No. 21-1333

IN THE

Supreme Court of the United States

REYNALDO GONZALEZ, *et al.*,

Petitioners,

v.

GOOGLE LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF WIKIMEDIA FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

KATHLEEN R. HARTNETT
Counsel of Record
BENJAMIN H. KLEINE
KELSEY R. SPECTOR
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111
(415) 693-2000
khartnett@cooley.com

ALEXANDER J. KASNER
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, DC 20004

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Wikimedia Foundation is a non-profit organization based in San Francisco, California that operates twelve free-knowledge projects on the Internet. Wikimedia Foundation's projects host factual and educational content that is created, edited, and moderated by over 300,000 volunteer contributors per month worldwide. Core to its mission, Wikimedia Foundation provides this content to people free of charge and is not funded by advertising. Wikimedia Foundation therefore relies on donations and philanthropic grants to provide its services.

Wikimedia Foundation's most well-known project is Wikipedia—the largest and most-read reference work in history. As of 2022, Wikipedia was ranked as the fifth-most popular website in the world. Since its creation, users have authored over 6.5 million English-language articles on Wikipedia alone. In November 2022, Wikipedia received 25 billion page views, including 10 billion page views on the English-language version of its site. That same month, Wikipedia's users submitted over 5 million edits to Wikipedia's English-language articles.

Wikimedia Foundation has a strong interest in the proper interpretation and scope of Section 230 of the Communications Decency Act. Wikimedia Foundation's model is predicated on user-generated content, and Section 230—and in particular Section 230(c)(1)—is vital to the survival of the Foundation and its public resources. Without the protection of Section 230, the

[1] No counsel for a party authored any part of this brief, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the *amicus* and its attorneys have paid for the filing and submission of the brief.

costs of defending suits challenging the content hosted on Wikimedia Foundation's sites would pose existential threats to the organization. For the same reasons, predictability as to Section 230's scope is critical to Wikimedia Foundation's work.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the twenty-seven years that courts have been tasked with interpreting Section 230, there has been no serious dispute that Section 230(c)(1), by its text, protects decisions by websites that are inherent in their publication of user-generated content. Pursuant to that text, websites' choices about which content to make available and how to display that content have long and uniformly been held immune from liability under Section 230. Petitioners ask this Court to upend that certainty through a novel and unfounded reading of Section 230(c)(1) that would significantly narrow its protections and inject debilitating confusion into its application.

Aware of this departure, Petitioners claim the consequences of their interpretation will be limited to large social media websites. *E.g.*, Pet. Br. 15. Not so. Section 230 is critical to the vibrant, diverse Internet as we know it today, and especially to the ability of smaller companies and nonprofits like Wikimedia Foundation to exist and compete online. Petitioners' scattershot theories—unanchored in Section 230's text—would have wide-ranging consequences for *every* website that hosts user-generated content, particularly smaller and nonprofit websites that have correspondingly smaller legal budgets. The arguments Petitioners press here, bereft of any clear limiting principle, threaten to expose websites to liability for basic

decisions about how to arrange, format, display, or link to user-generated content.

Wikimedia Foundation's Wikipedia project—a website with a profound impact and large worldwide readership despite its small budget—functionally owes its existence both to user-generated content and to the immunities afforded by Section 230(c)(1). And it is a prime example of why Petitioners' theory must fail. For example, Petitioners' theory calls into question Wikimedia Foundation's ability to format Wikipedia's own homepage and interface. It also implicates efforts by Wikimedia Foundation to facilitate the linking of articles on its sites using URLs that Wikimedia Foundation, in part, creates. And it even threatens to exclude from Section 230(c)(1)'s protections claims about content where the author took advantage of Wikimedia Foundation's generally available formatting tools in drafting the challenged article. Thus, despite Petitioners' argument that their position implicates only social media platforms and other sites that depend on large-scale advertising, their proposed statutory interpretation in fact sweeps with incredible breadth, threatening nonprofits like Wikimedia Foundation that host user-submitted educational content for the public good.

Shrinking Section 230's protections in this way would be especially devastating for Wikimedia Foundation and other small-budget or nonprofit online entities. Petitioners' suggestion that defendants can ultimately prevail on the merits of any claims without Section 230's shield ignores the purpose of Section 230 in the first place and is cold comfort for companies that cannot afford the cost of defending scores of meritless lawsuits. This is precisely why Section 230 immunity is critical to nonprofits and emergent websites,

including, respectively, Wikimedia Foundation and its projects.

In short, Petitioners' flawed theory of Section 230 has it backwards: rather than locking in advantage for major technology players, Section 230 ensures that websites with small budgets but large impacts can exist and compete against the big players. Petitioners' interpretation would hollow out Section 230 and call into question its protections for platforms that need it the most. The Court should decline that invitation, particularly given that Petitioners' theory lacks any textual basis.

ARGUMENT

Congress enacted Section 230 to promote the development of and competition on the Internet. 47 U.S.C. §§ 230(b)(1)-(2). The statute accomplishes those goals by removing barriers to entry for websites to host content on the Internet. It does so by dramatically reducing the costs of litigation associated with suits based on user-generated content. This distinctly American approach to user speech online has led most major website operators, like Wikimedia Foundation, to be based in the United States.

Section 230 has also resulted in the spectacular growth of Internet websites, like Wikipedia, that are centered around user-generated content. And this growth has, in turn, enriched the lives of billions of people around the world. But without Section 230's protections, the costs of litigation relating to user-generated content would cripple many of these sites, as the brunt of such costs would likely be borne by smaller-budget and nonprofit websites. Wikimedia Foundation and its projects, which run on user-generated content and rely on donations to fund their

operations, owe their existence largely to Section 230's immunity.

And so, though Petitioners pretend that their interpretation would impact only the most profitable players on the Internet, it would in truth eviscerate Section 230's protections for platforms of all sizes and budgets. Indeed, Petitioners' read of Section 230(c)(1) would introduce uncertainty and increase the threat of litigation for every website that hosts user-generated content. Considering these consequences, Petitioners' repeated refrain that their theory implicates only large technology companies and social media platforms rings hollow. *E.g.*, Pet. Br. 16-17 (describing "practices of social media sites" such as "YouTube, Facebook, Twitter and other Internet companies"); *see also* Cruz Br. 1, 3, 5 (describing dangers of "Big Tech" operating under Section 230(c)(1)'s protections).

What is even more remarkable is that Petitioners ask this Court to impose an interpretation of Section 230(c)(1) that is entirely disconnected from its text. Indeed, in seeking to hold Respondent liable in this case, Petitioners press a theory of Section 230(c)(1) that jumbles its language, disregards canons of construction, and would lead to absurd results.

The harmful effects that Petitioners' arguments threaten upon Wikimedia Foundation are particularly instructive. Petitioners' position threatens Wikimedia Foundation's ability to undertake basic functions necessary to publish user-generated content in its online encyclopedic projects. This is but one example of the wide-ranging, devastating, and unintended consequences of Petitioners' proposed interpretation for every single website that hosts user-generated content.

Petitioners' arguments should be rejected.

I. Section 230 Enabled the Development of the Internet and Is Critical to the Ability of Nonprofits and Smaller Companies to Operate and Compete Online Today.

By design, the enactment of Section 230 was integral in the development of the Internet in its early years. And the Section continues to play an equally important role today in allowing companies without large litigation budgets to exist online and compete against more well-funded companies.

In passing Section 230, Congress expressly sought to encourage the development of and competition on the Internet. It found that the Internet "represent[s] an extraordinary advance in the ability of educational and informational resources to our citizens" and that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. §§ 230(a)(1)-(3). In light of these findings, Congress made explicit that "the policy of the United States," encoded in Section 230, is "to promote the continued development of the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* §§ 230(b)(1)-(2).

Section 230 thus reflects a profoundly American approach to free speech by "appl[ying] . . . First Amendment values to the internet." Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 11 (1st ed. 2019). In doing so, the Section "reflects [a] strong U.S.

bias toward free speech ahead of other values," a balance that "traces back to the nation's founding." *Id.* at 179. By alleviating the risk to websites of allowing user-generated speech on their platforms, Section 230 created the conditions for a diverse online environment where such speech could flourish.

The last twenty-seven years have shown the value inherent in Section 230's approach to speech. In operation, Section 230 has "unshackl[ed] those platforms from regulations and crippling lawsuits" that otherwise would hinder free speech and thus has proved "the catalyst for . . . U.S.-centric growth" online. *Id.* at 11, 179. As a result, the United States has been and is the preferred home for the world's most innovative and useful websites.

While the Internet is no longer a new communication medium and some Internet-based companies are among the largest companies in the world today, Section 230 continues to play an important role in ensuring that the Internet remains a "competitive free market" where all can participate. 47 U.S.C. § 230(b)(2). "While Section 230 plays an important part in enabling large platforms to make content moderation decisions at scale, it is perhaps even more important for smaller platforms that lack the resources of larger and more established platforms." Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, CATO Inst. 5 (Jan. 31, 2022).[2] Such "newer and smaller" companies and non-profits often lack the resources of larger online companies, but nevertheless host voluminous user-generated content. *Id.* at 5-6.

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[2] Available at https://www.cato.org/sites/cato.org/files/2022-01/policy-analysis-922.pdf.

Section 230 promotes such enterprises by providing "two essential ingredients if new entrants are to join the marketplace" and "attract investors": "certainty around legal exposure," and "protect[ion] from open-ended liability for wrongs committed by others." *Id.* at 5.

Just as Section 230 encourages new entrants into the online marketplace, it also ensures that small companies and non-profit platforms operating online today—such as Wikimedia Foundation's projects—are not "forced out of business by litigation costs." Elizabeth Banker, *Understanding Section 230 & the Impact of Litigation on Small Providers*, Chamber of Progress 6, 26 (2022).[3] Such "costs are nontrivial for the average small business" and "can easily exceed the ability of an individual, nonprofit, or small business to pay." *Id.* at 7. Even with Section 230, litigation based on user speech can costs tens if not hundreds of thousands of dollars at the motion-to-dismiss stage. *See* Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, Info. Tech. & Innovation Found. (Feb. 2021).[4] These costs alone are significant to smaller and lesser-funded websites. "But without Section 230 granting start-ups the ability to dismiss cases against them, their legal expenses would pile up even higher, ranging anywhere from $100,000 to $500,000 or more for each case that reaches the discovery stage." *Id.*

While some companies can absorb such litigation expenses, the costs of combatting lawsuits related to

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[3] Available at https://progresschamber.org/wp-content/uploads/2022/04/CoP_230-report_w1i.pdf.

[4] Available at https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved.

user-generated content—content that is present in large volumes on many sites—would be existential for many small companies and non-profits. Indeed, litigating even a small handful of these cases through discovery would deplete Wikimedia Foundation's annual global litigation budget. But for Section 230, small companies and non-profits would face a Hobson's choice: they could "settle lawsuits they would prefer to fight" and cede to incursions on free speech, Banker, *supra*, at 7, or they could expend "[t]he tremendous cost of paying for a legal defense coupled with an uncertain outcome," *id.*

At bottom, the "legal certainty" that Section 230 provides today "is highly pro-competitive, and it is especially critical for smaller platforms that lack the resources of big tech." Huddleston, *supra*, at 7. Section 230 thus preserves a vibrant online marketplace and is needed to safeguard diverse online discourse.

II. Wikimedia Foundation's Model Depends on the Protections of Section 230.

Wikimedia Foundation and its most well-known project, Wikipedia, owe their existence in large part to Section 230 and to Section 230(c)(1) in particular. Kosseff, *supra*, at 10 ("Wikipedia . . . simply could not exist without Section 230."). Wikipedia—offered for free in over 300 different language editions to users around the globe—consists entirely of user-generated content. This democratic approach to content generation is central to Wikipedia's mission. To that end, while Wikimedia Foundation reserves the right to remove content, it does not write or edit the content found on Wikipedia or Wikimedia Foundation's other projects. Wikipedia's commitment to reflecting the diverse, global perspective of its users, from the

ground up, has made it a unique, invaluable resource for the entire world.

To promote that commitment, Wikipedia relies on a global community of volunteer editors both to generate content as well as to moderate disputes about the accuracy of that content and its compliance with Wikimedia Foundation's Terms of Use. In fact, the Terms of Use are themselves, in part, a product of community development and collaboration. *See* Justin Clark et al., *Content and Conduct: How English Wikipedia Moderates Harmful Speech*, Berkman Klein Ctr. for Internet & Soc'y, Harvard Univ. (Nov. 2019);[5] *see also* Wikimedia Foundation, *Terms of Use* § 16 (explaining that before any change to the Terms of Use, Wikimedia Foundation will give its userbase a thirty-day comment period).[6]

Although largely decentralized, like any organization that publishes user-generated content online, Wikimedia Foundation must make decisions about that content. For example, Wikimedia Foundation reserves the right to ban or block users and to remove content that violates its Terms. *See* Wikimedia Foundation, *Terms of Use*, *supra*, §§ 4, 8, 10.

Similarly, while Wikimedia Foundation does not *edit* content, it must make decisions about how to display, organize, and format content on its projects' websites. For example, Wikipedia's Main Page is formatted to show links to several article categories,

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[5] Available at https://dash.harvard.edu/bitstream/handle/1/41872342/Content%20and%20ConductHow%20English%20Wikipedia%20Moderates%20Harmful%20Speech.pdf?sequence=1&isAllowed=y.

[6] Available at https://foundation.wikimedia.org/wiki/Terms_of_Use/en (last visited Jan. 19, 2023).

curated by its users: a featured article of the day, articles on subjects or people in the news, articles about significant historical events that occurred on "this day," and articles with "fun facts." Separately, most articles on Wikipedia contain a variety of links to related content, which are again curated by users. Some links are to other Wikipedia pages devoted to topics referenced in the article. Others are links to "category" pages containing indexes of related content. While Wikipedia's users decide which articles belong in each of these sections on Wikipedia's website, Wikimedia Foundation itself establishes the technical framework for these cross-references to maximize Wikipedia's utility as a reference work. Further, Wikimedia Foundation itself provides neutral formatting tools, like its Article Wizard for Wikipedia, which assist users in organizing and formatting the content they create.

Given Wikimedia Foundation's and Wikipedia's reliance on user-generated content and the fact that Wikimedia Foundation operates as a nonprofit, the protections afforded by Section 230(c)(1) are critical to Wikimedia Foundation's viability. Without that immunity, Wikimedia Foundation would be forced to defend the merits of each suit related to user-generated content (Wikimedia Foundation receives hundreds of content-related complaints a year from U.S.-based users alone) and to incur the massive costs of litigation that go with such a merits defense. Kosseff, *supra*, at 168 ("It is difficult to imagine how Wikipedia could operate if it would be held liable for the vast amount of content provided by its millions of user-editors."). In short, absent Section 230, Wikimedia Foundation would struggle to effectively manage its sites and vindicate its non-profit educational mission.

III. Petitioners Ignore the Text of Section 230(c)(1) and Advance an Interpretation that Would Lead to Absurd Results.

Petitioners' interpretation of Section 230(c)(1) not only threatens to undo the conditions that have allowed the Internet and projects like Wikimedia Foundation's to flourish, but it also has no basis in the text of the statute. Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Among other things, and as explained below, Petitioners' proposed interpretation: (1) ignores the plain meaning of "publisher"; (2) muddles concepts like "publication" and "information," leading to a distorted concept of a "recommendation"; and (3) disregards the statutory definition of an "interactive computer service."

Moreover, Petitioners underplay the dramatic consequences that their interpretation would inflict upon every single website that hosts user-generated content, especially those run by smaller and non-profit entities, over routine activities that are necessary to publishing user-generated content online. The Court should reject Petitioners' invitation to adopt a novel, unsupported, and harmful interpretation of Section 230(c)(1).

A. Petitioners' Interpretation of "Publisher" Is Textually Inconsistent, Doctrinally Illogical, and Creates Unnecessary Uncertainty in Future Litigation.

1. Petitioners' Flawed Interpretation of "Publisher"

Petitioners argue that Section 230(c)(1)'s reference to "publisher" should be interpreted as the term is used in defamation law. Pet. Br. 18-19. However, this approach has no basis in the statutory text and, in any case, is a distinction without a difference.

Section 230 does not define the term "publisher," and this Court has consistently held that "[i]t is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifier v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). Accordingly, the Court must turn to the plain meaning of "publisher," namely, its definition at the time of enactment. *Id.* Congress passed the Communications Decency Act into law in 1996. And at that time, "publish" meant "to place before the public." *Webster's Third New Int'l Dictionary* 1837 (1993). Consistent with these principles of construction, circuit courts have routinely held that "publisher," for the purposes of Section 230(c)(1), bears it ordinary meaning and is not confined to how it may be understood in the defamation context. *E.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (holding that "publisher" comports with the term's "ordinary meaning: 'one that makes public'"); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 409 (6th Cir. 2014) (adopting the "traditional editorial function" definition of "publisher"); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096,

1101-02 (9th Cir. 2009) (holding that publication ought to be defined by its dictionary definition, as "language of the statute does not limit its application to defamation cases").

In other words, there is no basis to impose upon Section 230 an interpretation of "publisher" borrowed from defamation law. Doing so would be contrary to the statute's plain meaning and would assume legislative intent otherwise absent from Section 230. Instead, this Court should adopt the clear and settled interpretation of "publisher" in Section 230(c)(1), which has provided stability to websites for decades.

Also misplaced is Petitioners' suggestion that because there is a purported distinction between publication and distribution under defamation law, such a distinction applies to Section 230. Pet. Br. 3. First, as Respondent illustrates, there was in fact *no* such distinction between publication and distribution at common law. Resp. Br. 48-50. Second, even if prompted by cases arising in the defamation context, Section 230 as drafted, and as widely applied by courts, is not limited to defamation claims. *See*, *e.g.*, *Barnes*, 570 F.3d at 1101-02 ("what matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress" but rather "whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another").

Moreover, as Respondent's brief illuminates, Petitioners' plea that "publisher" should be given its meaning in defamation law ultimately makes little difference. The law of defamation treats any entity that "takes part in the publication," including editors, printers, and vendors, as a "publisher." Resp. Br. 25.

2. Petitioners' Flawed Concept of Unprotected "Recommendations"

Petitioners' shifting arguments about recommendations—flowing from their flawed understanding of "publisher" and a conflation between publishing and authoring content—are also unsupported. Petitioners ask the Court to reach a sweeping conclusion presented for the first time in their merits briefing: that "recommendations," writ large, are unprotected by Section 230 because they allegedly do not seek to treat platforms as "the publisher or speaker of [third-party] information." Pet. Br. 26. But that result, as applied by Petitioners, would call into question Section 230 immunity for basic actions, like formatting and organizing content, that are part and parcel to online publication.

Notably, Petitioners never define "recommendation" or explain the relationship between making a "recommendation" and acting as a "publisher" under Section 230(c)(1). Rather, Petitioners conflate two different inquiries: whether a website is acting as a "publisher" under Section 230(c)(1); and whether the content at issue was created by a third party or by the website itself. This conflation leads to an erroneous and overbroad notion of unprotected "recommendations" that the Court should reject.

For instance, Petitioners make the straightforward observation that a *recommendation* of something (*i.e.*, recommending a book) is different than the *creation* of that thing (*i.e.*, writing a book), using an example of a website's own review that "John Grisham's latest novel is terrific," Pet. Br. 31. But this example simply demonstrates the flaws in Petitioners' argument. Petitioners' hypothetical book review falls outside the ambit of Section 230(c)(1) not because it nebulously

"recommends" content but because the website itself authored the statement (and thus created information on its own).

The same cannot be said for the plethora of activity that Petitioners suggest should be treated as outside of the protections of Section 230(c)(1). For example, Petitioners suggest that the mere arranging of content is a "recommendation" and equates to a website-authored first-party statement that can strip a website of Section 230(c)(1) immunity. Pet. Br. 32 (contending such activity is a "result" of publication and not a publication itself). But this comparison overlooks the fact that, of course, much of the arrangement of content online is done by websites without focusing on or perhaps even being aware of the specific contents being arranged. Further, Petitioners do not explain how it can be that arranging user-generated content is not quintessential publishing activity. Nor can they. Publication inherently involves decisions about how to format and arrange content (whether in a book or on a website). Broadly equating arrangement and organization to endorsement of content, then, evinces a misunderstanding of the basic mechanics of websites, including those of Wikimedia Foundation's projects.

More fundamentally, if arranging content operated to remove the protections of Section 230(c)(1), that Section's immunity would be an empty promise. Under such a scheme, it is not clear whether *any* website operator—including Wikimedia Foundation—could claim immunity for basic decisions that are integral and necessary to publishing user-generated content online. Unlike a review, these decisions are indifferent to and ignorant of the subject matter of the user-generated content and instead are made to best

arrange and make available content to users. Thus, Petitioners' theory fails as it relies on a faulty analogy: decisions about how to format content are not the equivalent of a literary review evaluating and endorsing the content.

3. Other Harmful Consequences of Petitioners' Flawed Interpretation

In addition to being unmoored from the statutory text, Petitioners' unworkable interpretation of Section 230(c)(1) portends dire consequences—consequences that Petitioners fail to candidly recognize or address. For example, does the way a website orders pages on its homepage constitute a "recommendation" of content to users outside of Section 230's protection for "publication"? If such an ordering is not protected, why not? After all, a similar decision by the *New York Times* to elevate certain articles "above the fold" is clearly publishing activity. How about the bolding of font? The categorization of topics? Faced with this uncertainty, websites would be forced to decide between doing nothing more than passively displaying user content, perhaps in chronological or indexed order regardless of quality or relevance, or else be at risk of "recommending" content and facing the cost of litigation that could follow.

Consider also Petitioners' assertion that "connecting users to . . . materials" and "arranging . . . third-party information" is outside the ambit of "publisher" activity. Pet. Br. 32. Taken to its logical endpoint, Petitioners' theory would undermine many of Wikipedia's core functions. Wikimedia Foundation arguably could not link to, format, or arrange any content on Wikipedia's Main Page or within its articles without losing the protections of Section 230(c)(1). For example, Wikimedia Foundation's ability to enable its users to

link to an article on the Court from an article on the U.S. Constitution would be jeopardized lest such a link constitute a "recommendation." Similarly, Wikimedia Foundation's decision to allow its users to select featured content on Wikipedia's Main Page would arguably be removed from the protections of Section 230(c)(1), as it arguably "connects" Wikipedia's users to certain pages of interest. Indeed, Wikipedia's decision to even *have* a Main Page could fall outside the bounds of Section 230(c)(1).

Wikipedia's template for user-generated articles also could be called into question. Specifically, Wikimedia Foundation provides users with a template and formatting tools that enable users to organize articles, including by bolding and indexing subheadings. These uncontroversial formatting decisions make an encyclopedic page usable—a user should not need to scroll the entire Wikipedia page on the "Roman Empire" to find out when it fell. These subheadings and indexes can naturally include newsworthy controversies—subheadings like "Infidelity scandal and fallout" are ordinary. *Tiger Woods*, Wikipedia.[7] So too are subheadings such as "Arrest and Charges," *e.g.*, *Sam Bankman-Fried*, Wikipedia,[8] and "Legal problems," *e.g.*, *Silvio Berlusconi*, Wikipedia.[9] Is Wikimedia Foundation's decision to facilitate the arrangement of content in a way that could (and sometimes does) highlight important controversies now open season for litigation?

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[7] Available at https://en.wikipedia.org/wiki/Tiger_Woods (last visited Jan. 19, 2023).

[8] Available at https://en.wikipedia.org/wiki/Sam_Bankman-Fried (last visited Jan. 19, 2023).

[9] Available at https://en.wikipedia.org/wiki/Silvio_Berlusconi (last visited Jan. 19, 2023).

Both the Respondent and the government rightfully recognize that Section 230(c)(1) protects such formatting decisions as publishing acts that organize the content of others. Resp. Br. 28-29; U.S. Br. 23 (a "chatroom" that "organize[s] posts" by "supply[ing] topic headings" is protected by Section 230(c)(1)). The Court should decline to adopt Petitioners' untenable theory to the contrary.

Finally, that Petitioners' reading of Section 230 prompts such a parade of questions is, in and of itself, counter to the purpose of Section 230. Regardless of how they might be later answered, these questions introduce substantial uncertainty into Internet platforms' operations. The immunity offered by Section 230—designed to foster "continued development of the Internet" and a "vibrant and competitive free market"—would be a dead letter if non-profits like Wikimedia Foundation needed to litigate whether each anodyne formatting decision constituted a "recommendation." The Court should reject Petitioners' unworkable framework.

B. Many of Petitioners' Other Arguments Would Similarly Inject Uncertainty into Online Publication.

Petitioners' additional interpretations of Section 230 also have untenable implications. Petitioners' construction of what it means for a website to create information or act as an interactive computer service are counter to statutory text and logic. And, again, the harmful consequence of such interpretations—directly contrary to Section 230's purpose—would be uncertainty and the loss of protections for those providers and platforms, like Wikimedia Foundation and Wikipedia, that need it the most.

1. Theory of "Information Provided by Another Information Content Provider"

Petitioners appear to contend that a defendant should not qualify for Section 230(c)(1) immunity if it makes a recommendation that "contains information provided by the defendant itself." Pet. Br. 33. Their argument leaves it unclear, perhaps intentionally, whether immunity would continue to apply for claims relating to the content underlying the recommendation itself. Petitioners even go so far as to suggest that including "the date a video was posted or the number of times it had been viewed, or the number of likes, shares, and comments" constitutes "content creation" that can nebulously strip a defendant of Section 230(c)(1)'s immunity. *Id.* at 33-34. These examples starkly illustrate how Petitioners' theory is divorced from the text of Section 230(c)(1).

Most notably, Petitioners—ignoring how the Internet works—argue that a website contributes its own "information" and thus is not immune under Section 230(c)(1) whenever it generates a URL for (user-created) content. Pet. Br. 34-40. But a URL is nothing more than the electronic address where online content can be found, does not contribute to the development of the underlying user-generated information, and is a necessary step to publishing any information online. U.S. Br. 33. While Petitioners attempt to sidestep these issues by contending that Section 230(c)(1) looks only to "[t]he source of the information, not the website operator's subjective reason for providing the information," Pet. Br. 38-39, they blur the distinct requirements of Section 230(c)(1). Specifically, Petitioners disregard Section 230(c)(1)'s reference to "publisher" and have no answer to the straightforward proposition that when a defendant takes the technical

steps necessary to publish user content online, including by creating a URL at which that content can be accessed, the defendant is acting as a publisher of another user's content.

Putting aside that Petitioners' URL theory has no support in Section 230(c)(1)'s text, it would also imperil numerous websites' continued operations and undermine the express purpose of Section 230. Specifically, websites could potentially lose immunity for claims based on *any* user-generated content posted *anywhere* on a website if that content is accessible through a URL—which it *must* be, as that is how the Internet works.

Petitioners' theory is especially problematic for Wikimedia Foundation, which operates a number of free reference works. Specifically, Petitioners' theory threatens to prevent Wikimedia Foundation from allowing its users to link to other articles on Wikipedia's homepage or even from within a Wikimedia Foundation article, defeating the point of a reference work. Such an absurd outcome would hollow out Section 230(c)(1)'s textual commitment to provide immunity to "interactive computer services" that "provide[] or enable[]" access to information. 47 U.S.C. § 230(f)(2).

2. Theory of "Interactive Computer Service"

Petitioners also advance the novel and erroneous theory that a defendant acts as an interactive computer service only when it "responds" to a user query and not when it "sends a user third-party material which the recipient had not requested." Pet. Br. 43-46. Specifically, Petitioners contend that "[t]he role of a server is essentially responsive." *Id.* at 45.

But there is nothing in the text of Section 230 that suggests that an interactive computer service can operate only reactively to user queries. To the contrary, Section 230 defines an "interactive computer service" as "any information service, system, or access software provider that *provides or enables computer access* by multiple users to a computer server." 47 U.S.C. § 230(f)(2) (emphasis added). In other words, the definition of an interactive computer service itself suggests that the service can and does play an active role in making available user-generated content. Indeed, at the time Congress passed Section 230, the dictionary definition of "enable" implied a non-passive role: "to make possible, practical, or easy." *Merriam-Webster's Collegiate Dictionary* 380 (10th ed. 1996).

Petitioners' passive interpretation is not only divorced from the text of Section 230(c)(1) but would also lead to dramatic consequences online. Under Petitioners' read of "interactive computer service," websites would be forced to decide between facing legal uncertainty and litigation costs or restructuring their model to display user-generated content solely in reaction to user queries. That model would greatly impair the functionality of many websites, including Wikimedia Foundation's projects, which would be reduced to search engines as opposed to the invaluable encyclopedic references that the world has come to rely on.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

ALEXANDER J. KASNER
COOLEY LLP
1299 Pennsylvania Ave., NW
Suite 700
Washington, DC 20004

KATHLEEN R. HARTNETT
Counsel of Record
BENJAMIN H. KLEINE
KELSEY R. SPECTOR
COOLEY LLP
3 Embarcadero Center
San Francisco, CA 94111
(415) 693-2000
khartnett@cooley.com

Counsel for Amicus Curiae

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