

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

REYNALDO GONZALEZ, ET AL.,)
 Petitioners,)
 v.) No. 21-1333
GOOGLE LLC,)
 Respondent.)

Pages: 1 through 164
Place: Washington, D.C.
Date: February 21, 2023

HERITAGE REPORTING CORPORATION
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Washington, D.C. 20005
(202) 628-4888
www.hrccourtreporters.com

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9
10 Washington, D.C.
11 Tuesday, February 21, 2023

12
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United
15 States at 10:03 a.m.

16
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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 21-1333, Gonzalez versus Google.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONERS

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

Section 230(c)(1) distinguishes between claims that seek to hold an Internet company liable for content created by someone else and claims based on the company's own conduct. That distinction is drawn in each of the three sections of the statute.

First, Section 230(c)(1) is limited to claims that would treat the defendant as a publisher of third-party content. The statute uses "publish" in the common law sense. The Fourth Circuit decision in Henderson correctly interprets the statute in that manner and concludes that it involves two elements: the claim must be based on the action of the defendant in disseminating third-party content,

1 and the harm must arise from the content itself.

2 Second, Section 231 -- 230(c)(1) is
3 limited to publication of information provided
4 by another content provider, which is often
5 referred to as third-party content. The
6 statutory defense doesn't apply insofar as a
7 claim is based on words written by the defendant
8 or other content created by the defendant. In
9 some circumstances, the manner in which
10 third-party content is organized or presented
11 could convey other information from the
12 defendant itself, as the government notes.

13 Third, Section 230(c)(1) only applies
14 insofar as a defendant was acting as an Internet
15 computer service. Most entities that are
16 Internet computer services do other things as
17 well. This Court technically is an interactive
18 computer service because of its website. It
19 does other things, as it is doing today.
20 Conduct that falls outside that line of activity
21 is outside the scope of this statute.

22 A number of the briefs in this case
23 urge the Court to adopt a general rule that
24 things that might be referred to as a
25 recommendation are inherently protected by the

1 statute, a decision which would require the
2 Court to then fashion some judicial definition
3 of "recommendation."

4 We think the Court should decline that
5 invitation and should instead focus on
6 interpreting the specific language of the
7 statute.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Snapper --
10 Schnapper, just so we're clear about what we're
11 -- your claim is, are you saying that YouTube's
12 application of its algorithm is particular to --
13 in this case, that they're using a different
14 algorithm to the one that, say, they're using
15 for cooking videos, or are they using the same
16 algorithm across the board?

17 MR. SCHNAPPER: It's the same
18 algorithm across --

19 JUSTICE THOMAS: So --

20 MR. SCHNAPPER: -- the board.

21 JUSTICE THOMAS: -- so what is -- if
22 -- if it's the same algorithm, I think you have
23 to give us a clearer example of what your point
24 is exactly. The same algorithm to present
25 cooking videos to people who are interested in

1 cooking and ISIS videos to people who are
2 interested in ISIS, racing videos to people who
3 are interested in racing.

4 Then I think you're going to have to
5 explain more clearly, if it's neutral in that
6 way, how your claim is set apart from that.

7 MR. SCHNAPPER: Surely. The -- if I
8 might turn to the practice of displaying
9 thumbnails, which is a major part of what's at
10 issue here, the problem -- and the issue is not
11 the manner in which YouTube displays videos. It
12 actually displays, as you doubtless know from
13 having looked at, these little pictures, which
14 are referred to as thumbnails. They are
15 intended to encourage the viewer to click on
16 them and go see a video.

17 It's the use of algorithms to generate
18 these -- these thumbnails that's at issue, and
19 the thumbnails, in turn, involve a -- involve
20 content created by the defendant.

21 JUSTICE THOMAS: But the -- it's
22 basing -- the thumbnails, from what I
23 understand, is based upon what the algorithm
24 suggests the user is interested in. So, if
25 you're interested in cooking, you don't want

1 thumbnails on light jazz. You -- so the -- it's
2 -- it's -- it's neutral in that sense. You're
3 interested in cooking. Say you get interested
4 in rice -- in pilaf from Uzbekistan. You don't
5 want pilaf from some other place, say,
6 Louisiana.

7 The -- so the -- I don't see how that
8 is any different from what is happening in this
9 case. And what I'm trying to get you to focus
10 on is if -- if the -- are we talking about the
11 neutral application of an algorithm that works
12 generically for pilaf and -- and it also works
13 in a similar way for ISIS videos? Or is there
14 something different?

15 MR. SCHNAPPER: No, I think that's
16 correct, but -- but our -- our view is that the
17 fact that a -- a -- an algorithm is neutral
18 doesn't alter the application of the statute.
19 The statute requires that one work through each
20 of the elements of the defense and see if it
21 applies.

22 The -- the lower courts, in a couple
23 of cases, have said that -- really disregarding
24 the requirements of the -- of the defense, that
25 as long as an algorithm is neutral, that puts

1 the -- the conduct outside the -- within the
2 protection of the statute.

3 But that's not what the statute says.
4 The statute says you must be acting -- you must
5 be -- the claim must treat you as a publisher.

6 CHIEF JUSTICE ROBERTS: Well, but, I
7 mean, the -- the -- the difference is that the
8 Google, You -- YouTube, they're still not
9 responsible for the content of the videos or --
10 or text that is transmitted.

11 Your focus is on the actual selection
12 and recommendations. They're responsible that a
13 particular item is there but not for what the
14 item -- item says. And I don't -- I -- I think
15 part -- it may be significant if the algorithm
16 is the same across -- as Justice Thomas was
17 suggesting, across the different subject
18 matters, because then they don't have a focused
19 algorithm with respect to terrorist activities
20 or -- or pilaf or something, and then I think it
21 might be harder for you to say that there's
22 selection involved for which they could be held
23 responsible.

24 MR. SCHNAPPER: The -- the -- the
25 statute, I think, doesn't draw the distinction

1 that way. The -- the claim here is about the
2 encouragement of -- of -- of users to go look at
3 particular content. And that's the JASTA claim
4 that we'll hear about tomorrow.

5 And the underlying substantive claim
6 is encouraging people to go look at ISIS videos
7 would be aiding and abetting ISIS. More on that
8 tomorrow.

9 But, if that's an actionable claim,
10 then the conduct here would fit within it,
11 the -- because certain individuals would be
12 shown these thumbnails, which would encourage
13 them to go look at those videos.

14 JUSTICE KAGAN: So I think you're
15 right, Mr. Schnapper, that the statute doesn't
16 make that distinction. This was a pre-algorithm
17 statute. And, you know, everybody is trying
18 their best to figure out how this statute
19 applies, this statute which was a pre-algorithm
20 statute applies in a post-algorithm world.

21 But I think what was lying underneath
22 Justice Thomas's question was a suggestion that
23 algorithms are endemic to the Internet, that
24 every time anybody looks at anything on the
25 Internet, there is an algorithm involved,

1 whether it's a Google search engine or whether
2 it's this YouTube site or -- or -- or a Twitter
3 account or countless other things, that
4 everything involves ways of organizing and
5 prioritizing material.

6 And -- and that would essentially mean
7 that, you know, 230 -- I guess what I'm asking
8 is, does -- does -- does your position send us
9 down the road such that 230 really can't mean
10 anything at all?

11 MR. SCHNAPPER: I -- I -- I don't
12 think so, Your Honor. The question -- as you
13 say, algorithms are ubiquitous, but the question
14 is what does the defendant do with the
15 algorithm. If it uses the algorithm to direct
16 -- to encourage people to look at ISIS videos,
17 that's within the scope of JASTA.

18 It's not different than if back in
19 1996 a lot of clerks somewhere at Prodigy did
20 this manually and just had a bunch of file cards
21 and they figured out who was interested in what.

22 The statute would have meant the same
23 thing there that it does now. It's automated,
24 it's at a larger scale, but it doesn't change
25 the nature of what they're doing with the

1 algorithm. So --

2 JUSTICE SOTOMAYOR: Can I -- I'm
3 sorry, finish.

4 MR. SCHNAPPER: The -- the -- the
5 brief -- I think the brief for Respondent points
6 to a number of uses of algorithms, for example,
7 to pick the cheapest fare or things like that.
8 That's just outside the scope of the statute.
9 The algorithm is being used there to generate
10 additional content.

11 So the question is what you do with
12 the algorithm. The fact that you did it with an
13 algorithm doesn't give -- yield a different
14 result than if you had a lot of hard-working
15 people in a -- in an office somewhere doing the
16 same thing.

17 JUSTICE SOTOMAYOR: We seem --

18 JUSTICE KAGAN: Well, I -- I -- I
19 guess I --

20 JUSTICE SOTOMAYOR: Oh.

21 JUSTICE KAGAN: -- I -- I take the
22 point -- if -- if I could just --

23 JUSTICE SOTOMAYOR: No, no, go ahead.

24 JUSTICE KAGAN: You know, I take the
25 point that there are a lot of algorithms that

1 are not going to produce pro-ISIS content and
2 that won't create a problem under this statute,
3 but maybe they'll produce defamatory content or
4 maybe they'll produce content that violates some
5 other law.

6 And your -- your argument can't be
7 limited to this one statute. It has to extend
8 to any number of harms that can be done by -- by
9 speech and -- and so by the organization of
10 speech in ways that basically every provider
11 uses.

12 MR. SCHNAPPER: Well, if I might turn
13 to the example of what you said, referred to, an
14 algorithm that produces defamation. I may be
15 paraphrasing that wrong.

16 If the -- if the -- let's say the
17 algorithm generates a recommendation -- a --
18 a -- a face -- a thumbnail that on its face
19 is -- is benign, it just says interesting
20 information about Frank, you go there, and it's
21 defamatory.

22 The defendant's not responsible -- or
23 excuse me -- the defense applies to the video
24 itself that you saw. The question would be
25 whether the thumbnail was actionable. And under

1 -- in most circumstances, thumbnails aren't
2 going to be actionable.

3 In addition, the -- the thumbnails
4 typically include a snippet from a -- a video or
5 a text or whatever. If the snippet itself were
6 defamatory, again, the defense -- the statutory
7 defense would apply because what was being
8 displayed was third-party content. And so the
9 statute still applies there.

10 JUSTICE ALITO: Suppose that Google
11 could -- YouTube could display these thumbnails
12 purely at random. But, if it does anything than
13 displaying them purely at random, isn't it
14 organizing and presenting information to people
15 who access YouTube?

16 MR. SCHNAPPER: Yes, but --

17 JUSTICE ALITO: All right.

18 MR. SCHNAPPER: -- that doesn't put it
19 within the scope of the statute.

20 JUSTICE ALITO: Well, does that --
21 does that constitute publishing?

22 MR. SCHNAPPER: Yes. So they would --

23 JUSTICE ALITO: It does?

24 MR. SCHNAPPER: -- they would be
25 publishing -- they would be publishing the --

1 the thumbnail.

2 JUSTICE ALITO: Right.

3 MR. SCHNAPPER: But -- but, if the --
4 if the thumbnail isn't itself -- if -- if the --
5 if the -- the way they're using it is -- is --
6 is encouraging people to engage --

7 JUSTICE ALITO: Well, that's a
8 different question, though, isn't it? I -- I
9 don't know where you're drawing the line.
10 That's the problem.

11 MR. SCHNAPPER: Oh, I see, I see, I
12 see.

13 JUSTICE ALITO: That's the problem
14 that I see.

15 MR. SCHNAPPER: Oh.

16 JUSTICE ALITO: Unless you're --
17 you're saying that the publishing -- the
18 publication requirement is satisfied under all
19 circumstances, unless the thumbnails are
20 presented purely at random.

21 MR. SCHNAPPER: It's publication even
22 if it's at random, but the -- but the -- the --
23 the injury in the hypothetical we're talking
24 about about ISIS doesn't follow from the content
25 of the thumbnail. The thumbnail would typically

1 be fairly benign. The harm comes --

2 JUSTICE ALITO: Yeah, but in every
3 instance, in those instances where the thumbnail
4 is benign, that's not a concern for purposes of
5 this case, but in all those instances where some
6 plaintiff might have some cause of action based
7 on the content of the video that has been posted
8 --

9 MR. SCHNAPPER: There would have to be
10 a cause of action, as we assert there is in
11 JASTA, for encouraging people to go look at the
12 video. That's a fairly uncommon form of cause
13 of action.

14 The cause of action -- insofar as the
15 plaintiff asserts a cause of action based on the
16 video itself, that's within the -- that you've
17 been sent to, that's within the scope of the
18 defense.

19 JUSTICE JACKSON: And is that because
20 of the way in which you're interpreting the
21 statute? I mean, can we -- can we back up a
22 little bit and try to at least help me get my
23 mind around your argument about how we should
24 read the text of the statute?

25 I took your brief to be arguing and

1 that of those who support you that the statute
2 really is about one kind of publishing conduct,
3 and that is the failure to block or screen
4 offensive content.

5 Am I right about that? In other
6 words, what you say is covered by Section 230
7 and that Google could, like -- could rightly
8 claim immunity for is a claim that there was
9 something defective about their ability to
10 screen or block content, that the content is up
11 there and you should be liable for it?

12 MR. SCHNAPPER: I -- I think we --
13 we've -- I -- I think that's not our claim.

14 JUSTICE JACKSON: Okay.

15 MR. SCHNAPPER: I think we are trying
16 to distinguish between liability for what's in
17 the content that's on their websites that you
18 could access and actions they take to encourage
19 you to go look at it.

20 JUSTICE JACKSON: Yes, yes, that's
21 your claim. I'm just trying to --

22 MR. SCHNAPPER: If you encourage it,
23 then we're --

24 JUSTICE JACKSON: -- understand how
25 you read the statute. Your -- the statute, you

1 say, covers only scenarios in which the claim
2 that's being made is that there's offensive
3 content on the website, that you didn't take it
4 down, that, you know, you failed to screen it
5 out, but if you're making a claim that you're
6 encouraging people to look at this content,
7 that's something different, that's the claim
8 you're making, and it's not covered by the
9 statute.

10 MR. SCHNAPPER: That's our -- that's
11 the distinction --

12 JUSTICE JACKSON: All right.

13 MR. SCHNAPPER: -- we're trying to
14 draw. I mean, it -- the distinction is
15 illustrated by the e-mail in the Dyroff case,
16 which -- which is the precedent that -- that got
17 us here in the Ninth Circuit.

18 In that case, there was a, I think,
19 26-word -- 26-word e-mail from the website to an
20 individual which read something like there's
21 something new that's been posted to the question
22 where can I buy heroin in Jacksonville, Florida.
23 To access it, use this URL or use this URL.

24 It's our contention that that is
25 outside the protection of the statute.

1 JUSTICE JACKSON: But is that really
2 different -- I guess I'm trying -- so they would
3 argue, I think, that even assuming that the
4 statute only covered the kinds of things that
5 you say it covers, you know, defective blocking
6 and screening, meaning there's still offensive
7 stuff on your website and you should be liable
8 for it, I think they would say that to the
9 extent your claim is talking about their way --
10 their algorithm that presents the information,
11 it's really the same thing, that you're -- that
12 it reduces -- it's tantamount to saying we
13 haven't, you know, blocked this information,
14 it's still on the website, because algorithms
15 are the way in which the information is
16 presented.

17 MR. SCHNAPPER: So, if I may make
18 clear, as I may not have done that well, the
19 distinction we're drawing, our claim is not that
20 they did an inadequate job of block -- of
21 keeping things off their -- their computers that
22 you can access from -- from outside or from
23 failure to -- to block it.

24 It's that that's the -- that's the
25 heartland of the statute. What we're saying is

1 that insofar as they were encouraging people to
2 go look at things, that's what's outside the
3 protection of the statute, not that the stuff
4 was there.

5 If they stopped recommending things
6 tomorrow and -- and all sorts of horrible stuff
7 was on their website, as far as we read the
8 statute, they're fine. It's the recommendation
9 practice that we think is actionable.

10 JUSTICE SOTOMAYOR: Can I break down
11 your complaint a moment? There -- the vast
12 majority of it is paragraph after paragraph
13 after paragraph that says they're liable because
14 they failed to take ISIS off their website. I
15 think, as I'm listening to you today, you seem
16 to have abandoned that and -- and are saying
17 they don't have to take it off their website.

18 MR. SCHNAPPER: That --

19 JUSTICE SOTOMAYOR: Am I correct about
20 that?

21 MR. SCHNAPPER: That's exactly right.
22 That -- that --

23 JUSTICE SOTOMAYOR: So that can't be
24 --

25 MR. SCHNAPPER: -- is the way we've

1 framed the question presented.

2 JUSTICE SOTOMAYOR: So that can't be

3 --

4 MR. SCHNAPPER: We did not advance
5 that claim.

6 JUSTICE SOTOMAYOR: So you're
7 abandoning that claim, so that can't be aiding
8 and abetting. So I think I'm listening to you,
9 and the only aiding and abetting that you're
10 arguing is the recommendation, correct?

11 MR. SCHNAPPER: That's correct.

12 JUSTICE SOTOMAYOR: You're not arguing
13 that they're -- some of these providers create
14 chat rooms or put people together, users
15 together. You're not claiming that that's part
16 of what you're arguing about? The social
17 networking, I want to call it.

18 MR. SCHNAPPER: Well, that's not at
19 issue in this case.

20 JUSTICE SOTOMAYOR: It's in --

21 MR. SCHNAPPER: Face --

22 JUSTICE SOTOMAYOR: -- tomorrow's
23 case? All right.

24 MR. SCHNAPPER: Face -- if I can be
25 more specific --

1 JUSTICE SOTOMAYOR: All right. So
2 you're limiting -- you're limiting your --

3 MR. SCHNAPPER: -- I mean, Facebook --
4 Facebook does that.

5 JUSTICE SOTOMAYOR: All right.

6 MR. SCHNAPPER: Facebook recommends
7 people --

8 JUSTICE SOTOMAYOR: Right.

9 MR. SCHNAPPER: -- which is very
10 difficult to find within the four walls of the
11 statute. Google's created a lot of things but
12 so far not --

13 JUSTICE SOTOMAYOR: But you're not
14 claiming that in this case?

15 MR. SCHNAPPER: Not in -- it's not
16 what --

17 JUSTICE SOTOMAYOR: You're just
18 focusing --

19 MR. SCHNAPPER: No. This is about
20 content. It's not about --

21 JUSTICE SOTOMAYOR: This is about
22 content. And I just want to focus your
23 complaint so I understand it very clearly.
24 You're saying the -- the YouTube or the "Next
25 up" feature of the algorithm that says you

1 viewed this and so you might like this, it's
2 "you might like this" that's the aiding and
3 abetting?

4 MR. SCHNAPPER: Uh --

5 JUSTICE SOTOMAYOR: What -- what part
6 of what they're doing? Because, I mean, you --
7 you -- whoever the user is types in something,
8 they get an ISIS video, you say that's okay --
9 they can't be liable for you, the -- me, the
10 viewer, looking at the ISIS vehicle. But the
11 Internet providers can be liable for what?

12 MR. SCHNAPPER: Okay. So they're --
13 they're --

14 JUSTICE SOTOMAYOR: For showing me the
15 next video that's similar to that?

16 MR. SCHNAPPER: All right. They're --
17 it would be helpful perhaps if I distinguish
18 between two kinds of practices that -- that go
19 on at YouTube. The complaint doesn't describe
20 them in detail, but we're fairly familiar with
21 them. So what we can talk --

22 JUSTICE SOTOMAYOR: I'm glad, but I'm
23 going to be to look at complaint because it can
24 only survive if the complaint is adequate. So
25 you're going to have to tell me where in the

1 complaint you're saying this if I'm going to
2 think about holding them liable. So --

3 MR. SCHNAPPER: I'm about three
4 questions --

5 JUSTICE SOTOMAYOR: -- you're going to
6 have to separate out the two things then.

7 MR. SCHNAPPER: Okay. I'm about three
8 questions behind. Let me ---

9 JUSTICE SOTOMAYOR: All right.

10 MR. SCHNAPPER: -- let me try and do
11 my best here. So what we've been talking about
12 up until now is the use of -- of thumbnails to
13 encourage people to look at content -- people
14 who haven't clicked on any video yet. And our
15 contention is the use of thumbnails is -- is the
16 same thing under the statute as sending someone
17 an e-mail and saying: You might like to look at
18 this new video.

19 Now the "Up next" feature is a
20 different problem, and the problem there is --
21 is that when you click on one video and you pick
22 that one, YouTube will automatically keep
23 sending you more videos which you haven't asked
24 for.

25 That, in our view, runs afoul of a

1 different element of the statutory defense,
2 which is that they be acting as an interactive
3 computer service. And when they go beyond
4 delivering to you what you asked for, to start
5 sending things you haven't asked for, our
6 contention is that they're no longer acting as
7 an interactive computer service.

8 JUSTICE SOTOMAYOR: All right. So,
9 even if I accept that you're right that sending
10 you unrequested things that are similar to what
11 you've viewed, whether it's a thumbnail or an
12 e-mail, how does that become aiding and
13 abetting? I'm going back to Justice Thomas's
14 question, okay, which is, if they aren't
15 purposely creating their algorithm in some way
16 to feature ISIS videos, if they're -- I mean, I
17 can really see that an Internet provider who was
18 in cahoots with ISIS provided them with an
19 algorithm that would take anybody in the world
20 and find them for them and -- and do recruiting
21 of people by showing them other videos that will
22 lead them to ISIS, that's an intentional act,
23 and I could see 230 not going that far.

24 I guess the question is, how do you
25 get yourself from a neutral algorithm to an

1 aiding and abetting --

2 MR. SCHNAPPER: Right.

3 JUSTICE SOTOMAYOR: -- an intent,
4 knowledge? There has to be some intent to aid
5 and abet. You have to have knowledge that
6 you're doing this.

7 MR. SCHNAPPER: Yes.

8 JUSTICE SOTOMAYOR: So how do you get
9 there?

10 MR. SCHNAPPER: So the -- the -- if --
11 if the algorithm recommends an ISIS video or it
12 automatically plays it, that -- as we'll see
13 tomorrow, that by itself isn't going to satisfy
14 aiding and abetting.

15 Aiding and abetting requires knowledge
16 that it's happening. So the elements of the
17 aiding and abetting claim, which we'll be
18 talking about tomorrow, address the question
19 you're asking.

20 If -- if this was teed up, if they
21 didn't know it was happening, and the other
22 elements of an aiding-and-abetting claim were
23 present, they would not be liable for aiding and
24 abetting.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Just one short question. Your -- your
3 friend on the other side presented an analogy
4 that she thought would be helpful, which -- a
5 book seller that has a table with sports books
6 on it, and somebody comes in and says, I'm
7 looking for the book about Roger Maris, and the
8 bookseller says, well, it's over there on the
9 table with the other sports books.

10 Isn't that analogous to what's
11 happening here? You type in ISIS --

12 MR. SCHNAPPER: I'm not sure -- I'm
13 not sure where that -- that gets us. I mean, it
14 wouldn't be any different than sending an e-mail
15 saying that.

16 CHIEF JUSTICE ROBERTS: Well, we'll
17 figure out where we get -- it gets us in a
18 minute. But I just want to know if you think
19 that's a good -- a good analogy.

20 MR. SCHNAPPER: I -- I -- I'm a little
21 concerned to know where it's taking me. It's a
22 -- it's an analogy of --

23 (Laughter.)

24 MR. SCHNAPPER: -- it's an analogy of
25 sorts.

1 CHIEF JUSTICE ROBERTS: That's what we
2 call -- that's what we call questions.

3 MR. SCHNAPPER: But -- but I still --
4 I mean, I'm going to -- at some point, I'm going
5 to go yes, but you still have to fit it within
6 the four walls of the statute. Perhaps you
7 could -- you could tell me what lies ahead. I
8 think I could -- I mean, sure, it's an analogy
9 of sorts, but --

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: What lies
12 ahead is, I give up, Your Honor.

13 MR. SCHNAPPER: -- but I would like to
14 know what it leads up to. Yes.

15 CHIEF JUSTICE ROBERTS: Yeah.

16 MR. SCHNAPPER: Yeah. But --

17 CHIEF JUSTICE ROBERTS: No, what lies
18 ahead is the idea that you could look at that
19 and say it's not pitching something in
20 particular to the person who's made the request.
21 It is recognizing that it's a request about a
22 particular subject matter and it's there on the
23 table, and they might want to look at that or
24 they may not want to look at it.

25 But it's really just a 21st Century

1 version of what has taken place for a long time
2 in many contexts, which, when you ask a
3 question, people are putting together a group of
4 things, not necessarily precisely answering your
5 question. I mean, if somebody said --

6 MR. SCHNAPPER: Yes -- no, I -- all
7 right. I think -- I think I know where we're
8 going here.

9 The -- insofar as I -- I go to YouTube
10 and I say show me a cat -- you know, it's a
11 little more complicated than this -- but show me
12 -- show -- tell me what cat videos you have, and
13 in responding to that, they're --

14 CHIEF JUSTICE ROBERTS: Sure. That's
15 an easy case. They give you a bunch of cat
16 videos. You don't have any complaint about
17 something like that.

18 In this case, if they put in
19 something, say, show me ISIS videos, they would
20 get a bunch of ISIS videos, and you don't have
21 any objection to that given the way the search
22 was phrased.

23 MR. SCHNAPPER: It -- I have to answer
24 that with precision. If I say, play for me an
25 ISIS video, and they just directly play the

1 video, then what they've done falls within the
2 language of the statute. It's requested, it's
3 purely third-party content, and I would try and
4 be hold -- trying to be holding them liable for
5 displaying that content.

6 But what actually has happened -- and
7 this is maybe analogous to what goes on to some
8 extent at Twitter, where they might actually
9 literally just show you the thing. But what's
10 happening at YouTube is they're not doing that.

11 I type in ISIS video, and there are
12 going to be a catalogue of thumbnails which they
13 created. It's as if I went into the bookstore
14 and said, I'm interested in sports books, and
15 they said, we've got this catalogue which we
16 wrote of sports books, sports books we have
17 here, and handed that to me. They created that
18 content.

19 And -- and -- and if you publish
20 content you've created, you're not within the
21 four walls of the statute. So --

22 CHIEF JUSTICE ROBERTS: But you would
23 not -- you would not -- under your theory, they
24 would not be liable for the content of the
25 books, they'd be liable for the catalogue?

1 MR. SCHNAPPER: By -- by -- by
2 providing the catalogue.

3 CHIEF JUSTICE ROBERTS: Okay. Thank
4 you.

5 Justice Thomas, anything further?

6 JUSTICE THOMAS: What if the YouTube,
7 instead of automatically providing this list,
8 which is hard -- it's hard for me because I
9 don't see this as -- I see these as suggestions
10 and not really recommendations because they
11 don't really comment on them.

12 But what if you had to click on
13 something like "For more like this, click here"?
14 Would that also be, as far as you're concerned,
15 aiding and abetting or outside this statute?

16 MR. SCHNAPPER: It's -- so you --
17 you've played one video and they say click here
18 to see another one?

19 JUSTICE THOMAS: No, click here if you
20 want suggestions for more like this.

21 MR. SCHNAPPER: No, suggestions are --
22 depending how it happens. Let's say they say
23 send me more -- show me more thumbnails. It's
24 outside the statute.

25 And if I might come back to an earlier

1 part of what's embedded in your question, we
2 aren't asking the Court to adopt a rule that's
3 about recommendations versus suggestions.

4 What we're suggesting -- what -- what
5 we're arguing is -- is that this -- is that you
6 take the normal standards in each of the
7 elements and you apply it to what's going on.
8 It doesn't -- it doesn't matter if they're
9 encouraging it.

10 If -- if -- in terms of aiding and
11 abetting, if someone comes to me and says what's
12 al-Baghdadi's phone call -- phone number, I'd
13 like to call him, and I give him the phone
14 number, I'm aiding and abetting even if I -- I
15 don't say, and I hope you'll join ISIS.

16 Whether we label it a recommendation
17 or not on our view is not the issue here. We
18 tried to say that in our brief.

19 JUSTICE THOMAS: Thank you.

20 MR. SCHNAPPER: I don't -- was that
21 responsive? I'm not --

22 JUSTICE THOMAS: Well, it's
23 responsive, but I don't understand it.

24 (Laughter.)

25 JUSTICE THOMAS: You called -- I mean,

1 if you called Information and asked for
2 al-Baghdadi's number and they give it to you, I
3 don't see how that's aiding and abetting.

4 And I don't understand how a neutral
5 suggestion about something that you've expressed
6 an interest in is aiding and abetting. I just
7 don't -- I don't understand it.

8 And I'm trying to get you to explain
9 to us how something that is standard on YouTube
10 for virtually anything that you have an interest
11 in suddenly amounts to aiding and abetting
12 because you're in the ISIS category.

13 MR. SCHNAPPER: Well, again, I'll be
14 answering that probably again tomorrow, but as
15 little -- what you describe without more
16 probably wouldn't.

17 But, as you'll -- as we'll learn
18 tomorrow, the circumstances are far different
19 than that, that these -- YouTube and these other
20 companies were repeatedly told by government
21 officials, by the media, dozens of times that
22 this was going on, and they didn't do any --
23 they did almost nothing about it.

24 That's very different than providing
25 one phone number through Information.

1 JUSTICE THOMAS: Well, I mean, did --

2 MR. SCHNAPPER: So it goes to the
3 scope of JASTA, not to 230.

4 JUSTICE THOMAS: So we've gone from
5 recommendation to inaction being the source of
6 the problem. And this is what I'm -- you know,
7 the -- I understand you're putting it in
8 context, but I -- it's hard for me also to
9 understand where this obligation to take
10 specific actions can lead to an
11 aiding-and-abetting claim.

12 MR. SCHNAPPER: Well, the
13 interconnection in this case is that -- that
14 we're focusing on the recommendation function,
15 that they're affirmatively recommending or
16 suggesting ISIS content, and it's -- and it's
17 not mere inaction.

18 Mere inaction might work under aiding
19 and abetting, but we'll get there tomorrow, but
20 -- but the claim that we're focusing on today is
21 that, in fact, they're affirmatively
22 recommending things. You turn on your computer
23 and the -- and the -- the -- the computers at --
24 at YouTube send you stuff you didn't ask them
25 for. They just send you stuff. It's no

1 different than if they were sending you e-mails.
2 That's affirmative conduct.

3 CHIEF JUSTICE ROBERTS: Justice Alito?

4 JUSTICE ALITO: I'm afraid I'm
5 completely confused by whatever argument you're
6 making at the present time.

7 So, if someone goes on YouTube and
8 puts in ISIS videos and they show thumbnails of
9 ISIS videos -- and don't -- don't -- don't tell
10 me anything about the substantive underlying
11 tort claim -- if the person is -- if -- if
12 YouTube is sued for doing that, is it acting as
13 a publisher simply by displaying these
14 thumbnails of ISIS videos after a search for
15 ISIS videos?

16 MR. SCHNAPPER: It is acting as a
17 publisher but of something that they helped to
18 create because the thumbnail is a joint creation
19 that involves materials from a third party and a
20 URL from them and some other things.

21 JUSTICE ALITO: So, if YouTube uses
22 thumbnails at all, it is acting as a publisher
23 with respect to every thumbnail that it
24 displays?

25 MR. SCHNAPPER: Yes. Yes. They're --

1 they're publishing the thumbnails. And the
2 question is, are the thumbnails third-party
3 content, or are they content they've created?
4 And the problem is they are content.

5 JUSTICE ALITO: Yeah, I mean, if
6 that's your argument, then you're really arguing
7 that -- that this statute does not provide
8 protection against a suit that is in substance
9 based on the third-party-provided content.

10 MR. SCHNAPPER: No, we're -- we're
11 basing the -- I'm sorry. I don't mean to be so
12 --

13 JUSTICE ALITO: Okay.

14 MR. SCHNAPPER: That -- that -- that
15 they -- the particular business model they have
16 involves using this -- these thumbnails, which
17 are materials they've in part created to --
18 to -- to operate.

19 Let me --

20 JUSTICE ALITO: So they shouldn't use
21 thumbnails at all? If they want protection
22 under the statute, they shouldn't use
23 thumbnails?

24 MR. SCHNAPPER: Let me -- let --
25 that's -- that's the problem they have with the

1 way the statute's written. So, if I -- if I may
2 give a --

3 JUSTICE ALITO: Is there any other way
4 they could organize themselves without using
5 thumbnails? I suppose, if you type in "I want
6 ISIS videos," they can just put ISIS video 1,
7 ISIS video 2, and so forth.

8 MR. SCHNAPPER: That's the technical
9 problem they have.

10 JUSTICE ALITO: Well, would that be
11 acting as a publisher if they did that?

12 MR. SCHNAPPER: Yes, but they'd be
13 publishing third-party content because the video
14 itself is the content. If I might -- if I might
15 respond --

16 JUSTICE ALITO: Okay. I just -- I --
17 I -- I have one final question. It's a
18 technical question and probably better addressed
19 to Ms. Blatt.

20 Is it your contention that everybody
21 who uses YouTube and searches for a video
22 involving a particular subject will be
23 automatically presented with thumbnails that are
24 related to that regardless of that user's
25 YouTube setting, preferences, preferences that

1 YouTube allows you to --

2 MR. SCHNAPPER: I -- I -- I don't -- I
3 don't know. The practices are too varied. I
4 don't know. But, if I -- if I --

5 JUSTICE ALITO: You don't know if
6 somebody uses YouTube, they can -- can -- do
7 they have -- is there a function that allows
8 them not to be presented with similar videos?

9 MR. SCHNAPPER: I -- I don't know. I
10 mean, I've gone onto -- on YouTube and never
11 seen that, but I -- I wouldn't --

12 JUSTICE ALITO: Uh-huh. Okay.

13 MR. SCHNAPPER: The functions are
14 widely varied. But if I might make a broader
15 point about the way you framed that question?

16 JUSTICE ALITO: Well, I -- I think
17 you -- you answered my question. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I -- I do. This
21 has gone further than I thought or your position
22 has gone further than I thought.

23 No provider or user of an interactive
24 computer service shall be treated as the
25 publisher or speaker of any information provided

1 by another information content provider.

2 And I thought that you started by
3 telling me, if I put in ISIS and they just give
4 me a download of information, the Internet
5 provider is not liable, correct, under (c)(1)?
6 I just read to you (c)(1), correct?

7 MR. SCHNAPPER: It -- it depends what
8 the information is they give you.

9 JUSTICE SOTOMAYOR: If they give me
10 everything that has --

11 MR. SCHNAPPER: If they give you
12 information they created --

13 JUSTICE SOTOMAYOR: No, they have --

14 MR. SCHNAPPER: -- they're not
15 protected.

16 JUSTICE SOTOMAYOR: So you are going
17 to the extreme. Assume I don't think you're
18 right, I think you're wrong, that if I put in a
19 search and they give me materials that they
20 believe answers my search, no matter how they
21 organize it, that they're okay. Do you
22 survive -- does your complaint survive if I
23 believe 230 goes that far?

24 MR. SCHNAPPER: So it depends on what
25 materials they present you with. If -- if all

1 they presented you with -- Twitter would maybe
2 be a cleaner example -- is materials created by
3 third parties, they -- what they've published is
4 third-party materials, and they're good.

5 If they present you with things that
6 they wrote, at the other extreme, then they're
7 not protected because what they presented is not
8 third-party content.

9 JUSTICE SOTOMAYOR: So why do you
10 think the thumbnails are -- I type it in, they
11 give me a thumbnail of everything they think
12 answers my inquiry, the suggestion box.

13 MR. SCHNAPPER: Yes.

14 JUSTICE SOTOMAYOR: Why are they
15 liable?

16 MR. SCHNAPPER: Because a thumbnail is
17 not exclusively third-party material. It's a
18 joint operation, and you can find -- if you look
19 at the thumbnail, it'll have a picture, which
20 comes from the third party, it has an embedded
21 URL, which comes from the defendant, and it
22 might have some information below the --

23 JUSTICE SOTOMAYOR: The URL tells you
24 where to find it, correct?

25 MR. SCHNAPPER: Sorry?

1 JUSTICE SOTOMAYOR: The URL tells you
2 where to find it? It's a computer language that
3 tells you this is where this is located?

4 MR. SCHNAPPER: Yes, but it is
5 information within the meaning of the statute.
6 This is no different than an e-mail which writes
7 it out for you.

8 JUSTICE SOTOMAYOR: If I don't accept
9 your line --

10 MR. SCHNAPPER: Yeah.

11 JUSTICE SOTOMAYOR: -- assume that
12 you've lost on the width of that line.

13 MR. SCHNAPPER: Yes.

14 JUSTICE SOTOMAYOR: I gave you an
15 example earlier of an Internet provider working
16 directly with ISIS and doing an algorithm that
17 -- teaching them how to do an algorithm that
18 will look for everybody who is just
19 ISIS-related. There's more a collusion in the
20 creation than a neutral algorithm.

21 How do I draw the line between not
22 accepting your point about the thumbnails and
23 going to the other extreme of active collusion?
24 Because there has to be a line somewhere in
25 between. It can't be merely because you're a

1 computer person that you can create an algorithm
2 that discriminates against people. You have no
3 problem with that, right? If a -- if a --

4 MR. SCHNAPPER: The writing of the
5 algorithm would probably constitute aiding and
6 abetting --

7 JUSTICE SOTOMAYOR: Exactly. If you
8 write one that discriminated against people for
9 a user, you're probably going to be liable.

10 MR. SCHNAPPER: I'm not sure, as we
11 describe it, it would fall outside the four
12 walls of the defense. If you write an algorithm
13 that -- that in response -- that in -- that --
14 the -- the way you implement it's --

15 JUSTICE SOTOMAYOR: If you write an
16 algorithm --

17 MR. SCHNAPPER: -- going to put you
18 outside the defense. Yes.

19 JUSTICE SOTOMAYOR: -- if you write an
20 algorithm for someone that, in its structure,
21 ensures the discrimination between people, a
22 dating app, for example, someone comes to you
23 and says, I'm going to create an algorithm that
24 inherently discriminates against people, it
25 won't match black people to white people, Asian

1 people to Hispanics, it's going to discriminate,
2 you would say that Internet provider is
3 discriminating, correct?

4 MR. SCHNAPPER: I would -- what they
5 did -- the way the distinction played out would
6 be important, though. They would -- you know,
7 if -- if they're -- they would have to fall
8 outside of one of the elements of the claim.

9 It's hard to do this in the abstract.

10 JUSTICE SOTOMAYOR: All right.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: Mr. Schnapper, can I
13 give you three kinds of practices and you tell
14 me which gets 230 protection and which doesn't?

15 So one is the YouTube practices that
16 you're complaining of, and we know you think
17 that that does not get 230 protection.

18 A second would be Facebook or Twitter
19 or any entity that essentially prioritizes
20 items. So you're on Facebook and certain items
21 are prioritized on your news feed, or certain
22 tweets are prioritized on your Twitter feed, all
23 right, and that there's some algorithm that's
24 doing that and that's amplifying certain
25 messages rather than other messages on your

1 feed. That's the second.

2 And then the third is just a regular
3 search engine. You know, you put in a search
4 and something comes back, and in some ways, you
5 know, that's one giant recommendation system.
6 Here's the first item you should look at.
7 Here's the second item you should look at.

8 So are all three of those not
9 protected, or what happens to my second and
10 third? Are they protected or not protected?
11 And if they're -- and if they are protected,
12 what's the difference between them and your
13 practices?

14 MR. SCHNAPPER: Certainly. So let me
15 -- let me start with the search engine. The --
16 the -- there's a lot of discussion on search
17 engines, but there's not a specific provision in
18 the statute that says search engines are
19 protected. The question is, do they fit within
20 the language of the statute?

21 So, if I ask a search engine for
22 stories about John Doe and it gives me a list
23 and, if I click on one of them, it turns out to
24 be defamatory, they're not liable because
25 they --

1 JUSTICE KAGAN: Well, they just gave
2 it to you. It's the first thing. They just
3 prioritized it. They think it's really a great
4 one to click on.

5 MR. SCHNAPPER: The -- the mere prior
6 -- there are three -- there are multiple
7 questions here. First, are they liable just
8 because what you -- you -- you clicked on turned
9 out to be defamatory? The answer we think is
10 no.

11 Secondly, what if the snippet that
12 they took from the John Doe document said John
13 Doe is a shoplifter? And the answer is they're
14 not liable because they didn't write that. It's
15 publishing third-party content.

16 The third question is, could they be
17 liable for the way they prioritize things? And
18 the answer is I think so. It's going to depend
19 how -- what happened. And the example, I could
20 --

21 JUSTICE KAGAN: So even all the way to
22 the -- to the straight search engine, that they
23 could be liable for their prioritization system?

24 MR. SCHNAPPER: Yes. There was -- let
25 me --

1 JUSTICE KAGAN: Okay.

2 MR. SCHNAPPER: If I might continue --
3 if I --

4 JUSTICE KAGAN: No, I appreciate the
5 -- the -- go ahead. I'm sorry.

6 MR. SCHNAPPER: Those are the facts
7 which led the European Union to fine Google 2.3
8 billion euros, because they used prioritization
9 to wipe out competition --

10 JUSTICE KAGAN: Okay. So here's --

11 MR. SCHNAPPER: -- for things they
12 were selling.

13 JUSTICE KAGAN: Yeah, so I don't think
14 that a court did it over there, and I think that
15 that's my concern, is I can imagine a world
16 where you're right that none of this stuff gets
17 protection. And, you know, every other industry
18 has to internalize the costs of its conduct.
19 Why is it that the tech industry gets a pass? A
20 little bit unclear.

21 On the other hand, I mean, we're a
22 court. We really don't know about these things.
23 You know, these are not like the nine greatest
24 experts on the Internet.

25 (Laughter.)

1 JUSTICE KAGAN: And I don't have to --
2 I don't have to accept all Ms. Blatt's "the sky
3 is falling" stuff to accept something about,
4 boy, there is a lot of uncertainty about going
5 the way you would have us go, in part, just
6 because of the difficulty of drawing lines in
7 this area and just because of the fact that,
8 once we go with you, all of a sudden we're
9 finding that Google isn't protected. And maybe
10 Congress should want that system, but isn't that
11 something for Congress to do, not the Court?

12 MR. SCHNAPPER: Well, I -- I think the
13 -- the -- the -- the line-drawing problems are
14 real. No one minimizes that. I think that the
15 task for this Court is to apply the statute the
16 way it was written.

17 And if I might return to a point that
18 Justice Alito made, much of what goes on now
19 didn't exist in 1996. The statute was written
20 to address one or two very specific problems
21 about defamation cases, and it drew lines around
22 certain kind of things and it protected those.

23 It did not and could not have
24 written -- been written in such a way to protect
25 everything else that might come along that was

1 highly desirable. Congress didn't adopt a
2 regulatory scheme. They protected a few things.
3 It will inevitably happen, it has happened, that
4 companies have devised practices which are maybe
5 highly laudable, but they don't fit within the
6 four walls of the statute.

7 That will continue to happen no matter
8 what happens -- what you do. And the answer is,
9 when -- when someone devises some new -- some
10 new practice that may be highly desirable but
11 doesn't fit within the four walls of the
12 statute, the -- the industry has to go back to
13 Congress and say: We need you to broaden the
14 statute because you wrote this to protect chat
15 rooms in 1996, and we want to do something that
16 doesn't fit within the statutes.

17 And -- and using thumbnails would be a
18 perfect example of that.

19 JUSTICE KAGAN: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 JUSTICE GORSUCH: Mr. Schnapper, I
23 just want to make sure I understand, as you say,
24 the statutory language and how this case fits
25 with it, and if we could start with Section

1 230(f)(4), which defines the term "access
2 software provider." It includes, among other
3 things, picking, choosing, analyzing, or
4 digesting content.

5 And we might in another world in our
6 First Amendment jurisprudence think of picking
7 and choosing, analyzing or digesting content as
8 content providing, but the statute seems to
9 suggest that's not what it is, it's something
10 different in this context, in this statutory
11 context, and it's protected.

12 Do you agree with that?

13 MR. SCHNAPPER: No. Let -- and I --
14 if I might explain why?

15 JUSTICE GORSUCH: Briefly.

16 MR. SCHNAPPER: I'll do my best.

17 The -- the language that you refer to in
18 Section (f)(4) doesn't apply here.

19 JUSTICE GORSUCH: No, I -- I -- I --
20 we'll get to that in a minute. But let's just
21 take that as given, okay, that I think that
22 what, say, Google does in picking, choosing,
23 analyzing, or even digesting content just makes
24 it an access software provider. Let's take that
25 as given, and so that would normally be

1 protected activity.

2 But (f)(3) carves out a scenario where
3 you become a content provider, and that's
4 something different in my mind to picking,
5 choosing, analyzing, or digesting content, okay?
6 Let's just take those two premises as given.

7 MR. SCHNAPPER: Okay.

8 JUSTICE GORSUCH: All right? You got
9 to do something beyond picking, choosing, or
10 analyzing or digesting content, which is what
11 search engines typically do, even as I
12 understand it. You've got to do something
13 beyond that.

14 As I take your argument, you think
15 that the Ninth Circuit's Neutral Tools Rule is
16 wrong because, in a post-algorithm world,
17 artificial intelligence can generate some forms
18 of content, even according to Neutral Rules.

19 I mean, artificial intelligence
20 generates poetry, it generates polemics today.
21 That -- that would be content that goes beyond
22 picking, choosing, analyzing, or digesting
23 content. And that is not protected.

24 Let's -- let's assume that's right,
25 okay? Then I guess the question becomes, what

1 do we do about YouTube's recommendations?

2 And -- and as I see it, we have a few
3 options. We could say that YouTube does
4 generate its own content when it makes a
5 recommendation, says "Up next." We could say
6 no, that's more like picking and choosing.

7 Or we could say the Ninth Circuit's
8 Neutral Tools test was mistaken because, in some
9 circumstances, even neutral tools, like
10 algorithms, can generate through artificial
11 intelligence forms of content and that the Ninth
12 Circuit wasn't sensitive to that possibility and
13 remand the case for it to consider that
14 question.

15 What's wrong with that?

16 MR. SCHNAPPER: Well, it's not our
17 theory, but it's --

18 (Laughter.)

19 MR. SCHNAPPER: -- if the alternative
20 is what Ms. Blatt will be telling you, I'll --

21 JUSTICE GORSUCH: I'm not asking you,
22 you know, hey, I'll win at any cost.

23 MR. SCHNAPPER: No, there's nothing
24 wrong with it.

25 JUSTICE GORSUCH: I'm asking you

1 what's -- what's -- whether that is a correct
2 analysis of the statutory terms you keep
3 referring us to --

4 MR. SCHNAPPER: Yes.

5 JUSTICE GORSUCH: -- or whether it is
6 not.

7 MR. SCHNAPPER: Yes, yes, yes. As --
8 as we've said, this now is close to something we
9 set out in our brief, which is that the -- that
10 the algorithm could create things on its own.
11 It can create a catalogue of ISIS videos, which
12 would be analogous to a compilation under
13 Section 101 of the Copyright Act.

14 A compilation is a distinct entity,
15 it's copyrightable, even if the elements of it
16 were not. So, yes, absolutely, the software
17 could create something like that. It would not
18 be third-party content, and, therefore, it would
19 fall outside the scope of the statute.

20 JUSTICE GORSUCH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Kavanaugh?

23 JUSTICE KAVANAUGH: Just to pick up on
24 Justice Gorsuch's questions, the idea of
25 recommendations is not in the statute. And the

1 statute does refer to organization, and the
2 definition, as he was saying, of interactive
3 computer service means one that filters,
4 screens, picks, chooses, organizes content.

5 And your position, I think, would mean
6 that the very thing that makes the website an
7 interactive computer service also mean that it
8 loses the protection of 230. And just as a
9 textual and structural matter, we don't usually
10 read a statute to, in essence, defeat itself.

11 So what's your response to that?

12 MR. SCHNAPPER: My response is that
13 the text doesn't apply here. Let me explain
14 why. The -- the element in -- the -- the list
15 in -- in (f)(4) refers to only one of the three
16 kinds of interactive computer services in
17 (f)(2).

18 In (f)(2) -- and this is -- this is on
19 page 267 of the petition appendix. (f)(2) says
20 an interactive computer service means -- and
21 there -- it gives you three candidates, you've
22 got one of them -- an information service, a
23 system, or an access software provider.

24 Now YouTube is one of the first two.
25 It doesn't -- it's not a software provider. The

1 definition in (f)(4) only delineates who is an
2 access software provider. It doesn't apply to
3 who's an information system or service. And
4 that was Congress's choice.

5 Congress didn't say you're an
6 interactive -- you're a service, an information
7 service or a system if you do those things. It
8 said you're only -- those things only bring you
9 within the four walls of interactive computer
10 service if you're -- if you're a software
11 provider. And -- and that made sense in the
12 context of what was happening in 1996.

13 In 1996, if you wanted to go online,
14 you would typically sign up with CompuServe or
15 Prodigy and they would literally give you
16 diskettes. They would sell -- they would be
17 selling you software.

18 And -- and this provision in (f)(4) is
19 about that activity. That's not what's
20 happening here.

21 JUSTICE KAVANAUGH: Well, just -- just
22 to go back to 1996 and maybe pick up on Justice
23 Kagan's questions earlier, it seems that you
24 continually want to focus on the precise issue
25 that was going on in 1996, but then Congress

1 drafted a broad text, and that text has been
2 unanimously read by courts of appeals over the
3 years to provide protection in this sort of
4 situation and that you now want to challenge
5 that consensus.

6 But the amici on the other side say:
7 Well, to do that, to pull back now from the
8 interpretation that's been in place would create
9 a lot of economic dislocation, would really
10 crash the digital economy with all sorts of
11 effects on workers and consumers, retirement
12 plans and what have you, and those are serious
13 concerns and concerns that Congress, if it were
14 to take a look at this and try to fashion
15 something along the lines of what you're saying,
16 could account for.

17 We are not equipped to account for
18 that. So are the predictions of problems
19 overstated? If so, how? And are we really the
20 right body to draw back from what had been the
21 text and consistent understanding in courts of
22 appeals?

23 MR. SCHNAPPER: Well, I -- our
24 position is that the text doesn't -- doesn't say
25 this. With regard to the issue of what we've

1 come to call recommendations, this isn't a
2 longstanding, well-established body of
3 precedent. It's really three decisions: the
4 decision in this case, the Dyroff decision, and
5 Force. And -- and of the eight justices to --

6 JUSTICE KAVANAUGH: What about the
7 implications then? Go to that, the implications
8 for the economy, that you have a lot of amicus
9 briefs that we have to take seriously that say
10 this is going to cause a lot of economic
11 dislocation in the country.

12 MR. SCHNAPPER: I mean, I'd say a
13 couple things in response to that. The first
14 one is, on a close reading of the amicus briefs,
15 it's clear that they are urging the Court to
16 hold that a wide variety of different kinds of
17 things are protected. They're -- they're
18 inviting the Court to adopt a rule that
19 recommendations are protected and that whatever
20 they're doing would qualify as a recommendation.

21 But you can't --

22 JUSTICE KAVANAUGH: Well, I think
23 they're saying a recommendation is a
24 recommendation, something express. I mean,
25 your -- your whole thing is the algorithms are

1 an implied recommendation. And they're saying:

2 Well, they're not an express recommendation.

3 That -- that -- so --

4 MR. SCHNAPPER: I'm --

5 JUSTICE KAVANAUGH: But, in any event,
6 why don't we focus on the question.

7 MR. SCHNAPPER: Yes. Yes.

8 JUSTICE KAVANAUGH: Do you -- do you
9 challenge the -- the basic point?

10 MR. SCHNAPPER: I think -- I think --
11 yes. I -- I --

12 JUSTICE KAVANAUGH: And so --

13 MR. SCHNAPPER: We -- we do, on -- on
14 a couple grounds. One of them is that I'm not
15 sure all these decisions -- these briefs are
16 distinguishing as we have today between
17 liability because of the content of third-party
18 materials and the recommendation function
19 itself.

20 A -- a distinction between more and
21 less specific suggestions --

22 JUSTICE KAVANAUGH: What would the
23 difference be in liability, in damages?

24 MR. SCHNAPPER: I'm sorry, between
25 which two things?

1 JUSTICE KAVANAUGH: The third-party
2 content and the recommendation.

3 MR. SCHNAPPER: Well, most of the time
4 the recommendations isn't going to --

5 JUSTICE KAVANAUGH: Like how would the
6 money at the end of the day differ if you are
7 successful?

8 MR. SCHNAPPER: It might not be. But
9 most recommendations just aren't actionable. I
10 mean, there -- there is no cause of action for
11 telling someone to look at a book that has
12 something defamatory in it.

13 JASTA, the statute we're talking about
14 tomorrow, is unusual in that recommendations
15 could run you afoul of the statute. But there
16 are very few claims that are like that, so
17 it's -- it's a very different kind of situation.
18 It's -- the implications of this are limited
19 because the kinds of circumstances in which a
20 recommendation would be actionable are limited.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I'd like to take you
25 back, Mr. Schnapper, to Justice Sotomayor's

1 questions about the complaint. It seems to me
2 that the complaint in this case is materially
3 indistinguishable from the complaint in
4 tomorrow's case. Do you agree? Same aiding and
5 --

6 MR. SCHNAPPER: The complaint in which
7 case? I'm sorry.

8 JUSTICE BARRETT: In tomorrow's case,
9 in the Taamneh case, the Twitter case, and this
10 one.

11 MR. SCHNAPPER: Pretty much.

12 JUSTICE BARRETT: So they're both
13 relying on the same aiding-and-abetting theory.
14 So, if you lose tomorrow, do we even have to
15 reach the Section 230 question here? Would you
16 concede that you would lose on that ground here?

17 MR. SCHNAPPER: No. The -- there was
18 a motion to dismiss in tomorrow's case on JASTA
19 grounds. It didn't get decided. So, if we lose
20 tomorrow, they'll be -- the defense will be free
21 in this case to -- to move to dismiss, but we'd
22 be entitled to try to amend the complaint in
23 this case to satisfy whatever standard you
24 establish tomorrow.

25 JUSTICE BARRETT: Okay. Let me ask

1 you this. I'm switching gears now. So Section
2 230 protects not only providers but also users.
3 So I'm thinking about these recommendations.
4 Let's say I retweet an ISIS video. On your
5 theory, am I aiding and abetting and does the
6 statute protect me, or does my putting the
7 thumbs-up on it create new content?

8 MR. SCHNAPPER: I -- we don't read the
9 word "user" in -- that broadly. There's not
10 been a lot of litigation about this.

11 We -- we think the word "user" is
12 there to deal with a situation in which one
13 entity accesses a -- a -- a server, YouTube, for
14 example, and then someone else uses that entity,
15 like when I go to FedEx Office, FedEx Office is
16 the user that is accessing my e-mail, and the
17 statute protects them when I look at the FedEx
18 computer and find the defamatory --

19 JUSTICE BARRETT: Well, let's say that
20 I disagree with you. Let's say I'm an entity
21 that's using the service -- the service, so I
22 count as a user. You know, my computer is
23 accessing the servers when I retweet the image.
24 On your theory, could I be liable under JASTA
25 for aiding and abetting without -- do I lose 230

1 protection?

2 MR. SCHNAPPER: Right. Right. Right.

3 JUSTICE BARRETT: Have I created new
4 content?

5 MR. SCHNAPPER: The problem -- whether
6 it's enough for JASTA is a separate inquiry.

7 JUSTICE BARRETT: Okay. Right. Fair
8 enough.

9 MR. SCHNAPPER: The question is, is it
10 outside 230?

11 JUSTICE BARRETT: Is it outside of
12 230.

13 MR. SCHNAPPER: Right. And our view
14 is the statute doesn't mean anyone who's a user
15 who re -- who tweet -- who -- who pub -- conveys
16 third-party liable is protected. If you --
17 let's say that you -- you read a book, and it
18 says John Doe is a shoplifter, and you send an
19 e-mail that says John Doe is a shoplifter,
20 you're using, you know, the Internet. You're
21 using the -- the e-mail system.

22 But nobody thinks that -- that Section
23 230 gives -- is a blanket exemption for
24 defamation on the website as long as you're
25 quoting somebody else.

1 Retweeting is a very automatic way of
2 doing it, but if you start down that road, you'd
3 end up having to hold that as -- that anytime I
4 send a defamatory e-mail, I'm protected as long
5 as I'm quoting somebody else. And I don't think
6 anybody --

7 JUSTICE BARRETT: Well, I guess I
8 don't understand -- I mean, let's see, I guess I
9 don't understand logically why your argument
10 wouldn't mean that I was creating new content if
11 I retweeted or if I liked it or if I said check
12 this out. Why --

13 MR. SCHNAPPER: Well -- well, you --

14 JUSTICE BARRETT: -- why wouldn't
15 that?

16 MR. SCHNAPPER: -- you would be, but
17 I'm advancing an argument that gets to the same
18 place, which is you're -- you're not a user
19 within the meaning of the statute just because
20 you use -- you go on e-mail or -- or YouTube or
21 -- or on Twitter.

22 JUSTICE BARRETT: Let's say I disagree
23 with you. Let's say that I think you're a user
24 of Twitter if you go on Twitter and you're using
25 Twitter and you retweet or you like or you say

1 check this out. On your theory, I'm not
2 protected by Section 230.

3 MR. SCHNAPPER: That's content you've
4 created.

5 JUSTICE BARRETT: That's content I've
6 created. Okay. And on the content creation
7 point, let's imagine -- it seems like you're
8 putting a whole lot of weight on the fact that
9 these are thumbnails, and so it's something that
10 YouTube separately creates.

11 MR. SCHNAPPER: Yes.

12 JUSTICE BARRETT: What if they just
13 screenshot? They just screenshot the ISIS
14 thing. They don't do the thumbnail. Then are
15 they --

16 MR. SCHNAPPER: That's -- that's pure
17 third-party content.

18 JUSTICE BARRETT: That's pure third --
19 so this is just about how YouTube set it up?

20 MR. SCHNAPPER: That's -- that's --
21 that's correct in this context. And it gets
22 back to the conversation we were having earlier
23 about this is a new technology that didn't exist
24 in 1996, and rather than ask Congress to write
25 the statute to cover it, they just went ahead

1 and did it.

2 JUSTICE BARRETT: Okay. And last
3 question, turning to the statutory text. So it
4 seems to me that some the briefs in this case
5 are focusing on what it means to treat someone
6 as a publisher, treat an entity as a publisher.
7 You're not really focusing on that and the
8 traditional editorial functions argument. I
9 mean, you're really focusing on the content
10 provider argument, correct?

11 MR. SCHNAPPER: No. Well, we've
12 advanced views as to each element of the claim.
13 Our --

14 JUSTICE BARRETT: But today you've
15 really been honing in on this are you actually
16 creating content or just presenting third-party
17 content.

18 MR. SCHNAPPER: Well, I've been
19 answering -- that's where the questions --

20 JUSTICE BARRETT: Yes.

21 MR. SCHNAPPER: -- have taken us, but
22 -- but -- but our -- our view would be that
23 you're not being treated as a publisher of the
24 video just because you -- you publish the
25 thumbnail.

1 JUSTICE BARRETT: Okay. Thank you.

2 MR. SCHNAPPER: You're not being
3 harmed by the thumbnail.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I guess -- I
8 guess I'm thoroughly confused, but let me -- let
9 me try to -- let me try to understand what your
10 argument is. I think that the confusion that
11 I'm feeling is arising from the possibility that
12 we're talking about two different concepts and
13 conflating them in a way.

14 I thought that Section 230 and the
15 questions that we were asking in this case today
16 was about whether there was immunity and whether
17 Google could claim the defense of immunity and
18 that that's actually different than the question
19 of whether whatever it does gives rise to
20 liability. That is, is there liability for
21 aiding and abetting? That's tomorrow's
22 question.

23 And to the extent that you keep coming
24 back to this notion of creating content or
25 whatnot, I feel like we're conflating the two in

1 a way that I'd like to just see if I can clear
2 up from my perspective.

3 Your brief says that the immunity
4 question, Section 230(c)(1)'s text is most
5 naturally read to prohibit courts from holding a
6 website liable for failing to block or remove
7 third-party content.

8 And I read the arguments in your brief
9 and I read what you said about Stratton Oakmont
10 and the sort of background, and so I thought
11 your argument was that the -- that you can only
12 claim immunity, Google, if the claim that's
13 being made against you is about your failing to
14 block or remove third-party content.

15 To the extent we are making a claim
16 about recommendations or doing anything else,
17 any of the, you know, hypotheticals that people
18 have brought up, that's outside of the scope of
19 the statute because, really, the statute is
20 narrowly tailored in a way to protect Internet
21 platforms from claims about failing to block or
22 remove, right? I mean, that's what I thought
23 was happening.

24 All right. So, if that's true, then
25 all the hypotheticals and the questions about

1 are you aiding and abetting if Google, you know,
2 has a priority list or if there's
3 recommendations, maybe, but that's not in the
4 statute because we're just talking about
5 immunity. We're just talking about whether or
6 not you've made a claim for failing to block or
7 remove in this case today related to Section
8 230.

9 Am I doing too much of a separation
10 here in terms of how I'm conceiving of it?

11 MR. SCHNAPPER: Well, let me
12 articulate what -- what the contention is that
13 we are advancing, and I think it's not quite the
14 way you described it. The contention we're
15 advancing is that a variety of things that we're
16 loosely characterizing as recommendations fall
17 outside of the statute.

18 JUSTICE JACKSON: Why?

19 MR. SCHNAPPER: Because, in some of
20 them, the defendant's not being treated as the
21 publisher; because, in some of them, third-party
22 content's being -- content is being created by
23 the defendant; because, in some of them, the
24 defendant's not acting as an interactive
25 computer service.

1 JUSTICE JACKSON: I see. So I -- I
2 thought -- I thought you were -- the answer to
3 why was because the statute is limited, because
4 the statute only focuses on certain kind of
5 publisher conduct, and to the extent that --
6 that they're doing anything else, recommending
7 or whatever, that's not going to be covered by
8 this statute.

9 But you're sort of saying, well, let's
10 look at what they're actually doing and it may
11 fit in or it may not. You're not sort of hewing
12 very closely to the understanding of the
13 original scope of the statute in terms of what
14 it is trying to immunize these platforms
15 against.

16 MR. SCHNAPPER: I -- I -- I think
17 we're trying to do that in somewhat more of a
18 particularized way, that is, to -- to identify
19 -- to work our way through each of the three
20 specific elements of the statute, each tied to
21 particular language, to --

22 JUSTICE JACKSON: But I've got to tell
23 you I don't see three elements in this. I mean,
24 part of me -- part of this is all the confusion,
25 I think, that has developed over time about the

1 meaning of the statement in the statute, right?

2 I don't see three elements. I see
3 literally a sentence, and the sentence in my
4 view reads as though they're trying to actually
5 direct courts to not impose publisher liability,
6 strict publisher liability, against the backdrop
7 of Stat -- of Stratton Oakmont.

8 So there's like some -- somehow we've
9 gotten to a world in which we've teased out
10 three elements and we're trying to fit it all
11 into that, when I thought there was sort of a
12 very simple, sort of straightforward way to read
13 the statute that you articulate in your brief,
14 which is this is really -- this statute, (c)(1),
15 is really just Congress trying to not
16 disincentivize these platforms for blocking and
17 screening offensive conduct.

18 And so what they said is let's look at
19 (c)(1). Let's have (c)(2). Let's have a system
20 in which a system -- a platform is not going to
21 be punished, strict liability for just having
22 offensive conduct on their website, and, if they
23 try -- if they try to screen out, we're not --
24 we're going to say you won't be responsible for
25 that either. That's (c)(2).

1 But it really doesn't speak to whether
2 you do a recommendation or whether you have an
3 algorithm that does priorities or any of these
4 other things. That's how I thought that -- that
5 at least I was looking at the statute in light
6 of its purposes and history and -- and -- and
7 Stratton Oakmont and all of that, in which case
8 I think you would win, unless your
9 recommendations argument really is just the same
10 thing as saying they are hosting ISIS videos on
11 their website.

12 MR. SCHNAPPER: Well, I -- I think --
13 I think we do have to be drawing that
14 distinction.

15 But, with regard to your question
16 about the three elements, the -- the text does
17 take you there. It says, if you track the
18 briefs probably of either side, the -- part of
19 -- we're arguing about the meaning of "treat as
20 a publisher" because that's the first couple of
21 words of the statute.

22 Then we're arguing about did they
23 create the content because "publisher" has to be
24 of -- has to be of information provided by
25 another content provider. So we have to parse

1 out the meaning of that.

2 And then it refers to the defendant as
3 an interactive computer service, and we have to
4 parse out the meaning of, well, what does that
5 mean? So we -- we are forced to -- this --
6 this -- the language of the statute has those
7 three components, and it -- although the overall
8 purpose is I think as you described it, the
9 language is more complex and particularized.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Stewart.

14 ORAL ARGUMENT OF MALCOLM L. STEWART
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING VACATUR

17 MR. STEWART: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 I'd like to begin by addressing the
20 Roger Maris hypothetical because I -- I think it
21 illustrates our position and the limits on our
22 position.

23 Imagine in a particular state there
24 was an unusually protective law that said no
25 booksellers shall be held liable on any theory

1 for the content of any book that it sells, and
2 then the scenario that the Chief Justice
3 described occurred, the person was asked where
4 is the Roger Maris book and said it's over on
5 that table with the other sports book -- books.

6 Now, if the bookseller was sued for
7 making that statement, our position would be
8 there's no way textually that the immunity
9 statute would apply. This is a statement about
10 the book, not the contents of the book.

11 Now the statement "the book is over
12 there" is so obviously innocuous that it might
13 seem like pedantry to quibble about should the
14 dismissal of the suit be based on immunity or
15 for failure to state a claim. But a court, in
16 thinking about the possibility of harder cases
17 down the road, should distinguish carefully
18 between liability for the content itself,
19 liability for statements about the content.

20 And the other one other thing I would
21 say is, if the consequence of saying "it's over
22 there" was that the bookseller lost its immunity
23 for the content of the book, that would be a big
24 deal. But our position on 230(c)(1) is nothing
25 like that.

1 Our position is that the Internet
2 service provider can be sued for its own
3 organizational choices, but the fact that it
4 makes organizational choices doesn't deprive it
5 of the protection it receives for liability
6 based on the third-party content.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Well, I'm still
9 confused. What if the bookseller said, "it's
10 over there on the table with the other
11 trustworthy books"?

12 MR. STEWART: I mean, I think at that
13 point you would be asking could it conceivably
14 be an actionable tort to describe the book as
15 trustworthy.

16 JUSTICE THOMAS: Well, we're putting a
17 lot of weight on organization. But doesn't it
18 really depend on how we're organizing it and on
19 what the basis of the organization -- for
20 example, we could say this set -- you could
21 organize it on the basis of what's more
22 trustworthy than -- than something else.

23 MR. STEWART: I think that might
24 matter with respect to whether there was
25 substantive liability under the underlying cause

1 of action. It -- it shouldn't matter for
2 purposes, either of the hypothetical immunity I
3 -- statute I described, which focuses
4 exclusively on the contents of the books, or for
5 230(c)(1).

6 Now Mr. Schnapper said in a colloquy
7 earlier that he thought the allegations in his
8 complaint are basically the same as those in the
9 Twitter complaint. And the government is
10 arguing in Twitter that those allegations are
11 not sufficient to state a claim under the
12 Antiterrorism Act.

13 So our -- our interest in 230(c)(1) is
14 not in allowing this particular suit to go
15 forward. It is in preserving the distinction
16 between immunity -- protection for the
17 underlying content and protection for the
18 platform's own choices.

19 JUSTICE THOMAS: Well, I -- I just
20 think it's going to be difficult. How would you
21 respond to Justice Gorsuch's hypothetical about
22 the artificial intelligence creating content
23 organizational decisions?

24 MR. STEWART: I mean, I think the
25 organizational decisions could still be

1 subjected to a suit. Whether you think of them
2 as recommendations or simply as the platform --
3 the operation of the platform, it's still the
4 platform's own choice.

5 And if you ask how did a particular
6 video wind up in the queue of a particular
7 individual, it -- it could be some -- some sort
8 of artificial intelligence that was making that
9 choice, but it would have to do with the --
10 YouTube's administration of its own platform.
11 It wouldn't be a choice made by any third-party
12 who had posted it because third parties who post
13 on YouTube don't direct their videos to
14 particular recipients.

15 And -- and I -- I do want to emphasize
16 this -- this theory, this rationale applies even
17 in the most mundane circumstances. For
18 instance, if you do a Google search on the name
19 for a famous person and you misspell the name
20 slightly, you still get lots of content about
21 that person. Google knows that it's smarter
22 than we are and it knows that -- more about what
23 we want than the literal terms of our search
24 might suggest.

25 I went to the Court's website and used

1 the docket search function and typed in Google
2 and left off the -- the final E and I got a
3 message that said no items find -- found. In
4 order to call up the docket for this case, you
5 have to spell Google exactly right.

6 Now the choice between those two modes
7 of operating the platform, it's extraordinarily
8 unlikely, almost inconceivable that it could
9 ever give rise to legal liability, but those are
10 choices made by the platforms themselves. They
11 are not choices made by any third party. They
12 just don't implicate 230(c)(1).

13 And the choice -- any conceivable
14 lawsuit about the decision to use one mode of
15 operation rather than another, presumably, would
16 be dismissed on the merits. But --

17 JUSTICE KAGAN: I -- I think the
18 problem, Mr. Stewart, with minimizing what your
19 position is is that in trying to separate the
20 content from the choices that are being made,
21 whether it's by YouTube or anyone else, you
22 can't present this content without making
23 choices. So, in every case in which there is
24 content, there's also a choice about
25 presentation and prioritization.

1 And the whole point of suits like this
2 is that those choices about presentation and
3 prioritization amplify certain message --
4 messages and thus create more harm.

5 Now I appreciate what you're saying is
6 like, well, that doesn't mean that you're going
7 to have liability in every case, but -- but --
8 but still, I mean, you are creating a world of
9 lawsuits. Really anytime you have content, you
10 also have these presentational and
11 prioritization choices that can be subject to
12 suit.

13 MR. STEWART: Let -- let me say a
14 couple of things about that. The first thing I
15 would say is you could make substantially the
16 same argument about employment decisions. That
17 is, in order for YouTube to operate, it has to
18 hire employees.

19 But Ms. Blatt acknowledges in the --
20 the brief that employment decisions wouldn't be
21 shielded by 230(c)(1) if there was an allegation
22 of unlawful discrimination, for instance.

23 So the fact that the platform has to
24 make some sorts of organizational choices
25 doesn't mean it's immune from suit in the rare

1 instance where it might make a choice that
2 violates some other provision of law.

3 The second thing is the concern we
4 have in mind are things like imagine a
5 hypothetical job matching service like Indeed,
6 where job applicants can post their
7 qualifications and potential employers can post
8 their own listings and the website will match
9 them up.

10 And suppose it came to light that the
11 job -- the job search mechanism was routing the
12 high-paying, more professional jobs
13 disproportionately to the white applicants and
14 the lower-paying jobs to the black applicants
15 even when the qualifications were the same.

16 At -- at a general level, you could
17 describe that as choices about which content
18 would go to which users. But, when we saw that
19 kind of stark impropriety in the criteria that
20 the platform was -- was using, I think we would
21 say there has to be -- assuming it violates
22 applicable law, 230(c)(1) really shouldn't be
23 protecting that. That's not -- the complaint we
24 have here is not to the content itself or the
25 presence of the third-party job postings on the

1 platform. The complaint is about the use of
2 illicit criteria to decide which users will get
3 which content.

4 And our point is, in the more
5 innocuous cases or in the borderline cases where
6 the criteria seem a little bit shaky, but it's
7 not clear whether they violate any applicable
8 law, that that choice ought to be made based on
9 the law that the plaintiff invokes as the cause
10 of action. And the Court ought to be
11 determining, does the use of those criteria
12 violate that law? And it --

13 CHIEF JUSTICE ROBERTS: Well, I was
14 just going to say your -- the problem with your
15 analogies is that they involve -- I don't know
16 how many employment decisions are made in the
17 country every day, but I know that whatever it
18 is, hundreds of millions, billions of responses
19 to inquiries on the Internet are made every day.

20 And, as Justice Kagan suggested, under
21 your view, every one of those would be a
22 possibility of a lawsuit if they thought there
23 was something that the algorithm referred that
24 was defamatory, that, you know, whatever it is,
25 exposed them to harmful information. And so

1 that may be the analogy doesn't fit the
2 particular -- particular context.

3 MR. STEWART: I mean, I think it is
4 true that many platforms today are making an
5 enormous number of these choices. And if
6 Congress thinks that circumstances have changed
7 in such a way that amendments to the statute are
8 warranted because things that didn't exist or
9 that weren't on people's minds in 1996 have
10 taken on greater prominence, that would be a
11 choice for Congress to make.

12 CHIEF JUSTICE ROBERTS: Well, but
13 choice for Congress to make -- I mean, the --
14 the amici suggest that if we wait for Congress
15 to make that choice, the Internet will -- will
16 be sunk. And so maybe that's not as persuasive
17 a outcome as it might seem in other cases.

18 MR. STEWART: I -- I think the main
19 thing I would say is most of the amici that are
20 making that projection are making it based on a
21 misunderstanding of our position; namely, they
22 are misunding our -- misunderstanding our
23 position to be that once YouTube recommends a
24 video or once YouTube sends a video to a
25 particular user without the user requesting it,

1 that YouTube is liable for any impropriety in
2 the content of the video itself.

3 And that's not our position. Our
4 position is that YouTube's own conduct falls
5 outside of 230(c)(1). It's unlikely in very
6 many instances to give rise to actual liability.

7 JUSTICE KAVANAUGH: Why not? Why --
8 why -- why wouldn't it be liable? Explain that.

9 MR. STEWART: I think the reason --
10 the reason we would say is for -- for -- in this
11 case in particular, to -- to look ahead a little
12 bit to the -- the Twitter argument tomorrow,
13 there were questions at the beginning of
14 Mr. Schnapper's presentation about the role that
15 neutrality played in the analysis, and our view
16 is neutrality is not part of the 230(c)(1)
17 analysis, but it's a big part of the
18 Antiterrorism Act analysis because we say a
19 person is much more likely to be liable for
20 aiding and abetting if it is due -- kind of
21 giving special treatment to the primary
22 wrongdoing, if it has taken --

23 JUSTICE KAVANAUGH: Well, you -- keep
24 going.

25 MR. STEWART: And -- and -- and so, if

1 it is, in fact, the case that YouTube is
2 applying neutral algorithms, is simply showing
3 more ISIS videos to people who've shown an
4 interest in ISIS, just as it does more cat
5 videos to people who've shown an interest in --
6 in cats, that's much less likely to give rise to
7 liability under the Antiterrorism --

8 JUSTICE KAVANAUGH: I mean, much less
9 likely, I'm not sure based on what. You seem to
10 be putting a lot of stock on the liability piece
11 of this rather than, as Justice Jackson was
12 saying, the immunity piece. And I'm just not
13 sure -- you know, if we -- if we go down this
14 road, I'm not sure that's going to really pan
15 out. Certainly, as Justice Kagan says, lawsuits
16 will be nonstop --

17 MR. STEWART: I --

18 JUSTICE KAVANAUGH: -- on defamatory
19 material, which there's a lot of, that is out
20 there and finds its way onto the websites that
21 host third-party conduct.

22 MR. STEWART: And -- and --

23 JUSTICE KAVANAUGH: There will be lots
24 of lawsuits. You agree with that?

25 MR. STEWART: I -- I wouldn't

1 necessarily agree with there would be lots of
2 lawsuits, simply because there are a lot of
3 things to sue about, but they would not be suits
4 that have much likelihood of prevailing,
5 especially if the Court makes clear that even
6 after there's a recommendation, the website
7 still can't be treated as the publisher or
8 speaker of the underlying third-party content.

9 JUSTICE KAVANAUGH: Well, just bigger
10 picture then to the Chief's question, isn't it
11 better for -- to keep it the way it is for us
12 and Congress -- to put the burden on Congress to
13 change that and they can consider the
14 implications and make these predictive
15 judgments?

16 You're asking us right now to make a
17 very precise predictive judgment that, don't
18 worry about it, it's really not going to be that
19 bad. I don't know that that's at all the case,
20 and I don't know how we can assess that in any
21 meaningful way.

22 MR. STEWART: I -- I think, with
23 respect, that that -- that characterization of
24 the existing case law overstates the extent to
25 which courts are in agreement that platform

1 design choices --

2 JUSTICE KAVANAUGH: Assume they are.
3 Assume the status quo is against you in the law.
4 And you're asking us, well, the status quo is
5 wrong, okay, and this Court's the first time
6 we're getting to look at it. But don't worry
7 about the implications of this because it's
8 really all going to be fine, there won't be many
9 successful lawsuits, there won't be really many
10 lawsuits at all.

11 And I -- I don't know how we can make
12 that assessment.

13 MR. STEWART: I think, if the Court
14 thought that kind of the interpretive question,
15 looking at the plain language of the statute,
16 was on a knife's edge, it was an authentically
17 close call, then, yes, the Court could -- and
18 the Court perceived the existing case law to be
19 basically uniform, the Court could give some
20 weight to the interest in stability.

21 But I think, for us, neither of those
22 things is true.

23 JUSTICE BARRETT: Mr. Stewart --

24 MR. STEWART: That --

25 JUSTICE BARRETT: Oh, sorry. Please

1 finish.

2 MR. STEWART: I was -- I was going to
3 say the statutory text really is not -- it -- it
4 may have a little bit of ambiguity at the
5 margins, but it is very clearly focused on
6 protecting the platform from liability for
7 information provided by another information
8 content provider, not by the platform's own
9 choices.

10 I'm sorry, Justice Barrett?

11 JUSTICE BARRETT: Oh, no, no, no, I'm
12 sorry.

13 So speaking of this question of what
14 are the implications of this and Justice
15 Jackson's points about liability and immunity
16 overlapping, it seems like one of the responses
17 to should we worry about this is, well, it's
18 going to be the rare kind of claim that could be
19 based on recommendations.

20 So speaking of that, what is the
21 government's position, if you have one, on
22 whether, if the plaintiffs below lose tomorrow
23 in Twitter, should we just send this back?
24 Because there isn't -- I mean, you said the
25 government's position is that there is no claim.

1 So --

2 MR. STEWART: Certainly, our position
3 -- we haven't analyzed the -- the Gonzalez --

4 JUSTICE BARRETT: Right.

5 MR. STEWART: -- complaint in detail,
6 but that is our position as to the Twitter
7 complaint. And Mr. Schnapper said he doesn't
8 perceive a material difference between the two.

9 Now, presumably, the Court granted
10 cert in both cases because it thought it would
11 at least be helpful to clarify the law both as
12 to the Antiterrorism Act and as to Section
13 230(c)(1). But, if the Court no longer believes
14 that or if it resolves Twitter in such a way
15 that it seems evident that its decision on the
16 230(c)(1) issue wouldn't ultimately be
17 outcome-determinative in Gonzalez, then it could
18 vacate and remand for further analysis of the
19 ATA question. That would be a permissible -- I
20 mean, a possible course of action.

21 JUSTICE BARRETT: Okay.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 We're talking about the prospect of
25 significant liability in litigation, and up to

1 this point, people have focused on the ATA
2 because that's the one point that's at issue
3 here.

4 But I suspect there would be many,
5 many times more defamation suits, discrimination
6 suits, as -- as some of the discussion has been
7 this morning, infliction of emotional distress,
8 antitrust actions.

9 I -- I mean, it -- I guess I'd be
10 interested to understand exactly what the
11 government's position is on the scope of the
12 actions that could be brought and whether or not
13 we ought to be -- I mean, it would seem to me
14 that the terrorism support thing would be just a
15 tiny bit of all the other stuff. And why
16 shouldn't we be concerned about that?

17 MR. STEWART: Let me just address the
18 -- the potential causes of action that you
19 mentioned. For defamation, even if somebody is
20 suing about the recommendation, 230(c)(1) still
21 directs that the platform can't be treated as
22 the publisher or speaker of the underlying
23 content. And so the question --

24 CHIEF JUSTICE ROBERTS: Well, right.
25 But it's -- it's -- defamation law is implicated

1 if you repeat libel even though you didn't
2 originally commit defamation.

3 MR. STEWART: If you repeat it, and so
4 if YouTube circulated videos with a little blurb
5 saying -- and I think one of the amicus briefs
6 describes this hypothetical scenario -- if you
7 repeated it with a little blurb saying this
8 video shows that John Smith is a murderer, then,
9 yes, there would be liability. But --

10 CHIEF JUSTICE ROBERTS: But there
11 wouldn't be if you just repeated it without any
12 commentary? Normally, it would be if you're the
13 newspaper and you just publish something, so and
14 so's a shoplifter, the newspaper would be liable
15 for that.

16 MR. STEWART: No, we think it should
17 be analyzed as though it were an explicit
18 recommendation. And so, if Google had posted a
19 message that said we recommend that you watch
20 this video, now the recommendation would be its
21 own content. But, in answering the question can
22 it be held liable for defamation, you would ask:
23 Can a person under the law of the applicable --
24 of the relevant state be held liable for
25 recommending content that is itself defamatory

1 if the recommender does not repeat the
2 defamatory aspects of that content in the course
3 of the recommendation?

4 And our understanding is that at least
5 under the common law the answer to that would be
6 no, that simply saying you should read this book
7 that turns out to be defamatory would not be a
8 basis for defamation liability.

9 I think the same would basically be
10 true of intentional infliction of emotional
11 distress. That is, unless you could show that
12 the platform was acting with the intent to cause
13 emotional distress by circulating the video,
14 there would be no liability. And the fact that
15 the third-party poster may have met the elements
16 of that offense wouldn't carry the day.

17 With respect to antitrust, if you had
18 a claim that a particular search engine had
19 configured its results in such a way as to boost
20 its own products or to diminish the search
21 results for products of the competitor and if
22 that were found to be a viable claim under the
23 antitrust laws, there would be no reason to
24 insulate the provider from liability for that.

25 CHIEF JUSTICE ROBERTS: Now that's --

1 that's a broad overview of a lot of different
2 areas of law, but, certainly, the law is not
3 established the way you're suggesting, I -- I
4 think, in any of those areas.

5 MR. STEWART: But I guess the question
6 is, what did Congress intend to do or what did
7 it do when it passed this statute?

8 And Congress didn't create anything
9 that was -- even resembled a -- an all purposes
10 of immunity, immunity for anything it might do
11 in the course of its functions. It focused very
12 precisely on information provided by another
13 information content provider.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 thank you.

16 Justice Thomas?

17 Justice Alito?

18 JUSTICE ALITO: In the government's
19 view, are there any circumstances in which an
20 Internet service provider could be sued for
21 defamatory content in a video that it provides?

22 MR. STEWART: I think --

23 JUSTICE ALITO: Third-party video.

24 MR. STEWART: -- I think the only --
25 given our understanding of the -- the common

1 law, I think the only way that would happen is
2 if the third-party provider, in circulating the
3 video, added its own comment that incorporated
4 the defamatory gist of the allegations.

5 And as the Chief Justice was pointing
6 out, it is true that under common law, if you
7 repeat somebody else's defamatory statement but
8 say what it is, that you can be held liable for
9 that.

10 JUSTICE ALITO: I mean, imagine the
11 most defamatory -- terribly defamatory video.
12 So suppose the competitor of a restaurant posts
13 a video saying that this rival restaurant
14 suffers from all sorts of health problems, it --
15 it creates a fake video showing rats running
16 around in the kitchen, it says that the chef has
17 some highly communicable disease and so forth,
18 and YouTube knows that this is defamatory, knows
19 it's -- it's completely false, and yet refuses
20 to take it down.

21 They could not be civilly liable for
22 that?

23 MR. STEWART: That -- that's our -- I
24 mean, we think that Zeran -- Zeran was not
25 exactly a defamation case, but it fit within --

1 pretty closely within that profile. That is,
2 Zeran was the early Fourth Circuit case in which
3 a person posted a video that purported to be
4 from another person and subjected that other
5 person to complaints and harassment that seemed
6 justified to -- to the people who were doing it.

7 JUSTICE ALITO: Well, did any -- did
8 any entity have that scope of protection under
9 common law?

10 MR. STEWART: No, not -- no, I don't
11 believe so. And that was the point of (c)(1).
12 The point of (c)(1) was to say --

13 JUSTICE ALITO: Well, it was at least
14 to -- to shield Internet service providers from
15 liability they -- excuse me -- based on their
16 status as a publisher.

17 MR. STEWART: I -- I wouldn't put it
18 as --

19 JUSTICE ALITO: But even a distributor
20 wouldn't have immunity if it knew as a matter of
21 fact that this material that it was distributing
22 was defamatory, isn't that right?

23 MR. STEWART: I mean, that -- that --
24 that is right. I think we would think of the
25 distributor as a subcategory of publisher, but,

1 yes, the bookseller would not be strictly
2 liable. And, obviously, Justice Thomas --

3 JUSTICE ALITO: You really think that
4 Congress meant to go that far?

5 MR. STEWART: We -- we do, but,
6 obviously, that is -- if we're arguing about
7 whether the failure to take something down is
8 actionable if it is done knowingly and with an
9 understanding of the contents, then that --
10 that's a very different argument from the one
11 that we've been having up to this point.

12 That -- that would be saying that the
13 statute should be construed --

14 JUSTICE ALITO: But that is your --
15 but that is your position?

16 MR. STEWART: Our position --

17 JUSTICE ALITO: That is the
18 government's position, is it not?

19 MR. STEWART: -- our position -- yes,
20 our position is that if the -- if the wrong
21 alleged is simply the failure to block or remove
22 the third-party content, that 230(c)(1) protects
23 the platform from liability for that, whether
24 it's based on a strict liability theory or on a
25 theory -- theory of negligence or

1 unreasonable in failing to take the material
2 down upon request.

3 JUSTICE ALITO: The Internet service
4 provider wants to -- really has it in for
5 somebody, wants to harm this person as much as
6 possible, and so posts extraordinarily gruesome
7 videos of a family member who's been involved in
8 an automobile accident or something like that.

9 MR. STEWART: Well, when you use the
10 verb "posts," that -- that's a different
11 analysis. That is, if YouTube created --

12 JUSTICE ALITO: No, it's provided by
13 somebody else, and YouTube knows that it's --
14 knows what it's -- what it is, and yet it puts
15 it up and refuses to take it down.

16 MR. STEWART: Yes. Our view is, if
17 the only wrong alleged is the failure to block
18 or remove, that would be protected by 230(c)(1).
19 But -- but that's -- the 230(c)(1) protection
20 doesn't go beyond that. And the theory of
21 protecting the -- the website from that was that
22 the wrong is essentially done by the person who
23 makes the post. The website at most allows the
24 harm to continue.

25 And what we're talking about when

1 we're talking about the -- the website's own
2 choices are affirmative acts by the website, not
3 simply allowing third-party material to stay on
4 the platform.

5 JUSTICE ALITO: So an express
6 recommendation would potentially subject YouTube
7 to civil liabilities. So they put up -- they
8 say, watch this ISIS video, spectacular, okay,
9 they could be liable there?

10 MR. STEWART: Yes, if the other
11 elements --

12 JUSTICE ALITO: If it's expressed.
13 What if it's just implicit? What if it's the
14 fact that they put this up first and therefore
15 amplify the message of that?

16 MR. STEWART: Again, you would have to
17 ask -- they -- they could potentially be held
18 liable for that, but you would have to ask
19 whether the elements of the relevant tort have
20 been shown. And with respect to the ATA, those
21 elements include scienter, causation of the
22 relevant harm, et cetera.

23 If you were looking at another cause
24 of action, you would look at those elements.
25 And I think part of our reason for preferring

1 that most of the work be done at the liability
2 stage rather than the 230(c)(1) stage is, rather
3 than do a kind of undirected inquiry into
4 whether this seems neutral enough, you would be
5 looking at a specific cause of action and asking
6 but for 230(c)(1), would this be an actionable
7 tort under --

8 JUSTICE KAGAN: Let me just make sure
9 I understand. Let's talk about defamation and
10 an explicit recommendation, go watch this video,
11 it's the greatest of all time, okay? But it
12 does not repeat anything about the video. It
13 just says, go watch this video, it's the
14 greatest of all time. And the video is terribly
15 defamatory in the way Justice Alito was
16 describing.

17 Now is the provider on the hook for
18 that defamation?

19 MR. STEWART: The two things I would
20 say are that depends on the defamation law of
21 the relevant state, and, as we say in the brief,
22 you should analyze that as though the platform
23 was recommending in the same terms a video
24 posted on another site.

25 So, if it would give rise to

1 defamation liability under the law of the
2 relevant state to give that sort of glowing
3 recommendation of content posted on a different
4 platform, then there's no reason that YouTube
5 should be off the hook by virtue of the fact
6 that the material was on its own platform.

7 JUSTICE KAGAN: And -- and now it's --

8 CHIEF JUSTICE ROBERTS: Thank you.

9 Justice Sotomayor, anything further?

10 JUSTICE SOTOMAYOR: Let's assume we're
11 looking for a line because it's clear from our
12 questions we are, okay? And let's assume that
13 we're uncomfortable with a line that says merely
14 recommending something without adornment, you
15 suggest, we -- you're -- you might be interested
16 in this, something neutral, not something like
17 they're right, watch this video, because I could
18 see someone possibly having a defamation action
19 if they said -- if I said that video is right
20 about that person.

21 I could see someone saying that I'm
22 spreading a defamatory statement, correct?

23 MR. STEWART: I mean, we -- we don't
24 understand the common law to have operated in
25 that way, but, obviously, the laws vary from

1 state to state, and a particular law -- state
2 could adopt a law to that effect.

3 JUSTICE SOTOMAYOR: All right. How do
4 we draw a line so we don't have to go past the
5 complaint in every case?

6 MR. STEWART: I mean --

7 JUSTICE SOTOMAYOR: And I think that's
8 where my colleagues seem to be suffering.

9 And I understand your point, which is
10 there is a line at which affirmative action by
11 an Internet provider should not get them
12 protection under 230(c) because that seems
13 logical. The -- the example I used earlier, the
14 dating site, they create a search engine that
15 discriminates. Their action is in creating the
16 search engine. And I would think they would be
17 liable for that. So tell -- tell me how we get
18 there.

19 MR. STEWART: I guess whether they
20 would be liable would depend on the applicable
21 substantive law, which could be a federal law or
22 it could be a state law. And those questions,
23 obviously, are -- are routinely decided at the
24 motion to dismiss stage. That is, with respect
25 to the search engine choices that I described

1 earlier, do you include misspellings or not?
2 The plaintiff would still have to identify a law
3 that was violated by the choice that the search
4 engine made and would have to allege facts
5 sufficient to show a violation of law.

6 And -- and suits like that could
7 easily be dismissed at the pleading stage. But
8 it would at least predominantly be a question of
9 the adequacy of the allegations under the
10 underlying law.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 JUSTICE KAGAN: I guess I thought that
13 the claims in these kinds of suits are that in
14 making the recommendation or in presenting
15 something as first, so really prioritizing it,
16 that the -- the provider is -- is amplifying the
17 harm, is creating a kind of harm that wouldn't
18 have existed had the provider made other
19 choices.

20 Are you saying that that -- that is
21 something that could lead to liability or is
22 not?

23 MR. STEWART: I think it is something
24 that could lead to liability, but, again, it
25 would -- you would have to establish the

1 elements of the -- of the substantive law. And
2 so kind of the hypothetical we're concerned with
3 and the hypothetical that I -- I think would
4 come out in our view as the wrong way under
5 Respondent's theory is imagine a particular
6 platform had been systematically promoting
7 third-party ISIS videos and promoting in the
8 sense of putting them at the top of people's
9 queues, not of adding their own messages, in
10 order to enlist support for ISIS.

11 If that was the motivation and you
12 could show the right causal link to a particular
13 act of international terrorism, then that could
14 give rise to liability under the ATA.

15 JUSTICE KAGAN: And you're not saying
16 that the motivation matters for 230; you're
17 saying that the motivation matters with respect
18 to the -- the liability question down the road,
19 right?

20 MR. STEWART: Exactly. Exactly.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 JUSTICE GORSUCH: Mr. Stewart, I just
24 again kind of want to make sure I understand
25 your argument, and so I'm going to ask you a

1 question similar to what I asked Mr. Schnapper,
2 which is the Ninth Circuit held that any
3 information a company provides using neutral
4 tools is protected under 230. That's at 34a of
5 the -- of the petition.

6 And your argument is that this neutral
7 tools test isn't in the statute. What is in the
8 statute is a distinction on the one hand between
9 interactive computer service and access software
10 providers and on the other hand content
11 providers.

12 And when we look at that, the access
13 software provider is protected for picking,
14 choosing, analyzing, or even digesting content.
15 So 230 protects an access software provider, an
16 interactive computer service provider, who does
17 any of those things, whether using a neutral
18 tool or not. They -- they can order, they can
19 pick, they can choose, they can analyze, they
20 can digest however they wish and they're
21 protected, even those -- even though those
22 editorial functions we might well think of as
23 some form of content in our First Amendment
24 jurisprudence, but, here, they're shielded by
25 230.

1 And then your argument, I think, goes
2 that none of that means that they're protected
3 for content generated beyond those functions.
4 And it doesn't matter whether that content is
5 generated by neutral rules or not. That content
6 is actionable whether the -- and one could think
7 of content generated by neutral rules, for
8 example, by artificial intelligence.

9 And another problem also is that it
10 begs the question what a neutral rule is. Is an
11 algorithm always neutral? Don't many of them
12 seek to profit-maximize or promote their own
13 products? Some might even prefer one point of
14 view over another.

15 And because the Ninth Circuit applied
16 the wrong test, this neutral tools test, rather
17 than the content test, we should remand the case
18 for reconsideration under the appropriate
19 standard. Is that a fair summary of your
20 position? And, if not, what am I missing?

21 MR. STEWART: I think the thing -- the
22 aspect of that we would disagree with is we
23 don't think that the definition of "access
24 software provider" means that an entity is
25 immune from liability for performing all of

1 those functions.

2 The statute makes clear that even if
3 you perform those sorting, arranging, et cetera,
4 functions, you still fall within the definition
5 of "interactive computer service," and you are
6 still entitled to the protection of (c)(1).

7 But the protection of (c)(1) is
8 protection from liability for the third-party
9 content. And so, if you perform those sorting
10 functions in a way that was otherwise unlawful,
11 you could be on the hook for that.

12 And that -- that takes me back to the
13 hypothetical about the job placement service
14 that discriminates based on race. The -- the
15 allegation of the job placement -- of that job
16 placement service is not that it created any of
17 its own content. The allegation would be that
18 with respect to third-party content provided by
19 the firms that were looking for employees, it
20 had used an impermissibly legal -- a legally
21 impermissible criterion to decide which content
22 would be sent to which users. And that wouldn't
23 be protected by (c)(1) because imposing
24 liability wouldn't hold the platform -- wouldn't
25 treat the platform as the publisher or speaker

1 of the third-party content.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh?

5 JUSTICE KAVANAUGH: First, to follow
6 up on Justice Alito's question, the distributor
7 liability question, my understanding is that
8 issue is not before us at this time, right?

9 MR. STEWART: That's correct.

10 JUSTICE KAVANAUGH: And your position,
11 though, or your response to him suggested that
12 if we were addressing that, the reason that
13 falls within 230 is because the distributor at
14 common law or at least by 1996 was treated as a
15 secondary publisher in the circumstances
16 described there. Is that --

17 MR. STEWART: That's basically
18 correct, yes.

19 JUSTICE KAVANAUGH: Okay. Then
20 focusing on the text of the statute and
21 following up on Justice Gorsuch's question, it
22 seems to me that the key move in your position
23 as I understand it is to treat organization
24 through the algorithms as the same thing as an
25 express recommendation. Is that accurate?

1 MR. STEWART: I don't -- I don't think
2 we would put it quite that way. That is, in
3 some instances, if the operation of the
4 algorithm causes particular content to appear in
5 a particular person's queue that the person
6 hadn't requested, then that person might
7 perceive it to be a recommendation at least to
8 the effect that you will like this based on what
9 you have seen before.

10 So algorithms can't have that effect.
11 I don't know that we would equate the two. I
12 think we would say more the recommendation is
13 simply one instance of the platform potentially
14 being held liable for its own content rather
15 than the third-party content.

16 JUSTICE KAVANAUGH: And if the
17 algorithm prioritizes certain content, that
18 becomes the platform's own speech under your
19 theory of 231, correct -- or 230?

20 MR. STEWART: I don't know that we
21 would call it the platform's own speech, but
22 it's the platform's own conduct, the platform's
23 own choice. And so, if -- if it violated
24 antitrust law, for instance, to prioritize
25 search results in a particular way, whether or

1 not you thought of that as speech by the -- the
2 platform, it would be the platform's own
3 conduct. Holding it liable for that sort of
4 ordering wouldn't be treating it as the
5 publisher or speaker of any of the third-party
6 submissions.

7 JUSTICE KAVANAUGH: So the other side
8 and the amici say that happens -- that's what
9 the -- and Justice Kagan's question, that's
10 happening everywhere.

11 MR. STEWART: And --

12 JUSTICE KAVANAUGH: And, therefore,
13 230 really becomes somewhat meaningless, and
14 you've read what makes the definition of
15 "interactive computer service," including
16 organizing, to be a self-defeating provision
17 that really does nothing at all.

18 MR. STEWART: No, I think -- I mean, I
19 think, if -- if it is happening everywhere, that
20 is, if search engines are using a wide variety
21 of mechanisms to decide how content should be
22 ordered, that --

23 JUSTICE KAVANAUGH: Do you disagree
24 with that? I mean, that's all --

25 MR. STEWART: No, I -- no, I agree

1 with that.

2 JUSTICE KAVANAUGH: Okay.

3 MR. STEWART: And I think that's
4 probably because there are very few, if any,
5 laws out there that direct Internet service
6 providers to order the content in a particular
7 way.

8 If a particular legislature wanted to
9 say it will now be a violation of our law to
10 give greater priority to search results of
11 companies that advertise with you, then the
12 question whether that could violate the Commerce
13 Clause, the question whether it could violate
14 the First Amendment, those would be live
15 questions.

16 They wouldn't be 230(c)(1) questions
17 because the state's attempt to impose liability
18 on that rationale would not be an attempt to
19 hold the platform liable as the publisher or
20 speaker of the third-party content.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett?

24 JUSTICE BARRETT: I want to ask you
25 the question that Mr. Schnapper and I went back

1 and forth about, thumbnails versus screenshots.
2 What would the government's position on that be?

3 So, if there were screenshots on the
4 side, his objection seemed to be that it was
5 Google's content because YouTube creates these
6 thumbnails.

7 MR. STEWART: And that -- that was one
8 aspect of Mr. Schnapper's theory that we
9 disagreed --

10 JUSTICE BARRETT: Disagreed.

11 MR. STEWART: -- with in the brief.
12 That is, we thought that it's basically the same
13 content, the same information either way, even
14 if in the one instance Google is creating a URL
15 and in the other instance it's not.

16 JUSTICE BARRETT: So, for purposes of
17 this case, is there any difference -- let's
18 imagine that the Google algorithm, when you
19 search for ISIS, prioritizes videos produced by
20 ISIS in search results. I'm not talking about
21 being on YouTube. Content produced by ISIS, as
22 opposed to articles, if you're just looking for
23 articles about ISIS, they could be critical of
24 ISIS, they could be all kinds of things, but in
25 the search result rankings, you first get the

1 article -- the articles written by ISIS, videos
2 made by ISIS.

3 Is that the same thing as this case
4 then?

5 MR. STEWART: I think that would be
6 the same thing as this case because we would say
7 the fact that the videos appear in that order is
8 the result of choices made by the platform, not
9 the choice of any person who posted an ISIS
10 video on the platform.

11 And Congress -- it was very important
12 to Congress to absolve the platforms of
13 liability for the third-party content, but it
14 didn't try to go beyond that. The likelihood
15 that ISIS would be held liable just for that
16 seems very, very slim, but it would not be a 231
17 -- 230(c)(1) question. It would be a question
18 under whatever cause of action the plaintiff
19 invoked.

20 JUSTICE BARRETT: Okay. And then what
21 about users and retweets and likes, the question
22 I asked Mr. Schnapper about that. So, you know,
23 I gather 230(c) would protect me from liability
24 if I simply retweeted.

25 On Ms. Blatt's theory, on your theory,

1 if I retweet it, am I doing something different
2 than pointing to third-party content?

3 MR. STEWART: I mean, I think,
4 honestly, there hasn't been a lot of litigation
5 over the -- the -- the user prong of it, and
6 those are difficult issues. I think 230(c)(1)
7 at the very least would say just by virtue of
8 having retweeted, you can't be treated as though
9 you had made the original post yourself.

10 But, with respect to you retweet, can
11 the retweet itself be grounds for liability,
12 I -- I'm not sure, and I doubt that there would
13 be much of a common law history to draw upon.

14 JUSTICE BARRETT: So you -- but the
15 logic of your position, I think, is that
16 retweets or likes or check this out, for users,
17 the logic of your position would be that 230
18 would not protect in that situation either,
19 correct?

20 MR. STEWART: I -- I think it would --
21 I think more or less the case, the -- the one
22 difference I would point to between the user and
23 the platform is the user is -- who reads a tweet
24 is typically making an individualized choice, do
25 I want to like this tweet, retweet it, or

1 neither, whereas the -- the platform decisions
2 about which videos should wind up in -- in my
3 queue at a particular point in time, there's no
4 live human being making that choice on an
5 individualized basis. It's being -- that --
6 those choices are being made on a systemic
7 basis.

8 JUSTICE BARRETT: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Jackson?

11 JUSTICE JACKSON: Yes. So can -- can
12 you help me to understand whether there really
13 is a difference between the recommendations and
14 what you say is core 230 conduct?

15 I mean, I get -- I get and I'm holding
16 firm in my mind that 230 immunity, Congress
17 intended it to be directed to certain conduct by
18 the platform and that conduct is its failure to
19 block or screen the offensive conduct, so that
20 if the claim is this offensive content is on
21 your website and you didn't block or screen it,
22 230 says you're immune. I get that.

23 I guess what I'm trying to understand
24 is whether you say and plaintiff says,
25 Petitioner in this case says, well, what they're

1 really doing in the situation in which they
2 display it under a banner that says "Up next" is
3 more than just providing that content and
4 failing to block it. They are promoting it in
5 some way.

6 And I -- I'm really drilling down on
7 whether or not there is actually a distinction
8 in a world of the Internet where, as Ms. Blatt
9 and others have said, in order to be a platform,
10 what you're doing is you have an algorithm, and
11 in the universe of things that exist, you are
12 presenting it to people so that they can read
13 it.

14 Why -- why is that -- even though
15 it's -- you know, you call it a recommendation
16 or whatever, why is that act any different than
17 being a publisher who has this information and
18 hasn't taken it down?

19 MR. STEWART: I mean, I think I would
20 say, in -- in the situation that 230(c)(1) was
21 designed to address, the decision whether the
22 material would go up on the platform was not
23 that of the platform itself, it was the decision
24 of the third-party poster.

25 And Congress said, once that has

1 happened, you also can't be held liable for
2 failing to take it down. But, with respect to
3 what prominence you give it, that's the result
4 of your own choice, not the third-party poster.

5 Now, in most circumstances, it won't
6 make a difference because the recommendation
7 won't be actionable. And so what we are
8 concerned with is the -- the hypothetical that I
9 suggested earlier. You have --

10 JUSTICE JACKSON: Yes. I mean, I get
11 the -- I get the liability piece and all of
12 the -- the parade of horrors will depend on
13 whether or not they can actually be held liable
14 for organizing it in a certain way. And you say
15 they probably can't. And others say they might
16 be able to. And that's a separate issue.

17 Just back on the 230 piece of it, in
18 terms of Congress's intent with respect to the
19 scope of immunity, I'm -- I -- I guess I just
20 want to understand why Google or YouTube, when
21 they have a box that brings up all of the ISIS
22 videos and tees them up and, if you don't do
23 anything, they just keep playing, why that's
24 actually different than the newspaper publisher
25 who gets the offensive content and decides to

1 put it on page 1 versus page 20. It seemed like
2 Congress in its -- in 230 was saying, if you --
3 if -- if under the common law a newspaper
4 publisher would be liable for having put it on
5 page 1 or whatever and given it to people, we
6 don't want that to be the case for these
7 Internet service companies.

8 And so I -- I don't know that I
9 understand fully why the fact that it's
10 called -- that you call it a recommendation or
11 whatever is actually any different.

12 MR. STEWART: I -- I guess one
13 difference I would point to is newspaper
14 publishers can make decisions about what will be
15 on the front page and what'll be in the back,
16 but it's going to be the same for everybody.

17 And one of the things about why we
18 call them targeted recommendations with YouTube
19 is they are being sent differently to different
20 users. And the situation we're concerned with
21 is what if a platform is able through its
22 algorithms to identify users who are likely to
23 be especially receptive to ISIS's message, and
24 what if it systematically attempts to radicalize
25 them by sending more and more and more and more

1 extreme ISIS videos, is that the sort of
2 behavior that implicates either the text or the
3 purposes of Section 230(c)(1), and we would say
4 that it doesn't.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. STEWART: Thank you.

9 CHIEF JUSTICE ROBERTS: Ms. Blatt.

10 ORAL ARGUMENT OF LISA S. BLATT

11 ON BEHALF OF THE RESPONDENT

12 MS. BLATT: Mr. Chief Justice, and may
13 it please the Court:

14 Section 230(c)(1)'s 26 words created
15 today's Internet. (c)(1) forbids treating
16 websites as "the publisher or speaker of any
17 information provided by another." Publication
18 means communicating information. So, when
19 websites communicate third-party information and
20 the plaintiff's harm flows from that
21 information, (c)(1) bars the claim.

22 The other side agrees Section 230 bars
23 any claim that YouTube aided and abetted ISIS by
24 broadcasting ISIS videos. So they instead focus
25 on YouTube's organization of videos based on

1 what's known about viewers, what they call
2 targeted recommendations. They say that feature
3 can be separated out because it implicitly
4 conveys what viewers should watch or that they
5 might like the content.

6 But accepting that theory would let
7 plaintiffs always plead around (c)(1). All
8 publishing requires organization and inherently
9 conveys that same implicit message.

10 Plaintiffs should not be able to
11 circumvent (c)(1) by pointing to features
12 inherent in all publishing. (c)(1) reflects
13 Congress's choice to shield websites for
14 publishing other people's speech, even if they
15 intentionally publish other people's harmful
16 speech.

17 Congress made that choice to stop
18 lawsuits from stifling the Internet in its
19 infancy. The result has been revolutionary.
20 Innovators opened up new frontiers for the world
21 to share infinite information, and websites
22 necessarily pick, choose, and organize what
23 third-party information users see first.

24 Helping users find the proverbial
25 needle in the haystack is an existential

1 necessity on the Internet. Search engines thus
2 tailor what users see based on what's known
3 about users. So does Amazon, Tripadvisor,
4 Wikipedia, Yelp!, Zillow, and countless video,
5 music, news, job-finding, social media, and
6 dating websites. Exposing websites to liability
7 for implicitly recommending third-party content
8 defies the text and threatens today's Internet.

9 I welcome your questions.

10 JUSTICE THOMAS: Ms. Blatt, is --
11 could you give me an example of not a
12 recommendation but an endorsement similar to
13 this that would take you beyond 230?

14 MS. BLATT: Sure. So whenever you
15 have something that's going beyond the implicit
16 features of publishing and you have an express
17 statement, you have a continuum, and this
18 continuum is this: You have something that's
19 the functional equivalent of an implicit
20 message, basically, a topic heading or "Up
21 next," all the way to the other extreme of an
22 endorsement of the content such that the website
23 is adopting the content as its own.

24 Now, when you have that situation, the
25 claim is fairly treating the website for

1 publishing its own speech, and you can separate
2 that out from the harm that's just coming from
3 the information provided by another.

4 And the danger which your
5 hypotheticals has raised with express speech is
6 where on that continuum any express speech may
7 go because, unlike Google and YouTube, which are
8 the two world's largest sites, we don't have a
9 lot of endorsements and that kind of stuff, but
10 other websites and other users use a myriad of
11 topic headings and emojis that have different
12 meanings that I'm not prepared and you would
13 have to know what they mean, like kinds of
14 checkmarks and, I don't know, high fives and all
15 kinds of things.

16 But the basic features of topic
17 headings, "Up next," "Trending now," those kinds
18 of things we would say are core, inherent --
19 they're no different than expressing what is
20 implicit in any publishing, which is we hope you
21 read this.

22 CHIEF JUSTICE ROBERTS: Well, it seems
23 to me that the language of the statute doesn't
24 go that far. It says that -- their claim is
25 limited, as I understand it, to the

1 recommendations themselves. In other words,
2 this -- this is the list of things that you
3 might like.

4 But that information, the
5 recommendation, is not provided -- under the
6 words of the statute, it's not provided by
7 another information content provider. It's
8 provided by YouTube or -- or Google.

9 And so, although whatever the
10 liability issue may be, there's some issue
11 tomorrow and there are a lot of others, the
12 presence of an immunity under 230(c), it seems
13 to me, is just not directly applicable.

14 MS. BLATT: Well, that's incorrect
15 because of the word "recommendation." There is
16 no word called "recommendation" on YouTube's
17 website. It is videos that are posted by third
18 parties. That is solely information provided by
19 another.

20 You could say any posting is a
21 recommendation. Anytime anyone publishes
22 something, you could be said, it's a
23 recommendation. Anything.

24 CHIEF JUSTICE ROBERTS: Well, the --
25 well, the videos just don't appear out of thin

1 air. They appear pursuant to the algorithms
2 that your clients have. And those algorithms
3 must be targeted to something. And they're
4 targeted -- that targeting, I think, is fairly
5 called a recommendation, and that is Google's.
6 That's not the -- the -- the provider of the
7 underlying information.

8 MS. BLATT: So nothing in the statute
9 or in the common law of defamation turns on the
10 degree of tailoring or how you organized it.
11 There's no distinct actionable message. If you
12 say I think my readers would all be interested
13 in this or I think the readers in ZIP code 2005
14 would be interested in it or if you walk up to
15 someone and say I'm going to defame someone
16 because I thought you might be interested in it,
17 it's still publishing.

18 And the other side gives you no line
19 and no way to say in some way that would be
20 workable or give websites or users any clarity
21 of how you would organize the world's
22 information. Just think about search. There
23 are 3.5 billion searches per day. All of those
24 are displays of other people's information. And
25 you could call all of them a recommendation that

1 are tailored to the user because all search
2 engines take user information into account.
3 They take the location, the language, and what
4 have you.

5 And I can give the example of
6 football. Football -- the same two users will
7 enter the word "football" and get radically
8 different results based on the user's past
9 search history and their location and their
10 language because most of the world thinks of
11 football as soccer, not the way we do.

12 And so, if you go down this road of
13 did you target it, then you have to say how
14 much? Was the topic hitting too much? Was it
15 okay to have a violence channel? Was it okay to
16 have a sex channel? Was it okay to have, you
17 know, what have you, some other channel about
18 skinny models that you could say, well, that
19 just kept repeating the -- the channel and that
20 made me crazy. So --

21 JUSTICE JACKSON: But, Ms. -- Ms.
22 Blatt, Mr. Stewart suggests that all of those
23 kinds of questions in terms of the extent of
24 liability for this kind of organization would be
25 addressed in the context of liability, not -- by

1 that, I mean each state -- when somebody tried
2 to claim that YouTube had, you know, done
3 something improper in terms of pulling up those
4 kinds of videos, that each state would then look
5 and determine based on their own, you know,
6 common law whether or not you were liable. And
7 he posits that that wouldn't happen very often.
8 But we don't know.

9 My question is, isn't there something
10 different to what Congress was trying to do with
11 230? Isn't it true that that statute had a more
12 narrow scope of immunity than is -- than courts
13 have, you know, ultimately interpreted it to
14 have and that what YouTube is arguing here today
15 and that it really was just about making sure
16 that your platform and other platforms weren't
17 disincentivized to block and screen and remove
18 offensive conduct -- content?

19 And so, to the extent that the
20 question today is, well, can we be sued for
21 making recommendations, that's just not
22 something the statute was directed to.

23 MS. BLATT: So can I take this in two
24 parts? Because I -- I feel like your first part
25 of your question is addressing what the dispute

1 is between the parties, and the second part of
2 your question goes most deeper and which is, you
3 know, beyond the question presented.

4 But just on your first question about
5 why not -- why do you need an immunity as
6 opposed to liability, and in our view, that's
7 like saying -- I mean, that's death by a
8 thousand cuts, and the Internet would have never
9 gotten off the ground if anybody could sue every
10 time and it was left up to 50 states' negligence
11 regime.

12 And let me give you an example. A
13 website could put something alphabetical in
14 terms of reviews, and every Young, Williams, and
15 Zimmerman, i.e., X, Y, Z, could say, well, that
16 was negligent because you should have rated it
17 somewhere else.

18 JUSTICE JACKSON: No, I totally
19 understand that. But I think my things are not
20 actually different.

21 What I'm saying is that problem that
22 you identify, which is a real problem, the
23 Internet never would have gotten off the ground
24 if everybody would have sued, was not what
25 Congress was concerned about at the time it

1 enacted this statute.

2 MS. BLATT: Well, so I -- that's
3 correct -- I mean, that's incorrect for a number
4 of reasons. And we can talk about what two
5 choices you're talking about. There's only two
6 arguments on the table for what you could think
7 that (c)(1) does.

8 And that is it simply says, you know,
9 no Internet -- interactive computer service
10 shall be treated as a publisher. And you could
11 think, well, there are two -- two ways of
12 looking at that. One is that you need an
13 external law that has publication as an element,
14 and then, second, which I think that your
15 question may be going to, is it only directed to
16 eliminating forms of strict liability across all
17 causes of action? And so both -- both of those
18 ways are highly problematic and also inaccurate
19 given what was happening in 1996.

20 In terms of just looking at this as is
21 this just talking about defamation, it plainly
22 can't be because the statute would be a dead
23 letter upon inception because any defamation
24 cause of action can be replead as negligence or
25 intentional infliction of emotional distress.

1 So we think the word "treat," which
2 means to regard, applies whenever the claim is
3 treating the -- or imposing liability because --
4 by virtue of publishing. In other words --

5 JUSTICE JACKSON: But what do you do
6 with the -- what do you do with the title and
7 the content and the context, right? The title
8 of Section 230 is "Protection for Private
9 Blocking and Screening of Offensive Material."

10 MS. BLATT: So let me just pinpoint
11 then the second one, which hopefully I won't --
12 we'll get to on Section (e), which is all the
13 exceptions.

14 But, in terms of the title, Stratton
15 Oakmont and restrictions, (c)(1) and (c)(2) are
16 a pair. So what you have is (c)(2) is -- and --
17 and they work together, and if you -- every time
18 you weaken (c)(1), you make (c)(2) useless and
19 defeats the whole point of this statute at least
20 in terms of cleaning up the Internet.

21 (c)(2) is just a safe harbor and
22 directs what happens when you take stuff down.
23 It says nothing about what happens to the
24 content that's left up. And so the more any
25 website removes material, it perversely is

1 showing that it has knowledge or should have
2 known or could have known about the content that
3 was left up.

4 And so you have one of two things
5 happen -- that -- that would happen and would
6 have happened then and would happen now. The
7 first is websites just won't take down content.
8 And that just defeats the whole point, and you
9 basically have the Internet of filth, violence,
10 hate speech, and everything else that's not
11 attractive.

12 And the second thing which I think a
13 lot of the briefs are worried about in terms of
14 free speech is you have websites taking
15 everything down and leaving up -- you know,
16 basically, you take down anything that anyone
17 might object to, and then you basically have --
18 and I'm speaking figuratively and not literally
19 -- but you have the Truman Show versus a horror
20 show.

21 You have only anodyne, you know,
22 cartoon-like stuff that's very happy talk, and
23 otherwise you just have garbage on the Internet.
24 And Congress would not have achieved its purpose
25 of -- and, remember, it had in all those

1 findings only three of which are addressing the
2 harmful content. Most of it is dealing with
3 having free speech flourish on the Internet,
4 jump-starting a new industry.

5 And it's inconceivable that any
6 website would have started in -- I mean, one
7 lawsuit freaked out the Congress, and they --

8 JUSTICE KAGAN: Ms. Blatt?

9 MS. BLATT: Yes. Sorry.

10 JUSTICE KAGAN: Just suppose that this
11 were a pro-ISIS algorithm. In other words, it
12 was an algorithm that was designed to give
13 people ISIS videos, even if they hadn't
14 requested them or hadn't shown any interest in
15 them.

16 Still the same answer, that -- that --
17 that a claim built on that would get 230
18 protection?

19 MS. BLATT: Yes, except for the way
20 Justice Sotomayor raised it, which is material
21 support. So, if there's any -- I mean, there's
22 a criminal exception. So, if you have material
23 supporting collusion with ISIS, that's excepted
24 from the statute.

25 But, if I can just take the notion of

1 algorithms, either they're raising --

2 JUSTICE KAGAN: But -- but -- but what
3 I take you to be saying is that in general --
4 and this goes back to Justice Thomas's very
5 first question --

6 MS. BLATT: Yes.

7 JUSTICE KAGAN: -- in general, whether
8 it's neutral or whether it's not neutral,
9 whether it is designed to push a particular
10 message, does not matter under the statute and
11 you get protection either way?

12 MS. BLATT: That's correct. And just
13 referring -- I agree with what Justice Gorsuch
14 said, except for he was saying that somehow the
15 Ninth Circuit was at fault because it recognized
16 this was an easy case.

17 It's not the Ninth Circuit's fault
18 that the complaint said there's nothing wrong
19 with your algorithm. You just kept repeating
20 the same information, independent of any
21 content.

22 And so we shouldn't be faulted because
23 his complaint doesn't allege anything wrongful.

24 JUSTICE KAGAN: No --

25 MS. BLATT: But, in your hypothetical,

1 where someone could say -- and, again, this is
2 always going to turn on the claim. But let's
3 just think of -- I don't know what your
4 hypothetical would be about tortious speech, but
5 the bookstore example, you could decide that you
6 want to put the adult bookstore -- book -- adult
7 book section separated from the kids section.
8 That's a "biased" choice, and I'm doing scare
9 quotes for the transcript, but --

10 JUSTICE KAGAN: Yeah, or -- or have an
11 algorithm that looks for defamatory speech and
12 puts it up top, right, and you're still saying
13 230 protection?

14 MS. BLATT: So our test, when you look
15 at the claim, and so, if you have a claim for
16 defamation, is always going to look at the claim
17 and say is the harm flowing from the third-party
18 information or from the website's own conduct or
19 speech.

20 And so, if I can mention the race
21 example, that's an excellent example of the
22 claim has nothing to do with the content of the
23 third-party information. It can be --

24 JUSTICE KAGAN: Right. But this is
25 the claim would have something to do with the

1 content of the information. It would say, you
2 know, my complaint is that you just made
3 defamatory speech available to millions of
4 people who otherwise would never have seen it.
5 And you are on the hook for that. That was your
6 choice. That's your responsibility.

7 Why doesn't -- why -- why -- why
8 should there be protection for that?

9 MS. BLATT: Well, so, if there was
10 some sort of misrepresentation or some sort of
11 terms of service that you weren't going to do
12 that, but let me give you an example where this
13 opens up a can of worms is because you could say
14 that about any content, that you elevated the
15 most recent content.

16 I mean, search engines of all kinds,
17 including Google Search, but all the amici
18 briefs are telling you they have to make
19 choices. They've got an undescrivable amount of
20 content, and it has to be based on something,
21 whether it's relevance to a user request, a
22 search history. If it says headache, the
23 Microsoft example, do you want something from
24 the 18 -- you know, the 1300s, or do you want
25 something that's a little more recent? Do you

1 --

2 JUSTICE BARRETT: Okay. But what if
3 -- what if -- I'm sorry, but I just want to make
4 sure in Justice Kagan's example, what if the
5 criteria, the sorting mechanism, was really
6 defamatory or pro-ISIS?

7 I guess I don't see analytically why
8 your argument wouldn't say, as Justice Kagan
9 said, that, yeah, 230 applies to that.

10 MS. BLATT: Well, I mean, it's similar
11 to your -- your 303 case. You can make a
12 distinction between content choices in terms of
13 how you would organize or deal with any kind of
14 publication, whether it's a book, a newspaper, a
15 television channel, that kind of stuff, and that
16 is inherent to all publishing. But you --

17 JUSTICE KAGAN: Right. So you're
18 saying 230 does apply to that?

19 MS. BLATT: Yes.

20 JUSTICE KAGAN: 230 gives protection
21 regardless?

22 MS. BLATT: Yes. I hope I didn't say
23 something incorrect.

24 JUSTICE KAGAN: 230 gives protection

25 --

1 MS. BLATT: Yes.

2 JUSTICE KAGAN: -- regardless, whether
3 it's like put the defamatory stuff up top, put
4 the pro-ISIS stuff on top, or whether it's, you
5 know, what -- what people might consider a more
6 content-neutral principle.

7 MS. BLATT: Correct. And let me just
8 say you have websites that are hate speech, so
9 they may be elevating more racist speech as
10 opposed to some other speech that talks about
11 how the equality of the races.

12 You might have a speech devoted to,
13 you know, an interest of a certain community,
14 like an ethnic community. So they may be
15 saying, you know what, we don't want to put some
16 other kind of content, we may want to publish
17 it, but we may want to put it further down on
18 our algorithm. And if you said -- again, this
19 is a content distinction.

20 If you have a claim that --

21 JUSTICE KAGAN: So I can't imagine
22 that -- and, you know, we're in a predicament
23 here, right, because this is a statute that was
24 written at a different time when the Internet
25 was completely different, but the problem that

1 the statute is trying to address is you're being
2 held responsible for what is another person's
3 defamatory remark.

4 Now, in my example, you're not being
5 held responsible for another person's defamatory
6 remark. You're being held responsible for your
7 choice in broadcasting that defamatory remark to
8 millions and millions of people who wouldn't
9 have seen it otherwise through this
10 pro-defamatory algorithm.

11 MS. BLATT: I mean --

12 JUSTICE KAGAN: And the question is,
13 you know, should 230 really be taken to go that
14 far?

15 MS. BLATT: The question is can you
16 carve out pro-defamatory as opposed to pro
17 anything else, pro some other type of content
18 that someone may be suing over over negligence.

19 If I can just give you an example of a
20 TV channel. When you broadcast an excessively
21 violent TV channel, you're giving it a new
22 audience that they wouldn't otherwise have.
23 It's still inherent to publishing. And if you
24 decide to run reruns of the most sexually
25 explicit and violently explicit, you could say

1 that's a bad thing, and it may be, but on your
2 choice -- but it would be protected under 230.

3 In terms of what was happening in
4 1996, I strongly disagree with the notion that
5 algorithms weren't present based on targeted
6 recommendations. The Center For Democracy and
7 Technology has this wonderful history lesson of
8 what was happening in '92 through '94 on how
9 targeted recommendations developed.

10 And you had something called news
11 groups, which were for anyone using the
12 Internet, that was sort of what people did.
13 They signed up for a news group, and those news
14 groups adopted the technology that is the
15 technology that is alleged in this case.

16 They looked at what the user was
17 looking at. Say the user was looking at science
18 news. And they thought, oh, that also user is
19 looking at some other kind of news, maybe on
20 psychology or something. And so they would make
21 recommendations based on your user history and
22 that of others.

23 Amazon two months into 1997 introduced
24 its famous feature, if you buy X, you might like
25 Y based on that technology. So this technology

1 was present starting in '92.

2 And '92 through '96, the Internet was
3 definitely different, but it was kind of a mess.
4 You still had to organize it. So there were
5 search engines. There was all kinds of features
6 that were organizing content because even then
7 it was massive. It's just now on, like, an
8 exponentially greater scale.

9 JUSTICE JACKSON: Ms. Blatt, I guess
10 my concern is that your theory that 230 covers
11 the scenario that Justice Kagan pointed out
12 seems to bear no relationship in my view to the
13 text --

14 MS. BLATT: Okay.

15 JUSTICE JACKSON: -- of the actual
16 statute.

17 MS. BLATT: Sure.

18 JUSTICE JACKSON: I mean, the -- the
19 -- when we look at 230(c), it says protection
20 for good samaritan blocking and screening of
21 offensive material, suggesting that Congress was
22 really trying to protect those Internet
23 platforms that were in good faith blocking and
24 screening offensive material.

25 Yet, if we take Justice Kagan's

1 example, you're saying the protection extends to
2 Internet platforms that are promoting offensive
3 material. So it suggests to me that it is
4 exactly the opposite of what Congress was trying
5 to do in the statute.

6 MS. BLATT: Well, I think promoting --
7 I think a lot of things are offensive that other
8 people might think are entertaining, and so --

9 JUSTICE JACKSON: No, it's not about
10 -- it's not about whether -- let's take as a
11 given we're talking about offensive material
12 because that's all through the statute, right?
13 You don't -- you don't disagree that Congress
14 was focused on offensive material, that that's
15 sort of the basis of the whole statutory scheme.

16 So, if we take as a given that we're
17 talking about offensive material, it looks to me
18 from the text of the statute that Congress is
19 trying to immunize those platforms that are
20 taking it down, that are doing things to try to
21 clean up the Internet.

22 And in the hypothetical that was just
23 presented, we have a platform that is not only
24 not taking it down in the way that the statute
25 is focused on, it is creating a separate

1 algorithm that pushes to the front so that more
2 people would see than otherwise the offensive
3 material.

4 So how is that even conceptually
5 consistent with what it looks as though this
6 statute is about?

7 MS. BLATT: Well, so just a couple
8 things. And, again, I -- we're on this
9 defamatory material. The website itself does
10 something defamatory that's not -- it's
11 independent of the third-party content. It's
12 not protected.

13 But that same hypothetical could be
14 said if it was on the front -- the home page as
15 opposed to you had to do a search engine first.
16 And I don't see anything in the statute that
17 protects it.

18 In terms of what I think your deeper
19 section is -- deeper concern is, the reading of
20 the statute, I don't think it's coterminous with
21 (c)(2), which is dealing with the type of
22 offensive material, which, by the way, doesn't
23 mention defamation.

24 In terms of (c), we talked about how
25 they work together. We talked about how it

1 could be easily overrode if it had just
2 publication. The one thing we didn't talk about
3 was the structure in Section (e). (e) is a
4 laundry list -- a laundry list of a variety of
5 exceptions under federal law to which (c)(1)
6 does not apply as well as (c)(2). And those
7 exceptions make very little sense if (c)(1) is
8 read the way you're reading it. It would almost
9 never apply to (c)(2).

10 And let's just take federal criminal
11 laws. It would make very little sense because
12 those laws -- almost none of them have strict
13 liability as an element, and vanishingly few
14 would have publication or speaking as an
15 element. It's in there for no other reason
16 other than that (c)(1) would otherwise apply to
17 the -- the -- the -- the information provided by
18 another.

19 And in terms of just the pure text,
20 when you keep saying its failure to take down,
21 I'm hearing you say what Congress wrote was
22 treatment as a publisher. That means
23 dissemination. That means publishing.

24 JUSTICE JACKSON: So Congress didn't
25 say that.

1 MS. BLATT: You cannot be held liable
2 for publishing.

3 JUSTICE JACKSON: If you look at the
4 statute, it says "protection for good Samaritan
5 blocking and screening." If you take into
6 account Stratton Oakmont, if -- those things I
7 thought were like a given, what -- what the
8 people who were crafting this statute were
9 worried about was filth on the Internet and the
10 extent to which, because of that court case and
11 -- and perhaps others, the platforms were not
12 being incentivized to take it down, because if
13 they were trying to take it down like Prodigy,
14 they were going to be slammed because they were
15 going to be treated as a publisher.

16 And so the statute is like we want you
17 to take these things down, and so here's what
18 we're going to do. We're going to say that just
19 because they're on your -- your -- your website,
20 it doesn't mean you're going to be held
21 automatically liable for it. And that's (c)(1).
22 And to the extent you're in (c)(2), you're
23 trying to take it down, but you don't get them
24 all, we're not going to hold you liable for it.

25 That seems to me to be a very narrow

1 scope of immunity that doesn't cover whether or
2 not you're making recommendations or promoting
3 or doing anything else.

4 MS. BLATT: Well, I mean, that -- that
5 is -- what I understand the government and the
6 Petitioner to be saying is that disseminating --
7 even 24/7 disseminating of ISIS videos is
8 protected. The only thing that's not protected
9 is whether you can tease out something about the
10 organization and call it a recommendation when
11 there is no express speech recommending it.
12 It's just the placement of where in the order in
13 which content appears.

14 And that same complaint could be made
15 about search engines. So I think, under your
16 view, search engines would not be covered
17 because they are taking user information,
18 targeting recommendations in the sense of
19 they're saying we think you would be interested
20 in the first content as opposed to the content
21 on, you know, 1,000,692 sections. I mean, they
22 have millions and millions of hits for any
23 search result.

24 And if you think those are
25 recommendations and the other side gives you no

1 basis for distinguishing between search engines,
2 then the statute is just very different than I
3 think the one that Congress was talking about,
4 because, again, if you're going to look at
5 findings and history and policy, this is about
6 diversity of viewpoints, jump-starting an
7 industry, having information flourishing on the
8 Internet, and free speech.

9 JUSTICE BARRETT: Ms. Blatt, what
10 about Justice Sotomayor's dating hypothetical?
11 The discrimination, like, oh, we're only going
12 to -- we're not going to match black people and
13 white people, et cetera. What about that? Is
14 that given 230's shield?

15 MS. BLATT: Absolutely not, because
16 any disparate treatment claim or race
17 discrimination is saying you're treating people
18 different regardless of the content.

19 So, if I'm -- I'm going to use it like
20 with an advertising, like I don't know, whether
21 I'm a woman of 10 or -- I mean, that was a bad
22 example -- a woman of 30 or whatever, and
23 whether I live somewhere, it really doesn't
24 matter in terms of the law that's prohibiting
25 discrimination. The law is indifferent to what

1 the content is. It's just very unhappy about
2 any kind of status-based distinction.

3 So we think -- and the -- the harm
4 that would flow is not the third-party
5 information. It's the website's conduct,
6 whether you want to call it speech or conduct,
7 that's based on status.

8 JUSTICE BARRETT: But what about the
9 dating profile? I mean, isn't that part of the
10 content? Isn't that part of the third-party
11 information?

12 MS. BLATT: Sure. And it's just --
13 you could put it a bunch of different ways. You
14 could say, even before the profiles go up,
15 there's a complete harm, or even if the profiles
16 go up, it doesn't matter. We would distinguish
17 between the way dating sites work, which don't
18 work based on status but based on criteria
19 that's uploaded, and those are, you know, you're
20 matching with somebody else. The website is not
21 saying you should only date a white person.

22 JUSTICE BARRETT: Okay. Then what
23 about news? What about an algorithm that says,
24 you know, you are a white person, you're only
25 going to be interested in news about white

1 people, and it will screen out anything that is
2 a story featuring racial justice issues.

3 MS. BLATT: Yeah, again, anything
4 based on status, because the harm is complete,
5 independent of the information, but if a website
6 wants to say we're going to celebrate Black
7 History Month, no, a white person or a black
8 person is not going to be able to complain and
9 say, well, I didn't get enough white history
10 month on your website. Those are claims that
11 are core within treating them as publishing of
12 the information --

13 JUSTICE BARRETT: Yeah, but I guess
14 I'm -- don't you think you're just fighting on
15 the liability?

16 MS. BLATT: No.

17 JUSTICE BARRETT: I mean, it seems to
18 me that you're kind of going back to liability,
19 because all of those are choices that are made
20 independently, right? I mean, we've been
21 talking about the distinction between -- or --
22 or the lack of distinction in your view between
23 the content itself and the website's choice of
24 how to publish it.

25 I guess I don't see why --

1 MS. BLATT: So here's --

2 JUSTICE BARRETT: -- for 230 purposes.

3 MS. BLATT: -- here's our test, and
4 it's the test the Fourth Circuit recently took
5 in Henderson, and it's the test the Ninth
6 Circuit took.

7 Let me give you an example that I
8 think may help with the ad revenue sharing. So
9 this was an allegation that YouTube was giving
10 money to ISIS. Now this was in connection with
11 third-party videos, third-party information.
12 But the court said, no, that is not within
13 Section 230 because that's independent of the
14 information, that's giving money to ISIS. That
15 kind of, whatever you think about its validity
16 under the statute, you're not treating them as a
17 publisher; you're treating them as a financier.

18 And it's just -- and that's the test
19 of the Fourth Circuit too. The Fourth Circuit
20 is looking -- in that case, it was about -- you
21 know, all kinds of things were happening with
22 third-party information, and they were trying to
23 tease out is it the credit report, did they
24 contribute to the credit report, was it based on
25 the website's failure to -- to notify the

1 employee.

2 And what the Fourth Circuit said is
3 the exact same thing we said, and it's the exact
4 same thing the plaintiff has said on four pages
5 of its brief or four times in its brief, that
6 you're looking for the harm. What is the harm
7 caused? And this case is the perfect example.
8 The plaintiffs suffered a terrible fate, and
9 their argument is it's because people were
10 radicalized by ISIS.

11 And if you start with the concession
12 that the dissemination of those ISIS videos are
13 -- and a claim based on that is barred, the
14 question is, is what additional comes from the
15 way it was organized?

16 The government just says, I don't
17 know, let some state figure it out. That's not
18 very helpful to Internets that have to work on a
19 national level and are posting and sorting and
20 organizing billions upon billions upon billions
21 of piece of -- pieces of information.

22 JUSTICE BARRETT: So, just to clarify,
23 this is my last point, you're happy with the
24 Henderson test, the Fourth Circuit test?

25 MS. BLATT: Yes. I would say

1 Henderson is like 96 percent correct. I got a
2 little lost when they were going down the common
3 law on publication, but the result was great. I
4 just thought they got a little weird on the
5 publication.

6 But, yeah, no, their test is correct,
7 and it's also the Ninth Circuit's test on the
8 ISIS revenue. It's the exact same test we quote
9 in our brief, and it's the exact same test
10 Petitioner did.

11 And what that harm test is doing, if I
12 could just explain it because it sounds kind of
13 shorthand, but if you take the -- which I'm not
14 sure Justice Jackson agrees with, but if you
15 take the underlying notion that this bars
16 treatment as a publisher, and you're saying,
17 well, can they get around it by the way they're
18 pleading it, you're just looking to the harm, so
19 you're saying you can't really say that's
20 negligence or intentional infliction because the
21 harm is coming from the publishing of the
22 defamatory content.

23 And so what I think all these cases
24 where the courts are correctly saying 230 does
25 not apply to the claim is they're isolating the

1 harm and saying that's independent of the
2 third-party information. It's either based on
3 the website's own speech or it's website's own
4 conduct that's independent of the harm flowing
5 from the third-party information.

6 JUSTICE ALITO: If YouTube labeled
7 certain videos as the product of what it labels
8 as responsible news providers, that would be --
9 that would be Google's own content, right?

10 MS. BLATT: Yes. Yes. And can --

11 JUSTICE ALITO: And --

12 MS. BLATT: Yes. Can I say one thing
13 just because --

14 JUSTICE ALITO: Yeah. Sure.

15 MS. BLATT: -- I forgot to mention
16 thumbnails? Sorry. Thumbnails aren't mentioned
17 in the complaint, so I was literally trying to
18 figure out what he was talking about when I was
19 up there because it's just not something in the
20 complaint. But that is a screenshot of the
21 information being provided by another. It's the
22 embedded third-party speech. Okay. Sorry.
23 Keep going.

24 JUSTICE ALITO: All right. So if --
25 but then, if I do a search for today's news in

1 YouTube -- in fact, I did that yesterday -- and
2 all the top hits were very well-known news
3 sources. Those are not recommendations. That's
4 not YouTube's speech? The fact that YouTube put
5 those at the top, so those are the ones I'm most
6 likely to look at, that's not YouTube's speech?

7 MS. BLATT: Right. But, I mean, all
8 search engines work the same way. If you type
9 in whatever you type in, there is a algorithm
10 that's deciding what content to display. It has
11 to be displayed somehow.

12 And what I think is going on on
13 YouTube or it's certainly going on on Google
14 Search is they're not going to -- they're
15 looking at what did other users look, how
16 popular was it, that kind of thing. You know,
17 is it -- is that news source, you know, from
18 Russia? Probably not going to get on the top
19 list.

20 So, yeah, they're having to make
21 choices because there could be over a billion
22 hits from yours, and there are a -- a billion
23 hours of videos watched each day on YouTube and
24 500 hours uploaded every minute, so it's a lot
25 of content on YouTube. So some of it's based on

1 channels, and some of it's based on searches.

2 But they have to organize it somehow.

3 But that is what's going on, I think,
4 on your top searches, is they're -- in most
5 search engines too, and you can look at the
6 Microsoft brief, they're basing it on what --
7 time spent on those news sites, how many users
8 are looking at them, how relevant it is, if
9 it's -- if you're -- if you're typing in the
10 Turkey earthquake, they might be elevating some
11 stuff that's featuring that because it, you
12 know, seems more relevant.

13 If there's a recent election, they
14 might feature that. So all these kinds of
15 decisions are being made by websites every day.

16 JUSTICE ALITO: Would -- would the --
17 would Google collapse and the Internet be
18 destroyed if YouTube and, therefore, Google were
19 potentially liable for posting and refusing to
20 take down videos that it knows are defamatory
21 and false?

22 MS. BLATT: Well, I don't think Google
23 would. I think probably every other website
24 might be because they're not as big as Google.
25 But here's what happens.

1 I mean, you do have that situation in
2 Europe, but there -- there's not class actions.
3 There's not plaintiffs' lawyers. There's not
4 the tort system. So what you would have is a
5 deluge of people saying, you know, my -- that
6 restaurant review was -- you know, you say my
7 restaurant review, I didn't like it.

8 I think Yelp! does an amazing job on
9 this, about how much they got hit and had to
10 spend, you know, almost crushing litigation
11 because they were being accused of being, you
12 know, biased on reviewers. And everyone -- no
13 matter what -- they couldn't win for losing or
14 lose for winning, whatever the phrase is,
15 because whoever they -- whoever got reviewed,
16 somebody was upset.

17 And so I think those websites, they
18 never would have happened, and they probably
19 would collapse.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas, anything further?

23 Justice Alito?

24 Justice Sotomayor?

25 Justice Kagan?

1 Justice Gorsuch?

2 JUSTICE GORSUCH: Ms. Blatt, I -- I
3 kind of want to return to some of the questions
4 I asked earlier. It seems to me inherent in
5 (c)(1) is a distinction between those who are
6 simply interactive computer services and those
7 who are information content providers.

8 And so, when we flip over to (f), the
9 distinction I -- I -- I glean from that is that
10 if you're picking, choosing, analyzing, or
11 digesting content, which is the bulk of what you
12 -- how you describe Google's activities in -- in
13 the search engine context, are -- are protected
14 and that content must be something more than
15 that, providing content must be something more
16 than that.

17 Is -- is that right in your view?

18 MS. BLATT: I -- I thought you were
19 absolutely correct. And I think some of the
20 amicus briefs do this. In terms of if you're
21 looking at what is information being created or
22 developed, there is that distinction. It can't
23 be that you -- by sorting, you created or
24 partially developed the information.

25 So I think you had it exactly right.

1 I got a little upset when you talked about a
2 remand that somehow the Ninth Circuit got it
3 wrong.

4 JUSTICE GORSUCH: Well, let's -- let's
5 go there next then, because it seems to me that
6 even under that understanding of the statute,
7 there is some residual content for which an
8 interactive computer service can be liable.

9 You'd agree with that, that that's
10 possible?

11 MS. BLATT: Not on this complaint
12 because --

13 JUSTICE GORSUCH: No, no, no, of
14 course, not on this complaint, but in the
15 abstract, it -- it's possible?

16 MS. BLATT: Absolutely correct.

17 JUSTICE GORSUCH: Okay. And then,
18 when -- when it comes to what the Ninth Circuit
19 did, it applied this neutral tools test, and I
20 guess my problem with that is that language
21 isn't anywhere in the statute, number one.

22 Number two, you can use algorithms as
23 well as persons to generate content, so just
24 because it's an algorithm doesn't mean it
25 doesn't -- can't generate content, it seems to

1 me.

2 And third, that I'm not even sure any
3 algorithm really is neutral. I'm not even sure
4 what that test means because most algorithms are
5 designed these days to maximize profits.

6 There are other examples -- Justice
7 Kagan offered some, the Solicitor General
8 offered some -- where an algorithm might be --
9 contain a -- a point of view and even a
10 discriminatory one.

11 So I -- I guess I'm not sure I
12 understand why the Ninth Circuit's test was the
13 appropriate one and why a remand wouldn't be
14 appropriate to have it apply the test that we
15 just discussed.

16 MS. BLATT: Because it's not -- I
17 don't think that was the Ninth Circuit's test.
18 It was one sentence that -- maybe I think it
19 mentioned it twice -- that's basically, you
20 know, almost making fun of the complaint.

21 The complaint doesn't --

22 JUSTICE GORSUCH: Oh, oh, okay. Okay.
23 So we're just disagreeing over how we read the
24 Ninth Circuit's opinion, but if I read it that
25 way, then would a remand be appropriate?

1 MS. BLATT: Well, I'm -- I'm going to
2 say no because I don't understand how -- how
3 somehow that they have a bad complaint means the
4 Ninth Circuit's worse off when the Ninth Circuit
5 said over and over and over you haven't -- this
6 is just the way you're organizing it.

7 And the complaint never alleges there
8 was something independently wrongful about the
9 content. It never says these were colloquial
10 recommendations. It just says because you
11 previously liked this content.

12 And one other thing. The complaint
13 never even alleges that YouTube ever recommended
14 to any -- in terms of even displaying an ISIS
15 video, to anybody who wasn't looking for it. I
16 don't even know how you could get ISIS on your
17 YouTube system unless you were searching for it.
18 And the one --

19 JUSTICE GORSUCH: I certainly
20 understand your -- your -- your complaints about
21 the complaint. But, if I -- if -- if you --
22 you -- you don't think neutral tools -- you're
23 not defending the neutral tools principle either
24 as I understand it.

25 MS. BLATT: I'm defending it with

1 respect to Justice Kagan's question, absolutely,
2 because she's concerned about biased algorithms,
3 and she doesn't have to worry about that in this
4 case because they have neutral algorithms they
5 don't allege. And what they mean by neutral
6 algorithms is neutral with respect to content.
7 So there's no --

8 JUSTICE GORSUCH: Thank you.

9 MS. BLATT: Okay.

10 JUSTICE GORSUCH: Thank you.

11 MS. BLATT: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh? No?

14 Justice Barrett?

15 Justice Jackson?

16 JUSTICE JACKSON: So I understood you
17 to say that 230 immunizes platforms for
18 treatment as a publisher, which you take to mean
19 if they are acting as a publisher in the sense
20 that they are organizing and editing and -- not
21 editing, but organizing and -- content.

22 MS. BLATT: Communicating,
23 broadcasting, which includes how it's displayed.

24 JUSTICE JACKSON: And -- and would
25 that include -- I -- I just want to go back to

1 Justice Alito's point. Would that include the
2 home page of the YouTube website that has a
3 featured video box and the featured video is the
4 ISIS video?

5 MS. BLATT: Right.

6 JUSTICE JACKSON: That is -- is
7 covered?

8 MS. BLATT: Well, maybe not because
9 that gets into my continuum question. If you
10 think that feature is some sort of endorsement
11 such that the claim is actually treating the
12 website as -- and that the harm is flowing from
13 that -- the word feature, then that's out of 2
14 -- 230.

15 I think you would --

16 JUSTICE JACKSON: No, I'm sorry, why?
17 Why -- why is that out of 230?

18 MS. BLATT: So the whole point about
19 what we're saying is making sure that if you
20 start with the assumption that the dissemination
21 of YouTube -- I'm sorry -- of ISIS videos, you
22 can't hold the YouTube liable for that, then the
23 only question that we're concerned about and
24 which is so destabilizing is if you can just
25 plead around it by pointing to anything inherent

1 in the publication.

2 And the government never said what
3 websites are supposed to do.

4 JUSTICE JACKSON: No, but this is not
5 inherent in the publication.

6 MS. BLATT: Exactly, it's featured.

7 JUSTICE JACKSON: So -- so -- so this
8 is helpful, I mean, if --

9 MS. BLATT: Yes.

10 JUSTICE JACKSON: -- we -- we have
11 a -- a home page on YouTube and it has Featured
12 as the little title and a box, and let's say the
13 algorithm randomly selects videos from their
14 content and puts them up for a week at a time,
15 and the random video that's selected is the
16 YouTube -- is the ISIS video, and it runs when
17 you open up YouTube for a week.

18 MS. BLATT: Right.

19 JUSTICE JACKSON: Covered or not
20 covered?

21 MS. BLATT: Well, it depends on
22 whether you think it's an endorsement of -- I
23 mean, if it said this is the Library of Congress
24 and we feature this because we want to show you
25 how bad ISIS is, you know, I don't know.

1 The reason why I care so much about
2 this is because, like I said, Google and YouTube
3 don't do this, but all the other amicus briefs
4 are talking about they do things like that and
5 they might have a little emoji.

6 JUSTICE JACKSON: No, I guess I'm just
7 trying -- I don't understand. I just want to
8 know whether the -- put -- putting on the home
9 page of YouTube, the decision to have an
10 algorithm that puts on its home page various
11 videos, third-party content, and it turns out
12 that one of those videos is an ISIS video and
13 the person is radicalized and they harm the
14 Petitioner's family.

15 MS. BLATT: Yes. So that is inherent
16 to publishing the home page. The word
17 "Feature," actually using the express statement
18 of feature, it -- first of all, is not -- the
19 website didn't have to do it. The owner --

20 JUSTICE JACKSON: So I'm sorry,
21 inherent to publishing, it's covered?

22 MS. BLATT: The home page.

23 JUSTICE JACKSON: It's covered?

24 MS. BLATT: Absolutely, because no
25 website -- how are you supposed to -- how are

1 you supposed to operate a website unless you put
2 a home page on, and so they have to do
3 something.

4 And if you could always say, well, the
5 home page -- you know, unless you're just going
6 to do it alphabetically or reverse chronological
7 order, a website is always going to be sued for
8 negligence.

9 JUSTICE JACKSON: All right. So, if
10 I -- if I disagree with you and I -- and I'm --
11 about the meaning of the statute, all right,
12 focusing in on the meaning of the statute, you
13 say, if you're making editorial judgments about
14 how to organize things, then you're a publisher
15 and you're covered.

16 If I think that the statute really
17 only provides immunity if the claim is that the
18 platform has this ISIS video there and it can be
19 accessed and it hasn't taken it down, do you
20 have an argument that the recommendations that
21 they're talking about is -- is tantamount to the
22 same thing?

23 MS. BLATT: Yes, because the only
24 basis for saying recommendations are not covered
25 is -- that I saw is the government saying is it

1 conveys a distinct implicit message that you
2 might be interested. That is a distinct
3 implicit message that can only -- it happens
4 every time you publish.

5 If you publish one thing on the
6 Internet, it conveys a distinct message of dear
7 reader, we sat around and thought you might be
8 interested --

9 JUSTICE JACKSON: And you're saying --

10 MS. BLATT: -- or we want to make
11 money --

12 JUSTICE JACKSON: -- you're saying
13 that -- that there's no -- that organizational
14 choices that put that content on the front page,
15 on the first thing, when you open it up without
16 typing in anything, cannot be isolated and that
17 it's the same thing as it appears on the
18 Internet anywhere such that 230 applies?

19 MS. BLATT: Yes, and I'll use the
20 government's own words. They said, if you hold
21 them liable for topic headings, you render the
22 statute a dead letter because you have to
23 organize the content. So, if you think the
24 topic headings are conveying some implicit
25 message you can target out, the government said

1 then the web can't function.

2 And I think we care about it because
3 we're big websites that have lots of
4 information. Other websites, and all the amici
5 briefs are saying, is our whole business is
6 organizing to make it useful. If you need a
7 job, you're going to organize it by location --

8 JUSTICE JACKSON: Are you aware of any
9 defamation claim in any state or jurisdiction in
10 which you would be held liable, you would -- you
11 would actually be liable for organizational
12 choices like this?

13 MS. BLATT: No, I'm not worried about
14 the defamation claim. I'm worried for a
15 products liability claim or what the government
16 kept saying, your design choices. Those could
17 just be a product liability claim or a
18 negligence claim. You negligently went
19 alphabetical or you negligently featured
20 whatever you featured that made my, you know,
21 kid addicted to whatever it was. And that --
22 those kind of claims happen because they're
23 publishing. And the whole point of getting this
24 statute was to protect against publishing. So
25 whatever is publishing, inherent to publishing,

1 yeah, has to be covered.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Rebuttal, Mr. Schnapper?

6 REBUTTAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHNAPPER: Thank you, Mr. Chief
9 Justice, and may it please the Court:

10 If I might start with my colleague's
11 reference to things inherent in publishing, I
12 would just offer a cautionary note, and review
13 of the transcript will support this. That --
14 that has been given an extraordinarily expansive
15 account here.

16 So topic headings were characterized
17 as inherent in publishing. You know, a topic
18 heading could be how Bob steals things all the
19 time. That's not -- shouldn't be protected.
20 She mentioned "Trending now" as inherent in
21 publishing, but that's like "Featured today."
22 You could run -- you could have a site that
23 didn't use the words "Trending now." Auto-play
24 certainly isn't inherent in publication.

25 And she mentioned home pages, and you

1 have to have a home page, and that's fair, but
2 you don't have to have on the home page selected
3 things that you're drawing people's attention
4 to. The home page that I have on my desktop for
5 Google is a box and those charming little
6 cartoons, and there isn't anything featured
7 there. One could have a -- a website home page
8 for YouTube that wasn't promoting particular
9 things. That's just how they've chosen to do
10 it.

11 With regard to neutral tools, and this
12 goes back to a point a number of you made about
13 race, a neutral algorithm can end up creating
14 very non-neutral rules. It's not hard to
15 imagine that an algorithm might conclude that
16 most people who -- who went to Spelman and
17 Morehouse now live in Prince George's County
18 and, therefore, in showing you videos, people
19 who ask for videos about places to live near
20 Washington, if they're black, they'll be shown
21 Prince George's County; if they'll be -- if
22 they're white, they'll be shown Montgomery
23 County.

24 The algorithms can create those kinds
25 of rules. Whether -- characterizing that as

1 neutral loses its force once the defendant knows
2 it's happening. You know, to some extent,
3 algorithms and computer functions can run amok,
4 but you can't call it neutral once the defendant
5 knows that its algorithm is doing that. And
6 this runs a little bit into the issue that we'll
7 be talking about tomorrow.

8 Two short points and then one closing
9 item. With regard to Rule -- Section (f)(4), I
10 said this before, I just want to reiterate it,
11 Section (f)(4) does not apply to systems or to
12 information services. It only applies to
13 software providers. The language of the statute
14 is very specific.

15 And with the question about the
16 possible implications of the decision in -- in
17 Taamneh, it -- it is fair -- it is normal
18 practice in the district court when there's a
19 motion to dismiss to permit the plaintiff to
20 amend to deal with the relevant standard, and
21 that's exactly what we ought to be afforded an
22 opportunity to do.

23 Thank you very much.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel. The case is submitted.

1 (Whereupon, at 12:44 p.m., the case
2 was submitted.)
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