SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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REYNALDO GONZALEZ, ET AL.,)

Petitioners,)

v.) No. 21-1333

GOOGLE LLC,)

Respondent.)

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Place: Washington, D.C.

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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

17 APPEARANCES:

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19 behalf of the Petitioners.

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21 Department of Justice, Washington, D.C.; for

22 the United States, as amicus curiae, supporting

23 vacatur.

24 LISA S. BLATT, ESQUIRE, Washington, D.C.; on behalf of

25 the Respondent.

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1 P R O C E E D I N G S
2 (10:03 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument this morning in Case 21-1333, Gonzalez
5 versus Google.
6 Mr. Schnapper.
7 ORAL ARGUMENT OF ERIC SCHNAPPER
8 ON BEHALF OF THE PETITIONERS
9 MR. SCHNAPPER: Mr. Chief Justice, and
10 may it please the Court:
11 Section 230(c)(1) distinguishes
12 between claims that seek to hold an Internet
13 company liable for content created by someone
14 else and claims based on the company's own
15 conduct. That distinction is drawn in each of
16 the three sections of the statute.
17 First, Section 230(c)(1) is limited to
18 claims that would treat the defendant as a
19 publisher of third-party content. The statute
20 uses "published" in the common law sense. The
21 Fourth Circuit decision in Henderson correctly
22 interprets the statute in that manner and
23 concludes that it involves two elements: the
24 claim must be based on the action of the
25 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 courts 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 algorithms is particular
13 to -- in this case, that they're using a
14 different algorithm to the one that, say,
15 they're using for cooking videos, or are they
16 using the same 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 understand,
23 it's based upon what the algorithm suggests the
24 user is interested in. So, if you're interested
25 in cooking, you don't want thumbnails on light

1 jazz. You -- so the -- it's -- it's -- it's
2 neutral in that sense. You're interested in
3 cooking. Say you get interested in rice -- in
4 pilaf from Uzbekistan. You don't want pilaf
5 from some other place, say, Louisiana.
6 The -- so the -- I don't see how that
7 is any different from what is happening in this
8 case. And what I'm trying to get you to focus
9 on is if -- if the -- are we talking about the
10 neutral application of an algorithm that works
11 generically for pilaf and -- and it also works
12 in a similar way for ISIS videos? Or is there
13 something different?
14 MR. SCHNAPPER: No, I think that's
15 correct, but -- but our -- our view is that the
16 fact that a -- a -- an algorithm is neutral
17 doesn't alter the application of the statute.
18 The statute requires that one work through each
19 of the elements of the defense and see if it
20 applies.
21 The -- the lower courts, in a couple
22 of cases, have said that -- really disregarding
23 the requirements of the -- of the defense, that
24 as long as an algorithm is neutral, that puts
25 the -- the conduct outside the -- within the

1 protection of the statute. But that's not what
2 the statute says.
3 The statute says you must be acting --
4 you must be -- the claim must treat you as a
5 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, the 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: You 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?

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 you said -- you 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 -- they 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 publication requirement
18 is satisfied under all circumstances unless the
19 thumbnails are presented purely at random.
20 MR. SCHNAPPER: It's publication even
21 if it's at random, but the -- but the -- the --
22 the injury in the hypothetical we're talking
23 about about ISIS doesn't follow from the content
24 of the thumbnail. The thumbnail would typically
25 be fairly benign. The harm comes --

1 JUSTICE ALITO: Yeah, but in every
2 instance, in those instances where the thumbnail
3 is benign, that's not a concern for purposes of
4 this case, but in all those instances where some
5 plaintiff might have some cause of action based
6 on the content of the video that has been posted
7 --
8 MR. SCHNAPPER: There would have to be
9 a cause of action, as we assert there is in
10 JASTA, for encouraging people to go look at the
11 video. That's a fairly uncommon form of cause
12 of action.
13 The cause of action -- insofar as the
14 plaintiff asserts a cause of action based on the
15 video itself, that's within the -- that you've
16 been sent to, that's within the scope of the
17 defense.
18 JUSTICE JACKSON: Is that because of
19 the way in which you're interpreting the
20 statute? I mean, can we -- can we back up a
21 little bit and try to at least help me get my
22 mind around your argument about how we should
23 read the text of the statute?
24 I took your brief to be arguing and
25 that of those who support you that the statute

1 really is about one kind of publishing conduct,
2 and that is the failure to block or screen
3 offensive content.
4 Am I right about that? In other
5 words, what you say is covered by Section 230
6 and that Google could, like -- could rightly
7 claim immunity for is a claim that there was
8 something defective about their ability to
9 screen or block content, that the content is up
10 there and you should be liable for it?
11 MR. SCHNAPPER: I -- I think we --
12 we've -- I -- I think that's not our claim.
13 JUSTICE JACKSON: Okay.
14 MR. SCHNAPPER: I think we are trying
15 to distinguish between liability for what's in
16 the content that's on their websites that you
17 could access and actions they take to encourage
18 you to go look at it.
19 JUSTICE JACKSON: Yes, yes, that's
20 your claim. I'm just trying to --
21 MR. SCHNAPPER: If you encourage it,
22 then we're --
23 JUSTICE JACKSON: -- understand how
24 you read the statute. Your -- the statute, you
25 say, covers only scenarios in which the claim

1 that's being made is that there's offensive
2 content on the website, that you didn't take it
3 down, that, you know, you failed to screen it
4 out, but if you're making a claim that you're
5 encouraging people to look at this content,
6 that's something different, that's the claim
7 you're making, and it's not covered by the
8 statute.
9 MR. SCHNAPPER: That's our -- that's
10 the distinction --
11 JUSTICE JACKSON: All right.
12 MR. SCHNAPPER: -- we're trying to
13 draw. I mean, it -- the distinction is
14 illustrated by the e-mail in the Dyroff case,
15 which -- which is the precedent that -- that got
16 us here in the Ninth Circuit.
17 In that case, there was a, I think,
18 26-word -- 26-word e-mail from the website to an
19 individual which read something like there's
20 something new that's been posted to the question
21 where can I buy heroin in Jacksonville, Florida.
22 To access it, use this URL or use this URL.
23 It's our contention that that is
24 outside the protection of the statute.
25 JUSTICE JACKSON: But is that really

1 different -- I guess I'm trying -- so they would
2 argue, I think, that even assuming that the
3 statute only covered the kinds of things that
4 you say it covers, you know, defective blocking
5 and screening, meaning there's still offensive
6 stuff on your website and you should be liable
7 for it, I think they would say that to the
8 extent your claim is talking about their --
9 their algorithm that presents the information,
10 it's really the same thing, that you're -- that
11 it reduces -- it's tantamount to saying we
12 haven't, you know, blocked this information,
13 it's still on the website, because algorithms
14 are the way in which the information is
15 presented.
16 MR. SCHNAPPER: So, if I may make
17 clear, as I may not have done that well, the
18 distinction we're drawing, our claim is not that
19 they did an inadequate job of block -- of
20 keeping things off their -- their computers that
21 you can access from -- from outside or from
22 failure to -- to block it.
23 It's that that's the -- that's the
24 heartland of the statute. What we're saying is
25 that insofar as they were encouraging people to

1 go look at things, that's what's outside the
2 protection of the statute, not that the stuff
3 was there.
4 If they stopped recommending things
5 tomorrow and -- and all sorts of horrible stuff
6 was on their website, as far as we read the
7 statute, they're fine. It's the recommendation
8 practice that we think is actionable.
9 JUSTICE SOTOMAYOR: Can I break down
10 your complaint a moment? There -- the vast
11 majority of it is paragraph after paragraph
12 after paragraph that says they're liable because
13 they failed to take ISIS off their website. I
14 think, as I'm listening to you today, you seem
15 to have abandoned that and -- and are saying
16 they don't have to take it off their website.
17 MR. SCHNAPPER: That --
18 JUSTICE SOTOMAYOR: Am I correct about
19 that?
20 MR. SCHNAPPER: That's exactly right.
21 That -- that --
22 JUSTICE SOTOMAYOR: So that can't be
23 --
24 MR. SCHNAPPER: -- is the way we've
25 framed the question presented.

1 JUSTICE SOTOMAYOR: So that can't be
2 --
3 MR. SCHNAPPER: We did not advance
4 that claim.
5 JUSTICE SOTOMAYOR: So you're
6 abandoning that claim, so that can't be aiding
7 and abetting. So I think I'm listening to you,
8 and the only aiding and abetting that you're
9 arguing is the recommendation, correct?
10 MR. SCHNAPPER: That's correct.
11 JUSTICE SOTOMAYOR: You're not arguing
12 that they're -- some of these providers create
13 chat rooms or put people together, users
14 together. You're not claiming that that's part
15 of what you're arguing about? The social
16 networking, I want to call it.
17 MR. SCHNAPPER: Well, that's not at
18 issue in this case.
19 JUSTICE SOTOMAYOR: It's in --
20 MR. SCHNAPPER: Face --
21 JUSTICE SOTOMAYOR: -- tomorrow's
22 case? All right.
23 MR. SCHNAPPER: Face -- if I can be
24 more specific --
25 JUSTICE SOTOMAYOR: All right. So

1 you're limiting -- you're limiting your --
2 MR. SCHNAPPER: -- Facebook --
3 Facebook does that.
4 JUSTICE SOTOMAYOR: All right.
5 MR. SCHNAPPER: Facebook recommends
6 people --
7 JUSTICE SOTOMAYOR: Right.
8 MR. SCHNAPPER: -- which is very
9 difficult to find within the four walls of the
10 statute. Google's created a lot of things but
11 so far not --
12 JUSTICE SOTOMAYOR: But you're not
13 claiming that in this case?
14 MR. SCHNAPPER: Not in -- it's not
15 what --
16 JUSTICE SOTOMAYOR: You're just
17 focusing --
18 MR. SCHNAPPER: No. This is about
19 content. It not about --
20 JUSTICE SOTOMAYOR: This is about
21 content. And I just want to focus your
22 complaint so I understand it very clearly.
23 You're saying the -- the YouTube or the "Next
24 up" feature of the algorithm that says you
25 viewed this and so you might like this, it's the

1 "you might like this" that's the aiding and
2 abetting?
3 MR. SCHNAPPER: Uh --
4 JUSTICE SOTOMAYOR: What -- what part
5 of what they're doing? Because, I mean, you --
6 whoever the user is types in something, they get
7 an ISIS video, you say that's okay -- they can't
8 be liable for you, the -- me, the viewer,
9 looking at the ISIS vehicle. But the Internet
10 providers can be liable for what?
11 MR. SCHNAPPER: Okay. So they're --
12 they're --
13 JUSTICE SOTOMAYOR: For showing me the
14 next video that's similar to that?
15 MR. SCHNAPPER: All right. They're --
16 it would be helpful perhaps if I distinguish
17 between two kinds of practices that -- that go
18 on at YouTube. The complaint doesn't describe
19 them in detail, but we're fairly familiar with
20 them. So what we can talk --
21 JUSTICE SOTOMAYOR: I'm glad, but I'm
22 going to be to look at complaint because it can
23 only survive if the complaint is adequate. So
24 you're going to have to tell me where in the
25 complaint you're saying this if I'm going to

1 think about holding them liable. So --
2 MR. SCHNAPPER: I'm about three
3 questions --
4 JUSTICE SOTOMAYOR: -- you're going to
5 have to separate out the two things then.
6 MR. SCHNAPPER: Okay. I'm about three
7 questions behind. Let me ---
8 JUSTICE SOTOMAYOR: All right.
9 MR. SCHNAPPER: -- let me try and do
10 my best here. So what we've been talking about
11 up until now is the use of -- of thumbnails to
12 encourage people to look at content -- people
13 who haven't clicked on any video yet. And our
14 contention is the use of thumbnails is -- is the
15 same thing under the statute as sending someone
16 an e-mail and saying: You might like to look at
17 this new video.
18 Now the "Up next" feature is a
19 different problem, and the problem there is --
20 is that when you click on one video and you
21 picked that one, YouTube will automatically keep
22 sending you more videos which you haven't asked
23 for.
24 That, in our view, runs afoul of a
25 different element of the statutory defense,

1 which is that they be acting as an interactive
2 computer service. And when they go beyond
3 delivering to you what you've asked for, to
4 start sending things you haven't asked for, our
5 contention is they're no longer acting as an
6 interactive computer service.
7 JUSTICE SOTOMAYOR: All right. So,
8 even if I accept that you're right that sending
9 you unrequested things that are similar to what
10 you've viewed, whether it's a thumbnail or an
11 e-mail, how does that become aiding and
12 abetting? I'm going back to Justice Thomas's
13 question, okay, which is, if they aren't
14 purposely creating their algorithm in some way
15 to feature ISIS videos, if they're -- I mean, I
16 can really see that an Internet provider who was
17 in cahoots with ISIS provided them with an
18 algorithm that would take anybody in the world
19 and find them for them and -- and do recruiting
20 of people by showing them other videos that will
21 lead them to ISIS, that's an intentional act,
22 and I could see 230 not going that far.
23 I guess the question is, how do you
24 get yourself from a neutral algorithm to an
25 aiding and abetting?

1 MR. SCHNAPPER: Right.
2 JUSTICE SOTOMAYOR: An intent,
3 knowledge. There has to be some intent to aid
4 and abet. You have to have knowledge that
5 you're doing this.
6 MR. SCHNAPPER: Yes.
7 JUSTICE SOTOMAYOR: So how do you get
8 there?
9 MR. SCHNAPPER: So the -- the -- if --
10 if the algorithm recommends an ISIS video or it
11 automatically plays it, that -- as we'll see
12 tomorrow, that by itself isn't going to satisfy
13 aiding and abetting.
14 Aiding and abetting requires knowledge
15 that it's happening. So the elements of the
16 aiding and abetting claim, which we'll be
17 talking about tomorrow, address the question
18 you're asking.
19 If -- if this was teed up, if they
20 didn't know it was happening, and the other
21 elements of an aiding-and-abetting claim were
22 present, they would not be liable for aiding and
23 abetting.
24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Just one short question. Your -- your
2 friend on the other side presented an analogy
3 that she thought would be helpful, which -- a
4 book seller that has a table with sports books
5 on it and somebody comes in and says, I'm
6 looking for the book about Roger Maris, and the
7 bookseller says, well, it's over there on the
8 table with the other sports books.
9 Isn't that analogous to what's
10 happening here? You type in ISIS --
11 MR. SCHNAPPER: I'm not sure -- I'm
12 not sure where that -- that gets us. I mean, it
13 wouldn't be any different than sending an e-mail
14 saying that.
15 CHIEF JUSTICE ROBERTS: Well, we'll
16 figure out where we get -- it gets us in a
17 minute. But I just want to know if you think
18 that's a good -- a good analogy.
19 MR. SCHNAPPER: I -- I -- I'm a little
20 concerned to know where it's taking me. It's an
21 analogy of --
22 (Laughter.)
23 MR. SCHNAPPER: -- it's an analogy of
24 sorts.
25 CHIEF JUSTICE ROBERTS: That's what we

1 call -- that's what we call questions.
2 MR. SCHNAPPER: But -- but I still --
3 I mean, I'm going to -- at some point, I'm going
4 to go yes, but you still have to fit it within
5 the four walls of the statute. Perhaps you
6 could -- you could tell me what lies ahead. I
7 think I could -- I mean, sure, it's an analogy
8 of sorts, but --
9 (Laughter.)
10 CHIEF JUSTICE ROBERTS: What lies
11 ahead is, I give up, Your Honor.
12 MR. SCHNAPPER: -- but I would like to
13 know what it leads up to. Yes. Yeah. But --
14 CHIEF JUSTICE ROBERTS: No, what lies
15 ahead is the idea that you could look at that
16 and say it's not pitching something in
17 particular to the person who's made the request.
18 It is recognizing that it's a request about a
19 particular subject matter and it's there on the
20 table, and they might want to look at that or
21 they may not want to look at it.
22 But it's really just a 21st Century
23 version of what has taken place for a long time
24 in many contexts, which, when you ask a
25 question, people are putting together a group of

1 things, not necessarily precisely answering your
2 question. I mean, if somebody said --
3 MR. SCHNAPPER: Yes -- no, I -- all
4 right. I think -- I think I know where we're
5 going here.
6 The -- insofar as I -- I go to YouTube
7 and I say show me a cat -- you know, it's a
8 little more complicated than this -- but show me
9 -- show -- -- tell me what cat videos you have,
10 and in responding to that, they're --
11 CHIEF JUSTICE ROBERTS: Sure. That's
12 an easy case. They give you a bunch of cat
13 videos. You don't have any complaint about
14 something like that.
15 In this case, if they put in
16 something, say, show me ISIS videos, they would
17 get a bunch of ISIS videos, and you don't have
18 any objection to that given the way the search
19 was phrased.
20 MR. SCHNAPPER: It -- I have to answer
21 that with precision. If I say, play for me an
22 ISIS video, and they just directly play the
23 video, then what they've done falls within the
24 language of the statute. It's requested, it's
25 purely third-party content, and I would try and

1 be hold -- trying to be holding them liable for
2 displaying that content.
3 But what actually has happened -- and
4 this is maybe analogous to what goes on to some
5 extent at Twitter, where they might actually
6 literally just show you the thing. But what's
7 happening at YouTube is they're not doing that.
8 I type in ISIS video, and there are
9 going to be a catalogue of thumbnails which they
10 created. It's as if I went into the bookstore
11 and said, I'm interested in sports books, and
12 they said, we've got this catalogue which we
13 wrote of sports books, sports books we have
14 here, and handed that to me. They created that
15 content.
16 And -- and -- and if you publish
17 content you've created, you're not within the
18 four walls of the statute. So --
19 CHIEF JUSTICE ROBERTS: But you would
20 not -- you would not -- under your theory, they
21 would not be liable for the content of the
22 books, they'd be liable for the catalogue?
23 MR. SCHNAPPER: By -- by -- by
24 providing the catalogue.
25 CHIEF JUSTICE ROBERTS: Okay. Thank

1 you.

2 Justice Thomas, anything further?

3 JUSTICE THOMAS: What if the YouTube,

4 instead of automatically providing this list,

5 which is hard -- it's hard for me because I

6 don't see this as -- I see these as suggestions

7 and not really recommendations because they

8 don't really comment on them.

9 But what if you had to click on

10 something like "For more like this, click here"?

11 Would that also be, as far as you're concerned,

12 aiding and abetting or outside this statute?

13 MR. SCHNAPPER: It's -- so you --

14 you've played one video and they say click here

15 to see another one?

16 JUSTICE THOMAS: No, click here if you

17 want suggestions for more like this.

18 MR. SCHNAPPER: No, suggestions are --

19 depending how it happens. Let's say they say

20 send me more -- show me more thumbnails. It's

21 outside the statute.

22 And if I might come back to an earlier

23 part of what's embedded in your question, we

24 aren't asking the Court to adopt a rule that's

25 about recommendations versus suggestions.

1 What we're suggesting -- what -- what
2 we're arguing is -- is that this -- is that you
3 take the normal standards in each of the
4 elements and you apply it to what's going on.
5 It doesn't -- it doesn't matter if they're
6 encouraging it.
7 If -- if -- in terms of aiding and
8 abetting, if someone comes to me and says what's
9 al-Baghdadi's phone call -- phone number, I'd
10 like to call him, and I give him the phone
11 number, I'm aiding and abetting even if I -- I
12 don't say, and I hope you'll join ISIS.
13 Whether we label it a recommendation
14 or not on our view is not the issue here. We
15 tried to say that in our brief.
16 JUSTICE THOMAS: Thank you.
17 MR. SCHNAPPER: Was that responsive?
18 I'm not --
19 JUSTICE THOMAS: Well, it's
20 responsive, but I don't understand it.
21 (Laughter.)
22 JUSTICE THOMAS: You called -- I mean,
23 if you called Information and asked for
24 al-Baghdadi's number and they give it to you, I
25 don't see how that's aiding and abetting.

1 And I don't understand how a neutral
2 suggestion about something that you've expressed
3 an interest in is aiding and abetting. I just
4 don't -- I don't understand it.
5 And I'm trying to get you to explain
6 to us how something that is standard on YouTube
7 for virtually anything that you have an interest
8 in suddenly amounts to aiding and abetting
9 because you're in the ISIS category.
10 MR. SCHNAPPER: Well, again, I'll be
11 answering that probably again tomorrow, but as
12 little -- what you describe without more
13 probably wouldn't.
14 But, as you'll -- as we'll learn
15 tomorrow, the circumstances are far different
16 than that, that these -- YouTube and these other
17 companies were repeatedly told by government
18 officials, by the media, dozens of times that
19 this was going on, and they didn't do any --
20 they did almost nothing about it.
21 That's very different than providing
22 one phone number through Information.
23 JUSTICE THOMAS: Well, I mean, did --
24 MR. SCHNAPPER: So it goes to the
25 scope of JASTA, not to 230.

1 JUSTICE THOMAS: So we've gone from
2 recommendation to inaction being the source of
3 the problem. And this is what I'm -- you know,
4 the -- I understand you're putting it in
5 context, but I -- it's hard for me also to
6 understand where this obligation to take
7 specific actions can lead to an
8 aiding-and-abetting claim.
9 MR. SCHNAPPER: Well, the
10 interconnection in this case is that -- that
11 we're focusing on the recommendation function,
12 that they are affirmatively recommending or
13 suggesting ISIS content, and it's -- and it's
14 not mere inaction.
15 Mere inaction might work under aiding
16 and abetting, but we'll get there tomorrow, but
17 -- but the claim that we're focusing on today is
18 that, in fact, they're affirmatively
19 recommending things. You turn on your computer
20 and the -- and the -- the -- the computers at --
21 at YouTube send you stuff you didn't ask them
22 for. They just send you stuff. It's no
23 different than if they were sending you e-mails.
24 That's affirmative conduct.
25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: I'm afraid I'm
2 completely confused by whatever argument you're
3 making at the present time.
4 So, if someone goes on YouTube and
5 puts in ISIS videos and they show thumbnails of
6 ISIS videos, and don't -- don't -- don't tell me
7 anything about the substantive underlying tort
8 claim, if the person is -- if -- if YouTube is
9 sued for doing that, is it acting as a publisher
10 simply by displaying these thumbnails of ISIS
11 videos after a search for ISIS videos?
12 MR. SCHNAPPER: It is acting as a
13 publisher but of something that they helped to
14 create because the thumbnail is a joint creation
15 that involves materials from a third party and a
16 URL from them and some other things.
17 JUSTICE ALITO: So, if YouTube uses
18 thumbnails at all, it is acting as a publisher
19 with respect to every thumbnail that it
20 displays?
21 MR. SCHNAPPER: Yes. Yes. They're --
22 they're publishing the thumbnails. And the
23 question is, are the thumbnails third-party
24 content, or are they content they've created?
25 And the problem is they are content.

1 JUSTICE ALITO: Yeah, I mean, if
2 that's your argument, then you're really arguing
3 that -- that this statute does not provide
4 protection against a suit that is in substance
5 based on the third-party-provided content.
6 MR. SCHNAPPER: No, we're -- we're
7 basing the -- I'm sorry. I don't mean to be so
8 --
9 JUSTICE ALITO: Okay.
10 MR. SCHNAPPER: That -- that -- that
11 they -- the particular business model they have
12 involves using this -- these thumbnails, which
13 are materials they've in part created to --
14 to -- to operate.
15 Let me --
16 JUSTICE ALITO: So they shouldn't use
17 thumbnails at all? If they want protection
18 under the statute, they shouldn't use
19 thumbnails?
20 MR. SCHNAPPER: Let me -- let --
21 that's -- that's the problem they have with the
22 way the statute's written. So, if I -- if I may
23 give a --
24 JUSTICE ALITO: Is there any other way
25 they could organize themselves without using

1 thumbnails? I suppose, if you type in "I want
2 ISIS videos," they can just put ISIS video 1,
3 ISIS video 2, and so forth.
4 MR. SCHNAPPER: That's the technical
5 problem they have.
6 JUSTICE ALITO: Well, would that be
7 acting as a publisher if they did that?
8 MR. SCHNAPPER: Yes, but they'd be
9 publishing third-party content because the video
10 itself is the content. If I might -- if I might
11 respond --
12 JUSTICE ALITO: Okay. I just -- I --
13 I -- I have one final question. It's a
14 technical question and probably better addressed
15 to Ms. Blatt.
16 Is it your contention that everybody
17 who uses YouTube and searches for a video
18 involving a particular subject will be
19 automatically presented with thumbnails that are
20 related to that regardless of that user's
21 YouTube setting, preferences, preferences that
22 YouTube allows you to --
23 MR. SCHNAPPER: I -- I -- I don't -- I
24 don't know. The practices are too varied. I
25 don't know. But, if I -- if I --

1 JUSTICE ALITO: You don't know if
2 somebody uses YouTube, they can -- can -- do
3 they have -- is there a function that allows
4 them not to be presented with similar videos?
5 MR. SCHNAPPER: I -- I don't know. I
6 mean, I've gone onto -- on YouTube and never
7 seen that, but I -- I wouldn't --
8 JUSTICE ALITO: Uh-huh. Okay.
9 MR. SCHNAPPER: The functions there
10 are widely varied. But if I might make a
11 broader point about the way you framed
12 that question?
13 JUSTICE ALITO: I -- I think you --
14 you answered my question. Thank you.
15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?
17 JUSTICE SOTOMAYOR: I -- I do. This
18 has gone further than I thought or your position
19 has gone further than I thought.
20 No provider or user of a interactive
21 computer service shall be treated as the
22 publisher or speaker of any information provided
23 by another information content provider.
24 And I thought that you started by
25 telling me, if I put in ISIS and they just give

1 me a download of information, the Internet
2 provider is not liable, correct, under (c)(1)?
3 I just read to you (c)(1), correct?
4 MR. SCHNAPPER: It -- it depends what
5 the information is they give you.
6 JUSTICE SOTOMAYOR: If they give me
7 everything that has --
8 MR. SCHNAPPER: If they give you
9 information they created --
10 JUSTICE SOTOMAYOR: No, they have --
11 MR. SCHNAPPER: -- they're not
12 protected.
13 JUSTICE SOTOMAYOR: So you are going
14 to the extreme. Assume I don't think you're
15 right, I think you're wrong, that if I put in a
16 search and they give me materials that they
17 believe answers my search, no matter how they
18 organize it, that they're okay. Do you
19 survive -- does your complaint survive if I
20 believe 230 goes that far?
21 MR. SCHNAPPER: So it depends on what
22 materials they present you with. If -- if all
23 they presented you with -- Twitter would maybe
24 be a cleaner example -- is materials created by
25 third parties, they -- what they've published is

1 third-party materials, and they're good.
2 If they present you with things that
3 they wrote, at the other extreme, then they're
4 not protected because what they presented is not
5 third-party content.
6 JUSTICE SOTOMAYOR: So why do you
7 think the thumbnails are -- I type it in, they
8 give me a thumbnail of everything they think
9 answers my inquiry, the suggestion box.
10 MR. SCHNAPPER: Yes.
11 JUSTICE SOTOMAYOR: Why are they
12 liable?
13 MR. SCHNAPPER: Because a thumbnail is
14 not exclusively third-party material. It's a
15 joint operation, and you can find -- if you look
16 at the thumbnail, it'll have a picture, which
17 comes from the third party, it has an embedded
18 URL, which comes from the defendant, and it
19 might have some information below the --
20 JUSTICE SOTOMAYOR: The URL tells you
21 where to find it, correct?
22 MR. SCHNAPPER: Sorry?
23 JUSTICE SOTOMAYOR: The URL tells you
24 where to find it? It's a computer language that
25 tells you this is where this is located?

1 MR. SCHNAPPER: Yes, but it is
2 information within the meaning of the statute.
3 This is no different than an e-mail which writes
4 it out for you.
5 JUSTICE SOTOMAYOR: If I don't accept
6 your line --
7 MR. SCHNAPPER: Yeah.
8 JUSTICE SOTOMAYOR: -- assume that
9 you've lost on that -- with that line.
10 MR. SCHNAPPER: Yes.
11 JUSTICE SOTOMAYOR: I gave you an
12 example earlier of an Internet provider working
13 directly with ISIS and doing an algorithm that
14 -- teaching them how to do an algorithm that
15 will look for everybody who is just
16 ISIS-related. There's more a collusion in the
17 creation than a neutral algorithm.
18 How do I draw the line between not
19 accepting your point about the thumbnails and
20 going to the other extreme of active collusion?
21 Because there has to be a line somewhere in
22 between. It can't be merely because you're a
23 computer person that you can create an algorithm
24 that discriminates against people. You have no
25 problem with that, right? If a -- if a --

1 MR. SCHNAPPER: The writing of the
2 algorithm would probably constitute aiding and
3 abetting --
4 JUSTICE SOTOMAYOR: Exactly. If you
5 write one that discriminated against people or a
6 user, you're probably going to be liable.
7 MR. SCHNAPPER: I'm not sure, as we
8 describe it, it would fall outside the four
9 walls of the defense. If you write an algorithm
10 that -- that in response -- that in -- that --
11 the -- the way you implement it's --
12 JUSTICE SOTOMAYOR: If you write an
13 algorithm --
14 MR. SCHNAPPER: -- going to put you
15 outside the defense. Yes.
16 JUSTICE SOTOMAYOR: -- if you write an
17 algorithm for someone that, in its structure,
18 ensures the discrimination between people, a
19 dating app, for example, someone comes to you
20 and says, I'm going to create an algorithm that
21 inherently discriminates against people, it
22 won't match black people to white people, Asian
23 people to Hispanics, it's going to discriminate,
24 you would say that Internet provider is
25 discriminating, correct?

1 MR. SCHNAPPER: I would -- what they
2 did -- the way the distinction played out would
3 be important, though. They would -- you know,
4 if -- if they're -- they would have to fall
5 outside of one of the elements of the claim.
6 It's hard to do this in the abstract.
7 JUSTICE SOTOMAYOR: All right.
8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 JUSTICE KAGAN: Mr. Schnapper, can I
10 give you three kinds of practices and you tell
11 me which gets 230 protection and which doesn't?
12 So one is the YouTube practices that
13 you're complaining of, and we know you think
14 that that does not get 230 protection.
15 A second would be Facebook or Twitter
16 or any entity that essentially prioritizes
17 items. So you're on Facebook and certain items
18 are prioritized on your news feed, or certain
19 tweets are prioritized on your Twitter feed, all
20 right, and that there's some algorithm that's
21 doing that and that's amplifying certain
22 messages rather than other messages on your
23 feed. That's the second.
24 And then the third is just a regular
25 search engine. You know, you put in a search

1 and something comes back, and in some ways, you
2 know, that's one giant recommendation system.
3 Here's the first item you should look at.
4 Here's the second item you should look at.
5 So are all three of those not
6 protected, or what happens to my second and
7 third? Are they protected or not protected?
8 And if they're -- and if they are protected,
9 what's the difference between them and your
10 practices?
11 MR. SCHNAPPER: Certainly. So let me
12 -- let me start with the search engine. The --
13 the -- there's a lot of discussion on search
14 engines, but there's not a specific provision in
15 the statute that says search engines are
16 protected. The question is, do they fit within
17 the language of the statute?
18 So, if I ask a search engine for
19 stories about John Doe and it gives me a list
20 and, if I click on one of them, it turns out to
21 be defamatory, they're not liable because
22 they --
23 JUSTICE KAGAN: Well, they just gave
24 it to you. It's the first thing. They just
25 prioritized it. They think it's really a great

1 one to click on.

2 MR. SCHNAPPER: The -- the mere fact

3 -- there are three -- multiple questions here.

4 First, are they liable just because what you --

5 you -- you clicked on turned out to be

6 defamatory? The answer we think is no.

7 Secondly, what if the snippet that

8 they took from the John Doe document said John

9 Doe is a shoplifter? And the answer is they're

10 not liable because they didn't write that. It's

11 publishing third-party content.

12 The third question is, could they be

13 liable for the way they prioritize things? And

14 the answer is I think so. It's going to depend

15 how -- what happened. And the example, I could

16 --

17 JUSTICE KAGAN: So even all the way to

18 the -- to the straight search engine, that they

19 could be liable for their prioritization system?

20 MR. SCHNAPPER: Yes, there was -- let

21 me --

22 JUSTICE KAGAN: Okay.

23 MR. SCHNAPPER: If I might continue --

24 if I --

25 JUSTICE KAGAN: No, I appreciate the

1 -- the -- go ahead. I'm sorry.
2 MR. SCHNAPPER: Those are the facts
3 which led the European Union to fine Google 2.3
4 billion euros, because they used prioritization
5 to wipe out competition --
6 JUSTICE KAGAN: Okay. So here's --
7 MR. SCHNAPPER: -- for things they
8 were selling.
9 JUSTICE KAGAN: Yeah, so I don't think
10 that a court did it over there, and I think that
11 that's my concern, is I can imagine a world
12 where you're right that none of this stuff gets
13 protection. And, you know, every other industry
14 has to internalize the costs of its conduct.
15 Why is it that the tech industry gets a pass? A
16 little bit unclear.
17 On the other hand, I mean, we're a
18 court. We really don't know about these things.
19 You know, these are not like the nine greatest
20 experts on the Internet.
21 (Laughter.)
22 JUSTICE KAGAN: And I don't have to --
23 I don't have to accept all Ms. Blatt's "the sky
24 is falling" stuff to accept something about,
25 boy, there is a lot of uncertainty about going

1 the way you would have us go, in part, just
2 because of the difficulty of drawing lines in
3 this area and just because of the fact that,
4 once we go with you, all of a sudden we're
5 finding that Google isn't protected. And maybe
6 Congress should want that system, but isn't that
7 something for Congress to do, not the Court?
8 MR. SCHNAPPER: Well, I -- I think the
9 -- the -- the -- the line-drawing problems are
10 real. No one minimizes that. I think that the
11 task for this Court is to apply the statute the
12 way it was written.
13 And if I might return to a point that
14 Justice Alito made, much of what goes on now
15 didn't exist in 1996. The statute was written
16 to address one or two very specific problems
17 about defamation cases, and it drew lines around
18 certain kind of things and it protected those.
19 It did not and could not have
20 written -- been written in such a way to protect
21 everything else that might come along that was
22 highly desirable. Congress didn't adopt a
23 regulatory scheme. They protected a few things.
24 It will inevitably happen, it has happened, that
25 companies have devised practices which are maybe

1 highly laudable, but they don't fit within the
2 four walls of the statute.
3 That will continue to happen no matter
4 what happens -- what you do. And the answer is,
5 when -- when someone devises some new -- some
6 new practice that may be highly desirable but
7 doesn't fit within the four walls of the
8 statute, the -- the industry has to go back to
9 Congress and say: We need you to broaden the
10 statute because you wrote this to protect chat
11 rooms in 1996, and we want to do something that
12 doesn't fit within the statutes.
13 And -- and using thumbnails would be a
14 perfect example of that.
15 JUSTICE KAGAN: Thank you.
16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?
18 JUSTICE GORSUCH: Mr. Schnapper, I
19 just want to make sure I understand, as you say,
20 the statutory language and how this case fits
21 with it, and if we could start with Section
22 230(f)(4), which defines the term "access
23 software provider." It includes, among other
24 things, picking, choosing, analyzing, or
25 digesting content.

1 And we might in another world in our
2 First Amendment jurisprudence think of picking
3 and choosing, analyzing or digesting content as
4 content providing, but the statute seems to
5 suggest that's not what it is, it's something
6 different in this context, in this statutory
7 context, and it's protected.
8 Do you agree with that?
9 MR. SCHNAPPER: No. Let -- and I --
10 if I might explain why?
11 JUSTICE GORSUCH: Briefly.
12 MR. SCHNAPPER: I'll do my best.
13 The -- the language that you refer to in
14 Section (f)(4) doesn't apply here.
15 JUSTICE GORSUCH: No, I -- I -- I --
16 we'll get to that in a minute. But let's just
17 take that as given, okay, that I think that
18 what, say, Google does in picking, choosing,
19 analyzing, or even digesting content just makes
20 it an access software provider. Let's take that
21 as given. And so that would normally be
22 protected activity.
23 But (f)(3) carves out a scenario where
24 you become a content provider, and that's
25 something different in my mind to picking,

1 choosing, analyzing, or digesting content, okay?
2 Let's just take those two premises as given.
3 MR. SCHNAPPER: Okay.
4 JUSTICE GORSUCH: All right? You got
5 to do something beyond picking, choosing, or
6 analyzing or digesting content, which is what
7 search engines typically do, even as I
8 understand it. You've got to do something
9 beyond that.
10 As I take your argument, you think
11 that the Ninth Circuit's Neutral Tools Rule is
12 wrong because, in a post-algorithm world,
13 artificial intelligence can generate some forms
14 of content, even according to Neutral Rules.
15 I mean, artificial intelligence
16 generates poetry, it generates polemics today.
17 That -- that would be content that goes beyond
18 picking, choosing, analyzing, or digesting
19 content. And that is not protected.
20 Let's -- let's assume that's right,
21 okay? Then I guess the question becomes, what
22 do we do about YouTube's recommendations?
23 And -- and as I see it, we have a few
24 options. We could say that YouTube does
25 generate its own content when it makes a

1 recommendation, says up next. We could say no,
2 that's more like picking and choosing.
3 Or we could say the Ninth Circuit's
4 Neutral Tools test was mistaken because, in some
5 circumstances, even neutral tools, like
6 algorithms, can generate through artificial
7 intelligence forms of content and that the Ninth
8 Circuit wasn't sensitive to that possibility and
9 remand the case for it to consider that
10 question.
11 What's wrong with that?
12 MR. SCHNAPPER: Well, it's not our
13 theory, but it's --
14 (Laughter.)
15 MR. SCHNAPPER: If the alternative is
16 what Ms. Blatt will be telling you, I'll --
17 JUSTICE GORSUCH: I'm not asking you,
18 you know, hey, I'll win at any cost.
19 MR. SCHNAPPER: No, there's nothing
20 wrong with it.
21 JUSTICE GORSUCH: I'm asking you
22 what's -- what's -- whether that is a correct
23 analysis of the statutory terms you keep
24 referring us to --
25 MR. SCHNAPPER: Yes.

1 JUSTICE GORSUCH: -- or whether it is
2 not.
3 MR. SCHNAPPER: Yes, yes, yes. As --
4 as we've said, this now is close to something we
5 set out in our brief, which is that the -- that
6 the algorithm could create things on its own.
7 It could create a catalogue of ISIS videos,
8 which would be analogous to a compilation under
9 Section 101 of the Copyright Act.
10 A compilation is a distinct entity,
11 it's copyrightable, even if the elements of it
12 were not. So, yes, absolutely, the software
13 could create something like that. It would not
14 be third-party content, and, therefore, it would
15 fall outside the scope of the statute.
16 JUSTICE GORSUCH: Thank you.
17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?
19 JUSTICE KAVANAUGH: Just to pick up on
20 Justice Gorsuch's questions, the idea of
21 recommendations is not in the statute. And the
22 statute does refer to organization and the
23 definition, as he was saying, of interactive
24 computer service means one that filters,
25 screens, picks, chooses, organizes content.

1 And your position, I think, would mean
2 that the very thing that makes the website an
3 interactive computer service also mean that it
4 loses the protection of 230. And just as a
5 textual and structural matter, we don't usually
6 read a statute to, in essence, defeat itself.
7 So what's your response to that?
8 MR. SCHNAPPER: My response is that
9 the text doesn't apply here. Let me explain
10 why. The -- the element in the -- the list in
11 -- in (f)(4) refers to only one of the three
12 kinds of interactive computer services in
13 (f)(2).
14 In (f)(2) -- and this is -- this is on
15 page 267 of the petition appendix. (f)(2) says
16 an interactive computer service means -- and
17 there -- it gives you three candidates, you've
18 got one of them -- an information service, a
19 system, or an access software provider.
20 Now YouTube is one of the first two.
21 It doesn't -- it's not a software provider. The
22 definition in (f)(4) only delineates who is an
23 access software provider. It doesn't apply to
24 who's an information system or service. And
25 that was Congress's choice.

1 Congress didn't say you're an
2 interactive -- you're a service, an information
3 service or a system if you do those things. It
4 said you're only -- those things only bring you
5 within the four walls of interactive computer
6 service if you're -- if you're a software
7 provider. And -- and that made sense in the
8 context of what was happening in 1996.
9 In 1996, if you wanted to go online,
10 you would typically sign up with CompuServe or
11 Prodigy and they would literally give you
12 diskettes. They would sell -- they would be
13 selling you software.
14 And -- and this provision in (f)(4) is
15 about that activity. That's not what's
16 happening here.
17 JUSTICE KAVANAUGH: Well, just -- just
18 to go back to 1996 and maybe pick up on Justice
19 Kagan's questions earlier, it seems that you
20 continually want to focus on the precise issue
21 that was going on in 1996, but then Congress
22 drafted a broad text, and that text has been
23 unanimously read by courts of appeals over the
24 years to provide protection in this sort of
25 situation and that you now want to challenge

1 that consensus.

2 But the amici on the other side say:

3 Well, to do that, to pull back now from the

4 interpretation that's been in place would create

5 a lot of economic dislocation, would really

6 crash the digital economy with all sorts of

7 effects on workers and consumers, retirement

8 plans and what have you, and those are serious

9 concerns and concerns that Congress, if it were

10 to take a look at this and try to fashion

11 something along the lines of what you're saying,

12 could account for.

13 We are not equipped to account for

14 that. So are the predictions of problems

15 overstated? If so, how? And are we really the

16 right body to draw back from what had been the

17 text and consistent understanding in courts of

18 appeals?

19 MR. SCHNAPPER: Well, I -- our

20 position is that the text doesn't -- doesn't say

21 this. With regard to the issue of what we've

22 come to call recommendations, this isn't a

23 longstanding, well-established body of

24 precedent. It's really three decisions: the

25 decision in this case, the Dyroff decision, and

1 Force. And -- and of the eight justices to --
2 JUSTICE KAVANAUGH: What about the
3 implications then? Go to that, the implications
4 for the economy, that you have a lot of amicus
5 briefs that we have to take seriously that say
6 this is going to cause a lot of economic
7 dislocation in the country.
8 MR. SCHNAPPER: I mean, I'd say a
9 couple things in response to that. The first
10 one is, on a close reading of the amicus briefs,
11 it's clear that they are urging the Court to
12 hold that a wide variety of different kinds of
13 things are protected. They're -- they're
14 inviting the Court to adopt a rule that
15 recommendations are protected and that whatever
16 they're doing would qualify as a recommendation.
17 The -- you can't --
18 JUSTICE KAVANAUGH: Well, I think
19 they're saying a recommendation is a
20 recommendation, something express. And your --
21 your whole thing is the algorithms are an
22 implied recommendation. And they're saying:
23 Well, they're not an express recommendation.
24 That -- that -- so --
25 MR. SCHNAPPER: I'm --

1 JUSTICE KAVANAUGH: But, in any event,
2 why don't we focus on the question.
3 MR. SCHNAPPER: Yes. Yes.
4 JUSTICE KAVANAUGH: Do you -- do you
5 challenge the -- the basic point?
6 MR. SCHNAPPER: I think -- I think --
7 yes.
8 JUSTICE KAVANAUGH: And so --
9 MR. SCHNAPPER: We -- we do, on -- on
10 a couple grounds. One of them is that I'm not
11 sure all these decisions -- these briefs are
12 distinguishing as we have today between
13 liability because of the content of third-party
14 materials and the recommendation function
15 itself.
16 A -- a distinction between more and
17 less specific suggestions --
18 JUSTICE KAVANAUGH: What would the
19 difference be in liability, in damages?
20 MR. SCHNAPPER: I'm sorry, between
21 which two things?
22 JUSTICE KAVANAUGH: The third-party
23 content and the recommendation.
24 MR. SCHNAPPER: Well, most of the time
25 the recommendations isn't going to --

1 JUSTICE KAVANAUGH: Like how would the
2 money at the end of the day differ if you are
3 successful?
4 MR. SCHNAPPER: It might not be. But
5 most recommendations just aren't actionable. I
6 mean, there -- there is no cause of action for
7 telling someone to look at a book that has
8 something defamatory in it.
9 JASTA, the statute we're talking about
10 tomorrow, is unusual in that recommendations
11 could run you afoul of the statute, but there
12 are very few claims that are like that. So
13 it's -- it's a very different kind of situation.
14 It's -- the implications of this are limited
15 because the kinds of circumstances in which a
16 recommendation would be actionable are limited.
17 JUSTICE KAVANAUGH: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?
20 JUSTICE BARRETT: I'd like to take you
21 back, Mr. Schnapper, to Justice Sotomayor's
22 questions about the complaint. It seems to me
23 that the complaint in this case is materially
24 indistinguishable from the complaint in
25 tomorrow's case. Do you agree? Same aiding and

1 --

2 MR. SCHNAPPER: The complaint in which

3 case? I'm sorry.

4 JUSTICE BARRETT: In tomorrow's case,

5 in the Taamneh case, the Twitter case, and this

6 one.

7 MR. SCHNAPPER: Pretty much.

8 JUSTICE BARRETT: So they're both

9 relying on the same aiding-and-abetting theory.

10 So, if you lose tomorrow, do we even have to

11 reach the Section 230 question here? Would you

12 concede that you would lose on that ground here?

13 MR. SCHNAPPER: No. The -- there was

14 a motion to dismiss in tomorrow's case on JASTA

15 grounds. It didn't get decided. So, if we lose

16 tomorrow, they'll be -- the defense will be free

17 in this case to -- to move to dismiss, but we'd

18 be entitled to try to amend the complaint in

19 this case to satisfy whatever standard you

20 establish tomorrow.

21 JUSTICE BARRETT: Okay. Let me ask

22 you this. I'm switching gears now. So Section

23 230 protects not only providers but also users.

24 So I'm thinking about these recommendations.

25 Let's say I retweet an ISIS video. On your

1 theory, am I aiding and abetting and does the
2 statute protect me, or does my putting the
3 thumbs-up on it create new content?
4 MR. SCHNAPPER: I -- we don't read the
5 word "user" in -- that broadly. There's not
6 been a lot of litigation about this.
7 We -- we think the word "user" is
8 there to deal with a situation in which one
9 entity accesses a -- a -- a server, YouTube, for
10 example, and then someone else uses that entity,
11 like when I go to FedEx Office, FedEx Office is
12 the user that is accessing my e-mail, and the
13 statute protects them when I look at the FedEx
14 computer and find the defamatory --
15 JUSTICE BARRETT: Well, let's say that
16 I disagree with you. Let's say I'm an entity
17 that's using the service -- the service, so I
18 count as a user. You know, my computer is
19 accessing the servers when I retweet the image.
20 On your theory, could I be liable under JASTA
21 for aiding and abetting without -- do I lose 230
22 protection --
23 MR. SCHNAPPER: Right. Right. Right.
24 JUSTICE BARRETT: -- if I created new
25 content?

1 MR. SCHNAPPER: The problem -- whether
2 it's enough for JASTA is a separate --
3 JUSTICE BARRETT: Okay. Right. Fair
4 enough.
5 MR. SCHNAPPER: The question is, is it
6 outside of 230?
7 JUSTICE BARRETT: Is it outside of
8 230.
9 MR. SCHNAPPER: Right. And our view
10 is the statute doesn't mean anyone who's a user
11 who re -- who tweet -- who -- who conveys
12 third-party liable is protected. If you --
13 let's say that you -- you read a book, and it
14 says John Doe is a shoplifter, and you send an
15 e-mail that says John Doe is a shoplifter,
16 you're using, you know, the Internet. You're
17 using the -- the e-mail system.
18 But nobody thinks that -- that Section
19 230 gives -- is a blanket exemption for
20 defamation on the website as long as you're
21 quoting somebody else.
22 Retweeting is a very automatic way of
23 doing it, but if you start down that road, you'd
24 end up having to hold that -- that anytime I
25 send a defamatory e-mail, I'm protected as long

1 as I'm quoting somebody else. And I don't think
2 anybody would --
3 JUSTICE BARRETT: Well, I guess I
4 don't understand -- I mean, let's see, I guess I
5 don't understand logically why your argument
6 wouldn't mean that I was creating new content if
7 I retweeted or if I liked it or if I said check
8 this out. Why --
9 MR. SCHNAPPER: Well -- well, you --
10 JUSTICE BARRETT: -- why wouldn't
11 that?
12 MR. SCHNAPPER: -- you would be, but
13 I'm advancing an argument that gets to the same
14 place, which is you're -- you're not a user
15 within the meaning of the statute just because
16 you use -- you go on e-mail or -- or YouTube or
17 -- or on Twitter.
18 JUSTICE BARRETT: Let's say I disagree
19 with you. Let's say that I think you're a user
20 of Twitter if you go on Twitter and you're using
21 Twitter and you retweet or you like or you say
22 check this out. On your theory, I'm not
23 protected by Section 230.
24 MR. SCHNAPPER: That's content you've
25 created.

1 JUSTICE BARRETT: That's content I've
2 created. Okay. And on the content creation
3 point, let's imagine -- it seems like you're
4 putting a whole lot of weight on the fact that
5 these are thumbnails, and so it's something that
6 YouTube separately creates.
7 MR. SCHNAPPER: Yes.
8 JUSTICE BARRETT: What if they just
9 screenshot? They just screenshot the ISIS
10 thing. They don't do the thumbnail. Then are
11 they --
12 MR. SCHNAPPER: That's -- that's pure
13 third-party content.
14 JUSTICE BARRETT: That's pure third --
15 so this is just about how YouTube set it up?
16 MR. SCHNAPPER: That's -- that's --
17 that's correct in this context. And it gets
18 back to the conversation we were having earlier
19 about this is a new technology that didn't exist
20 in 1996, and rather than ask Congress to write
21 the statute to cover it, they just went ahead
22 and did it.
23 JUSTICE BARRETT: Okay. And last
24 question, turning to the statutory text. So it
25 seems to me that some the briefs in this case

1 are focusing on what it means to treat someone
2 as a publisher, treat an entity as a publisher.
3 You're not really focusing on that and the
4 traditional editorial functions argument. I
5 mean, you're really focusing on the content
6 provider argument, correct?
7 MR. SCHNAPPER: No. Well, we've
8 advanced views as to each element of the claim.
9 Our --
10 JUSTICE BARRETT: But today you've
11 really been honing in on this are you actually
12 creating content or just presenting third-party
13 content.
14 MR. SCHNAPPER: Well, I've been
15 answering -- that's where the questions --
16 JUSTICE BARRETT: Yes.
17 MR. SCHNAPPER: -- have taken us, but
18 -- but -- but our -- our view would be that
19 you're not being treated as a publisher of the
20 video just because you -- you publish the
21 thumbnail.
22 JUSTICE BARRETT: Okay. Thank you.
23 MR. SCHNAPPER: You're not being
24 harmed by the thumbnail.
25 JUSTICE BARRETT: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Jackson?
3 JUSTICE JACKSON: So I guess -- I
4 guess I'm thoroughly confused, but let me -- let
5 me try to -- let me try to understand what your
6 argument is. I think that the confusion that
7 I'm feeling is arising from the possibility that
8 we're talking about two different concepts and
9 conflating them in a way.
10 I thought that Section 230 and the
11 questions that we were asking in this case today
12 was about whether there was immunity and whether
13 Google could claim the defense of immunity and
14 that that's actually different than the question
15 of whether whatever it does gives rise to
16 liability. That is, is there liability for
17 aiding and abetting? That's tomorrow's
18 question.
19 And to the extent that you keep coming
20 back to this notion of creating content or
21 whatnot, I feel like we're conflating the two in
22 a way that I'd like to just see if I can clear
23 up from my perspective.
24 Your brief says that the immunity
25 question, Section 230(c)(1)'s text is most

1 naturally read to prohibit courts from holding a
2 website liable for failing to block or remove
3 third-party content.
4 And I read the arguments in your brief
5 and I read what you said about Stratton Oakmont
6 and the sort of background, and so I thought
7 your argument was that the -- that you can only
8 claim immunity, Google, if the claim that's
9 being made against you is about your failing to
10 block or remove third-party content.
11 To the extent we are making a claim
12 about recommendations or doing anything else,
13 any of the, you know, hypotheticals that people
14 have brought up, that's outside of the scope of
15 the statute because, really, the statute is
16 narrowly tailored in a way to protect Internet
17 platforms from claims about failing to block or
18 remove, right? I mean, that's what I thought
19 was happening.
20 All right. So, if that's true, then
21 all the hypotheticals and the questions about
22 are you aiding and abetting if Google, you know,
23 has a priority list or if there's
24 recommendations, maybe, but that's not in the
25 statute because we're just talking about

1 immunity. We're just talking about whether or
2 not you've made a claim for failing to block or
3 remove in this case today related to Section
4 230.
5 Am I doing too much of a separation
6 here in terms of how I'm conceiving of it?
7 MR. SCHNAPPER: Well, let me
8 articulate what -- what the contention is that
9 we are advancing, and I think it's not quite the
10 way you described it. The contention we're
11 advancing is that a variety of things that we're
12 loosely characterizing as recommendations fall
13 outside of the statute.
14 JUSTICE JACKSON: Why?
15 MR. SCHNAPPER: Because, in some of
16 them, the defendant's not being treated as the
17 publisher; because, in some of them, third-party
18 content's being -- content is being created by
19 the defendant; because, in some of them, the
20 defendant's not acting as an interactive
21 computer service.
22 JUSTICE JACKSON: I see. So I -- I
23 thought -- I thought you were -- the answer to
24 why was because the statute is limited, because
25 the statute only focuses on certain kind of

1 publisher conduct, and to the extent that --
2 that they're doing anything else, recommending
3 or whatever, that's not going to be covered by
4 this statute.
5 But you're sort of saying, well, let's
6 look at what they're actually doing and it may
7 fit in or it may not. You're not sort of hewing
8 very closely to the understanding of the
9 original scope of the statute in terms of what
10 it is trying to immunize these platforms
11 against.
12 MR. SCHNAPPER: I -- I -- I think
13 we're trying to do that in somewhat more of a
14 particularized way, that is, to -- to identify
15 -- to work our way through each of the three
16 specific elements of the statute, each tied to
17 particular language, to --
18 JUSTICE JACKSON: But I've got to tell
19 you I don't see three elements in this. I mean,
20 part of me -- part of this is all the confusion,
21 I think, that has developed over time about the
22 meaning of the statement in the statute, right?
23 I don't see three elements. I see
24 literally a sentence, and the sentence in my
25 view reads as though they're trying to actually

1 direct courts to not impose publisher liability,
2 strict publisher liability, against the backdrop
3 of Stat -- of Stratton Oakmont.
4 So there's like some -- somehow we've
5 gotten to a world in which we've teased out
6 three elements and we're trying to fit it all
7 into that, when I thought there was sort of a
8 very simple, sort of straightforward way to read
9 the statute that you articulate in your brief,
10 which is this is really -- this statute, (c)(1),
11 is really just Congress trying to not
12 disincentivize these platforms for blocking and
13 screening offensive conduct.
14 And so what they said is let's look at
15 (c)(1). Let's have (c)(2). Let's have a system
16 in which a system -- a platform is not going to
17 be punished, strict liability for just having
18 offensive conduct on their website and, if they
19 try, if they try to screen out, we're not --
20 we're going to say you won't be responsible for
21 that either. That's (c)(2).
22 But it really doesn't speak to whether
23 you do a recommendation or whether you have an
24 algorithm that does priorities or any of these
25 other things. That's how I thought that -- that

1 at least I was looking at the statute in light
2 of its purposes and history and -- and -- and
3 Stratton Oakmont and all of that, in which case
4 I think you would win unless your
5 recommendation's argument really is just the
6 same thing as saying they are hosting ISIS
7 videos on their website.
8 MR. SCHNAPPER: Well, I -- I think --
9 I think we do have to be drawing that
10 distinction. But with regard to your question
11 about the three elements, the -- the text does
12 take you there.
13 It says, if you track the briefs,
14 probably of either side, the -- part of what
15 we're arguing about, the meaning of treat as a
16 publisher because that's the first couple of
17 words of the statute.
18 Then we're arguing about did they
19 create the content because publisher has to be
20 of -- has to be of information provided by
21 another content provider. So we have to parse
22 out the meaning of that.
23 And then it refers to the defendant as
24 an interactive computer service. And we have to
25 parse out the meaning of, well, what does that

1 mean? So we -- we are forced to -- this --
2 this -- the language of the statute has those
3 three components. And it -- although the
4 overall purpose is I think as you described it,
5 the language is more complex and particularized.
6 JUSTICE JACKSON: Thank you.
7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.
9 Mr. Stewart.
10 ORAL ARGUMENT OF MALCOLM L. STEWART
11 FOR THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING VACATUR
13 MR. STEWART: Thank you, Mr. Chief
14 Justice and may it please the Court:
15 I'd like to begin by addressing the
16 Roger Maris hypothetical because I -- I think it
17 illustrates our position and limits on our
18 position.
19 Imagine in a particular state there
20 was an unusually protective law that said no
21 books at sellers shall be held liable on any
22 theory for the content of any book that it sells
23 and then the scenario that the Chief Justice
24 described occurred, the person was asked where
25 is the Roger Maris book and said it's over on

1 that table with the other sports book -- books.
2 Now, if the book seller was sued for
3 making that statement, our position would be
4 there's no way textually that the immunity
5 statute would apply. This is a statement about
6 the book, not the contents of the book.
7 Now, the statement "the book is over
8 there" is so obviously innocuous that it might
9 seem like pedantry to quibble about should the
10 dismissal of the suit be based on immunity or
11 for failure to state a claim.
12 But a court in thinking about the
13 possibility of harder cases down the road should
14 distinguish carefully between liability for the
15 content itself, liability for statements about
16 the content.
17 And the other one other thing I would
18 say is, if the consequence of saying it's over
19 there was that the book seller lost its immunity
20 for the content of the book, that would be a big
21 deal. But our position on 230(c)(1) is nothing
22 like that.
23 Our position is that the Internet
24 service provider can be sued for its own
25 organizational choices, but the fact that it

1 makes organizational choices doesn't deprive it
2 of the protection it receives for liability
3 based on the third-party content.
4 I welcome the Court's questions.
5 JUSTICE THOMAS: Well, I'm still
6 confused. But what if the book seller said it's
7 over there on the table with the other
8 trustworthy books?
9 MR. STEWART: I mean, I think at that
10 point you would be asking could it conceivably
11 be an actionable tort to describe the book as
12 trustworthy.
13 JUSTICE THOMAS: Well, we're putting a
14 lot of weight on organization. But doesn't it
15 really depend on how we're organizing it and on
16 what the basis of the organization -- for
17 example, we could say this set -- you could
18 organize it on the basis of what's more
19 trustworthy than -- than something else.
20 MR. STEWART: I think that might
21 matter with respect to whether there was
22 substantive liability under the underlying cause
23 of action. It -- it shouldn't matter for
24 purposes, either of the hypothetical immunity I
25 -- statute I described, which focuses

1 exclusively on the contents of the books or for
2 230(c)(1).
3 Now, Mr. Schnapper said in a colloquy
4 earlier that he thought the allegations in his
5 complaint are basically the same as those in the
6 Twitter complaint. And the government is
7 arguing in Twitter that those allegations are
8 not sufficient to state a claim under the
9 Antiterrorism Act.
10 So our -- our interest in 230(c)(1) is
11 not in allowing this particular suit to go
12 forward. It is in preserving the distinction
13 between immunity -- protection for the
14 underlying content and protection for the
15 platform's own choices.
16 JUSTICE THOMAS: Well, I -- I just
17 think it's just going to be difficult. How
18 would you respond to Justice Gorsuch's
19 hypothetical about the artificial intelligence
20 creating content organizational decisions?
21 MR. STEWART: I think the
22 organizational decisions could still be
23 subjected to a suit. Whether you think of them
24 as recommendations or simply as the platform --
25 the operation of the platform, it's still the

1 platform's own choice.
2 And if you ask how did a particular
3 video wind up in the queue of a particular
4 individual, it -- it could be some -- some sort
5 of artificial intelligence that was making that
6 choice but it would have to do with the --
7 YouTube's administration of its own platform.
8 It wouldn't be a choice made by any
9 third-party who had posted it, because third
10 parties who post on YouTube don't direct their
11 videos to particular recipients.
12 And -- and I -- I do want to emphasize
13 this -- this theory, this rationale applies even
14 in the most mundane circumstances. For
15 instance, if you do a Google search on the name
16 for a famous person and you misspell the name
17 slightly, you still get lots of content about
18 that person. Google knows that it's smarter
19 than we are and it knows that -- more about what
20 we want than the literal terms of our search
21 might suggest.
22 I went to the Court's website and used
23 the docket search function and typed in Google
24 and left off the -- the final E and I got a
25 message that said no items find -- found. In

1 order to call up the docket for this case, you
2 have to spell Google exactly right.
3 Now, the choice between those two
4 modes of operating the platform, it's
5 extraordinarily unlikely, almost inconceivable
6 that it could ever give rise to legal liability,
7 but those are choices made by the platforms
8 themselves. They are not choices made by any
9 third-party. They just don't implicate
10 230(c)(1).
11 And the choice -- any conceivable
12 lawsuit about the decision to use one mode of
13 operation rather than another, presumably, would
14 be dismissed on the merits. But --
15 JUSTICE KAGAN: I -- I think the
16 problem, Mr. Stewart, with minimizing what your
17 position is is that in trying to separate the
18 content from the choices that are being made,
19 whether it's by YouTube or anyone else, you
20 can't present this content without making
21 choices. So in every case in which there is
22 content, there's also a choice about
23 presentation and prioritization.
24 And the whole point of suits like
25 this, is that those choices about presentation

1 and prioritization amplify certain message --
2 messages and thus create more harm.
3 Now I appreciate what you're saying is
4 like, well, that doesn't mean that you're going
5 to have liability in every case, but -- but --
6 but still, I mean, you are creating a world of
7 lawsuits. Really anytime you have content, you
8 also have these presentational and
9 prioritization choices that can be subject to
10 suit.
11 MR. STEWART: Let -- let me say a
12 couple things about that. The first thing I
13 would say is you could make substantially the
14 same argument about employment decisions; that
15 is, in order for YouTube to operate, it has to
16 hire employees.
17 But Ms. Blatt acknowledges in the --
18 the brief that employment decisions wouldn't be
19 shielded by 230(c)(1) if there was an allegation
20 of unlawful discrimination for instance.
21 So the fact that the platform has to
22 make some sorts of organizational choices
23 doesn't mean it's immune from suit in the rare
24 instance where it might make a choice that
25 violates some other provision of law.

1 The second thing is that the concern
2 we have in mind are things like imagine a
3 hypothetical job matching service like Indeed,
4 where job applicants can post their
5 qualifications and potential employers can post
6 their own listings and the website will match
7 them up.
8 And suppose it came to light that the
9 job -- the job search mechanism was routing the
10 high-paying, more professional jobs
11 disproportionately to the white applicants and
12 the lower paying jobs to the black applicants
13 even when the qualifications were the same.
14 At -- at a general level, you could
15 describe that as choices about which content
16 would go to which users. But when we saw that
17 kind of stark impropriety in the criteria that
18 the platform was -- was using, I think we would
19 say there has to be -- assuming it violates
20 applicable law, 230(c)(1) really shouldn't be
21 protecting that. That's not -- the complaint we
22 have here is not to the content itself or the
23 presence of the third-party job postings on the
24 platform. The complaint is about the use of
25 illicit criteria to decide which users will get

1 which content.

2 And our point is, in the more

3 innocuous cases or in the borderline cases where

4 the criteria seem a little bit shaky but it's

5 not clear whether they violate any applicable

6 law, that -- that choice ought to be made based

7 on the law that the plaintiff invokes as the

8 cause of action.

9 And the Court ought to be determining

10 does the use of those criteria violate that law?

11 And it --

12 CHIEF JUSTICE ROBERTS: Well, I was

13 just going to say, your -- the problem with your

14 analogies is that they involve -- I don't know

15 how many employment decisions are made in the

16 country every day, but I know that whatever it

17 is, hundreds of millions, billions of responses

18 to inquiries on the Internet are made every day.

19 And as Justice Kagan suggested, under

20 your view, every one of those would be a

21 possibility of a lawsuit, if they thought there

22 was something that the algorithm referred that

23 was defamatory, that, you know, whatever it is,

24 exposed them to harmful information. And so

25 that maybe the analogy doesn't fit the

1 particular -- particular context.
2 MR. STEWART: I mean, I think it is
3 true that many platforms today are making an
4 enormous number of these choices. And if
5 Congress thinks that circumstances have changed
6 in such a way that amendments to the statute are
7 warranted because things that didn't exist or
8 that weren't on people's minds in 1996 have
9 taken on greater prominence, that would be a
10 choice for Congress to make. But --
11 CHIEF JUSTICE ROBERTS: Well, but
12 choice for Congress to make -- I mean, the --
13 the amici suggest that if we wait for Congress
14 to make that choice, the Internet will -- will
15 be sunk. And so maybe that's not as persuasive
16 a outcome as it might seem in other cases.
17 MR. STEWART: I -- I think the main
18 thing I would say is most of the amici making
19 that projection are making it based on a
20 misunderstanding of our position; namely, they
21 are misunder- our -- misunderstanding our
22 position to be that once YouTube recommends a
23 video or once YouTube sends a video to a
24 particular user without the user requesting it,
25 that YouTube is liable for any impropriety in

1 the content of the video itself.
2 And that's not our position. Our
3 position is that YouTube's own conduct falls
4 outside of 230(c)(1). It's unlikely in very
5 many instances to give rise to actual liability.
6 JUSTICE KAVANAUGH: Why not? Why --
7 why -- why wouldn't it be liable? Explain that.
8 MR. STEWART: I think the reason --
9 the reason we would say is for -- for -- in this
10 case, in particular, to -- to look ahead a
11 little bit to the -- the Twitter argument
12 tomorrow, there were questions at the beginning
13 of Mr. Schnapper's presentation about the role
14 that neutrality played in the analysis. And our
15 view is neutrality is not part of the 230(c)(1)
16 analysis. But it's a big part of the
17 Antiterrorism Act analysis because we say a
18 person is much more likely to be liable for
19 aiding and abetting if it is due -- kind of
20 giving special treatment to the primary
21 wrongdoing, if it is taking --
22 JUSTICE KAVANAUGH: Well you -- keep
23 going.
24 MR. STEWART: And -- and -- and so, if
25 it is, in fact, the case that YouTube is

1 applying neutral algorithms, is simply showing
2 more ISIS videos to people who've shown an
3 interest in ISIS, just as it does more cat
4 videos to people who've shown an interest in --
5 in cats, that's much less likely to give rise to
6 liability under the Antiterrorism --
7 JUSTICE KAVANAUGH: And much less
8 likely -- I'm not sure based on what. You seem
9 to be putting a lot of stock on the liability
10 piece of this, rather than, as Justice Jackson,
11 was saying, the immunity piece. And I'm just
12 not sure, you know, if we -- if we go down this
13 road, I'm not sure that's going to really pan
14 out. Certainly, as Justice Kagan says, lawsuits
15 will be non-stop --
16 MR. STEWART: I --
17 JUSTICE KAVANAUGH: -- on defamatory
18 material, which there's a lot of, that is out
19 there and finds its way onto the websites that
20 host third-party conduct.
21 MR. STEWART: And -- and --
22 JUSTICE KAVANAUGH: There will be lots
23 of lawsuits. You agree with that?
24 MR. STEWART: I -- I wouldn't
25 necessarily agree with there would be lots of

1 lawsuits, simply because there are a lot of
2 things to sue about, but they would not be suits
3 that have much likelihood of prevailing,
4 especially if the Court makes clear that even
5 after there's a recommendation, the website
6 still can't be treated as the publisher or
7 speaker of the underlying third-party content.
8 JUSTICE KAVANAUGH: Well, just bigger
9 picture, then, to the Chief's question, isn't it
10 better for -- to keep it the way it is, for us,
11 and Congress -- to put the burden on Congress to
12 change that and they can consider the
13 implications and make these predictive
14 judgments?
15 You're asking us right now to make a
16 very precise predictive judgment that, don't
17 worry about it, it's really not going to be that
18 bad. I don't know that that's at all the case,
19 and I don't know how we can assess that in any
20 meaningful way.
21 MR. STEWART: I -- I think, with
22 respect, that that -- that characterization of
23 the existing case law overstates the extent to
24 which courts are in agreement that platform
25 design choices --

1 JUSTICE KAVANAUGH: Assume they are.
2 Assume the status quo is against you in the law.
3 And you're asking us, well, the status quo is
4 wrong, okay, and this Court is the first time
5 we're getting to look at it. But don't worry
6 about the implications of this because it's
7 really all going to be fine, there won't be much
8 successful lawsuits, there won't be really many
9 lawsuits at all.
10 And I -- I don't know how we can make
11 that assessment.
12 MR. STEWART: I think if the Court
13 thought that kind of the interpretive question,
14 looking at the plain language of the statute,
15 was on a knife's edge, it was an authentically
16 close call, then, yes, the Court could -- and
17 the Court perceived the existing case law to be
18 basically uniform, the Court could give some
19 weight to the interest in stability.
20 But I think, for us, neither of those
21 things is true.
22 JUSTICE BARRETT: Mr. Stewart -- oh,
23 sorry. Please finish.
24 MR. STEWART: I was -- I was going to
25 say the statutory text really is not -- it may

1 have a little bit of ambiguity at the margins,
2 but it is very clearly focused on protecting the
3 platform from liability for information provided
4 by another information content provider, not by
5 the platform's own choices.
6 I'm sorry, Justice Barrett?
7 JUSTICE BARRETT: No, no, no, I'm
8 sorry.
9 So speaking of this question of what
10 are the implications of this, and Justice
11 Jackson's points about liability and immunity
12 overlapping, it seems like one of the responses
13 to should we worry about this is, well, it's
14 going to be the rare kind of claim that could be
15 based on recommendations.
16 So speaking of that, what is the
17 government's position, if you have one, on
18 whether, if the plaintiffs below lose tomorrow
19 in Twitter, should we just send this back?
20 Because there isn't -- I mean, you said the
21 government's position is that there is no claim.
22 So --
23 MR. STEWART: Certainly, our position
24 -- we haven't analyzed the -- the Gonzalez --
25 JUSTICE BARRETT: Right.

1 MR. STEWART: -- complaint in detail,
2 but that is our position as to the Twitter
3 complaint. And Mr. Schnapper said he doesn't
4 perceive a material difference between the two.
5 Now, presumably, the Court granted
6 cert in both cases because it thought it would
7 at least be helpful to clarify the law both as
8 to the Antiterrorism Act and as to Section
9 230(c)(1). But if the Court no longer believes
10 that or if it resolves Twitter in such a way
11 that it seems evident that its decision on the
12 230(c)(1) issue wouldn't ultimately be
13 outcome-determinative in Gonzalez, then it could
14 vacate and remand for further analysis of the
15 ATA question. That would be a permissible -- I
16 mean, a possible course of action.
17 JUSTICE BARRETT: Okay.
18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.
20 We're talking about the prospect of
21 significant liability in litigation. And -- and
22 up to this point, people have focused on the ATA
23 because that's the one point that's at issue
24 here.
25 But I suspect there would be many,

1 many times more defamation suits, discrimination
2 suits, as -- as some of the discussion has been
3 this morning, infliction of emotional distress,
4 antitrust actions.
5 I -- I mean, it -- I guess I'd be
6 interested to understand exactly what the
7 government's position is on the scope of the
8 actions that could be brought and whether or not
9 we ought to be -- I mean, it would seem to me
10 that the terrorism support thing would be just a
11 tiny bit of all the other stuff. And why
12 shouldn't we be concerned about that?
13 MR. STEWART: Let me just address the
14 -- the potential causes of action that you
15 mentioned. For defamation, even if somebody is
16 suing about the recommendation, 230(c)(1) still
17 directs that the platform can't be treated as
18 the publisher or speaker of the underlying
19 content. And so the question --
20 CHIEF JUSTICE ROBERTS: Well, right.
21 But it's -- it's -- defamation law is implicated
22 if you repeat libel, even though you didn't
23 originally commit defamation.
24 MR. STEWART: If you repeat it, and so
25 if YouTube circulated videos with a little blurb

1 saying -- and I think one of the amicus briefs
2 describes this hypothetical scenario -- if you
3 repeated it with a little blurb saying this
4 video shows that John Smith is a murderer, then,
5 yes, there would be liability. But --
6 CHIEF JUSTICE ROBERTS: But there
7 wouldn't be if you just repeated it without any
8 commentary? Normally, it would be if you're the
9 newspaper and you just publish something, so and
10 so's a shoplifter, the newspaper would be liable
11 for that.
12 MR. STEWART: No, we think it should
13 be analyzed as though it were an explicit
14 recommendation. And so if Google had posted a
15 message that we said we recommend that you watch
16 this video, now the recommendation would be its
17 own content. But in answering the question can
18 it be held liable for defamation, you would ask:
19 Can a person under the law of the applicable --
20 of the relevant state be held liable for
21 recommending content that is itself defamatory,
22 if the recommender does not repeat the
23 defamatory aspects of that content in the course
24 of the recommendation?
25 And our understanding is that at least

1 under the common law the answer to that would be
2 no, that simply saying you should read this book
3 that turns out to be defamatory would not be
4 basis for defamation liability.
5 I think the same would basically be
6 true of intentional infliction of emotional
7 distress. That is, unless you could show that
8 the platform was acting with the intent to cause
9 emotional distress by circulating the video,
10 there would be no liability. And the fact that
11 the third-party poster may have met the elements
12 of that offense wouldn't carry the day.
13 With respect to antitrust, if you had
14 a claim that a particular search engine had
15 configured its results in such a way as to boost
16 its own products or to diminish the search
17 results for products of the competitor and if
18 that were found to be a viable claim under the
19 antitrust laws, there would be no reason to
20 insulate the provider from liability for that.
21 CHIEF JUSTICE ROBERTS: Now that's --
22 that's a broad overview of a lot of different
23 areas of law, but, certainly, the law is not
24 established the way you're suggesting, I -- I
25 think, in any of those areas.

1 MR. STEWART: But I guess the question
2 is, what did Congress intend to do or what did
3 it do when it passed this statute?
4 And Congress didn't create anything
5 that was -- even resembled a -- an all purposes
6 of immunity, immunity for anything it might do
7 in the course of its functions. It focused very
8 precisely on information provided by another
9 information content provider.
10 CHIEF JUSTICE ROBERTS: Thank you,
11 thank you.
12 Justice Thomas?
13 Justice Alito?
14 JUSTICE ALITO: In the government's
15 view, are there any circumstances in which an
16 Internet service provider could be sued for
17 defamatory content in a video that it provides?
18 MR. STEWART: I think --
19 JUSTICE ALITO: Third-party video.
20 MR. STEWART: -- I think the only --
21 given our understanding of the -- the common
22 law, I think the only way that would happen is
23 if the third-party provider, in circulating the
24 video, added its own comment that incorporated
25 the defamatory gist of the allegations.

1 And as the Chief Justice was pointing
2 out, it is true that under common law, if you
3 repeat somebody else's defamatory statement but
4 say what it is, that you can be held liable for
5 that.
6 JUSTICE ALITO: I mean, imagine the
7 most defamatory -- terribly defamatory video.
8 So suppose the competitor of a restaurant posts
9 a video saying that this rival restaurant
10 suffers from all sorts of health problems, it --
11 it creates a fake video showing rats running
12 around in the kitchen, it says that the chef has
13 some highly communicable disease and so forth,
14 and YouTube knows that this is defamatory, knows
15 it's -- it's completely false, and yet refuses
16 to take it down.
17 They could not be civilly liable for
18 that?
19 MR. STEWART: That -- that's our -- I
20 mean, we think that Zeran -- Zeran was not
21 exactly a defamation case, but it fit within --
22 pretty closely within that profile. That is,
23 Zeran was the early Fourth Circuit case in which
24 a person posted a video that purported to be
25 from another person and subjected that other

1 person to complaints and harassment that seemed
2 justified to -- to the people who were doing it.
3 JUSTICE ALITO: Well, did any -- did
4 any entity have that scope of protection under
5 common law?
6 MR. STEWART: No, not -- no, I don't
7 believe so. And that was the point of (c)(1).
8 The point of (c)(1) was to say --
9 JUSTICE ALITO: Well, it was at least
10 to -- to shield Internet service providers from
11 liability they -- excuse me -- based on their
12 status as a publisher.
13 MR. STEWART: I -- I wouldn't put it
14 as --
15 JUSTICE ALITO: But even a distributor
16 wouldn't have immunity if it knew as a matter of
17 fact that this material that it was distributing
18 was defamatory, isn't that right?
19 MR. STEWART: I mean, that -- that --
20 that is right. I think we would think of the
21 distributor as a subcategory of publisher, but,
22 yes, the book seller would not be strictly
23 liable. And, obviously, Justice Thomas --
24 JUSTICE ALITO: You really think that
25 Congress meant to go that far?

1 MR. STEWART: We -- we do, but,
2 obviously, that is -- if we're arguing about
3 whether the failure to take something down is
4 actionable if it is done knowingly and with an
5 understanding of the contents, then that --
6 that's a very different argument from the one
7 that we've been having up to this point.
8 That -- that would be saying that the
9 statute should be construed --
10 JUSTICE ALITO: But that is your --
11 but that is your position?
12 MR. STEWART: Our position --
13 JUSTICE ALITO: That is the
14 government's position, is it not?
15 MR. STEWART: -- our position -- yes,
16 our position is that if the -- if the wrong
17 alleged is simply the failure to block or remove
18 the third-party content, that 230(c)(1) protects
19 the platform from liability for that, whether
20 it's based on a strict liability theory or on a
21 theory -- theory of negligence or
22 unreasonableness in failing to take the material
23 down upon request.
24 JUSTICE ALITO: The Internet service
25 provider wants to -- really has it in for

1 somebody, wants to harm this person as much as
2 possible, and so posts extraordinarily gruesome
3 videos of a family member who's been involved in
4 an automobile accident or something like that.
5 MR. STEWART: Well, when you use the
6 verb "posts," that -- that's a different
7 analysis. That is, if YouTube created --
8 JUSTICE ALITO: No, it's provided by
9 somebody else, and YouTube knows that it's --
10 knows what it's -- what it is, and yet it puts
11 it up and refuses to take it down.
12 MR. STEWART: Yes. Our view is, if
13 the only wrong alleged is the failure to block
14 or remove, that would be protected by 230(c)(1).
15 But -- but that's -- the 230(c)(1) protection
16 doesn't go beyond that. And the theory of
17 protecting the -- the website from that was that
18 the wrong is essentially done by the person who
19 makes the post, the website at most allows the
20 harm to continue.
21 And what we're talking about when
22 we're talking about the -- the website's own
23 choices are affirmative acts by the website, not
24 simply allowing third-party material to stay on
25 the platform.

1 JUSTICE ALITO: So an express
2 recommendation would potentially subject YouTube
3 to civil liabilities. So they put up -- they
4 say, watch this ISIS video, spectacular, okay,
5 they could be liable there?
6 MR. STEWART: Yes, if the other
7 elements --
8 JUSTICE ALITO: If it's expressed.
9 What if it's just implicit? What if it's the
10 fact that they put this up first and therefore
11 amplify the message of that?
12 MR. STEWART: Again, you would have to
13 ask -- they -- they could potentially be held
14 liable for that, but you would have to ask
15 whether the elements of the relevant tort have
16 been shown. And with respect to the ATA, those
17 elements include scienter, causation of the
18 relevant harm, et cetera.
19 If you were looking at another cause
20 of action, you would look at those elements.
21 And I think part of our reason for preferring
22 that most of the work be done at the liability
23 stage rather than the 230(c)(1) stage is, rather
24 than do a kind of undirected inquiry into
25 whether this seems neutral enough, you would be

1 looking at a specific cause of action and asking
2 but for 230(c)(1), would this be an actionable
3 tort under --
4 JUSTICE KAGAN: Let me just make sure
5 I understand. Let's talk about defamation and
6 an explicit recommendation, go watch this video,
7 it's the greatest of all time, okay? But it
8 does not repeat anything about the video. It
9 just says go watch this video, it's the greatest
10 of all time. And the video is terribly
11 defamatory in the way Justice Alito was
12 describing.
13 Now is the provider on the hook for
14 that defamation?
15 MR. STEWART: The two things I would
16 say are that depends on the defamation law of
17 the relevant state, and, as we say in the brief,
18 you should analyze that as though the platform
19 was recommending in the same terms a video
20 posted on another site.
21 So, if it would give rise to
22 defamation liability under the law of the
23 relevant state to give that sort of glowing
24 recommendation of content posted on a different
25 platform, then there's no reason that YouTube

1 should be off the hook by virtue of the fact
2 that the material was on its own platform.
3 JUSTICE KAGAN: And -- and now it's --
4 CHIEF JUSTICE ROBERTS: Thank you.
5 Justice Sotomayor, anything further?
6 JUSTICE SOTOMAYOR: Let's assume we're
7 looking for a line because it's clear from our
8 questions we are, okay? And let's assume that
9 we're uncomfortable with a line that says merely
10 recommending something without adornment, you
11 suggest, we -- you're -- you might be interested
12 in this, something neutral, not something like
13 they're right, watch this video, because I could
14 see someone possibly having a defamation action
15 if they said -- if I said that video is right
16 about that person.
17 I could see someone saying that I'm
18 spreading a defamatory statement, correct?
19 MR. STEWART: I mean, we -- we don't
20 understand the common law to have operated in
21 that way, but, obviously, the laws vary from
22 state to state and a particular law -- state
23 could adopt a law to that effect.
24 JUSTICE SOTOMAYOR: All right. How do
25 we draw a line so we don't have to go past the

1 complaint in every case?
2 MR. STEWART: I mean --
3 JUSTICE SOTOMAYOR: And I think that's
4 where my colleagues seem to be suffering.
5 And I understand your point, which is
6 there is a line at which affirmative action by
7 an Internet provider should not get them
8 protection under 230(c) because that seems
9 logical. The -- the example I used earlier, the
10 dating site, they create a search engine that
11 discriminates. Their action is in creating the
12 search engine. And I would think they would be
13 liable for that. So tell -- tell me how we get
14 there.
15 MR. STEWART: I guess whether they
16 would be liable would depend on the applicable
17 substantive law, which could be a federal law or
18 it could be a state law. And those questions,
19 obviously, are -- are routinely decided at the
20 motion to dismiss stage. That is, with respect
21 to the search engine choices that I described
22 earlier, do you include misspellings or not?
23 The plaintiff would still have to identify a law
24 that was violated by the choice that the search
25 engine made and would have to allege facts

1 sufficient to show a violation of law.
2 And -- and suits like that could
3 easily be dismissed at the pleading stage. But
4 it would at least predominantly be a question of
5 the adequacy of the allegations under the
6 underlying law.
7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 JUSTICE KAGAN: I guess I thought that
9 the claims in these kinds of suits are that in
10 making the recommendation or in presenting
11 something as first, so really prioritizing it,
12 that the -- the provider is -- is amplifying the
13 harm, is creating a kind of harm that wouldn't
14 have existed had the provider made other
15 choices.
16 Are you saying that that -- that is
17 something that could lead to liability or is
18 not?
19 MR. STEWART: I think it is something
20 that could lead to liability, but, again, it
21 would -- you would have to establish the
22 elements of the -- of the substantive law. And
23 so kind of the hypothetical we're concerned with
24 and the hypothetical that I -- I think would
25 come out in our view as the wrong way under

1 Respondent's theory is imagine a particular
2 platform had been systematically promoting
3 third-party ISIS videos and promoting in the
4 sense of putting them at the top of people's
5 queues, not of adding their own messages, in
6 order to enlist support for ISIS.
7 If that was the motivation and you
8 could show the right causal link to a particular
9 act of international terrorism, then that could
10 give rise to liability under the ATA.
11 JUSTICE KAGAN: And you're not saying
12 that the motivation matters for 230; you're
13 saying that the motivation matters with respect
14 to the -- the liability question down the road,
15 right?
16 MR. STEWART: Exactly. Exactly.
17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch?
19 JUSTICE GORSUCH: Mr. Stewart, I just
20 again kind of want to make sure I understand
21 your argument, and so I'm going to ask you a
22 question similar to what I asked Mr. Schnapper,
23 which is the Ninth Circuit held that any
24 information a company provides using neutral
25 tools is protected under 230. That's at 34a of

1 the -- of the petition.

2 And your argument is that this neutral

3 tools test isn't in the statute. What is in the

4 statute is a distinction on the one hand between

5 interactive computer service and access software

6 providers and on the other hand content

7 providers.

8 And when we look at that, the access

9 software provider is protected for picking,

10 choosing, analyzing, or even digesting content.

11 So 230 protects an access software provider, an

12 interactive computer service provider, who does

13 any of those things, whether using a neutral

14 tool or not. They -- they can order, they can

15 pick, they can choose, they can analyze, they

16 can digest however they wish and they're

17 protected, even those -- even though those

18 editorial functions we might well think of as

19 some form of content in our First Amendment

20 jurisprudence, but, here, they're shielded by

21 230.

22 And then your argument, I think, goes

23 that none of that means that they're protected

24 for content generated beyond those functions.

25 And it doesn't matter whether that content is

1 generated by neutral rules or not. That content
2 is actionable whether the -- and one could think
3 of content generated by neutral rules, for
4 example, by artificial intelligence.
5 And another problem also is that it
6 begs the question what a neutral rule is. Is an
7 algorithm always neutral? Don't many of them
8 seek to profit-maximize or promote their own
9 products? Some might even prefer one point of
10 view over another.
11 And because the Ninth Circuit applied
12 the wrong test, this neutral tools test, rather
13 than the content test, we should remand the case
14 for reconsideration under the appropriate
15 standard. Is that a fair summary of your
16 position? And, if not, what am I missing?
17 MR. STEWART: I think the thing -- the
18 aspect of that we would disagree with is we
19 don't think that the definition of "access
20 software provider" means that an entity is
21 immune from liability for performing all of
22 those functions.
23 The statute makes clear that even if
24 you perform those sorting, arranging, et cetera,
25 functions, you still fall within the definition

1 of "interactive computer service," and you are
2 still entitled to the protection of (c)(1).
3 But the protection of (c)(1) is
4 protection from liability for the third-party
5 content. And so, if you perform those sorting
6 functions in a way that was otherwise unlawful,
7 you could be on the hook for that.
8 And that -- that takes me back to the
9 hypothetical about the job placement service
10 that discriminates based on race. The -- the
11 allegation of the job placement -- of that job
12 placement service is not that it created any of
13 its own content. The allegation would be that
14 with respect to third-party content provided by
15 the firms that were looking for employees, it
16 had used an impermissibly legal -- a legally
17 impermissible criterion to decide which content
18 would be sent to which users. And that wouldn't
19 be protected by (c)(1) because imposing
20 liability wouldn't hold the platform -- wouldn't
21 treat the platform as the publisher or speaker
22 of the third-party content.
23 JUSTICE GORSUCH: Thank you.
24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh?

1 JUSTICE KAVANAUGH: First, to follow
2 up on Justice Alito's question, the distributor
3 liability question, my understanding is that
4 issue is not before us at this time, right?
5 MR. STEWART: That's correct.
6 JUSTICE KAVANAUGH: And your position,
7 though, or your response to him suggested that
8 if we were addressing that, the reason that
9 falls within 230 is because the distributor at
10 common law or at least by 1996 was treated as a
11 secondary publisher in the circumstances
12 described there. Is that --
13 MR. STEWART: That's basically
14 correct, yes.
15 JUSTICE KAVANAUGH: Okay. Then
16 focusing on the text of the statute and
17 following up on Justice Gorsuch's question, it
18 seems to me that the key move in your position
19 as I understand it is to treat organization
20 through the algorithms as the same thing as an
21 express recommendation. Is that accurate?
22 MR. STEWART: I don't -- I don't think
23 we would put it quite that way. That is, in
24 some instances, if the operation of the
25 algorithm causes particular content to appear in

1 a particular person's queue that the person
2 hadn't requested, then that person might
3 perceive it to be a recommendation at least to
4 the effect that you will like this based on what
5 you have seen before.
6 So algorithms can't have that effect.
7 I don't know that we would equate the two. I
8 think we would say more the recommendation is
9 simply one instance of the platform potentially
10 being held liable for its own content rather
11 than the third-party content.
12 JUSTICE KAVANAUGH: And if the
13 algorithm prioritizes certain content, that
14 becomes the platform's own speech under your
15 theory of 231, correct -- or 230?
16 MR. STEWART: I don't know that we
17 would call it the platform's own speech, but
18 it's the platform's own conduct, the platform's
19 own choice. And so, if -- if it violated
20 antitrust law, for instance, to prioritize
21 search results in a particular way, whether or
22 not you thought of that as speech by the -- the
23 platform, it would be the platform's own
24 conduct. Holding it liable for that sort of
25 ordering wouldn't be treating it as the

1 publisher or speaker of any of the third-party
2 submissions.
3 JUSTICE KAVANAUGH: So the other side
4 and the amici say that happens -- that's what
5 the -- and Justice Kagan's question, that's
6 happening everywhere.
7 MR. STEWART: And --
8 JUSTICE KAVANAUGH: And, therefore,
9 230 really becomes somewhat meaningless, and
10 you've read what makes the definition of
11 "interactive computer service," including
12 organizing, to be a self-defeating provision
13 that really does nothing at all.
14 MR. STEWART: No, I think -- I mean, I
15 think, if -- if it is happening everywhere, that
16 is, if search engines are using a wide variety
17 of mechanisms to decide how content should be
18 ordered, that --
19 JUSTICE KAVANAUGH: Do you disagree
20 with that? I mean, that's all --
21 MR. STEWART: No, I -- no, I agree
22 with that.
23 JUSTICE KAVANAUGH: Okay.
24 MR. STEWART: And I think that's
25 probably because there are very few, if any,

1 laws out there that direct Internet service
2 providers to order the content in a particular
3 way.
4 If a particular legislature wanted to
5 say it will now be a violation of our law to
6 give greater priority to search results of
7 companies that advertise with you, then the
8 question whether that could violate the Commerce
9 Clause, the question whether it could violate
10 the First Amendment, those would be live
11 questions.
12 They wouldn't be 230(c)(1) questions
13 because the state's attempt to impose liability
14 on that rationale would not be an attempt to
15 hold the platform liable as the publisher or
16 speaker of the third-party content.
17 JUSTICE KAVANAUGH: Thank you.
18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?
20 JUSTICE BARRETT: I want to ask you
21 the question that Mr. Schnapper and I went back
22 and forth about, thumbnails versus screenshots.
23 What would the government's position on that be?
24 So, if there were screenshots on the
25 side, his objection seemed to be that it was

1 Google's content because YouTube creates these
2 thumbnails.
3 MR. STEWART: And that -- that was one
4 aspect of Mr. Schnapper's theory that we
5 disagreed --
6 JUSTICE BARRETT: Disagreed.
7 MR. STEWART: -- with in the brief.
8 That is, we thought that it's
9 basically the same content, the same information
10 either way, even if in the one instance Google
11 is creating a URL and in the other instance it's
12 not.
13 JUSTICE BARRETT: So, for purposes of
14 this case, is there any difference -- let's
15 imagine that the Google algorithm when you
16 search for ISIS prioritizes videos produced by
17 ISIS in search results. I'm not talking about
18 being on YouTube. Content produced by ISIS, as
19 opposed to articles, if you're just looking for
20 articles about ISIS, they could be critical of
21 ISIS, they could be all kinds of things, but in
22 the search result rankings, you first get the
23 article -- the articles written by ISIS, videos
24 made by ISIS.
25 Is that the same thing as this case

1 then?

2 MR. STEWART: I think that would be

3 the same thing as this case because we would say

4 the fact that the videos appear in that order is

5 the result of choices made by the platform, not

6 the choice of any person who posted an ISIS

7 video on the platform.

8 And Congress -- it was very important

9 to Congress to absolve the platforms of

10 liability for the third-party content, but it

11 didn't try to go beyond that. The likelihood

12 that ISIS would be held liable just for that

13 seems very, very slim, but it would not be a 231

14 -- 230(c)(1) question, it would be a question

15 under whatever cause of action the plaintiff

16 invoked.

17 JUSTICE BARRETT: Okay. And then what

18 about users and retweets and likes, the question

19 I asked Mr. Schnapper about that. So, you know,

20 I gather 230(c) would protect me from liability

21 if I simply retweeted.

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

23 if I retweet it, am I doing something different

24 than pointing to third-party content?

25 MR. STEWART: I mean, I think,

1 honestly, there hasn't been a lot of litigation
2 over the -- the -- the user prong of it, and
3 those are difficult issues. I think 230(c)(1)
4 at the very least would say just by virtue of
5 having retweeted, you can't be treated as though
6 you had made the original post yourself.
7 But, with respect to you retweet, can
8 the retweet itself be grounds for liability,
9 I -- I'm not sure, and I doubt that there would
10 be much of a common law history to draw upon.
11 JUSTICE BARRETT: So you -- but the
12 logic of your position, I think, is that
13 retweets or likes or check this out, for users,
14 the logic of your position would be that 230
15 would not protect in that situation either,
16 correct?
17 MR. STEWART: I -- I think it would --
18 I think more or less the case, the -- the one
19 difference I would point to between the user and
20 the platform is the user is -- who reads a tweet
21 is typically making an individualized choice, do
22 I want to like this tweet, retweet it, or
23 neither, whereas the -- the platform decisions
24 about which video should wind up in -- in my
25 queue at a particular point in time, there's no

1 live human being making that choice on an
2 individualized basis. It's being -- that --
3 those choices are being made on a systemic
4 basis.
5 JUSTICE BARRETT: Thank you.
6 CHIEF JUSTICE ROBERTS: Justice
7 Jackson?
8 JUSTICE JACKSON: Yes. So can -- can
9 you help me to understand whether there really
10 is a difference between the recommendations and
11 what you say is core 230 conduct?
12 I mean, I get -- I get and I'm holding
13 firm in my mind that 230 immunity, Congress
14 intended it to be directed to certain conduct by
15 the platform and that conduct is its failure to
16 block or screen the offensive conduct, so that
17 if the claim is this offensive content is on
18 your website and you didn't block or screen it,
19 230 says you're immune. I get that.
20 I guess what I'm trying to understand
21 is whether you say and plaintiff says,
22 Petitioner in this case says, well, what they're
23 really doing in the situation in which they
24 display it under a banner that says "up next" is
25 more than just providing that content and

1 failing to block it. They are promoting it in
2 some way.
3 And I -- I'm really drilling down on
4 whether or not there is actually a distinction
5 in a world of the Internet where, as Ms. Blatt
6 and others have said, in order to be a platform,
7 what you're doing is you have an algorithm, and
8 in the universe of things that exist, you are
9 presenting it to people so that they can read
10 it.
11 Why -- why is that -- even though
12 it's -- you know, you call it a recommendation
13 or whatever, why is that act any different than
14 being a publisher who has this information and
15 hasn't taken it down?
16 MR. STEWART: I mean, I think I would
17 say, in -- in the situation that 230(c)(1) was
18 designed to address, the decision whether the
19 material would go up on the platform was not
20 that of the platform itself, it was the decision
21 of the third-party poster.
22 And Congress said, once that has
23 happened, you also can't be liable for failing
24 to take it down. But, with respect to what
25 prominence you give it, that's the result of

1 your own choice, not the third-party poster.
2 Now, in most circumstances, it won't
3 make a difference because the recommendation
4 won't be actionable. And so what we are
5 concerned with is the -- the hypothetical that I
6 suggested earlier. You have --
7 JUSTICE JACKSON: Yes. I mean, I get
8 the -- I get the liability piece and all of
9 the -- the parade of horribles will depend on
10 whether or not they can actually be held liable
11 for organizing it in a certain way. And you say
12 they probably can't. And others say they might
13 be able to. And that's a separate issue.
14 Just back on the 230 piece of it, in
15 terms of Congress's intent with respect to the
16 scope of immunity, I'm -- I -- I guess I just
17 want to understand why Google or YouTube, when
18 they have a box that brings up all of the ISIS
19 videos and tees them up, and if you don't do
20 anything, they just keep playing, why that's
21 actually different than the newspaper publisher
22 who gets the offensive content and decides to
23 put it on page 1 versus page 20, it seemed like
24 Congress in 230 was saying, if you -- if -- if
25 under the common law a newspaper publisher would

1 be liable for having put it on page 1 or
2 whatever and given it to people, we don't want
3 that to be the case for these Internet service
4 companies.
5 And so I -- I don't know that I
6 understand fully why the fact that it's
7 called -- that you call it a recommendation or
8 whatever is actually any different.
9 MR. STEWART: I -- I guess one
10 difference I would point to is newspaper
11 publishers can make decisions about what will be
12 on the front page and what'll be in the back,
13 but it's going to be the same for everybody.
14 And one of the things about why we
15 call them targeted recommendations with YouTube
16 is they are being sent differently to different
17 users. And the situation we're concerned with
18 is what if a platform is able through its
19 algorithms to identify users who are likely to
20 be especially receptive to ISIS's message, and
21 what if it systematically attempts to radicalize
22 them by sending more and more and more and more
23 extreme ISIS videos, is that the sort of
24 behavior that implicates either the text or the
25 purposes of Section 230(c)(1), and we would say

1 that it doesn't.

2 JUSTICE JACKSON: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,

4 counsel.

5 MR. STEWART: Thank you.

6 CHIEF JUSTICE ROBERTS: Ms. Blatt.

7 ORAL ARGUMENT OF LISA S. BLATT

8 ON BEHALF OF THE RESPONDENT

9 MS. BLATT: Mr. Chief Justice, and may

10 it please the Court:

11 Section 230(c)(1)'s 26 words created

12 today's Internet. (c)(1) forbids treating

13 websites as "the publisher or speaker of any

14 information provided by another." Publication

15 means communicating information. So, when

16 websites communicate third-party information and

17 the plaintiff's harm flows from that

18 information, (c)(1) bars the claim.

19 The other side agrees Section 230 bars

20 any claim that YouTube aided and abetted ISIS by

21 broadcasting ISIS videos. So they instead focus

22 on YouTube's organization of videos based on

23 what's known about viewers, what they call

24 targeted recommendations. They say that feature

25 can be separated out because it implicitly

1 conveys what viewers should watch or that they
2 might like the content.
3 But accepting that theory would let
4 plaintiffs always plead around (c)(1). All
5 publishing requires organization and inherently
6 conveys that same implicit message.
7 Plaintiffs should not be able to
8 circumvent (c)(1) by pointing to features
9 inherent in all publishing. (c)(1) reflects
10 Congress's choice to shield websites for
11 publishing other people's speech, even if they
12 intentionally publish other people's harmful
13 speech.
14 Congress made that choice to stop
15 lawsuits from stifling the Internet in its
16 infancy. The result has been revolutionary.
17 Innovators opened up new frontiers for the world
18 to share infinite information, and websites
19 necessarily pick, choose, and organize what
20 third-party information users see first.
21 Helping users find the proverbial
22 needle in the haystack is an existential
23 necessity on the Internet. Search engines thus
24 tailor what users see based on what's known
25 about users. So does Amazon, Tripadvisor,

1 Wikipedia, Yelp!, Zillow, and countless video,
2 music, news, job-finding, social media, and
3 dating websites. Exposing websites to liability
4 for implicitly recommending third-party context
5 defies the text and threatens today's Internet.
6 I welcome your questions.
7 JUSTICE THOMAS: Ms. Blatt, is --
8 could you give me an example of, not a
9 recommendation, but an endorsement similar to
10 this that would take you beyond 230?
11 MS. BLATT: Sure. So whenever you
12 have something that's going beyond the implicit
13 features of publishing and you have an express
14 statement, you have a continuum, and this
15 continuum is this: You have something that's
16 the functional equivalent of an implicit
17 message, basically a topic heading or "Up next,"
18 all the way to the other extreme of an
19 endorsement of the content, such that the
20 website is adopting the content as its own.
21 Now, when you have that situation, the
22 claim is fairly treating the website for
23 publishing its own speech, and you can separate
24 that out from the harm that's just coming from
25 the information provided by another.

1 And the danger which your
2 hypotheticals has raised with express speech is
3 where on that continuum any express speech may
4 go, because unlike Google and YouTube, which are
5 the two world's largest sites, we don't have a
6 lot of endorsements and that kind of stuff, but
7 other websites and other users use a myriad of
8 topic headings and emojis that have different
9 meanings that I'm not prepared and you would
10 have to know what they mean, like kinds of
11 checkmarks and, I don't know, high fives and all
12 kinds of things.
13 But the basic features of topic
14 headings, "Up next," "Trending now," those kinds
15 of things we would say are core, inherent --
16 they're no different than expressing what is
17 implicit in any publishing, which is we hope you
18 read this.
19 CHIEF JUSTICE ROBERTS: Well, it seems
20 to me that the language of the statute doesn't
21 go that far. It says that -- their claim is
22 limited, as I understand it, to the
23 recommendations themselves. In other words,
24 this -- this is the list of things that you
25 might like.

1 But that information, the
2 recommendation, is not provided -- under the
3 words of the statute, it's not provided by
4 another information content provider. It's
5 provided by YouTube or -- or Google.
6 And so, although whatever the
7 liability issue may be, there's some issue
8 tomorrow and there are a lot of others, the
9 presence of an immunity under 230(c), it seems
10 to me, is just not directly applicable.
11 MS. BLATT: Well, that's incorrect
12 because of the word "recommendation." There is
13 no word called "recommendation" on YouTube's
14 website. It is videos that are posted by third
15 parties. That is solely information provided by
16 another.
17 You could say any posting is a
18 recommendation. Any time anyone publishes
19 something, you could be said, it's a
20 recommendation. Anything.
21 CHIEF JUSTICE ROBERTS: Well, the
22 videos just don't appear out of thin air. They
23 appear pursuant to the algorithms that your
24 clients have. And those algorithms must be
25 targeted to something. And they're targeted --

1 that targeting, I think, is fairly called a
2 recommendation, and that is Google's. That's
3 not the -- the provider of the underlying
4 information.
5 MS. BLATT: So nothing in the statute
6 or the common law defamation turns on the degree
7 of tailoring or how you organized it. There's
8 no distinct actionable message. If you say I
9 think my readers would all be interested in this
10 or I think the readers in ZIP code 2005 would be
11 interested in it, or you walk up to someone and
12 say I'm going to defame someone because I
13 thought you might be interested in it, it's
14 still publishing.
15 And the other side gives you no line
16 and no way to say in some way that would be
17 workable or give websites or users any clarity
18 of how you would organize the world's
19 information. Just think about search. There
20 are 3.5 billion searches per day. All of those
21 are displays of other people's information. And
22 you could call all of them a recommendation that
23 are tailored to the user because all search
24 engines take user information into account.
25 They take the location, the language, and what

1 have you.

2 And I can give the example of

3 football. Football -- the same two users will

4 enter the word "football" and get radically

5 different results based on the user's past

6 search history and their location and their

7 language because most of the world thinks of

8 football as soccer, not the way we do.

9 And so if you go down this road of did

10 you target it, then you have to say how much?

11 Was the topic hitting too much? Was it okay to

12 have a violence channel? Was it okay to have a

13 sex channel? Was it okay to have, you know,

14 what have you, some other channel about skinny

15 models that you could say, well, that just kept

16 repeating the -- the channel and that made me

17 crazy. So --

18 JUSTICE JACKSON: But, Ms. -- Ms.

19 Blatt, Mr. Stewart suggests all of those kinds

20 of questions in terms of the extent of liability

21 for this kind of organization would be addressed

22 in the context of liability, not -- by that I

23 mean each state -- when somebody tried to claim

24 that YouTube had done something improper in

25 terms of pulling up those kinds of videos, that

1 each state would then look and determine, based
2 on their own, you know, common law, whether or
3 not you were liable. And he posits that that
4 wouldn't happen very often. But we don't know.
5 My question is isn't there something
6 different to what Congress was trying to do with
7 230? Isn't it true that that statute had a more
8 narrow scope of immunity than is -- than courts
9 have, you know, ultimately interpreted it to
10 have and that what YouTube is arguing here
11 today, and that it really was just about making
12 sure that your platform and other platforms
13 weren't disincentivized to block and screen and
14 remove offensive conduct -- content?
15 And so to the extent the question
16 today is, well, can we be sued for making
17 recommendations, that's just not something the
18 statute was directed to.
19 MS. BLATT: So can I take this in two
20 parts? Because I -- I feel like your first part
21 of your question is addressing what the dispute
22 is between the parties, and the second part of
23 your question goes most deeper, and which is,
24 you know, beyond the question presented.
25 But just on your first question about

1 why not -- why do you need an immunity as
2 opposed to liability, and in our view, that's
3 like saying -- I mean, that's death by a
4 thousand cuts, and the Internet would have never
5 gotten off the ground if anybody could sue every
6 time and it was left up to 50 states' negligence
7 regime.
8 And let me give you an example. A
9 website could put something alphabetical in
10 terms of reviews, and every Young, Williams and
11 Zimmerman, i.e., X, Y, Z, could say, well, that
12 was negligent because you should have rated it
13 somewhere else.
14 JUSTICE JACKSON: No, I totally
15 understand that. But I think my things are not
16 actually different.
17 What I'm saying is that problem that
18 you identify, which is a real problem, the
19 Internet never would have gotten off the ground
20 if everybody would have sued, was not what
21 Congress was concerned about at the time it
22 enacted this statute.
23 MS. BLATT: Well, so I -- that's
24 correct. I mean, that's incorrect for a number
25 of reasons. And we can talk about what two

1 choices you're talking about. There's only two
2 arguments on the table for what you could think
3 that (c)(1) does.
4 And that is it simply says, you know,
5 no Internet -- interactive computer service
6 shall be treated as a publisher. And you could
7 think, well, there are two -- two ways of
8 looking at that. One is that you need an
9 external law that has publication as an element.
10 And then, second, which I think that your
11 question may be going to, is it only directed to
12 eliminating forms of strict liability across all
13 causes of action? And so both -- both of those
14 ways are highly problematic and also inaccurate,
15 given what was happening in 1996.
16 In terms of just looking at this as is
17 this just talking about defamation, it plainly
18 can't be because the statute would be a dead
19 letter upon inception because any defamation
20 cause of action can be replead as negligence or
21 intentional infliction of emotional distress.
22 So we think the word "treat," which
23 means to regard, applies whenever the claim is
24 treating the -- or imposing liability because --
25 by virtue of publishing; in other words --

1 JUSTICE JACKSON: But what do you do
2 -- what do you do with the title and the content
3 and the context? Right? The title of Section
4 230 is "protection for private blocking and
5 screening of offensive material."
6 MS. BLATT: So let me just pinpoint,
7 then, the second one, which hopefully I won't --
8 we'll get to on section (e), which is all the
9 exceptions.
10 But in terms of the title, Stratton
11 Oakmont and restrictions, (c)(1) and (c)(2) are
12 a pair. So what you have is (c)(2) is -- and
13 they work together, and if you -- every time you
14 weaken (c)(1), you make (c)(2) useless and
15 defeats the whole point of this statute, at
16 least in terms of cleaning up the Internet.
17 (c)(2) is just a safe harbor and
18 directs what happens when you take stuff down.
19 It says nothing about what happens to the
20 content that's left up. And so the more any
21 website removes material, it perversely is
22 showing that it has knowledge or should have
23 known or could have known about the content that
24 was left up.
25 And so you have one of two things

1 happen -- that would happen and would have
2 happened then and would happen now. The first
3 is websites just won't take down content. And
4 that just defeats it -- the whole point, and you
5 basically have the Internet of filth, violence,
6 hate speech and everything else that's not
7 attractive.
8 And the second thing, which I think a
9 lot of the briefs are worried about in terms of
10 free speech, is you have websites taking
11 everything down and leaving up -- you know,
12 basically you take down anything that anyone
13 might object to, and then you basically have,
14 and I'm speaking figuratively and not literally,
15 but you have the Truman Show versus a horror
16 show.
17 You have only anodyne, you know,
18 cartoon-like stuff that's very happy talk, and
19 otherwise you just have garbage on the Internet.
20 And Congress would not have achieved its purpose
21 of -- and, remember, it had in all those
22 findings only three of which are addressing the
23 harmful content. Most of it is dealing with
24 having free speech flourish on the Internet,
25 jump-starting a new industry.

1 And it's inconceivable that any
2 website would have started in -- I mean, one
3 lawsuit freaked out the Congress.
4 JUSTICE KAGAN: Ms. Blatt?
5 MS. BLATT: Yes. Sorry.
6 JUSTICE KAGAN: Just suppose that this
7 were a pro-ISIS algorithm. In other words, it
8 was an algorithm that was designed to give
9 people ISIS videos, even if they hadn't
10 requested them or hadn't shown any interest in
11 them.
12 Still the same answer, that -- that --
13 that a claim built on that would get 230
14 protection?
15 MS. BLATT: Yes, except for the way
16 Justice Sotomayor raised it, which is material
17 support. So, if there's any -- I mean, there's
18 a criminal exception. So, if you have material
19 supporting collusion with ISIS, that's excepted
20 from the statute.
21 But, if I can just take the notion of
22 algorithms, either they're raising --
23 JUSTICE KAGAN: But -- but -- but what
24 I take you to be saying is that in general --
25 and this goes back to Justice Thomas's very

1 first question --

2 MS. BLATT: Yes.

3 JUSTICE KAGAN: -- in general, whether

4 it's neutral or whether it's not neutral,

5 whether it is designed to push a particular

6 message, does not matter under the statute and

7 you get protection either way?

8 MS. BLATT: That's correct. And just

9 referring -- I agree with what Justice Gorsuch

10 said, except for he was saying that somehow the

11 Ninth Circuit was at fault because it recognized

12 this was an easy case.

13 It's not the Ninth Circuit's fault

14 that the complaint said there's nothing wrong

15 with your algorithm. You just kept repeating

16 the same information, independent of any

17 content.

18 And so we shouldn't be faulted because

19 his complaint doesn't allege anything wrongful.

20 JUSTICE KAGAN: No --

21 MS. BLATT: But, in your hypothetical,

22 where someone could say -- and, again, this is

23 always going to turn on the claim. But let's

24 just think of -- I don't know what your

25 hypothetical would be about tortious speech, but

1 the bookstore example, you could decide that you
2 want to put the adult bookstore -- book -- adult
3 book section separated from the kid section.
4 That's a "biased" choice, and I'm doing scare
5 quotes for the transcript, but --
6 JUSTICE KAGAN: Or -- or have an
7 algorithm that looks for defamatory speech and
8 puts it up top, right, and you're still saying
9 230 protection?
10 MS. BLATT: So our test, when you look
11 at the claim, and so, if you have a claim for
12 defamation, is always going to look at the claim
13 and say is the harm flowing from the third-party
14 information or from the website's own conduct or
15 speech.
16 And so, if I can mention the race
17 example, that's an excellent example of the
18 claim has nothing to do with the content of the
19 third-party information. It can be --
20 JUSTICE KAGAN: Right. But this is
21 the claim would have something to do with the
22 content of the information. It would say, you
23 know, my complaint is that you just made
24 defamatory speech available to millions of
25 people who otherwise would never have seen it.

1 And you are on the hook for that. That was your
2 choice. That's your responsibility.
3 Why doesn't -- why -- why -- why
4 should there be protection for that?
5 MS. BLATT: Well, so, if there was
6 some sort of misrepresentation or some sort of
7 terms of service that you weren't going to do
8 that, but let me give you an example where this
9 opens up a can of worms is because you could say
10 that about any content, that you elevated the
11 most recent content.
12 I mean, search engines of all kinds,
13 including Google Search, but all the amici
14 briefs are telling you they have to make
15 choices. They've got an undescribable amount of
16 content, and it has to be based on something,
17 whether it's relevance to a user request, a
18 search history. If it says headache, the
19 Microsoft example, do you want something from
20 the 18 -- you know, the 1300s, or do you want
21 something that's a little more recent? Do you
22 --
23 JUSTICE BARRETT: Okay. But what if
24 -- what if -- I'm sorry, but I just want to make
25 sure in Justice Kagan's example, what if the

1 criteria, the sorting mechanism, was really
2 defamatory or pro-ISIS?
3 I guess I don't see analytically why
4 your argument wouldn't say, as Justice Kagan
5 said, that, yeah, 230 applies to that.
6 MS. BLATT: Well, I mean, it's similar
7 to your -- your 303 case. You can make a
8 distinction between content choices in terms of
9 how you would organize or deal with any kind of
10 publication, whether it's a book, a newspaper, a
11 television channel, that kind of stuff, and that
12 is inherent to all publishing. But you --
13 JUSTICE KAGAN: Right. So you're
14 saying 230 does apply to that?
15 MS. BLATT: Yes.
16 JUSTICE KAGAN: 230 gives protection
17 regardless?
18 MS. BLATT: Yes. I hope I didn't say
19 something incorrect.
20 JUSTICE KAGAN: 230 gives protection
21 --
22 MS. BLATT: Yes.
23 JUSTICE KAGAN: -- regardless, whether
24 it's like put the defamatory stuff up top, put
25 the pro-ISIS stuff on top, or whether it's, you

1 know, what -- what people might consider a more
2 content-neutral principle.
3 MS. BLATT: Correct. And let me just
4 say you have websites that are hate speech, so
5 they may be elevating more racist speech as
6 opposed to some other speech that talks about
7 how the equality of the races.
8 You might have a speech devoted to,
9 you know, an interest of a certain community,
10 like an ethnic community. So they may be
11 saying, you know what, we don't want to put some
12 other kind of content, we may want to publish
13 it, but we may want to put it further down on
14 our algorithm. And if you said -- again, this
15 is a content distinction.
16 If you have a claim that --
17 JUSTICE KAGAN: So I can't imagine
18 that -- and, you know, we're in a predicament
19 here, right, because this is a statute that was
20 written at a different time when the Internet
21 was completely different, but the problem that
22 the statute is trying to address is you're being
23 held responsible for what is another person's
24 defamatory remark.
25 Now, in my example, you're not being

1 held responsible for another person's defamatory
2 remark. You're being held responsible for your
3 choice in broadcasting that defamatory remark to
4 millions and millions of people who wouldn't
5 have seen it otherwise through this
6 pro-defamatory algorithm.
7 MS. BLATT: I mean --
8 JUSTICE KAGAN: And the question is,
9 you know, should 230 really be taken to go that
10 far?
11 MS. BLATT: The question is can you
12 carve out pro-defamatory as opposed to pro
13 anything else, pro some other type of content
14 that someone may be suing over over negligence.
15 If I can just give you an example of a
16 TV channel. When you broadcast an excessively
17 violent TV channel, you're giving it a new
18 audience that they wouldn't otherwise have.
19 It's still inherent to publishing. And if you
20 decide to run reruns of the most sexually
21 explicit and violently explicit, you could say
22 that's a bad thing, and it may be, but on your
23 choice -- but it would be protected under 230.
24 In terms of what was happening in
25 1996, I strongly disagree with the notion that

1 algorithms weren't present based on targeted
2 recommendations. The Center For Democracy and
3 Technology has this wonderful history lesson of
4 what was happening in '92 through '94 on how
5 targeted recommendations developed.
6 And you had something called news
7 groups, which were for anyone using the
8 Internet, that was sort of what people did.
9 They signed up for a news group, and those news
10 groups adopted the technology that is the
11 technology that is alleged in this case.
12 They looked at what the user was
13 looking at. Say the user was looking at science
14 news. And they thought, oh, that also user is
15 looking at some other kind of news, maybe on
16 psychology or something. And so they would make
17 recommendations based on your user history and
18 that of others.
19 Amazon two months into 1997 introduced
20 its famous feature, if you buy X, you might like
21 Y based on that technology. So this technology
22 was present starting in '92.
23 And '92 through '96, the Internet was
24 definitely different, but it was kind of a mess.
25 You still had to organize it. So there were

1 search engines. There was all kinds of features
2 that were organizing content because even then
3 it was massive. It's just now on, like, an
4 exponentially greater scale.
5 JUSTICE JACKSON: Ms. Blatt, I guess
6 my concern is that your theory that 230 covers
7 the scenario that Justice Kagan pointed out
8 seems to bear no relationship in my view to the
9 text --
10 MS. BLATT: Okay.
11 JUSTICE JACKSON: -- of the actual
12 statute.
13 MS. BLATT: Sure.
14 JUSTICE JACKSON: I mean, the -- the
15 -- when we look at 230(c), it says protection
16 for good samaritan blocking and screening of
17 offensive material, suggesting that Congress was
18 really trying to protect those Internet
19 platforms that were in good faith blocking and
20 screening offensive material.
21 Yet, if we take Justice Kagan's
22 example, you're saying the protection extends to
23 Internet platforms that are promoting offensive
24 material. So it suggests to me that it is
25 exactly the opposite of what Congress was trying

1 to do in the statute.

2 MS. BLATT: Well, I think promoting --

3 I think a lot of things are offensive that other

4 people might think are entertaining, and so --

5 JUSTICE JACKSON: No, it's not about

6 -- it's not about whether -- let's take as a

7 given we're talking about offensive material

8 because that's all through the statute, right?

9 You don't -- you don't disagree that Congress

10 was focused on offensive material, that that's

11 sort of the basis of the whole statutory scheme.

12 So, if we take as a given that we're

13 talking about offensive material, it looks to me

14 from the text of the statute that Congress is

15 trying to immunize those platforms that are

16 taking it down, that are doing things to try to

17 clean up the Internet.

18 And in the hypothetical that was just

19 presented, we have a platform that is not only

20 not taking it down in the way that the statute

21 is focused on, it is creating a separate

22 algorithm that pushes to the front so that more

23 people would see than otherwise the offensive

24 material.

25 So how is that even conceptually

1 consistent with what it looks as though this
2 statute is about?
3 MS. BLATT: Well, so just a couple
4 things. And, again, I -- we're on this
5 defamatory material. The website itself does
6 something defamatory that's not -- it's
7 independent of the third-party content. It's
8 not protected.
9 But that same hypothetical could be
10 said if it was on the front -- the home page as
11 opposed to you had to do a search engine first.
12 And I don't see anything in the statute that
13 protects it.
14 In terms of what I think your deeper
15 section is -- deeper concern is, the reading of
16 the statute, I don't think it's coterminous with
17 (c)(2), which is dealing with the type of
18 offensive material, which, by the way, doesn't
19 mention defamation.
20 In terms of (c), we talked about how
21 they work together. We talked about how it
22 could be easily overrode if it had just
23 publication. The one thing we didn't talk about
24 was the structure in Section (e). (e) is a
25 laundry list, a laundry list, of a variety of

1 exceptions under federal law to which (c)(1)
2 does not apply as well as (c)(2). And those
3 exceptions make very little sense if (c)(1) is
4 read the way you're reading it. It would almost
5 never apply to (c)(2).
6 And let's just take federal criminal
7 laws. It would make very little sense because
8 those laws -- almost none of them have strict
9 liability as an element, and vanishingly few
10 would be publication or speaking as an element.
11 It's in there for no other reason, other than
12 that (c)(1) would otherwise apply to the -- the
13 -- the information provided by another.
14 And in terms of just the pure text,
15 when you keep saying its failure to take down,
16 I'm hearing you say what Congress wrote was
17 treatment as a publisher. That means
18 dissemination. That means publishing.
19 JUSTICE JACKSON: So Congress didn't
20 say that.
21 MS. BLATT: You cannot be held liable
22 for publishing.
23 JUSTICE JACKSON: If you look at the
24 statute, it says "protection for good Samaritan
25 blocking and screening." If you take into

1 account Stratton Oakmont, if -- those things I
2 thought were like a given, what -- what the
3 people who were crafting this statute were
4 worried about was filth on the Internet and the
5 extent to which, because of that court case and
6 -- and perhaps others, the platforms were not
7 being incentivized to take it down, because if
8 they were trying to take it down like Prodigy,
9 they were going to be slammed because they were
10 going to be treated as a publisher.
11 And so the statute is like we want you
12 to take these things down, and so here's what
13 we're going to do. We're going to say that just
14 because they're on your -- your -- your website,
15 it doesn't mean you're going to be held
16 automatically liable for it. And that's (c)(1).
17 And to the extent you're in (c)(2), you're
18 trying to take it down but you don't get them
19 all, we're not going to hold you liable for it.
20 That seems to me to be a very narrow
21 scope of immunity that doesn't cover whether or
22 not you're making recommendations or promoting
23 or doing anything else.
24 MS. BLATT: Well, I mean, that that is
25 -- what I understand the government and the

1 Petitioner to be saying is that disseminating,
2 even 24/7 disseminating of ISIS videos, is
3 protected. The only thing that's not protected
4 is whether you can tease out something about the
5 organization and call it a recommendation when
6 there is no express speech recommending it.
7 It's just the placement of where in the order in
8 which content appears.
9 And that same complaint could be made
10 about search engines. So I think, under your
11 view, search engines would not be covered
12 because they are taking user information,
13 targeting recommendations in the sense of
14 they're saying we think you would be interested
15 in the first content as opposed to the content
16 on, you know, 1,692,000 sections. I mean, they
17 have millions and millions of hits for any
18 search result.
19 And if you think those are
20 recommendations and the other side gives you no
21 basis for distinguishing between search engines,
22 then the statute is just very different than I
23 think the one that Congress was talking about,
24 because, again, if you're going to look at
25 findings and history and policy, this is about

1 diversity of viewpoints, jump-starting an
2 industry, having information flourishing on the
3 Internet, and free speech.
4 JUSTICE BARRETT: Ms. Blatt, what
5 about Justice Sotomayor's dating hypothetical?
6 The discrimination, like, oh, we're only going
7 to -- we're not going to match black people and
8 white people, et cetera, what about that? Is
9 that given 230's shield?
10 MS. BLATT: Absolutely not, because
11 any disparate treatment claim or race
12 discrimination is saying you're treating people
13 different regardless of the content.
14 So if I'm -- I'm going to use it like
15 with an advertising, like I don't know, whether
16 I'm a woman of 10 or -- I mean, that was a bad
17 example -- a woman of 30 or whatever, and
18 whether I live somewhere, it really doesn't
19 matter in terms of the law that's prohibiting
20 discrimination. The law is indifferent to what
21 the content is. It's just very unhappy about
22 any kind of status-based distinction.
23 So we think -- and the -- the harm
24 that would flow is not the third-party
25 information. It's the website's conduct,

1 whether you want to call it speech or conduct,
2 that's based on status.
3 JUSTICE BARRETT: But what about the
4 dating profile? I mean, isn't that part of the
5 content? Isn't that part of the third-party
6 information?
7 MS. BLATT: Sure. And it's just --
8 you could put it a bunch of different ways. You
9 could say, even before the profiles go up,
10 there's a complete harm, or even if the profiles
11 go up, it doesn't matter. We would distinguish
12 between the way dating sites work, which don't
13 work based on status but based on criteria
14 that's uploaded, and those are, you know, you're
15 matching with somebody else. The website is not
16 saying you should only date a white person.
17 JUSTICE BARRETT: Okay. Then what
18 about news? What about an algorithm that says,
19 you know, you are a white person, you're only
20 going to be interested in news about white
21 people. And it will screen out anything that is
22 a story featuring racial justice issues.
23 MS. BLATT: Yeah, again, anything
24 based on status because the harm is complete,
25 independent of the information, but if a website

1 wants to say we're going to celebrate Black
2 History Month, no, a white person or black
3 person is not going to be able to complain and
4 say, well, I didn't get enough white history
5 month on your website. Those are claims that
6 are core within treating them as publishing of
7 the information --
8 JUSTICE BARRETT: Yeah, but I guess
9 I'm -- don't you think you're just fighting on
10 liability?
11 MS. BLATT: No.
12 JUSTICE BARRETT: I mean, it seems to
13 me that you're kind of going back to liability,
14 because all of those are choices that are made
15 independently, right? I mean, we've been
16 talking about the distinction between -- or --
17 or the lack of distinction, in your view,
18 between the content itself and the website's
19 choice of how to publish it.
20 I guess I don't see why --
21 MS. BLATT: So here's --
22 JUSTICE BARRETT: -- for 230 purposes.
23 MS. BLATT: Here's our test, and it's
24 the test the Fourth Circuit recently took in
25 Henderson, and it's the test the Ninth Circuit

1 took.
2 Let me give you an example and -- that
3 I think may help; with the ad revenue sharing.
4 So this was an allegation that YouTube was
5 giving money to ISIS. Now, this was in
6 connection with third-party videos, third-party
7 information. But the court said no, that is not
8 within Section 230 because that's independent of
9 the information, that's giving money to ISIS.
10 That kind of, whatever you think about its
11 validity under the statute, you're not treating
12 them as a publisher; you're treating them as a
13 financer.
14 And it's just -- and that's the test
15 of the Fourth Circuit too. The Fourth Circuit
16 is looking -- in that case, it was about -- you
17 know, all kinds of things were happening with
18 third-party information, and they were trying to
19 tease out is it the credit report, did they
20 contribute to the credit report, was it based on
21 the website's failure to -- to notify the
22 employee?
23 And what the Fourth Circuit said is
24 the exact same thing we said, and it's the exact
25 same thing the plaintiff has said on four pages

1 of its brief, for four times in its brief, that
2 you're looking for the harm. What is the harm
3 caused? And this case is the perfect example.
4 The plaintiffs suffered a terrible fate, and
5 their argument is it's because people were
6 radicalized by ISIS.
7 And if you start with the concession
8 that the dissemination of those ISIS videos are
9 -- and a claim based on that is barred, the
10 question is, is what additional comes from the
11 way it was organized?
12 The government just says I don't know,
13 let some state figure it out. That's not very
14 helpful to Internets that have to work on a
15 national level and are posting and sorting and
16 organizing billions upon billions upon billions
17 of piece of -- pieces of information.
18 JUSTICE BARRETT: Just to clarify,
19 this is my last point, you're happy with the
20 Henderson test, the Fourth Circuit test?
21 MS. BLATT: Yes. I would say
22 Henderson is like 96 percent correct. I got a
23 little lost when they were going down the common
24 law on publication, but the result was great. I
25 just thought they got a little weird on the

1 publication.

2 But yeah, no, their test is correct,

3 and it's also the Ninth Circuit's test on the

4 ISIS revenue. It's the exact same test we quote

5 in our brief, and it's the exact same test

6 Petitioner did.

7 And what the harm test is doing, if I

8 could just explain it because it kinds

9 shorthand, but if you take the -- which I'm not

10 sure Justice Jackson agrees with, but if you

11 take the underlying notion that this bars

12 treatment as a publisher, and you're saying,

13 well, can they get around it by the way they're

14 pleading it, you're just looking to the harm, so

15 you are saying you can't really say that's

16 negligence or intentional infliction because the

17 harm is coming from the publishing of the

18 defamatory content.

19 And so what I think all these cases

20 where the courts are correctly saying 230 does

21 not apply to the claim, is they're isolating the

22 harm and saying that's independent of the

23 third-party information. It's either based on

24 the website's own speech or it's website's own

25 conduct that's independent of the harm flowing

1 from the third-party information.
2 JUSTICE ALITO: If YouTube labeled
3 certain videos as the product of what it labels
4 as responsible news providers, that would be --
5 that would be Google's own content, right?
6 MS. BLATT: Yes. Yes.
7 JUSTICE ALITO: And --
8 MS. BLATT: Yes. Can I say one thing
9 just because --
10 JUSTICE ALITO: Yeah. Sure.
11 MS. BLATT: -- I forgot to mention
12 thumbnails? I'm sorry. Thumbnails aren't
13 mentioned in the complaint. So I was literally
14 trying to figure out what he was talking about
15 when I was up there because it's just not
16 something in the complaint. But that is a
17 screenshot of the information being provided by
18 another. It's the embedded third-party speech.
19 Okay. Sorry. Keep going.
20 JUSTICE ALITO: All right. So if --
21 but then if I do a search for today's news in
22 YouTube -- and in fact, I did that yesterday --
23 and all the top hits were very well-known news
24 sources. Those are not recommendations. That's
25 not YouTube's speech? The fact that YouTube put

1 those at the top, so those are the ones I'm most
2 likely to look at, that's not YouTube's speech?
3 MS. BLATT: Right. But, I mean, all
4 search engines work the same way. If you type
5 in whatever you type in, there is a algorithm
6 that's deciding what content to display. It has
7 to be displayed somehow.
8 And what I think is going on, on
9 YouTube or it's certainly going on on Google
10 search, is they're not going to -- they're
11 looking at what did other users look, how
12 popular was it, that kind of thing. You know,
13 is it -- is that news source, you know, from
14 Russia? Probably not going to get on the top
15 list.
16 So, yeah, they're having to make
17 choices because there could be over a billion
18 hits from yours, and there are a -- a billion
19 hours of videos watched each day on YouTube and
20 500 hours uploaded every minute. So it's a lot
21 of content on YouTube.
22 So some of it's based on channels.
23 And some of it's based on searches. But they
24 have to organize it somehow. But that is what's
25 going on, I think, on your top searches, is

1 they're -- in most search engines too, and you
2 can look at the Microsoft brief, they're basing
3 it on what -- time spent on those news sites,
4 how many users are looking at them, how relevant
5 it is, if it's -- if you're -- if you're typing
6 in the Turkey earthquake they might be elevating
7 some stuff featuring that because it -- you
8 know, seems more relevant.
9 If there's a recent election, they
10 might feature that. So all these kinds of
11 decisions are being made by websites every day.
12 JUSTICE ALITO: Would -- would the --
13 would Google collapse and the Internet be
14 destroyed if YouTube and, therefore, Google were
15 potentially liable for posting and refusing to
16 take down videos that it knows are defamatory
17 and false?
18 MS. BLATT: Well, I don't think Google
19 would. I think probably every other website
20 might be, because they're not as big as Google.
21 But here's what happens.
22 I mean, you do have that situation in
23 Europe, but there -- there's not class actions.
24 There's not plaintiffs' lawyers. There's not
25 the tort system. So what you would have is a

1 deluge of people saying, you know, my -- that
2 restaurant review was -- you know, you say my
3 restaurant review, I didn't like it.
4 I think Yelp! does an amazing job on
5 this, about how much they got hit and had to
6 spend, you know, almost crushing litigation
7 because they were being accused of being, you
8 know, biased on reviewers. And everyone -- no
9 matter what -- they couldn't win for losing or
10 lose for winning, whatever the phrase is,
11 because whoever they -- whoever got reviewed,
12 somebody was upset.
13 And so I think those websites, they
14 never would have happened. And they probably
15 would collapse.
16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. Justice Thomas, anything further?
18 Justice Alito?
19 Justice Sotomayor?
20 Justice Kagan?
21 Justice Gorsuch?
22 JUSTICE GORSUCH: Ms. Blatt, I -- I
23 kind of want to return to some of the questions
24 I asked earlier. It seems to me inherent in
25 (c)(1) is a distinction between those who are

1 simply interactive computer services and those
2 who are information content providers.
3 And so, when we flip over to (f), the
4 distinction I -- I -- I glean from that is that
5 if you're picking, choosing, analyzing, or
6 digesting content, which is the bulk of what you
7 -- how you describe Google's activities in -- in
8 the search engine context, are -- are protected
9 and that content must be something more than
10 that, providing content must be something more
11 than that.
12 Is -- is that right in your view?
13 MS. BLATT: I -- I thought you were
14 absolutely correct. And I think some of the
15 amici's briefs do this. In terms of if you're
16 looking at what is information being created or
17 developed, there is that distinction. It can't
18 be that you -- by sorting, you created or
19 partially developed the information.
20 So I think you had it exactly right.
21 I got a little upset when you talked about a
22 remand that somehow the Ninth Circuit got it
23 wrong.
24 JUSTICE GORSUCH: Well, let's -- let's
25 go there next then, because it seems to me that

1 even under that understanding of the statute,
2 there is some residual content for which an
3 interactive computer service can be liable.
4 You'd agree with that, that that's
5 possible?
6 MS. BLATT: Not on this complaint
7 because --
8 JUSTICE GORSUCH: No, no, no, of
9 course, not on this complaint, but in the
10 abstract, it -- it's possible?
11 MS. BLATT: Absolutely correct.
12 JUSTICE GORSUCH: Okay. And then,
13 when -- when it comes to what the Ninth Circuit
14 did, it applied this neutral tools test, and I
15 guess my problem with that is that language
16 isn't anywhere in the statute, number one.
17 Number two, you can use algorithms as
18 well as persons to generate content, so just
19 because it's an algorithm doesn't mean it
20 doesn't -- can't generate content, it seems to
21 me.
22 And third, that I'm not even sure any
23 algorithm really is neutral. I'm not even sure
24 what that test means because most algorithms are
25 designed these days to maximize profits.

1 There are other examples -- Justice
2 Kagan offered some, the Solicitor General
3 offered some -- where an algorithm might be --
4 contain a -- a point of view and even a
5 discriminatory one.
6 So I -- I guess I'm not sure I
7 understand why the Ninth Circuit's test was the
8 appropriate one and why a remand wouldn't be
9 appropriate to have it apply the test that we
10 just discussed.
11 MS. BLATT: Because it's not -- I
12 don't think that was the Ninth Circuit's test.
13 It was one sentence that -- maybe I think it
14 mentioned it twice -- that's basically, you
15 know, almost making fun of the complaint.
16 The complaint doesn't --
17 JUSTICE GORSUCH: Oh, oh, okay. Okay.
18 So we're just disagreeing over how we read the
19 Ninth Circuit's opinion, but if I read it that
20 way, then would a remand be appropriate?
21 MS. BLATT: Well, I'm -- I'm going to
22 say no because I don't understand how -- how
23 somehow that they have a bad complaint means the
24 Ninth Circuit's worse off when the Ninth Circuit
25 said over and over and over you haven't -- this

1 is just the way you're organizing it.
2 And the complaint never alleges there
3 was something independently wrongful about the
4 content. It never says these were colloquial
5 recommendations. It just says because you
6 previously liked this content.
7 And one other thing. The complaint
8 never even alleges that YouTube ever recommended
9 to any -- in terms of even displaying an ISIS
10 video, to anybody who wasn't looking for it. I
11 don't even know how you could get ISIS on your
12 YouTube system unless you were searching for it.
13 And the one --
14 JUSTICE GORSUCH: I certainly
15 understand your -- your -- your complaints about
16 the complaint. But, if I -- if -- if you --
17 you -- you don't think neutral tools -- you're
18 not defending the neutral tools principle either
19 as I understand it.
20 MS. BLATT: I'm defending it with
21 respect to Justice Kagan's question, absolutely,
22 because she's concerned about biased algorithms,
23 and she doesn't have to worry about that in this
24 case because they have neutral algorithms. They
25 don't allege. And what they mean by neutral

1 algorithms is neutral with respect to content.
2 So there's no --
3 JUSTICE GORSUCH: Thank you.
4 MS. BLATT: Okay.
5 JUSTICE GORSUCH: Thank you.
6 MS. BLATT: Thank you.
7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh? No?
9 Justice Barrett?
10 Justice Jackson?
11 JUSTICE JACKSON: So I understood you
12 to say that 230 immunizes platforms for
13 treatment as a publisher, which you take to mean
14 if they are acting as a publisher in the sense
15 that they are organizing and editing and -- not
16 editing, but organizing and -- content.
17 MS. BLATT: Communicating,
18 broadcasting, which includes how it's displayed.
19 JUSTICE JACKSON: And -- and would
20 that include -- I -- I just want to go back to
21 Justice Alito's point. Would that include the
22 home page of the YouTube website that has a
23 featured video box and the featured video is the
24 ISIS video?
25 MS. BLATT: Right.

1 JUSTICE JACKSON: That is -- is
2 covered?
3 MS. BLATT: Well, maybe not because
4 that gets into my continuum question. If you
5 think that featured is some sort of endorsement
6 such that the claim is actually treating the
7 website as -- and that the harm is flowing from
8 that -- the word feature, then that's out of 2
9 -- 230.
10 I think you would --
11 JUSTICE JACKSON: No, I'm sorry, why?
12 Why -- why is that out of 230?
13 MS. BLATT: So the whole point about
14 what we're saying is making sure that if you
15 start with the assumption that the dissemination
16 of YouTube -- I'm sorry -- of ISIS videos, you
17 can't hold the YouTube liable for that, then the
18 only question that we're concerned about and
19 which is so destabilizing is if you can just
20 plead around it by pointing to anything inherent
21 in the publication.
22 And the government never said what
23 websites are supposed to do.
24 JUSTICE JACKSON: No, this is not
25 inherent in the publication.

1 MS. BLATT: Exactly, it's featured.
2 JUSTICE JACKSON: So -- so -- so this
3 is helpful, I mean, if --
4 MS. BLATT: Yes.
5 JUSTICE JACKSON: -- we -- we have
6 a -- a home page on YouTube and it has featured
7 as the little title and a box, and let's say the
8 algorithm randomly selects videos from their
9 content and puts them up for a week at a time,
10 and the random video that it selected is the
11 YouTube -- is the ISIS video, and it runs when
12 you open up YouTube for a week.
13 MS. BLATT: Right.
14 JUSTICE JACKSON: Covered or not
15 covered?
16 MS. BLATT: Well, it depends on
17 whether you think it's an endorsement of -- I
18 mean, if it said this is the Library of Congress
19 and we feature this because we want to show you
20 how bad ISIS is, you know, I don't know.
21 The reason why I care so much about
22 this is because, like I said, Google and YouTube
23 don't do this, but all the other amicus briefs
24 are talking about they do things like that and
25 they might have a little emoji.

1 JUSTICE JACKSON: No, I guess I'm just
2 trying -- I don't understand. I just want to
3 know whether the -- put -- putting on the home
4 page of YouTube, the decision to have an
5 algorithm that puts on its home page various
6 videos, third-party content, and it turns out
7 that one of those videos is an ISIS video and
8 the person is radicalized and they harm the
9 Petitioner's family.
10 MS. BLATT: Yes. So that is inherent
11 to publishing the home page. The word
12 "feature," actually using the express statement
13 of feature, it -- first of all, is not -- the
14 website didn't have to do it. The owner --
15 JUSTICE JACKSON: So I'm sorry,
16 inherent to publishing, it's covered?
17 MS. BLATT: The home page.
18 JUSTICE JACKSON: It's covered?
19 MS. BLATT: Absolutely, because no
20 website -- how are you supposed to -- how are
21 you supposed to operate a website unless you put
22 a home page on, and so they have to do
23 something.
24 And if you could always say, well, the
25 home page -- you know, unless you're just going

1 to do it alphabetically or reverse chronological
2 order, a website is always going to be sued for
3 negligence.
4 JUSTICE JACKSON: All right. So, if
5 I -- if I disagree with you and I -- and I'm --
6 about the meaning of the statute, all right,
7 focusing in on the meaning of the statute, you
8 say if you're making editorial judgments about
9 how to organize things, then you're a publisher
10 and you're covered.
11 If I think that the statute really
12 only provides immunity if the claim is that the
13 platform has this ISIS video there and it can be
14 accessed and it hasn't taken it down, do you
15 have an argument that the recommendations that
16 they're talking about is -- is tantamount to the
17 same thing?
18 MS. BLATT: Yes, because the only
19 basis for saying recommendations are not covered
20 is -- that I saw is the government saying is it
21 conveys a distinct implicit message that you
22 might be interested. That is a distinct
23 implicit message that can only -- it happens
24 every time you publish.
25 If you publish one thing on the

1 Internet, it conveys a distinct message of dear
2 reader, we sat around and thought you might be
3 interested --
4 JUSTICE JACKSON: And you're saying --
5 MS. BLATT: Or we want to make money
6 --
7 JUSTICE JACKSON: You're saying that
8 -- that there's no -- that organizational
9 choices that put that content on the front page,
10 on the first thing, when you open it up without
11 typing in anything, cannot be isolated and that
12 it's the same thing as it appears on the
13 Internet anywhere such that 230 applies?
14 MS. BLATT: Yes, yes, and I'll use the
15 government's own words. They said if you hold
16 them liable for topic headings, you render the
17 statute a dead letter because you have to
18 organize the content. So if you think the topic
19 headings are conveying some implicit message you
20 can target out, the government said then the web
21 can't function.
22 And I think we care about it because
23 we're big websites that have lots of
24 information. Other websites, and all the amici
25 briefs are saying, is our whole business is

1 organizing to make it useful. If you need a
2 job, you're going to organize it by location --
3 JUSTICE JACKSON: Are you aware of any
4 defamation claim in any state or jurisdiction in
5 which you would be held liable, you would -- you
6 would actually be liable for organizational
7 choices like this?
8 MS. BLATT: No, I'm not worried about
9 the defamation claim. I'm worried for a
10 products liability claim or what the government
11 kept saying, your design choices. Those could
12 just be a product liability claim or a
13 negligence claim. You negligently went
14 alphabetical or you negligently featured
15 whatever you featured that made my, you know,
16 kid addicted to whatever it was. And that --
17 those kind of claims happen because they're
18 publishing. And the whole point of getting this
19 statute was to protect against publishing. So
20 whatever is publishing, inherent to publishing,
21 yeah, has to be covered.
22 JUSTICE JACKSON: Thank you.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.
25 Rebuttal, Mr. Schnapper?

1 REBUTTAL ARGUMENT OF ERIC SCHNAPPER
2 ON BEHALF OF THE PETITIONERS
3 MR. SCHNAPPER: Thank you, Mr. Chief
4 Justice, and may it please the Court:
5 If I might start with my colleague's
6 reference to things inherent in publishing, I
7 would just offer a cautionary note and review of
8 the transcript will support this. That -- that
9 has been given an extraordinarily expansive
10 account here.
11 So topic headings were characterized
12 as inherent in publishing. You know, a topic
13 heading could how Bob steals things all the
14 time. That's not -- shouldn't be protected.
15 She mentioned "trending now" as inherent in
16 publishing, but that's like "featured today."
17 You could -- you could have a site that didn't
18 use the words "trending now." Auto-play
19 certainly isn't inherent in publication.
20 And she mentioned home pages, and you
21 have to have a home page, and that's fair, but
22 you don't have to have on the home page selected
23 things that you're drawing people's attention
24 to. The home page that I have on my desktop for
25 Google is a box and those charming little

1 cartoons, and there isn't anything featured
2 there. One could have a -- a website home page
3 for YouTube that wasn't promoting particular
4 things. That's just how they've chosen to do
5 it.
6 With regard to neutral tools, and this
7 goes back to the point a number of you made
8 about race, a neutral algorithm can end up
9 creating very non-neutral rules. It's not hard
10 to imagine that an algorithm might conclude that
11 most people who -- who went to Spelman and
12 Morehouse now live in Prince George's County
13 and, therefore, in showing you videos, people
14 who asked for videos about places to live near
15 Washington, if they're black, they'll be shown
16 Prince George's County; if they'll be -- if
17 they're white, they'll be shown Montgomery
18 County.
19 The algorithms can create those kinds
20 of rules. Whether -- characterizing that as
21 neutral loses its force once the defendant knows
22 it's happening. You know, to some extent,
23 algorithms and computer functions can run amuck,
24 but you can't call it neutral once the defendant
25 knows that its algorithm is doing that. And

1 this runs a little bit into the issue that we'll
2 be talking about tomorrow.
3 Two short points and then one closing
4 item. With regard to Rule -- Section (f)(4), I
5 said this before, I just want to reiterate it,
6 Section (f)(4) does not apply to systems or to
7 information services. It only applies to
8 software providers. The language of the statute
9 is very specific.
10 And with the question about the
11 possible implications of the decision in -- in
12 Taamneh, it -- it is fair -- it is normal
13 practice in the district court when there's a
14 motion to dismiss, to permit the plaintiff to
15 amend, to deal with the relevant standard, and
16 that's exactly what we ought to be afforded an
17 opportunity to do.
18 Thank you very much.
19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.
21 The case is submitted.
22 (Whereupon, at 12:44 p.m., the case
23 was submitted.)
24
25

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