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

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Daniel R. Suhr
Counsel of Record
LIBERTY JUSTICE CENTER
440 N. Wells Street, Suite 200
Chicago, Illinois 60654
Phone: 312-637-2280
dsuhr@libertyjusticecenter.org

November 18, 2022

QUESTION PRESENTED

Does section 230(c)(1) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTEREST OF AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that pursues strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. Our groundbreaking lawsuits stake out Americans' constitutional rights.

Liberty Justice Center's First Amendment advocacy includes *Hart v. Facebook*, No. 3:22-cv-00737-CRB (N.D. Cal.), which challenges the federal government's cooperation with social media companies to censor free speech. Section 230 is one of the defenses asserted by the social media companies.

[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties have filed blanket consents or specifically consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Petitioners argue that Judges Berzon and Gould on the Ninth Circuit panel below found a broad reading of Section 230's immunity shield "inconsistent with the text and the legislative history." Pet. 81a-92a (Berzon, J., concurring), 92a-110a (Gould, J., concurring in part and dissenting in part) (discussing *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019)). Chief Judge Katzmann's dissenting opinion in *Force* similarly relies extensively on legislative history to document "congressional intent" showing a consistent misreading of Section 230. *Force v. Facebook, Inc.*, 934 F.3d 53, 78-80 (2d Cir. 2019) (Katzmann, C.J., dissenting).

But a textualist justice skeptical of legislative history need not get the willies from the preceding paragraph. Rather, a textualist judge can read the full law adopted by Congress in the entirety of Section 230, including the congressional findings and statement of policy, to reach the same conclusion: that the lower courts' interpretation of Section 230 has radically departed from its natural reading.

ARGUMENT

I. Textualist judges may rely on congressional purpose and findings statements for insight into a statute's correct reading.

The findings and purposes that appear at the beginning of legislation are appropriate tools for textualist judges to consider. "Enacted findings and purposes should be useful tools of interpretation even

for textualists because they are not subject to the formalist and pragmatic arguments textualists commonly raise against legislative history." Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. Chi. L. Rev. 669, 675 (2019). Most importantly, they have actually been enacted by Congress and signed into law by the President.[2] Thus they comport with that fundamental rule: "Statutory construction must begin with the language employed by Congress." *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 175 (2009).

In this instance, as in many other statutes, that language includes statements of finding and policy. Such statements make "an inquiry into legislative history" "quite superfluous" "since the text of the Act itself makes clear [what] Congress sought." *Reynolds v. United States*, 132 S. Ct. 975, 986 n.* (2012) (Scalia J., dissenting). Here, the language employed by Congress includes not only 230(c)(1)-(2), the liability shield, but also 230(a) ("findings") and (b) ("policy"), two statements that make clear what Congress sought in enacting the statute.

The justices of this Court frequently rely on the congressional findings to ensure Congress's thoughtful exercise of its powers, including an evaluation of the governmental interests justifying

---

[2] Victoria L. Killion, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, Cong. Research Serv. (May 19, 2022) 33 (courts "view findings in the bill text itself as more authoritative than those that appear in the legislative history, because both houses of Congress passed them."). Interestingly, the same rule pertains in the interpretation of treaties under the Vienna Convention on the Law of Treaties. Max H. Hulme, Note: *Preambles in Treaty Interpretation*, 164 U. Pa. L. Rev. 1281 (2016).

various restrictions on liberty. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 29 (2010); *Gonzales v. Raich*, 545 U.S. 1, 20 (2005); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 257 (2002); *Bd. of Trs. v. Garrett*, 531 U.S. 356, 372 (2001); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981).

But congressional findings are also a legitimate tool for statutory interpretation. *See, e.g., King v. Burwell*, 576 U.S. 473, 492-93 (2015); *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 197 (2002); *Sutton v. United Air Lines*, 527 U.S. 471, 484 (1999). Even Justice Scalia, the apostle and apotheosis of textualism, would rely on congressional findings to help guide interpretation. *See, e.g., H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring) (interpreting RICO).

This Court also makes frequent reference to congressional "policy" statements as interpretive tools. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 539 (2015) (the Fair Housing Act); *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 193 n.2 (2011) (Sotomayor, J., dissenting) (Indian trust lands); *Negusie v. Holder*, 555 U.S. 511, 553 (2009) (Thomas, J., dissenting) (International Religious Freedom Act); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 360 (2002) (Thomas, J., dissenting) (Section 230); *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439, 454-55 (1988) (American Indian Religious Freedom Act).

And such statements of purpose or findings then guide the interpretation of what follows; as this Court explained regarding another prefatory purpose

clause, "Logic demands that there be a link between the stated purpose and the command." *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008). As Justice Scalia said in *Heller*, "a prefatory clause does not limit or expand the scope of the operative clause," but nevertheless it is an important tool to "ensure that our reading of the operative clause is consistent with the announced purpose." *Id.* Put differently, a "plain-meaning interpretation cannot contravene a textually or contextually manifest statutory purpose." *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 59 (Sykes, J.).

None of this is to say that there should be an "elevation of judge-supposed legislative intent over clear statutory text" or "policy-driven interpretation." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 109-10 (2007) (Scalia, J., dissenting). It is rather to say that this Court should not ignore clear statutory text just because it has findings or statements of policy instead of operative clauses. And just as Justice Scalia himself did in *Heller*, the Court should "ensure that our reading of the operative clause is consistent with the announced purpose." 554 U.S. at 578. In this instance, the announced purpose set forth by Congress is a helpful tool in clarifying the correct scope of Section 230.

II. The congressional policy and findings in Section 230 support Petitioners in this case.

Congress adopted both a set of legislative findings and a declaration of policy at the start of Section 230. These enactments help answer the question posed by petitioners, "the question that divided the panel and

the Second Circuit, whether section 230 protects recommendations, or is limited to traditional editorial functions." Pet. 37.

1. The first theme in the findings and policy is Congress's desire to empower the individual Internet user, the consumer, to take control and dictate the content he or she receives. The second finding says the Internet and other interactive computer services "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops." 47 U.S.C. § 230(a)(2). Congress continues in the next section then by stating "It is the policy of the United States—to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." 47 U.S.C. § 230(b)(3). This included a specific focus on objectionable content: "It is the policy of the United States—to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4).

In this case, user control is not served by protecting publishers from liability for their editorial choices. Publishers may wish to push particular content at consumers, especially if they have a financial incentive to do so, but insulating them from liability for those choices does nothing to empower consumers to control content. If the algorithms push content that is designed to appeal to certain

consumers, that in some sense may enhance consumer value, but not consumer control. But usually the algorithm does not operate purely based on what it thinks the consumer wants more of. Often the algorithm acts at the intersection of what the consumer wants and what the platform wants. In other words, the algorithm may push content the consumer will be interested in, but from which the platform receives ad revenue. If a consumer is interested in running shoes, the platform algorithm does not necessarily treat Nike and Adidas equally: it pushes more content for whichever company buys more ads. The publisher, rather than the consumer, is in the driver's seat as to the content the consumer receives. That is antithetical to the first principle Congress set, and should not fall within the protections Congress created.

2. The second theme in the findings is the function of the Internet as an open, democratic marketplace of ideas. The Internet, Congress declared, should host "a true diversity of political discourse . . . and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). And later, Congress recognized that "[i]ncreasingly Americans are relying on interactive media for a variety of *political*, educational, cultural, and entertainment services." *Id.* at (a)(5) (italics added).

Again, this principle favors petitioners. Whether on COVID, climate change, or election integrity, it has become clear in recent years that social media publishers are taking an active approach to promoting particular views within the marketplace of ideas, and censoring divergent views. Acting on their own, such

editorial functions may be protected by the First Amendment. But that does not mean they are protected by Section 230. When the publisher comes in and puts a massive thumb on the scale for its preferred view, it "might silence dissent and distort the marketplace of ideas." *See Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring). When publishers distort the marketplace of ideas, they undermine the "true diversity of political discourse" that Congress sought and artificially constrict the "myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Section 230 should be construed to promote an open and equal forum, not one where publishers can artificially distort the forum through their algorithms.

3. Third and finally, Congress focused on the need for a light regulatory touch on the Internet. In the findings, Congress noted that prior to Section 230's enactment, "The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). This conclusion motivated Congress to declare the policy, "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." 47 U.S.C. § 230(b)(2).

This third principle again favors Petitioners. Today is not the day to litigate the persistent pattern of collusion in favor of censorship by the government and the social media companies, which is a stake to the heart of what Congress wanted. Even in this more

limited instance, Congress's stated goals favor a narrow interpretation of the liability shield.

A liability shield is, in some sense, a hedge against government interference, as it carves off an area into which the judiciary cannot intrude. But in another sense, a liability shield is absolutely a form of government regulation. It is Congress coming in to favor one set of economic actors by protecting them against the financial repercussions of their decisions. That is substantial governmental interference in the free market. A free market operates optimally when actors have freedom within a reliable, neutral set of rules, including the rule of law. A market where contracts go unenforced and torts go unpunished may be in a certain sense free, but it will not function for long. And a market where Congress chooses to exempt one set of privileged actors from the normal rules of contracts or torts is not fully free either. A narrow interpretation of Section 230's liability shield facilitates a free market and minimizes governmental interference in the Internet. By allowing the normal rules of torts and trade to apply, such a reading promotes accountability and transparency and relieves pressure so we won't end up with an agency of federal bureaucrats to regulate the Internet.

CONCLUSION

By looking to Congress's own declarations of findings and policy that immediately proceed the contested portion of Section 230, this Court will find that the principles set by Congress favor a limited reading of the liability shield in this case.

November 18, 2022 Respectfully submitted,

Daniel R. Suhr
Counsel of Record
LIBERTY JUSTICE CENTER
400 N. Wells Street, Suite 200
Chicago, Illinois 60654
(312) 637-2280
dsuhr@libertyjusticecenter.org