No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, ET AL., *Petitioners,*

v.

GOOGLE LLC.

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

BRIEF FOR REASON FOUNDATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

When Congress adopted Section 230, it made legislative findings articulating the purposes and benefits it perceived from that provision. Congress found that the Internet and other interactive computer services, taken as a whole, could serve as "a forum for a true diversity of political discourse," "offer * * * unique opportunities for cultural development," and provide "myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). It also recognized the benefits that flowed to the American people when the Internet was allowed to grow "with a minimum of government regulation." *Id.* § 230(a)(4). To implement such limits on government regulation, it adopted Section 230, the key provision of which 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." *Id.* § 230(c)(1).

The 26 words of Section 230(c)(1) have "come to mean that, with few exceptions, websites and Internet service providers are not liable for the comments, pictures, and videos that their users and subscribers post, no matter how vile or damaging."[2] Insofar as there is any uncertainty in interpreting those words,

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, aside from *Amicus Curiae*, its members, and its counsel, made any monetary contribution toward the brief's preparation or submission.

[2] Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 8 (2019).

Congress's expansive legislatively declared purposes favor a broad reading of Section 230's protections for providers and users of interactive computer services, not a cramped one.

Because an incorrect reading of Section 230(c)(1) would be enormously harmful to the development of new technology, the furthering of free speech, and the online economy, this case interests *Amicus* Reason Foundation (Reason). Reason is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets" and equality before the law, Reason selectively participates as *amicus curiae* in cases raising significant issues.

Amicus agrees with Respondent on the merits of the question presented. The plain text of Section 230 precludes claims that would treat YouTube as the publisher of videos created by third parties solely because YouTube uses an algorithm that organizes and presents the videos of its users to others who might be interested in them. They write separately to address how, consistent with Congress's legislative findings, the economy and the public indeed have benefited from Section 230. And even if there is debate or disagreement about the policy pros and cons of Sec-

tion 230, it is the congressional findings and purposes that take priority and favor broad protection of providers and users should it become necessary to resolve any ambiguity in the text. *Amicus* also writes to address a key textual distinction in the statute—between information provided by a "provider" or "user" of an interactive computer service themselves versus information provided by "*another* information content provider."

SUMMARY OF ARGUMENT

I. For nearly three decades, Section 230 has served as the backbone of the Internet, precisely as Congress correctly anticipated and intended. The legislatively enacted congressional findings and purpose favor an expansive reading of Section 230's protections in the event of any uncertainty or perceived ambiguity in the language of Section 230(c)(1).

A. Section 230's benefits were by design, even if Congress could not have predicted every detail—or challenge—of a growing Internet. What Congress did know is that, for the Internet to grow, it had to be left alone without fear of the "litigation minefield," Resp. Br. 19, that would cripple its expansion in its infancy if the providers and users of interactive computer services could be found liable for the content created by others. Congress thus enacted Section 230 with a list of policy statements that show what it intended and expected the statute to do: protect platforms and users from liability for the speech of others and promote the growth and use of interactive computer services.

Congress explained that the goal of Section 230 is to "promote the continued development of the Inter-

net" by, among other things, "encourag[ing] the development of technologies which maximize user control over what information is received by" those "who use the Internet and other interactive computer services." *Id.* (b)(1), (3). Section 230 has done that. Congress also expressed the importance of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* (b)(2) (emphasis added). Section 230 has created that world, too.

Those policy statements are not mere pieces of legislative history entered into the Congressional Record by opportunistic politicians or their staffers—to the contrary, they are the product of bicameralism and presentment just like any other duly enacted legislation. And such statements are entitled controlling weight regarding what policy considerations might potentially influence the interpretation of Section 230. Whether Section 230 creates good policy is not a question for this Court to decide. That question remains where it was in 1996—with Congress.

B. Even years after Congress's legislative findings and purpose, Section 230 has overwhelmingly fulfilled such legislative predictions and goals. By providing immunity from liability for the content posted by others, it has allowed for the development of new technologies that make it easier for everyone to find information online, to organize and to let others help organize the information they receive, and to associate both directly and indirectly with people around the world sharing common interests. These advances in technology have also led to the development of all manner of social-media sites, including

video-based platforms, dating apps, and even improved traditional chatrooms providing users many of the same organization tools as providers themselves.

The improved ability to find and organize information online is only one of the many benefits of Section 230. It also has led to an exponential growth in the amount of speech online. As providers have innovated and users have enthusiastically participated in online speech free from "the "specter of liability," *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), interactive computer services have made it easier for ideas to spread than ever before in human history. Through retweets and other user engagements, the views and content created by even the poorest Americans can spread around the country and world in a way that wouldn't have been possible just twenty years ago.[3]

Other benefits from Section 230 abound. The economic benefits to innovators, providers, users, and the economy as a whole have been tremendous. It has facilitated the gig economy by allowing individuals and small businesses to flourish on websites provided by bigger platforms. It has also allowed consumers to directly review products and other services, make those reviews readily available online for the next consumer, and pass along or comment upon reviews by others, thus democratizing the marketplace of products and services as well as the marketplace of

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[3] *E.g.*, Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away.*, Reason (Jul. 29, 2019), https://tinyurl.com/2x5zh9vd.

ideas. Thus, insofar as such practical considerations matter to the interpretation of Section 230(c)(1), the findings and purposes of Congress are not only controlling, they are right.

II. The language of Section 230 both reflects such Congressional policy and confirms that Respondent should prevail in this case.

A. An "interactive computer service" "provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). "Interactive computer services" expressly include "access software providers," which—as relevant here—are providers of software or tools that can "pick, choose, analyze, or digest," "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." *Id.* (f)(2), (4)(B), (C). The providers of such services and their users can both create their own information content and can organize, transmit, and provide access to information content provided by others.

B. YouTube's algorithm, which organizes and reorganizes the content uploaded to YouTube by others, thus performs a function which Congress expressly included in the definition of an interactive computer service. Indeed, as both a provider and user of such software, Respondent falls squarely within the class protected by Section 230(c)(1). Insofar as Petitioners are seeking to hold Google liable for the consequences of having presented or organized the "information provided by another," rather than for creating and publishing Google's *own* information content, Section 230(c)(1) bars such liability.

To the extent any given algorithm or other organizational policy or choice might be said to create Google's own "content," the further question becomes the precise parameters of such content as distinguished from the content of *others*. That distinction helps clarify that even where an algorithm or other organizational action or policy itself might create some information content (appending a warning label for example), a user or provider may only be held responsible for that information alone, and not the underlying information "provided by another." Alternatively, if YouTube or any other user of its service were to expressly adopt or endorse the information content of another as its own, such adopted content may well fall outside of Section 230's protection.

But merely identifying, organizing, or even recommending the content of another is a far cry from adopting it as your own. YouTube's algorithm, for example, analyzes different users' activity and viewing behavior to predict what that user might find interesting and to organize further information content provided by others according to such predictions. Though the algorithm's analysis and predictions are more automated and sophisticated than manual efforts to organize or recommend content in a manner appealing to users, it remains fundamentally the same as the manual choices exercised by chatroom moderators, bloggers, and indeed, any individual user who selects, reposts, "likes," or otherwise passes along the information content of others in a way such user believes might be interesting or appealing to her followers and potential followers. Such organizational effort by both providers and users of interactive computer services is precisely what Congress anticipated

and intended to encourage via Section 230, and the text provides broad protection reflecting that purpose.

ARGUMENT

I. Congress intended and correctly predicted that Section 230 would generate enormous benefits for free speech, technological innovation, and the economy.

While *Amicus* agrees with Respondent that the plain language of Section 230(c)(1) protects Google against claims based on its algorithms organizing the content of others, to the extent that this Court perceives any uncertainty in such language, that uncertainty should be resolved according to the findings and purposes expressly adopted by Congress, and not based on any competing policy concerns expressed by Petitioners, their *Amici*, or even members of this Court. Congress favored broad protection for providers and users of interactive computer services regarding their organization and passing along of the information content of others. And it was right to do so. The issues presented by this case risk seriously undermining the legislative judgments of Congress and undermining the many benefits that Section 230 provides to the public and interactive computer services alike. To the extent that time and technological developments have created new challenges or concerns, addressing such issues, weighing them against the original predictions and policies of Section 230, and, if necessary, adjusting the protections afforded by that section are tasks for Congress, not this Court. Any uncertainty regarding the language of Section 230(c)(1) should be resolved according to Congress's

expansive and protective express intent adopt in conjunction with that provision.

A. Congress's enacted legislative judgment regarding the purposes and benefits of Section 230 take priority over any competing policy claims or concerns raised by third parties or even the Court itself.

As will be discussed more fully below, Section 230 has in fact been enormously beneficial to interactive computer services and the public alike. This was by design. Indeed, although Congress could not have understood all of the specific benefits Section 230 would have for the economy and the public, what it did conclude was that interactive computer services needed to be protected from ruinous litigation if the Internet was to thrive.

1. One need not guess about what Congress intended to do when it passed Section 230—Congress told us. The statute includes both congressional findings and general policy statements. To be sure, several members of this Court have reflected on the folly of looking to generalized and often cherry-picked legislative history to divine the will of Congress as a whole. But in response to such concerns "Congress increasingly makes such findings in the course of enacting statutes."[4] Enacted findings provide "the sort of textual evidence everyone agrees can sometimes shed light on meaning." See *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting).

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[4] Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 Geo. L.J. 637, 639 (2014).

Enacted findings and policy statements are worthy of this Court's considerations because they lack the problems of general statements in legislative history. Thus, while legislative history is "not the law," *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1631 (2018), enacted policy statements are. Similarly, while courts cannot divine "the view of Congress as a whole" from "what is said by a single person in a floor debate or by a committee report," *Zedner* v. *United States*, 547 U.S. 489, 510 (2006) (Scalia, J., concurring in part and in the judgment), enacted policy statements or factual findings are the product of the constitutional requirements of bicameralism and presentment. Accordingly, to the extent that a court finds the operative provisions of a statute ambiguous, any legislative policy statements or factual findings are entitled substantial weight in resolving that ambiguity, particularly as compared to conflicting policy concerns or factual propositions offered by others either before or after the statute was adopted.

2. Those policy statements and factual findings enacted as part of Section 230 are particularly illuminating and show why Section 230(c)(1) is correctly read to protect Google or any other provider or user of an interactive computer service from liability for organizing and presenting third-party content to other users through an algorithm or any other means of organizing such third-party content.

Starting first with the findings, Congress found that the Internet's rapid growth represented "an extraordinary advance in the availability of educational and informational resources." 47 U.S.C. § 230(a)(1). That was true when Section 230 was enacted, and the Internet's ability to make information available

has only expanded—and exponentially so—since. Congress also found that the Internet, when left "with a minimum of government regulation," offers "myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(4), (5).

Congress's findings about the Internet's potential informed the purpose that it established when it enacted Section 230. That purpose could not have been clearer—Congress intended the government, including the judiciary, to get out of the way of the Internet's growth. Congress explained that the goal of Section 230 is to "promote the continued development of the Internet" by, among other things, "encourag[ing] the development of technologies that maximize user control over what information is received by" those "who use the Internet and other interactive computer services." *Id.* (b)(1), (3). And Congress expressed its goal of "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* (b)(2) (emphasis added).

These findings and policy considerations should guide the Court's interpretation of Section 230 even if members of the Court disagree with the policy Congress enacted or believe that time and circumstance have presented new and unanticipated concerns. As this Court has explained, "[i]t is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pa.*, 140 S. Ct. 2367, 2381 (2020) (citation omitted); accord *Hall* v. *United States*, 566 U.S. 506, 523 (2012) ("[T]here may be compelling policy

reasons" to reach a particular result, "[b]ut if Congress intended that result, it did not so provide in the statute. Given the statute's plain language, context, and structure, it is not for us to rewrite the statute[.]").

This Court should thus follow the path taken by other courts around the country that have looked to Congress's stated objectives to conclude that "Section 230(c)(1) should be construed broadly in favor of immunity," *Force* v. *Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), and that Section 230 "should not be construed grudgingly," *Jane Doe No. 1* v. *Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016). In the process, the Court should expressly reject the Petitioners' suggestion, at 18–25, that it rewrite Section 230 to conflict with Congress's broad policy goals by "restrain[ing] the automation of interactive computer services' publishing activities" as a precondition to Section 230 immunity. *Force*, 934 F.3d at 67.

The policy positions of Section 230, moreover, should govern even though there are many in Congress who seemingly disagree with Section 230's reach and the policy considerations that led to its enactment. Congress remains free to amend the statute through its own legislative efforts, not by some of its members encouraging this Court to do the work for them. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in judgment) ("If Congress disagrees with how courts are interpreting an existing statute, it is free to amend the statute to establish a different rule going forward.").

Many in Congress have been trying to adopt such amendments. Numerous legislative options have

been proposed to respond to the policy concerns raised by Petitioners here. Just a few weeks before the filing of this brief, for example, a bipartisan group introduced the Platform Integrity Act, H.R. 9695, 117th Cong. (2022), a bill expressly designed to supersede judicial holdings that Section 230 "bars victims of terrorist attacks from seeking relief from a social-media company for its proactive role connecting the perpetrators through friend- and content-suggestion algorithms."[5] Another bill, the Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong. (2021), would have done essentially the same thing. The Biased Algorithm Deterrence Act of 2019, H.R. 492, 116th Cong. (2019), would remove Section 230 immunity when an algorithm reorders user content in a way that is not chronological. The Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020), would strip platforms of immunity whenever an algorithm amplifies content tied to or promoting terrorism or even violations of civil rights.

The virtues or folly of such proposals, and the details of balancing their competing policy concerns, is a matter for the political branches, not this Court. As it stands, Congress has established the immunity-favoring policy of the United States, and that policy should guide this Court's interpretation of the operative provisions of Section 230 until Congress legislatively adopts a different or modified policy or limitation on Section 230 immunity.

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[5] David N. Cicilline, *Cicilline, Buck Release Bill to Hold Online Platforms Accountable for Promoting Extremism* (Dec. 27, 2022), https://tinyurl.com/mnhsutz.

B. Congress accurately predicted the benefits of Section 230, which allows providers and users of interactive computer services to innovate, collectively expand the reach of protected speech, and generate economic growth without the crushing transaction cost of liability based on the speech of others.

In addition to the weight that should be accorded to the legislative facts and purposes adopted by Congress, Section 230 is indeed acting precisely as Congress intended. In the nearly 30 years since Section 230 was enacted, it has played an incalculable role in the way that Americans live in the digital age.

The key benefits from Section 230 stem from the innovation it facilitates. As several commentors have explained, Section 230 has served as the "permissionless innovation model that fueled America's commanding lead in the digital information revolution," has allowed "digital entrepreneurs" to be "free to launch bold new ideas without fear of punishing lawsuits or regulatory shenanigans," and has, in turn, "boosted economic growth and dramatically broadened consumer information and communications options."[6] In short, Section 230 "allowed * * * the digital economy as we know it[.]"[7]

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[6] Jonathan Cannon & Adam Thierer, *Quite a Fall for Digital Tech*, Discourse (Dec. 7, 2022), https://tinyurl.com/yd43h3ua.

[7] Elizabeth Nolan Brown, *4 Cases That Show the Scope of Services, Speech, and Conduct Protected by Section 230*, Reason (Jan. 25, 2019), https://tinyurl.com/3v63bvb5.

Section 230 was able to do this because it protected internet platforms from liability for the content created by others. This in turn allowed companies to experiment with new technologies to improve the experiences of their users without fear. That has led to incredible advancements in technology that benefit the providers and users of interactive computer services, and the public as a whole. That many providers and users of such services also often receive substantial financial rewards from such advancements benefits both them and the economy and incentivizes further innovations.

Consider the algorithms at issue here. They are one such technology that has developed because of Section 230's protections. Now, rather than awaiting active input and effort from a new user to match the content of an interactive content provider to that user, algorithms allow providers and users of interactive computer services to predict what information would be relevant to a particular user based on information provided by that user in the past and by that user's actual behavior in the past, present, and future. See *Force*, 934 F.3d at 70 ("The algorithms take the information provided by Facebook users and 'match' it to other users—again, materially unaltered—based on objective factors applicable to any content, whether it concerns soccer, Picasso, or plumbers."). Throughout the process, the user—who has control over whether to use any given service at all and generally over what information she shares with the interactive computer service—is in control of the information she receives, even if the content is shared with her predictively.

Staying within the Google umbrella, without the protections of Section 230, it would be easy to imagine the countless ways that Google's search engine could face potential liability for the answers it provides to users for even the most innocuous search. By protecting Google from liability, Section 230 allowed Google to create a search engine—guided by a different, though similar, algorithm—that is more responsive to the needs of its user base by predicting which of the millions of answers to a query most likely meet the needs and interests of the particular user. Going back to YouTube itself, one commentator has explained that, "[i]f Google loses its case, the probable outcome will be a significant reduction of video recommendations on YouTube, making it harder for people to find videos related to what they're viewing and harder for content providers to reach viewers."[8] Another quipped that "it is hard to imagine what the entire social media ecosystem would look like if platforms could be held liable for hosted third-party content."[9] Both are right—particularly because, whatever the uncertainty of what could have been without Section 230, what *is* certain is that both the providers and the users of interactive computer services would be more cautious in the organizational services they provide and the third-party content they present, "like," repost, recommend, or even reference lest they

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[8] Scott Shackford, *Supreme Court To Hear 2 Cases About Social Media Moderation and Liability for Terrorism*, Reason (Oct. 3, 2022), https://tinyurl.com/mt24k3bm.

[9] David Post, *Content Moderation, Social Media, and the Constitution*, Reason (Nov. 1, 2022), https://tinyurl.com/ms2tcwru.

be held liable for the information content of such third-party materials.

For that reason, it is no exaggeration to say that the fallout from a narrow reading of Section 230 would affect the entire Internet. "[M]any common features of websites, such as user reviews and comments, exist because of the liability protection offered by Section 230."[10] Wikimedia—the company that runs the online user-driven encyclopedia Wikipedia—expressly credits Section 230 with making Wikipedia possible.[11]

While it is a truism that the Congress faced with protecting a "nascent consumer Internet" could not have fully anticipated the future twists and turns of the Internet and may have "struggled to envision how this new technology would work,"[12] the limited ability to predict the future is true of every legislative effort and irrelevant to this Court's task. Regardless whether the members of Congress could have predicted the precise details of the future they were helping create, they were certainly correct about the tremendous innovation they sought to encourage. In the nearly 30 years since Section 230 became law, the

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[10] Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, Information Technology & Innovation Foundation (Feb. 22, 2021), https://tinyurl.com/2kfhs7wh.

[11] Leighanna Mixter, *Three principles in CDA 230 that make Wikipedia possible*, Diff (Nov. 9, 2017), https://tinyurl.com/yc5d4w55.

[12] Susan Benkelman, *The Law that made the Internet what it is today*, The Washington Post (Apr. 26, 2019), https://tinyurl.com/2rkc9b5x.

Internet has exploded because its protections have allowed providers and users of interactive computer services to test new technologies—to the great benefit of the Nation as a whole.

2. The technological innovations made possible by Section 230 have also greatly increased the ability of the average American to spread ideas. As the Fourth Circuit recognized just months after Section 230 was enacted, without Section 230 protections, the "specter of tort liability in an area of such prolific speech would have an obvious chilling effect." *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Section 230 protections, by contrast, allow interactive computer services to provide their users, rich and poor alike, with a reach that, historically, would not have been available even to the most privileged classes with access to the gatekeepers of the institutional press. Indeed, because of its ability to expand the reach of speech, Section 230 has been described as "the internet's First Amendment—possibly better."[13]

Further, Section 230 promotes the distribution of all speech—even speech that may be unpopular. In a way, the speech that Section 230 facilitates is "something like the way people actually communicate—online and off—in a world without top-down government control of our every utterance and interaction."[14] True, free speech on the Internet can be "messy," "florid," "outrageous," "offensive," "unpre-

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[13] Elizabeth Nolan Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away.*, Reason (Jul. 29, 2019), https://tinyurl.com/2x5zh9vd.

[14] *Ibid.*

dictable, uncontrollable, and frustrating."[15] But at the same time, it can also be "illuminating and informative."[16] But whatever the mix of speech on particular services and across the many interactive services collectively, that is the nature of *free* speech and, at least in our constitutional system, remains an overall public good. By protecting interactive computer services from liability for the speech of others, Section 230 has given room for all that speech to spread.

That is not, of course, to say that anything "in Section 230 requires that an entity maintain 'a true diversity of political discourse.'"[17] After all, if Congress did impose such a requirement as a precondition to Section 230 immunity, it would raise serious First Amendment questions. Cf. *Miami Herald Pub. Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974) (holding that newspapers cannot be forced to give access to all viewpoints). Instead, the benefits to free speech come from the sheer number of platforms available to the American people that have only been able to rise to prominence because of the protections of Section 230. Thus, if certain platforms promote or limit speech about a particular topic—or even a particular viewpoint that the platform owners find preferable or offensive—users are free to find another platform with

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[15] *Ibid.*

[16] *Ibid.*

[17] Elizabeth Nolan Brown, *Expect More Conservative Purges on Social Media If Republicans Target Section 230*, Reason (Nov. 28, 2018), https://tinyurl.com/bddn2mde (quoting @HawleyMO, Twitter (Nov. 27, 2018, 11:22 AM), https://tinyurl.com/33fa3fxm).

different terms of service. Put differently, if Twitter, Instagram, or Facebook decide to promote a particular viewpoint or perspective and decide that a different viewpoint is offensive, other services are available to promote competing views and disfavor other perspectives or content that they and their users find objectionable. And, of course, Section 230 provides the same protections to the smaller social media platforms that it does to the biggest platforms. They too can—and have—engaged in censorship of particular viewpoints.[18]

Furthermore, Section 230 provides its protection not only to the "providers" of interactive computer services, but to the "users" of such services as well. Removing immunity from Google here would equally remove immunity for persons hosting humble chat rooms, interest- or politics-focused blogs, and even for persons who "like" or repost the information content of others on their blog, their Facebook page, or their Twitter account. That the "algorithm" such users apply when deciding what to like, recommend, or republish to their followers may often be entirely in their heads, as opposed to incorporated into computers, makes no difference if—as Petitioners argue—the point is that merely recommending or promoting the information content of another makes you liable for any alleged harms from such content. Narrowing Section 230's protections thus not only would chill activi-

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[18] Truth Social, for example, famously deleted a user account for pretending to be a cow owned by the CEO of Trump Media, Devin Nunes. Matt Binder, *Truth Social already censoring content, bans user who made fun of Trump Media CEO*, Mashable (Feb. 22, 2022), https://tinyurl.com/yc87hunc.

ties by providers, large and small, it would chill the activity of millions of users as well.

3. The technological advancements and the benefits to free speech that Section 230 facilitates also have led to enormous economic growth.

The economic benefits that stem from Section 230 manifest in various ways. *First*, Section 230 "makes user-submitted reviews" of products "possible."[19] Such user reviews increase the likelihood that a user will find a product that meets their needs and that such product will be purchased. In one survey into the effects of user reviews on consumer behavior:

- 67% of respondents said they check online reviews either most of the time or every time before buying products in person or online;
- 72% said it is highly important for a business to have positive online reviews before they buy;
- 85% either strongly agreed or somewhat agreed that they would be less likely to purchase products online that did not have any reviews; and

[19] Ethan Wham, *An Economic Case for Section 230*, Disruptive Competition Project (Sept. 6, 2019), https://tinyurl.com/2m6kvam5.

- 65% responded with a 7 or above out of 10 when asked how much they trust online reviews.[20]

Indeed, research shows that "[b]uyers are looking to their peers to understand which products and services will benefit them, as peers can provide unbiased, individualized information."[21] Neither consumer reviews—nor the purchases they lead to—would be possible without Section 230 protections, particularly if platforms were potentially responsible for any reviews they hosted or organized in a manner useful to other shoppers.

Second, Section 230 allows small businesses to flourish. After all, a "single small provider may use multiple large providers to operate their own service or forum" by, among other things, "maintain[ing] accounts and advertis[ing] across multiple social media and other services, in addition to relying on ISPs, domain name registrars, and hosting providers."[22] If larger providers lacked protections for content posted by smaller providers, it is unlikely that they would make their services available to them. Loss of Section 230 protections could thus harm not only digital platforms that have dominant market share, but every-

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[20] *Ibid.* (citing Internet Association, *Best Of The Internet: Consumers Rely On User-Generated Content* (2019), https://tinyurl.com/yjtde9tc).

[21] Russell Rothstein, *The gig economy and customer reviews: Trust in the digital era*, The Future of Commerce and Customer Engagement (2016), https://tinyurl.com/yc3pupju.

[22] Elizabeth Banker, *Understanding Section 230 & the Impact of Litigation on Small Providers* 10 (2022), https://tinyurl.com/2nn66m87.

one down to the atomized worker in the gig economy merely trying to get word out about her services and to be matched with users most likely to be interested in such services.

In sum, Section 230's protections—as predicted and intended—have led to increased innovation which has, in turn, led to increases in the reach of speech and significant benefits for the national economy.

II. Algorithms or other actions that merely suggest information content provided by another content provider do not generally convert that content into "information provided by" the recommending user or provider of an interactive computer service.

Amicus agrees with Respondent that the plain text of Section 230 protects the information organizing activities at issue in this case. Resp. Br. 21–29. Beyond the textual arguments discussed by others, *Amicus* highlights the essential distinction in Section 230(c)(1) between information content provided by "another" and information content provided by the challenged provider or user themselves. Insofar as any organizational activity by the challenged provider or user could be deemed to create its own information content, that content would be far narrower than the underlying information content provided by another and would not itself form the basis for a credible claim of liability.

A. The plain text of Section 230 draws a distinction between redistribution of "information provided by another information content provider" and information content provided by a user or interactive computer service itself.

The plain text of Section 230(c)(1) bars claims that seek to hold a provider or user of "interactive computer service[s]" liable "as the publisher or speaker" of any information content provided by "another" information content provider. This case turns less on whether Gonzalez's claim against Google would treat YouTube as a "publisher" of the videos it suggested for users who seemed interested in such fare than it does on whether, by highlighting such videos to particular users, YouTube somehow adopted such information content as its own or itself became the information content provider as opposed to the underlying videos remaining the information content of "another."

The statutory definitions of "information content provider" and "interactive computer service" are helpful in resolving that question. An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). The provider of an "interactive computer service," by contrast, does not itself necessarily create or develop information, but instead "provides or enables computer access by multiple users to a computer server." *Id.* (f)(2). Included in the definition of "interactive computer services" are "access software providers." *Ibid.* As relevant here, an "access software

provider" means a provider of software or tools that can "pick, choose, analyze, or digest," "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." *Id.* (f)(4)(B), (C). Those distributional and organizational activities thus stand in direct contrast to the "creation" or "development" of the underlying content.

Applying these definitions, it is—of course—true that the providers of interactive computer services *can* create their own information content and thus, with respect to that content, act as an information content provider. *Batzel* v. *Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) ("The reference to '*another* information content provider' * * * distinguishes the circumstance in which the interactive computer service itself meets the definition of 'information content provider' with respect to the information in question."); *Jones* v. *Dirty World Ent. Recordings LLC*, 755 F.3d 398, 408–409 (6th Cir. 2014) ("[A] website may be immune from liability for some of the third-party content it publishes but be subject to liability for the content that it is responsible for as a creator or developer."). But more often a provider of an interactive computer service organizes and displays the content of "another" rather than its own content. Thus, the relevant question for this case is whether the algorithm that YouTube uses to show videos to others is an example of Google creating its *own* information content or whether it is Google merely organizing and displaying the content of "another."

B. Algorithms that point users of interactive computer services to the content of others generally do not themselves create or develop content from the recommending person or entity.

Like every other court to decide this issue, this Court should recognize that "[m]erely arranging and displaying others' content to users of [YouTube] through * * * algorithms—even if the content is not actively sought by those users—is not enough to hold [YouTube] responsible as the 'developer' or 'creator' of that content." *Force*, 934 F.3d at 70 (cleaned up).

1. This conclusion flows in part from Congress's definition of "access software provider." That definition allows interactive computer services to organize the information content of "another information content provider." What they cannot do if they want to maintain immunity from liability for particular content is to "create" or "develop" that content. Thus, under the plain language of the statute, unless an interactive computer service engages in the creation or development of the underlying information content, it cannot be treated as the information content provider.

2. Google does not create its own content when it organizes the content of others. As Respondent explains, YouTube's algorithms "identify the [videos] that users might find most relevant based on user inputs and other information." Resp. Br. 12. It then displays those identified pieces of content to the user. Pet. App. 38a ("Google matches what it knows about users based on their historical actions and sends

third-party content to users that Google anticipates they will prefer.").

As the *Force* court rightly explained, "[m]erely arranging and displaying" the content of others does not itself create content. 934 F.3d at 70. "[M]aking information more available is * * * an essential part of traditional *publishing*" and does not "amount to 'developing' that information within the meaning of Section 230." *Ibid.* This conclusion, moreover, holds both for providers of interactive computer services *and* their users alike. After all, Section 230(c)(1) treats the providers of interactive computer services and their users the same by expressly providing that neither shall be liable for the information content provided by another.

If Petitioners' theory is correct, and Google truly is liable for recommending the content created by its users via an algorithm or otherwise, then every time a *user* of an interactive computer service shares a video, blog, or tweet created by another, then that user would become a developer of the underlying content and face potential liability for such content. Indeed, under Petitioners' approach, by sharing another user's content, the sharing user becomes the means by which that content reaches a broader audience. This is no different than what an algorithm does.

And, as with algorithms, even though retweeting or sharing the content of another may not be an endorsement of a particular message,[23] both are—at the

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[23] "There are many reasons that someone might retweet a statement; a retweet is not necessarily an endorsement of the original tweet, much less an endorsement of the unexpressed be-

very least—recommendations that the retweeted or shared content be viewed. Put differently, if suggesting content via an algorithm somehow falls outside of Section 230's gambit by magically transforming one party's speech into the speech of the platform, so too does retweeting it. See Resp. Br. 33.

Petitioners' theory is wrong and would lead to absurd results. Section 230 protects ***both*** providers and users of interactive computer services from liability for sharing, recommending, or displaying the speech of another. Any attempt to split liability regimes between the "providers" and "users" of interactive computer services, or to distinguish the choices made manually by individual users about what to recommend or highlight to others verses the automated incorporation of the same or comparable choices into an algorithm, would be completely divorced from the text of the statute.

3. That is not to say that the provider or user of an interactive computer service can never take steps that would make it an information content provider itself and subject it to liability because of the ways that it interacts with the content of others. There is, after all, a difference between a provider or user suggesting the content of others to its users or followers based on their prior history or some other predictive judgment about likely interest and a provider or user actively adopting such content as its own, such as by

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lief system of the original tweeter[.]" *Flynn* v. *Cable News Network, Inc.*, No. 1:21-CV-2587-GHW, 2022 WL 3334716, at *5 (S.D.N.Y. Aug. 12, 2022).

endorsing the truth or correctness of a particular message or statement.

In the former example, all a provider or user does is acknowledge that another information content provider has created content that may be relevant to another user's or follower's interests and organizes that content in a way that makes it more visible to those users or followers. When a provider or user does that—even through an automated algorithm—the material that reaches a user is materially unaltered from the material submitted by the user information content provider in the first instance. *E.g.*, *Force*, 934 F.3d at 70. As the Ninth Circuit here explained it, an interactive computer service that actively displays or organizes the content of an information content provider—which it is expressly allowed to do under the statute, 47 U.S.C. § 270(f)(4)(B), (C)—does not itself contribute to the unlawfulness of the content and thus cannot be held liable for it. Pet. App. 32a–33a. Put differently, such an interactive computer service (or recommending user) has not created or developed that content.

By contrast, in the latter example of affirmative endorsement, a provider or user actively adopts particular information content as its own and thus may potentially be held liable for that content. In such circumstances, rather than merely displaying a text or a video to users based on their prior viewing history, geography, or other data the interactive computer service might have on them (or even based on the provider's own views of what might be interesting in general), a provider or user of an interactive computer service would be endorsing and adopting the un-

derlying information content itself, perhaps by suggesting that such information is correct.

This Court recognizes an analogous distinction in its First Amendment cases. This Court has held, for example, that while the government cannot discriminate on the basis of a person's viewpoint, it can discriminate on the basis of the broader category of content when it opens up its property for a limited purpose. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). The *Rosenberger* Court, for example, expressly recognized that some level of "content discrimination" may be permissible to "preserve[] the purposes of th[e] limited forum." *Id.* at 830. Thus, while the government is sometimes permitted to discriminate against particular subject matter in limited public fora, that is not necessarily equivalent to discrimination against or in favor of particular viewpoints, and hence not expressing the government's own substantive view or suppressing the views it opposes. *Ibid*. Providers and users of interactive computer services, of course, are not subject to the same limitations the First Amendment places on government, but the broader point is that by selecting or highlighting content or even viewpoints, the provider or user of an interactive computer service is not necessarily endorsing such information content or adopting it as its own, it is merely organizing the information.

YouTube is not taking a stance when it, having collected enormous amounts of data on a user's interests, points that user to content relevant to those interests. For example, if YouTube sends a list of new cat videos to a user that has watched cat videos in the past, the separate information content of that or-

ganizational effort is no more than: "You seem to like cats, here is more cat content."[24]

But if YouTube were to ever affirmatively adopt the view contained in one of the videos posted to it, it would itself be creating content in a way that is categorically different from merely organizing that content on its platform—which Section 230 expressly distinguishes from the creation or development of content. 47 U.S.C. § 230(f)(4)(C). It is only when the provider or user of an interactive computer service actually creates its own information content that Section 230, properly understood, allows those services to be held liable for such content. Because YouTube's algorithm merely organizes, and does not create, the content of other users, this Court should affirm the judgment below.

CONCLUSION

By design, Section 230(c)(1) serves a vital function that would be lost were this Court to conclude that the provider or user of an interactive computer service is ineligible for immunity if it uses an algorithm or similar set of decision factors to organize and display content provided by third parties. To prevent that result, the Court should affirm.

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[24] And even were a provider or user to recommend material created by others based on their own views regarding subject matter or viewpoint, that would not necessarily constitute an adoption or endorsement of the underlying information content as opposed to a more generic statement that such viewpoints are interesting or potentially valuable or any number of other implied statements short of adoption and endorsement.

Respectfully submitted,

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January 19, 2023