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Reply Brief for Petitioners, *Gonzalez v. Google*, 143 S.Ct. 1191 (2023) (No. 21-1333)

Eric Schnapper
University of Washington School of Law

Keith L. Altman

Daniel Weininger

Robert J. Tolchin

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No. 21-1333

In The
Supreme Court of the United States

—◆—
REYNALDO GONZALEZ, *et al.*,

Petitioners,

v.

GOOGLE LLC,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
REPLY BRIEF FOR PETITIONERS

—◆—
KEITH L. ALTMAN
THE LAW OFFICE OF
KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885

DANIEL WEININGER
EXCOLO LAW
26700 Lasher Rd.
Suite 401
Southfield, MI 48003
(248) 251-0594

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

ROBERT J. TOLCHIN
THE BERKMAN LAW
OFFICE, LLC
111 Livingston St.
Suite 1928
Brooklyn, NY 11201
(718) 855-3627

Counsel for Petitioners

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ARGUMENT**I. THE DECISIONS IN *DYROFF*, *FORCE*, AND THE INSTANT CASE ARE ABOUT ACTUAL RECOMMENDATIONS, NOT ABOUT MERELY DISPLAYING THIRD-PARTY CONTENT**

The brief in opposition is based on a straightforward premise: the decisions in *Dyroff*, *Force*, and the instant case are not about real recommendations at all. According to respondent, those decisions instead held only that section 230 (47 U.S.C. § 230) protects an interactive computer service which merely displays third-party content selected to be of interest to the viewer. If that were correct, the question presented (about recommendations) would not be presented at all, the decision below would be obviously sound, the conflict described in the petition would magically disappear, and the detailed scholarly dissents of Judges Katzmann, Berzon and Gould would all be based on an inexplicable misunderstanding of what the cases before them were actually about. Those conclusions indeed follow from the premise, but the premise itself is incorrect.

The brief in opposition asserts that the Ninth Circuit decision in *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093 (9th Cir. 2019), held only that section 230 protects websites when they display third-party content. Br. Opp. 1-2, 8, 10. That is not correct. The central issue in *Dyroff* was that the defendant was sending out emails, written by the defendant itself, seeking to induce recipients to look at its website. 934 F.3d at 1095 (“the site sent [the decedent] an email notification”), 1098 “[the defendant was] sending email

notifications”). The emails told recipients what URL to use to see the recommended third-party content, but did not display or quote that content.¹ The brief in opposition in *Dyroff* did not assert that the defendant had merely displayed third-party content, but acknowledged that “[w]hen a user posted a new message or response in a group, the website automatically sent an email to inform other users in the group.” Brief in Opposition, *Dyroff v. Ultimate Software Group, Inc.*, 3-4, available at 2020 WL 1486537. In *Dyroff* the Ninth Circuit interpreted section 230 to mean that provider-created emails are protected by section 230 if the emails are “tools meant to facilitate the communication and content of others.” 934 F.3d at 1098.

The brief in opposition asserts that the Second Circuit decision in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), held only that section 230 protects websites when they display third-party content. Br. Opp. 1-2, 10. That is not correct. The central contention in *Force* was that Facebook was recommending people, other Facebook users whom Facebook was suggesting the viewer “friend.” 934 F.3d at 58. That “suggestion” did not itself contain the content of the suggested friend’s Facebook page; as the majority explained, only

¹ For example, the email at issue in *Dyroff* read:

Someone posted a new update to the question “where can i [stet] score heroin in Jacksonville, fl” If your email won’t let you go straight to the link, it can be found here [URL] ... If you cannot visit this link, please go to [different URL].

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“accept[ance] [of the suggestion] by the user [would] result in those users seeing each other’s shared content.” *Id.* (The familiar text of Facebook recommendations, such as “suggestion” or “people you might know,” are written by Facebook, not a third-party). The complaint alleged that Facebook also “suggest[ed] ... groups, services and local events.” 934 F.3d at 82 (Katzmann, J., concurring in part and dissenting in part). The brief in opposition in *Force* did not deny that Facebook had suggested friends, and acknowledged that Facebook had suggested third-party content; it did not argue that Facebook was merely displaying third-party content, but instead contended that section 230 protects actual recommendations. Brief in Opposition, *Force v. Facebook, Inc.*, 12-13, 15-16, 23, 28.

The district court opinion’s analysis of plaintiffs’ recommendation claim refers 13 times to “recommendations” (or a variant), but never uses the term “display.” Pet. App. 200a-203a. Respondent’s summary of the district court opinion never uses the term “recommendation” (or a variant), but instead uses only the term “displaying.” Br. Opp. 6-7. Respondent summarizes the district court decision as follows: “[t]he court held that displaying videos related to user inputs did not turn YouTube into the ‘creat[or] or develop[er]’ of those videos.” Br. Opp. 7. But the quoted phrase is not part of a holding; rather, it is instead taken from a sentence describing what petitioners were *not* contending, noting that “[the complaint] does not allege” that Google “either created or developed ISIS content.” Pet. App. 200a-201a. The district court’s discussion of

what the petitioners did allege, that YouTube was recommending videos created by ISIS, is in the subsequent paragraphs. There the court did not suggest that it thought “recommend” meant “display,” or even use the term “display.” Instead, the court held that recommendations (of any type) are protected so long as they were dispensed neutrally. Pet. App. 201a-202a.

Much of respondent’s account of the court of appeals’ opinion in the instant case concerns a different claim, which the petition does not advance, that merely displaying terrorist material (even in the absence of any recommendation) is unprotected by section 230. Br. Opp. 7-8.² The brief then describes the panel as applying a supposed holding in *Dyroff* that section 230 protects “online tools that display content to users based on past activity.” Id. at 8. But neither the *Dyroff* discussion of “online tools” nor the cited portion of the opinion below (Pet. App. 37a) refer to the “display” of third-party content. The “tools” in *Dyroff* were defendant-created email recommendations, not displays of third-party content, and the opinion below recites that the practice in *Dyroff* was not “materially distinguishable from” the practices alleged here. Pet. App. 37a. Elsewhere, the brief in opposition summarizes the court of appeals as holding that “YouTube does not ‘specifically target[] ISIS content’ for promotion, but neutrally selects what content to display.” Br. Opp. 8 (quoting Pet. App. 38a). But although the four quoted

² Most of the analysis deals with the portion of the court of appeals’ opinion at Pet. App. 30a-34a. The discussion of the recommendation claim begins at Pet. App. 37a.

words do appear in the opinion below, the rest of the cited paragraph in question refers to YouTube selecting neutrally “what content its algorithms would *promote*,” not “display.” Pet. App. 38a (emphasis added). As the quoted portion indicates, the panel interpreted section 230 to protect provider-generated recommendations so long as the standard for deciding what to recommend is “neutral.” Pet. App. 36a-42a.

The complaint repeatedly alleges that YouTube “recommended” ISIS videos. Third Amended Complaint, ¶¶ 535, 549, 550. The brief in opposition seeks to recharacterize the complaint, asserting that “[w]hat petitioners challenge is YouTube’s display of content responsive to user inputs....” Br. Opp. 20. But the operative language of the complaint is “recommended,” not “display.”

The complaint, district court opinion and court of appeals opinion all concern whether section 230 protects a provider if it “recommended” third-party content. The brief in opposition rephrases this, describing the issue as whether section 230 provides protection if a provider “displayed recommended content.” Br. Opp. 1, 20. “Displayed” replaces “recommended” as the action in question. “[R]ecommended” no longer describes a message communicated by YouTube to the viewer, but instead merely indicates that YouTube selected the particular third-party material to display in the hope that it would interest the viewer. This semantic maneuver does not alter what the complaint actually alleged or what the courts below actually decided.

Respondent (unlike the respondent in *Force*), does not argue that section 230 protects recommendations involving provider-created content. With regard to the divergent lower court justifications for that interpretation of section 230 (Pet. 30-36), respondent suggests that any differences in reasoning “would be all the more reason for percolation as the circuits fully air this question.” Br. Opp. 11. But if, after three attempts, the courts of appeals cannot agree on or even fashion a defensible justification for this highly dubious interpretation of section 230, the time has come for action by this Court.

II. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

Respondent bases its opposition to certiorari in part on a number of factual assertions about YouTube’s practices, essentially denying that YouTube makes recommendations. The brief describes YouTube as displaying videos which it selects to interest a viewer, but stops short of claiming in so many words that that is all that YouTube does. The brief specifically denies that YouTube makes express recommendations like labeling video “terrific.” Br. Opp. 20. With regard to the video stills (“thumbnails”) that YouTube displays, the brief asserts that the text appearing in a thumbnail is created by third parties. *Id.* Respondent acknowledges that a hyperlink is attached to the thumbnail, and seems to suggest that the hyperlink as well is created and attached by a third party. *Id.*

These factual assertions are not relevant to the current appeal, which concerns only Google’s Rule 12(b)(6) motion to dismiss. A motion to dismiss accepts as true the allegations in the plaintiff’s complaint, and tests whether those allegations state “a claim on which relief can be granted.” A party wishing to rely on factual assertions of its own to attack a complaint must do so with a motion for summary judgment under Rule 56. Rule 56 requires that such assertions be supported by “admissible evidence,” which the plaintiff can test through depositions or other discovery. Google chose only to file a Rule 12(b)(6) motion to dismiss, and cannot on appeal convert that into a Rule 56 motion for summary judgment by relying on factual assertions of its appellate counsel.

In the alternative, Google argues that the complaint was “threadbare.” Br. Opp. 2. For example, it objects that the complaint includes only one screenshot of an alleged recommendation. Br. Opp. 6. The brief in opposition suggests it would have been better if the complaint had spelled out in greater detail which of the defendants’ functions plaintiffs contended were recommendations. *Id.* Respondent complains that the plaintiffs have not “fleshed out” the complaint during the years this case has been pending. Br. Opp. 16. But if Google’s attorneys thought that the complaint was insufficiently specific, their remedy under the Federal Rules of Civil Procedure was to file in the district court a motion for more definite statement under Rule 12(e), instead of (or perhaps in addition to) their Rule 12(b)(6) motion to dismiss. Google chose instead to file

only a motion to dismiss. Having made that tactical choice five years ago, and having then persuaded the courts below to hold that the complaint does not state a claim on which relief can be granted, Google cannot in this Court now object that the complaint is not sufficiently clear to permit a sound judicial resolution of Google's own Rule 12(b)(6) motion.

In the alternative, the brief in opposition contends that the complaint was actually quite specific, but defectively so. Although the complaint repeatedly asserts that YouTube "recommended" ISIS videos, the brief in opposition insists that what the attorneys who drafted that allegation really *meant* to assert was only that YouTube was selecting which ISIS videos to display. "[W]hat petitioners (at i) call 'targeted recommendations' are merely 'YouTube's selection and arrangement of third party content to display to users.'" *Id.* at 1. The brief in opposition does not contend that this is the only possible meaning of "recommendation," or even a normal use of that term. Whether a complaint states a claim on which relief can be granted turns on the ordinary objective meaning of the language of the complaint, not on the alleged possibly idiosyncratic subjective intent of the attorneys who drafted it. A Rule 12(b)(6) motion requires the court to determine the legal sufficiency of the complaint as written, not to engage in a factual inquiry into what the framers of the complaint meant to say.

The brief in opposition asserts that, even if this Court were to grant review and overturn the Ninth Circuit's interpretation of section 230, respondent

would ultimately prevail on other grounds. Br. Opp. 17-18 (“the bottom-line result will be the same regardless”). But it is often the case that the decision of a court of appeals did not address one or more issues on which, if review were granted and the decision below reversed, a respondent might subsequently prevail on remand. That does not affect the certworthiness of a petition, which turns on the nature and importance of the question which the court of appeals did decide.

Respondent argues that “[t]his Court’s intervention would also be premature” (Br. Opp. 18) because “Congress is in the midst of considering legislation that would alter section 230’s ambit.” Br. Opp. 3. No one familiar with the workings of Congress would assume that the introduction of a few bills on a subject means that new legislation is imminent; of the tens of thousands of bills introduced in each session, only a handful are ever enacted into law. None of the bills listed in footnote 9 of the brief in opposition have even been the subject of a congressional hearing. In the alternative, respondent suggests that the failure of Congress to adopt legislation amending section 230 regarding recommendations, algorithms, or almost anything else indicates that Congress is satisfied with all the current judicial interpretations of the statute. Br. Opp. 19-20. But this Court has repeatedly warned against attaching meaning to congressional inaction. The brief in opposition, excerpting 13 words from a sentence in Judge Gould’s opinion, argues that “[a]s the dissenting judge below recognized, the ‘regulation of social media companies would best be handled by

the political branches.’” Br. Opp. 19 (quoting Pet. App. 94a). But the remainder of that sentence, which respondent fails to quote, as well as the sentence that follows in Judge Gould’s opinion, make clear that Judge Gould actually insisted that judicial action was indeed called for in this case. Pet. App. 94a-95a.

The pending conditional petition in *Twitter, Inc. v. Taamneh*, No. 21-1496, does not create a “procedural morass.” Br. Opp. 18. The situation is entirely straightforward. The defendants in these cases have (inter alia) two distinct grounds on which they might seek to attack the complaint. In the Ninth Circuit, Google prevailed on one (the meaning of section 230), while Twitter (and Google³) lost on the other (the meaning of the “aids and abets” clause of the Anti-Terrorism Act (“ATA”)). If the Court concludes that both legal issues warrant review, it can simply grant certiorari in both this case and *Twitter*.

The pending petition in *Twitter, Inc. v. Taamneh* provides an additional reason to grant review in the instant case. The petition in *Twitter* asserts that the Ninth Circuit’s interpretation of the aiding and abetting clause in the ATA raises an issue of considerable and urgent public importance. Conditional Petition, 5 (“This Court’s review is especially important given the

³ Although Google is a defendant in the *Twitter* litigation, it did not join the petition seeking review of the Ninth Circuit’s decision. Google has, however, filed a letter pursuant to Rule 12.6 of this Court stating that it remains an interested party with regard to that petition, and urging this Court to grant review of the petition in *Twitter* if it grants review in the instant case.

broad impact of the question presented.”), 14 (“The Ninth Circuit[’s] ... erroneous statutory construction threatens harmful consequences for ordinary businesses that provide generally available services or engage in arms-length transactions with large numbers of consumers.”). In the Ninth Circuit litigation of the claim in *Twitter*, Google itself asserted that the panel’s interpretation of the aiding and abetting provision of the ATA “threatens harmful consequences for ordinary businesses that provide generally available services or engage in arms-length transactions with large numbers of consumers.”⁴ But as both Twitter and Google correctly note, if certiorari were denied in the instant case, the Court could not consider the issues raised in *Twitter*, because that denial would moot the dispute between the parties in *Twitter*. Br. Opp. 18; Conditional Petition for Writ of Certiorari, *Twitter, Inc. v. Taamneh*, 2. Although we disagree with these characterizations of the effect of the Ninth Circuit’s interpretation of the ATA, this Court can only address the concerns raised by Twitter and Google regarding that aspect of the Ninth Circuit decision by granting the petitions in both cases.

Much has changed since certiorari was denied in *Dyroff* and *Force*. Then there was only a single dissenting opinion arguing that section 230 does not protect recommendations; now there are three such lengthy

⁴ Petition for Panel Rehearing and Hearing En Banc, *Taamneh v. Twitter, Inc.*, No. 18-17192, 6; see *id.* at 17 (“[t]he panel’s decision ... threatens major harm to ordinary businesses providing standardized goods or services to the general public”).

dissents. Then a majority of the Ninth Circuit panel in *Dyroff* had held that section 230 protects recommendations; in the instant, case a majority of a different Ninth Circuit panel concluded that *Dyroff* misinterpreted section 230. Then no member of this Court had expressed concern that the exceptionally important issues regarding the interpretation of section 230 were not being considered by this Court; now Justice Thomas has twice done so. Then, the respondent in *Dyroff* insisted that there was no circuit conflict because *no* circuit applied the traditional editorial function test;⁵ now the respondent in the instant case insists there is no circuit conflict because *all* circuits apply that test. Br. Opp. 11-12. And now, unlike in the past, a grant of certiorari regarding whether section 230 protects recommendations is a necessary precondition to consideration by this Court of an issue regarding the ATA which Twitter, and Google itself, insist is of great public importance.



⁵ Brief in Opposition, *Dyroff v. Ultimate Software Group*, 2, 26-30, available at 2020 WL 1486537.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ERIC SCHNAPPER
Counsel of Record
University of Washington
School of Law
Box 353020
Seattle, WA 98195
(206) 660-8845
schnapp@uw.edu

ROBERT J. TOLCHIN
THE BERKMAN LAW OFFICE, LLC
111 Livingston St.
Suite 1928
Brooklyn, NY 11201
(718) 855-3627

KEITH L. ALTMAN
THE LAW OFFICE OF KEITH ALTMAN
33228 West 12 Mile Rd.
Suite 375
Farmington Hills, MI 48334
(516) 456-5885

DANIEL WEININGER
EXCOLO LAW
26700 Lasher Rd.
Suite 401
Southfield, MI 48003
(248) 251-0594

Counsel for Petitioners