x 586, 590 (2d Cir. 2019) (failure to warn, products liability); *Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017) (Title II discrimination claim); *Klayman*, 753 F.3d at 1359 (intentional assault); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009), *as amended* (Sept. 28, 2009) (negligent undertaking).

2. The interpretation proposed by the Cruz amici cannot be reconciled with Congress's subsequent enactments, either. As an initial matter, Congress twice amended Section 230 directly without casting doubt on the consistent interpretation by the lower courts that Section 230 extends beyond claims requiring publication as an element. *See* Pub. L. No. 105-277, §1404(a)(2)-(3), 112 Stat. 2681, 2681-739 (1998) (adding new §230(d)); Pub. L. No. 115-164, 132 Stat. 1253 (2018) (adding §230(e)(5)(A)). Congress's repeated acquiescence suggests adoption of that interpretation. *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1351 (2021); *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 537 (2015).

Other enactments incorporating Section 230 likewise confirm that Section 230(c)(1) is not limited to claims that require publishing as an element. In 2010, for example, Congress passed the Securing the Protection of our Enduring and Established Constitutional Heritage (SPEECH) Act, which expressly affirmed that Section 230 reaches beyond defamation claims. The SPEECH Act prohibits U.S. courts from recognizing or enforcing foreign defamation judgments that are inconsistent with Section 230. *See* Pub. L. No. 111-223, 124 Stat. 2380 (2010); 28 U.S.C. §4102(c)(1). The statute provides that “[n]othing in [ ] section [4102] shall be construed to ... limit the applicability of section 230 ... to causes of action for defamation.” 28 U.S.C. §4102(e). That reference to defamation claims indicates that Congress could readily have limited Section 230(c)(1)’s reach to defamation claims if it had so desired. But Congress instead confirmed Section 230(c)(1)’s broad application.

Similarly, in enacting the Dot Kids Implementation and Efficiency Act in 2002, Congress noted that Section 230 applies to negligence claims, which do not require publication as an element. The Dot Kids Act established a second-level domain—.kids.us—for child-friendly websites, and extended Section 230’s protection to certain entities that would operate in the new domain. *See* Pub. L. No. 107-317, §2, 116 Stat. 2766, 2766 (2002); 47 U.S.C. §941(e)(1). The committee report accompanying the statute affirmed that “courts have correctly interpreted Section 230(c), which was aimed at protecting against liability for such claims as *negligence*,” and stated that the committee “intends these interpretations of section 230(c) to be equally applicable to those entities covered by” the new statute. H.R. Rep. No. 107-449, at 13 (2002) (emphasis added) (citing

cases including *Zeran* and *Ben Ezra*). Negligence does not contain publishing or speaking as an element, *e.g.*, 57A Am. Jur. 2d Negligence §5 (2002), which confirms that Section 230(c)(1) is not confined to causes of action for which publication is an element.

**B. Section 230(c)(1)'s Protection Is Not Limited To Claims That Impose Strict Liability**

Several amici suggest that Section 230(c)(1) prohibits only strict liability for third-party content, leaving websites exposed to knowledge- or notice-based liability—*i.e.*, liability for distributing content that the website knew or should have known was illegal. *See Cruz Br. 7-10; Hawley Br. 4-13.* According to this view, the common law distinguished “between publisher liability and distributor liability,” with publishers that exercised editorial control (like newspapers) held strictly liable “for the contents of the works [they] publishe[d]” while distributors were liable only if they had knowledge that the content of a work was illegal. *Hawley Br. 4-5; accord Cruz Br. 7-8.* On that understanding, amici argue that Section 230(c)(1)'s prohibition against treating service providers as “the publisher” means that they may not be subject to the strict liability traditionally imposed on publishers but may be held liable for disseminating content they knew or should have known was illegal. *See Cruz Br. 8-10; Hawley Br. 6-8.* That interpretation contradicts the statutory text and enacted purposes, and distorts the common law.

1. Section 230(c)(1) bars treating a service provider or user as “the publisher or speaker” of third-party content. 47 U.S.C. §230(c)(1). It does not say anything whatsoever about the provider's or user's state of mind, much less tie its protection to knowledge. Nor do the ordinary meanings of “publisher” or “speaker”

implicate state of mind. *See supra* p.9. Under the plain meaning, therefore, Section 230(c)(1) precludes all claims that seek to hold providers or users liable for disseminating third-party content, regardless of any knowledge or awareness they may have had regarding the nature of that content.

An adjacent provision in the statute reinforces this reading. Section 223(d), which was enacted concurrently with Section 230 as part of the Communications Decency Act, *see* Pub. L. No. 104-104, 110 Stat. 133 (1996), made it a crime to “knowingly permit[] any telecommunications facility under such person’s control to be used” to send or display offensive material to a minor. 47 U.S.C. §223(d). Although this Court held that provision overbroad under the First Amendment in *Reno v. ACLU*, 521 U.S. 844, 874-885 (1997), its enactment shows that the Congress that enacted Section 230 knew how to make liability for disseminating content turn on knowledge. But in Section 230(c)(1), Congress used distinctly different language—presumed to impart “a difference in meaning,” *Loughrin v. United States*, 573 U.S. 351, 358 (2014)—to preclude *all* claims seeking to hold websites responsible for third-party content. That choice is all the more notable because Section 230(e) states that “[n]othing in this section shall be construed to impair the enforcement of section 223 ... of this title.” 47 U.S.C. §230(e)(1). If Section 230(c)(1) does not protect against knowledge-based liability, the statute would not have needed to specify that Section 230 does not disturb Section 223, which imposed knowledge-based liability.

What is more, Congress has ratified lower court decisions rejecting the very interpretation amici suggest. As explained, Congress enacted the Dot Kids Implementation and Efficiency Act in 2002. Pub. L.

No. 107-312, §2, 116 Stat. at 2766. A committee report accompanying the statute explained that lower “courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)).” H.R. Rep. No. 107-449, at 13. Notably, in *Zeran*, which the report identified as having “correctly interpreted” Section 230(c), the Fourth Circuit expressly rejected the argument that Section 230(c)(1) permits knowledge-based liability. *See* 129 F.3d at 331-334.

Accepting amici’s view would also undermine Section 230’s express purposes by both deterring self-regulation and encouraging excessive removal of third-party content. As discussed (*supra* p.9), a key impetus of the statute was to overrule *Stratton Oakmont* and “remove disincentives for the development and utilization of blocking and filtering technologies” to eliminate objectionable content. 47 U.S.C. §230(b)(4). Permitting knowledge-based liability, however, would discourage self-policing because “[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby create a stronger basis for liability.” *Zeran*, 129 F.3d at 333; *accord Barrett v. Rosenthal*, 146 P.3d 510, 525 (Cal. 2006) (permitting knowledge-based liability would “motivate providers to insulate themselves from receiving complaints” and “frustrate the goal of self-regulation”).

Section 230’s primary sponsor identified exactly that as the problem the statute is designed to fix. During the floor debate, Representative Cox identified knowledge-based liability as one of “two ... examples”



of how “the existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so.” 141 Cong. Rec. 22045 (1995). Specifically, he called out *Cubby v. CompuServe, Inc.*, in which a New York court “held that CompuServe would not be liable in a defamation case,” *id.*, because CompuServe did not “kn[o]w or ha[ve] reason to know of” the communication’s contents, 776 F. Supp. 135, 141 (S.D.N.Y. 1991). Representative Cox explained that CompuServe was able to avoid liability under the existing legal regime because “[i]t just let everything come onto your computer without, in any way, trying to screen it or control it,” while the *Stratton Oakmont* court held that another service provider, Prodigy, could be liable because it had taken steps to regulate the content available on its platform. 141 Cong. Rec. 22045. Representative Cox called the reasoning and consequences of both cases “backward” because “[w]e want to encourage people like Prodigy, like CompuServe, like America Online, like the new Microsoft network, to do everything possible for us, the customer, to help us control, at the portals of our computers ... what comes in and what our children see.” *Id.* Permitting knowledge-based liability would undermine that purpose by rewarding head-in-the-sand obliviousness.

The knowledge-based limitation suggested by amici also flies in the teeth of another express purpose of Section 230—to “preserve” the Internet as a “vibrant and competitive free market.” 47 U.S.C. §230(a)(3), (b)(2). If notice of harmful content were the touchstone for subjecting a website to liability, then providers would have “a natural incentive simply to remove messages upon notification,” regardless of whether the content is in fact offensive. *Zeran*, 129 F.3d at 333. That would result in the kind of “heckler’s veto” this Court

has condemned, *Reno*, 521 U.S. at 880, because it would allow “complaining parties to impose substantial burdens on the freedom of Internet speech by lodging complaints whenever they were displeased by an online posting,” *Barrett*, 146 P.3d at 525; *see also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407-408 (6th Cir. 2014).

2. The pre-existing common-law regime likewise precludes limiting Section 230(c)(1) to barring only strict liability claims.

At common law, holding distributors liable for unlawful or tortious third-party content meant treating them as publishers. Indeed, the term “publisher” was understood broadly to encompass everyone who “participat[ed] to such an extent in making the books, newspapers, magazines, and information [at issue] available to others” as to be deemed responsible for the publication, irrespective of the precise role in disseminating the communication. *Keeton et al., Prosser & Keeton on the Law of Torts* §113, at 803 (5th ed. 1984). Thus, anyone held liable for a publication was held “liable as [a] publisher[.]” *Banon v. Moran*, 12 Ky. L. Rptr. 989 (Ky. 1891); *accord Tacket v. General Motors Corp.*, 836 F.2d 1042, 1047 (7th Cir. 1987) (company that “intentionally and unreasonably fail[ed] to remove” third-party sign posted on its premises “thereby published its contents”).

That included distributors, like newsstands and booksellers. Certainly, distributors received additional First Amendment protections, as “the constitutional guarantees of the freedom of speech and of the press” prohibited imposing liability without fault on distributors of third-party content, like booksellers. *Smith v. California*, 361 U.S. 147, 152-153 (1959). But that only

imposed an additional requirement for distributors to be held liable as publishers, and did not create a new category—“distributor liability”—as distinguished from “publisher liability,” *Malwarebytes*, 141 S. Ct. at 15. For example, under nineteenth-century (and later) defamation law, dissemination by a distributor of a libelous writing could only “be a publication” if the distributor “knew anything of [the writing’s libel] before delivery.” *Layton v. Harris*, 3 Del. (3 Harr.) 406, 407 (Super. Ct. 1842); accord *Church of Scientology of Minn. v. Minnesota State Med. Ass’n Found.*, 264 N.W.2d 152, 156 (Minn. 1978) (“Those who merely deliver or transmit defamatory material previously published by another will be *considered to have published the material* only if they knew, or had reason to know, that the material was false and defamatory.” (emphasis added)). A distributor with sufficient knowledge *was* deemed a “publisher” under the law.

Justice Thomas’s discussion of this topic in *Malwarebytes* recognized as well that distributors were sometimes referred to as “secondary publishers,” a moniker that rightly recognizes they may be “charged with publication.” 141 S. Ct. at 15 (citation and quotation marks omitted). And courts have understood liability for a distributor’s dissemination of someone else’s content as exactly that—liability for publishing. See *Doe*, 783 So.2d at 1016 (“liability for knowingly or negligently distributing defamatory material is merely a species or type of liability for publishing defamatory material”); *Zeran*, 129 F.3d at 332 (recognizing the liability imposed on primary publishers and “distributors” as existing “*within* the larger publisher category”). Accordingly, under the common law, holding a distributor liable for third-party content based on knowledge *was* treating the distributor as the publisher of that

content—exactly what the text of Section 230(c)(1) forbids.

In any event, whatever difference may have historically existed between the state-of-mind standard applicable to distributors (*i.e.*, secondary publishers) and that applicable to primary publishers, that difference had dissipated by the time Section 230 was enacted in 1996. Up until the mid-twentieth century, a primary publisher’s lack of knowledge of a communication’s unlawful nature “was no excuse.” *Herbert v. Lando*, 441 U.S. 153, 159 n.4 (1979) (quoting *Peck v. Tribune Co.*, 214 U.S. 185, 189 (1909)). But in the mid-20th century, this Court held that the First Amendment does not tolerate no-fault liability, at least where public officials, public figures, or matters of public concern are involved. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (states may “not impose liability without fault” for defamatory falsehoods). Accordingly, by 1996, defamation liability for primary publishers (like newspapers) in the vast majority of states—including New York, long before *Stratton Oakmont*—required a showing of at least negligence, even in cases involving private plaintiffs. *See Speiser et al.*, 8A Am. Law of Torts §29:31 (2022); *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975). That is not much different from the showing of fault required to hold a distributor liable for unlawful third-party communications—specifically, “facts or circumstances known to him which would suggest to him, as a reasonable man, that a particular book contains” unlawful content. *Restatement (Second) of Torts* §581 cmt. e; *see Osmond v. EWAP, Inc.*, 200 Cal. Rptr. 674, 680 (Cal. Ct. App. 1984) (recognizing the “defense for a mere vendor or distributor ... that he had no knowledge of the libelous matter and that there were no extraneous facts which

should have put him on guard”). Thus, insofar as Congress borrowed from the common law when using the word “publisher” in Section 230(c)(1), it did not adopt any distinct treatment of publishers as compared to distributors, and certainly did not confine the provision’s operation to barring only strict liability.

\* \* \*

Section 230(c)(1) is unambiguous. Under both its ordinary meaning and the meaning derived from the common law, Section 230(c)(1) bars claims seeking to hold service providers or users liable for disseminating third-party content. This plain meaning is reinforced by the statute’s dual purposes to promote the development of the Internet and to encourage self-regulation by websites. More than a quarter century of lower court decisions, several Congressional enactments, Plaintiffs, and the United States all agree that this interpretation is correct, and this Court should leave this fundamental understanding undisturbed. Insofar as Plaintiffs and the United States take issue with the statute’s application to the selective display of third-party content to particular users, their arguments misunderstand Plaintiffs’ claims, the statute, and the nature of any recommendations at issue in this case. Such selective displays are simply a mechanism of making particular content available to particular users, and whatever implicit recommendations they reflect are no different from many other forms of recommendations that are inherent in displaying and making meaningfully accessible the oceans of information that are present on the Internet. If the Court were to address Section 230 in this case, therefore, it should affirm the judgment below.

**CONCLUSION**

The Court should adopt Twitter's interpretation of the ATA in *Taamneh* and dismiss the petition in this case. If the Court were to address Section 230 in this case, it should affirm the judgment below.

Respectfully submitted.

RISHITA APSANI  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
7 World Trade Center  
250 Greenwich St.  
New York, NY 10007

SETH P. WAXMAN  
*Counsel of Record*  
PATRICK J. CAROME  
ARI HOLTZBLATT  
CLAIRE H. CHUNG  
ALLISON M. SCHULTZ  
WILMER CUTLER PICKERING  
HALE AND DORR LLP  
1875 Pennsylvania Ave., NW  
Washington, DC 20006  
(202) 663-6000  
seth.waxman@wilmerhale.com

JANUARY 2023