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 AMICUS CURIAE CHILD USA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Section 230(c)(1) defense apply to internet service providers when they design and deploy their own algorithms to affirmatively surface and make targeted recommendations of third-party content to users on their platform?

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INTEREST OF AMICUS CURIAE[1]

CHILD USA is the leading national nonprofit think tank fighting for the civil rights of children. CHILD USA engages in in-depth legal analysis and cutting-edge social science research to determine the most effective public polices to protect children from sexual abuse and online exploitation and to ensure access to justice for victims. Distinct from an organization engaged in the direct delivery of services, CHILD USA produces evidence-based solutions and information needed by policymakers, organizations, courts, media, and society as a whole to increase child protection and the common good. CHILD USA's interests in this case are directly correlated with its mission to increase child protection and to eliminate barriers to justice for victims of sexual abuse and online exploitation. CHILD USA is an expert on the proximate, immediate, and persistent harms to child-victims whose imagery is hosted and trafficked online, the ways in which digital communication platforms exacerbate this abuse and its attendant harms, and on the measures Congress has taken to address the epidemic of child sexual exploitation by holding online entities accountable.

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[1] All parties consent to the submission of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae and its counsel—has contributed money that was intended to fund preparing or submitting this brief. There is no relationship between CHILD USA or its attorneys and petitioners or petitioners' counsel.

Section 230's failure to incentivize tech companies to develop child-protective processes has made child sexual exploitation and abuse a feature of digital communication platforms and left victims without recourse, which is inconsistent with Congress's intent. This case presents an opportunity to change the incentive calculus by restoring interpretation of Section 230 to its text and congressionally intended purpose in favor of child protection.

SUMMARY OF ARGUMENT

Congress passed the Communications Decency Act (CDA) twenty-six years ago, which included a limited defense for online platforms in Section 230. Over the years, federal courts have steadily expanded the boundaries of the Section 230 defense such that online platforms now enjoy near absolute immunity from suit, even when they engage in harmful practices that would be actionable had they been undertaken offline. This was not Congress's intent when they set out on a broad campaign to "clean up the internet."

As amicus will discuss in this brief, the text and legislative history of Section 230 "shout to the rafters" regarding Congress's intent to restrict children's access to sexually explicit and otherwise harmful content and to incentivize development of technologies that would allow parents and users to filter out such materials. *Force v. Facebook*, 934 F.3d 53, 88 (2d Cir. 2019) (Katzmann, J., concurring in part and dissenting in

part). In Section 230, lawmakers thought they were creating a limited defense from civil liability for internet service providers' good faith efforts to restrict or enable restriction of objectionable content on their platforms. Section 230 bars claims that impose liability on an internet service provider based solely on the improper character of a third-party's post. 47 U.S.C. § 230(c)(1). That is a very circumscribed set of claims.

The categorical immunity asserted by Google and affirmed by the court below runs afoul of the statutory text and is antithetical to congressional objectives. This Court needs to clarify what the text already makes clear: that the design, development, and deployment of a company's algorithmic functions reach beyond the traditional editorial activities that Section 230 protects. When a plaintiff's claim is based not on the content of the information shown but rather on the affirmative conduct of the defendant, Section 230 should leave online platforms accountable for the harm to children they cause.

ARGUMENT

I. An Overly Broad Construction Of Section 230 Has Produced Immunity From Liability Far More Sweeping Than The Statute's History And Text Support

The Section 230 defense does not immunize online platforms for their affirmative conduct and its overly

broad construction impedes Congress's goal to protect children from harmful online material.

A. Congress Designed Section 230 As a Limited Defense to Liability Consistent with Its Policy Goal of Protecting Children from Harmful Materials by Encouraging Good Faith Content Monitoring Online

With the dawn of cable television, digital communication, and the growing advent of the internet, Congress took on the daunting task of modernizing the regulatory framework of the national telecommunications law, the Communications Act of 1934. Communications Act of 1934, c. 652, Title I, § 1, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 151 *et seq*.). Congress later recognized that the many benefits of a free and open internet came with potentially serious costs. Among the many issues that a nascent internet implicated, Congress sought to tackle only one: the ease with which children could access sexually explicit materials. Section 230 was developed as part of the solution to stop the proliferation of such content to keep the internet safe for its users.

Congress took action on February 1, 1995, when Senator Exon (D-NE) introduced the Communications Decency Act ("CDA") in the Senate as an amendment to the Telecommunications Act of 1996. Communications Decency Act of 1996, Pub. L. No. 104–104, 110 Stat. 133–145 (1996) (codified as amended at 47 U.S.C. § 223 (1934)); Robert Cannon, *The Legislative History*

of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway, 49 FED. COMM. L. J. 51, 52–53 (Nov. 1996). The bill sought, in part, to impose criminal penalties on those who knowingly use interactive computer services to make, solicit, or transmit obscene materials to minors. 47 U.S.C. § 223(a); Communications Decency Act § 502.

Members of the Senate described the CDA's fundamental purpose as "**provid[ing] much needed protection for children**," not only from explicit content online, but also from child abuse itself. *See* 141 CONG. REC. S1954 (daily ed. June 9, 1995) (comments of Sen. Exon); *see also* 141 CONG. REC. S8332 (daily ed. June 14, 1995) (comments of Sen. Coats); 141 CONG. REC. S8088 (daily ed. June 9, 1997) (comments of Sen. Exon).

In the House, Congressmen Christopher Cox (R-CA) and Ron Wyden (D-OR) introduced their own amendment to the Telecommunications Act—the "Internet Freedom and Family Empowerment Act of 1995" ("IFFEA")—which offered a slightly different approach to that adopted in the Senate's CDA to achieve its policy objective. *See* Internet Freedom and Family Empowerment Act of 1995, H.R. 1978, 104th Cong. (1995). The CDA, though recognizing the value of the internet, sought to restrict children's access to explicit content online and impose barriers to child abuse and exploitation, whereas the IFFEA, while acknowledging the concerns behind the CDA, focused on protecting online service providers from liability for user-generated content on their platforms. *See*, *e.g.*, 47 U.S.C.

§ 230(c), (b)(3), (b)(4). The Senate Conference Report explained Section 230 as follows:

> This section provides "Good Samaritan" protections from civil liability for providers or users of an interactive computer service for actions to *restrict* or to enable *restriction of access to objectionable online material*. One of the specific purposes of this section is to overrule Stratton-Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have *restricted access to objectionable material*. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

S. CONF. REP. 104–230, 194 (1996) (emphasis added). To achieve its promise of creating a safe online environment for its users—especially children—Congress prioritized the necessity of liability for entities with knowledge of illicit conduct on their platforms and others acting in bad faith. *See, e.g.*, 47 U.S.C. § 230(b)(5); *see also* 142 CONG. REC. 8687 (daily ed. Feb. 1, 1996) (statement of Sen. Coates) ("On-line services and access software providers are liable where they are **conspirators with, advertise for, are involved in the creation of or knowing distribution** of obscene material or indecent material to minors."); Christopher Cox, *The Origins and Original Intent of Section 230 of*

the Communications Decency Act, UNIV. RICH. J.L. & TECH., 64 (2020).

The House Rules Committee, which considered Section 230, described the provision as "protecting from liability those providers and users seeking to clean up the Internet" by providing a *limited* defense for "those who lack knowledge of a violation" and who have "server and software functions" so that if they attempted to protect children by policing their platforms for explicit materials, they would not be held liable if, in some instances, those protections failed. H.R. CONF. REP. No. 104–458, at 188, 190.

Congress's intent to protect children was a preeminent theme during House floor debates. *See, e.g.*, 141 CONG. REC. S8087 (daily ed. June 9, 1995) (statement of Sen. Exon) (stating that their intent was to make the internet "**a safe place for our children and our families**") (emphasis added). Making the argument for adoption of the amendment Congressman Cox stated, "[a]s the parent of two, I want to make sure that my children have access to this future and that I do not have to worry about what they might be running into online." 142 CONG. REC. 1993, 22, 044–45. Likewise, Congressman Wyden said, "[w]e are all against smut and pornography, and, as the parents of two small computer-literate children, my wife and I have seen our kids find their way into these chat rooms that make their middle-aged parents cringe." *Id*. Not a single legislator criticized the bill, and the amendment passed both Houses with near unanimous support. *See, e.g.*, 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995)

(statement of Rep. Danner); (statement of Rep. White); (statement of Rep. Goodlatte) ("**Congress has a responsibility to help encourage the private sector to protect our children from being exposed to obscene and indecent material on the Internet**") (emphasis added).

Both the House and Senate having passed their respective versions of the CDA, the conference committee had before it two approaches to countering children's access to indecent and obscene materials in cyberspace. The disagreement that ensued during the House-Senate debate, however, was not over the CDA's purpose of protecting kids, but rather the most effective way to achieve it. 141 CONG. REC. S8334, 8337 (statement of Rep. Cox); (statement of Rep. Wyden); *see also* 142 CONG. REC. 1993, 2042 (comments of Sen. Breaux). Congress ultimately adopted both amendments as part of the final CDA which was attached under Title V to the Telecommunications Act of 1996. *See* Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56, §§ 502, 509 (1996) (codified as amended at 47 U.S.C. § 151 *et seq.* (1934)); *see also* 141 CONG. REC. 1993, 2041 (comments of Sen. Exon). Although the United States Supreme Court quickly struck down the Senate's CDA provisions as unconstitutional on adults' free speech grounds, the purpose of keeping children safe online remains the central goal of the Act. *See Reno v. A.C.L.U.*, 521 U.S. 844, 874 (1997).

Notwithstanding the history and plain language of Section 230, powerful tech companies like Google have relentlessly advocated for an expansive

interpretation of Section 230's defense and labored to reframe the law's purpose from child protection online to one limited to adult free speech. Nicolas Conlon, *Freedom to Filter Versus User Control: Limiting Scope of § 230(C)(2) Immunity*, 2014 UNIV. ILL. J. L. TECH. & POL'Y 105, 115 (2014). To be sure, Federal lawmakers *did* want a free and open internet, but they also recognized the harm that would come to bear—specifically upon children—because of that openness. Having carefully designed a limited defense under Section 230, Congress was able to strike an appropriate balance that it believed would limit harm without limiting growth. By expanding immunity beyond that contemplated by Congress, courts have tipped the scales away from its central purpose.

B. The Plain Language of Section 230 Does Not Immunize Online Platforms for Their Affirmative Conduct

At the core of Section 230 is subsection (c), "Protection for 'Good Samaritan' blocking and screening of offensive material," which addresses certain limitations on liability for interactive service providers. First, subsection (c)(1) states 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). Second, subsection (c)(2)(A) protects a "provider or user of an interactive computer service" from liability for "any action voluntarily taken in good faith to restrict access to or availability of

[objectionable] material." 47 U.S.C. § 230(c)(2)(A). Section 230(c) is "most naturally read" to protect companies when they (1) "unknowingly *decline* to exercise editorial functions [over objectionable] third-party content," § 230(c)(1), or (2) "when they decide to exercise those editorial functions in good faith, § 230(c)(2)(A)." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 17 (2020) (Thomas, J., dissenting).

Section 230 does not immunize an internet service provider from liability for all activities in which it might engage. That is, Section 230 does not apply whenever a cause of action would require treating the defendant as "a publisher" in the abstract. *Force v. Facebook, Inc.*, 934 F.3d 53, 81 (2d Cir. 2019) (Katzmann, J., concurring in part and dissenting in part). Rather, it is "'whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another.'" *Id*. (citing *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016)).

Thus, by its own terms, Section 230 creates an affirmative defense to liability for those defendants who can establish that they are an internet service provider, that the claim relates to information provided by another information content provider, and that an element of the claim requires treating them as the original speaker or publisher of that content. *See Meacham v. Knolls Atomic Power Lab'y,* 554 U.S. 84, 91 (2008) (quoting *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)); *see also City of Chicago v. Stubhub!, Inc*., 624 F.3d 363, 366 (7th Cir. 2010) (holding that § 230(c)(1)

does not create an immunity); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009) (same); *e-ventures Worldwide, LLC v. Google Inc.*, 188 F. Supp. 3d 1265, 1273 (M.D. Fla. 2016); *Nestle Purina Petcare Co. v. Blue Buffalo Co. Ltd.*, No. 4:14 CV 859 RWS, 2015 WL 1782661, at *10 (E.D. Mo. Apr. 20, 2015); *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484 AHM (SHx), 2008 WL 4217837, *12 (C.D. Cal. July 16, 2008); *cf.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1202 (N.D. Cal. 2009); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735(RMB), 2009 WL 1704355, *5 (S.D.N.Y. June 15, 2009).

Moreover, the language of subsection 230(c)(1) must be understood within the structure of Section 230 as a whole to give it proper effect; most critically the Section's unambiguously narrow scope—to enable blocking and filtering, § 230(c)(2)(A)—and its separately enumerated subsection, § 230(e) *et seq.*, that expressly defines Section 230's "Effect on other laws." 47 U.S.C. § 230(e)(1)–(5). Congress intended Section 230 to establish a uniform federal policy, but as the text makes clear, one that is wholly consistent with robust enforcement of federal and state criminal and civil law. *See* 47 U.S.C. § 230(e)(1)–(5). While Section 230 includes a preemption on inconsistent state law, it was drafted to ensure that prosecutors and civil litigants would be able to hold internet companies accountable for illicit online activities by establishing that they were at least partially responsible for the creation of

the content or for its later development. *See* 47 U.S.C. § 230(f)(3). That intent is expressed in the definition of "information content provider": "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) (emphasis added).

By Section 230's plain terms, an internet service provider "shall not be treated as the publisher or speaker of any information provided by another information content provider," which means that where the cause of action targets defendant's affirmative conduct, liability still attaches. 47 U.S.C. § 230(e)(1)–(5). Section 230 does *not* immunize defendants from liability based on their own content creation, nor does it immunize them for disseminating, developing, or otherwise manipulating content provided by another user. Indeed, according to Justice Clarence Thomas:

> "[H]ad Congress wanted to eliminate both publisher and distributor liability, it could have simply created a categorical immunity in § 230(c)(1): No provider 'shall be held liable' for information provided by a third party. After all, it used that exact categorical language in the very next subsection, which governs removal of content."

Malwarebytes, 141 S. Ct. at 16 (Thomas, J., statement respecting the denial of certiorari). Thus, properly construed, Section 230 protects *only* those internet service providers who mistakenly host objectionable content provided by a third-party or who, in good faith, restrict

more content than is necessary to keep their platforms safe.

Here, Google deployed its own algorithms to affirmatively surface and make targeted recommendations of illicit third-party content to its users. To hold that Section 230 protects Google for engaging in behavior that is the opposite of that which its text expressly encompasses would be patently absurd. To conclude that Google is entitled to *immunity* when that behavior violates federal anti-terrorism laws is not only textually nonsensical, but downright dangerous.

C. The Immunity Afforded to Online Platforms Is Now So Broad That It Undermines Fundamental Public Interests Including Child Protection

Overly broad construction of Section 230 can be traced back to the Fourth Circuit's decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). Relying exclusively on Section 230's purpose to protect online providers in limited circumstances, without reference to the statutory text or the law's other purpose to protect children, the court erroneously held that Section 230(c)(1) creates immunity for "any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id*. at 330, 333. Justice Clarence Thomas criticized the decision explaining that, "[a]lthough the text of § 230(c)(1) grants immunity only from 'publisher' or 'speaker' liability, the first appellate court to consider

the statute held that it eliminates distributor liability too." *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting the denial of certiorari) (citing *Zeran*, 129 F.3d at 331–34). "Extending § 230 immunity beyond the natural reading of the text," Justice Thomas cautioned, could have "serious consequences." *Id*. at 18.

To that point, *Doe v. Am. Online*, one of the first cases to adopt the approach in *Zeran*, is illustrative. 783 So. 2d 1010 (Fla. 2001). In this case, the majority rejected Doe's claims alleging that AOL had knowingly distributed and permitted advertisements for child pornography on its platform, that it had received complaints about child sexual abuse materials (CSAM) depicting Doe on its platform, and that it had failed to terminate the account of the user it knew to be posting such material in violation of the company's terms of service. *Id*. In his incisive dissent, Judge Lewis argued that the majority's reliance on *Zeran* had been in error and that its decision "frustrate[d] the core concepts explicitly furthered by the [Communications Decency] Act and contravene[d] its express purpose . . . [T]he so-called Decency Act has, contrary to well established legal principles been transformed from an appropriate shield into a sword of harm." *Id*. at 1019 (Lewis, J., dissenting). He also forewarned that adopting this approach would create "carte blanche immunity for wrongful conduct plainly not intended by Congress." *Id*.

As predicted, courts following *Zeran* have "read extra immunity" into the statute "where it does not belong" and in a manner far beyond what the text

supports. *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., statement respecting the denial of certiorari) (citation omitted). The effect has been a cascade of increasingly flawed decisions providing online platforms with immunity for a vast array of criminal and tortious activities that have very little to do with publishing, including terrorism, *Force*, illegal firearm sales, *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 715, 726 (Wis. 2019), cert. denied, 140 S. Ct. 562 (2019), and sex trafficking, *Doe v. Backpage.com, L.L.C.*, 817 F.3d 12 (1st Cir. 2016), to name a few.

Even after Congress enacted the Fight Online Sex Trafficking Act ("FOSTA") to clarify that Section 230 does not immunize online service providers that facilitate or materially benefit from trafficking activities on their platforms, courts *still* provided immunity to internet companies that knowingly or recklessly facilitated heinous crimes against children despite the actual language of the Act. Pub. L. No. 115–164, 132 Stat. 1253; *see also* 164 CONG. REC. H1290-02 (daily ed. Feb. 27, 2018) (statement of Rep. Lee); *A.M. v. Omegle.com, LLC*, 2022 WL 2713721, at *1 (D. Or. July 13, 2022); *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1142 (9th Cir. 2022); *M. L. v. Craigslist Inc.*, 2020 WL 6434845, at *10 (W.D. Wash. Apr. 17, 2020).

This extreme view that would immunize online platforms for their own misconduct is impossible to reconcile with the statute's plain language, which clearly indicates that the operative reasons for immunity are restricting access to objectional content and "Good Samaritan" screening. 47 U.S.C. § 230(c); *see*

also Alina Selyukh, *Section 230: A Key Legal Shield For Facebook, Google Is About To Change*, NPR (Mar. 21, 2018) (statement of Rep. Cox), https://www.npr.org/sections/alltechconsidered/2018/03/21/591622450/section-230-a-key-legal-shield-for-facebook-google-is-about-to-change. Furthermore, broad construction of Section 230 has created a perverse incentive for online platforms to behave recklessly in pursuit of profit. Without an obligation for online service providers to address harmful activities on their platforms, no matter how easily they could so, and no requisite standard of care by which to conform their conduct, consumers—especially children and victims of abuse—are left to bear the consequences.

II. The Prevailing Interpretation of Section 230 Improperly Immunizes Online Platforms for Conduct Beyond the Scope of "Traditional Editorial Functions"

A publisher's "traditional editorial functions" protected by Section 230 are those "such as deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. However, the functional transformation from early internet into a virtual world with all manner of products and services has changed the way online platforms relate with third-party content, such that online platforms frequently have duties to their users beyond their role as publisher. When companies design, develop, and deploy their own algorithmic tools, they transform from internet service provider into content service providers. There is no duty

owed to a user when the internet service provider acts as a mere publisher, but there is a duty owed to a user to not design a defective product. These are different in kind and severable from traditional editorial decisions. When courts elide that distinction, they cause plaintiffs great harm.

A. Courts Have Expanded Section 230 Beyond Congress's Intent to Protect Only the Online Provider's Role as a Publisher when They Fail to Acknowledge Online Platforms' Additional Role as a Manufacturer of Online Products with Duties to Consumers and the Public

The online networked environment that Section 230 presides over today is profoundly different from that of the early static, content-repository days of Prodigy, which means Section 230's limits on immunity are more important than ever for child protection. Modern tech companies like Google are vastly larger, wealthier, and more powerful than were the online service providers of two decades ago, and the activities in which they engage are less obviously about speech. *See* Shira Ovide, *Big Tech Has Outgrown This Planet*, NY TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/07/29/technology/big-tech-profits.html. Today's virtual world offers a multitude of products and services that would have been unimaginable to Congress back in 1996, and, as is true in the physical world, poorly designed digital products can cause significant harm to its users. Whereas in the physical world, consumers

may seek redress for their harm by filing a tort claim against the manufacturer of the product, such claims are often preempted by Section 230 in the virtual world.

Section 230's content-publisher model has proven especially problematic in cases where a plaintiff's injury is causally connected to third-party content, but the defendant's alleged wrongdoing is not based on a failure to moderate that content. The Fifth Circuit's decision in *Doe v. Myspace*, one of the first appellate court cases to address liability in the context of a defective virtual product, is illustrative of the paradigmatic error courts have and continue to make in assessing these claims under Section 230. *Doe v. Myspace*, 528 F.3d 413 (5th Cir. 2008). In that case, the Court considered allegations that the social media platform had been negligent in its failure to implement basic safety features that could have prevented Doe, then thirteen-years-old, from creating a profile on the platform through which she was able to connect with a sexual predator. *Id*. The Court rejected Doe's claim, characterizing it as a "disingenuous" attempt to circumvent Section 230 and to hold MySpace liable based on her own disapproval of the platform's "monitoring, screening and deletion" choices, activities generally protected by Section 230. *Id*. at 420. In so holding, the Court ignored that the alleged harm stemmed from Doe's ability to access the social media platform, which occurred well before she interacted with any users, and not from the contents of any correspondence posted to the website by this predator or any other third party. By

disregarding MySpace's affirmative conduct—namely its failure to design and implement features that would have prevented such foreseeable harms to minors in accessing their platform—and assuming that Doe sought redress for some content-derived harm, the Fifth Circuit improperly foreclosed claimants' ability to hold online platforms liable for their actions as manufacturers of products.

Many courts have followed suit, dismissing claims against online platforms for their affirmative design and system choices reasoning that, regardless of any negligence or defects or preventable harm to others, online entities are immune from liability so long as the duty breached does not involve the creation of content. *See, e.g.*, *Force v. Facebook, Inc* 934 F.3d 53 (2d Cir. 2019); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019); *Stokinger v. Armslist, LLC*, No. 1884CV03236F, 2020 WL 2617168, at *5 (Mass. Super. Apr. 28, 2020); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 590 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019), cert. denied, 140 S. Ct. 221 (2019); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097–101 (9th Cir. 2019); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016).

In a departure, the Ninth Circuit in *Doe v. Internet Brands, Inc.*, held that Section 230 did not bar a claim against the owners of a social networking site for individuals in the modeling industry for the website's alleged negligent failure to warn about two individuals who used the website to lure Doe to a fake audition, where she was raped. The owners had obtained

information from an offline source about the third-parties' scheme to target and lure victims through its platform. *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). In so holding, the Court drew a distinction between a remedial measure that may require an interactive computer service provider to warn its users of a known risk and the paradigmatic case of Section 230 immunity—a defamation claim based on content published by a third-party user. *Id.* at 853. The Court explained that Doe's failure to warn claim "ha[d] nothing to do with [Defendant's] efforts, or lack thereof, to edit, monitor, or remove user-generated content." *Id*. at 852. Further, the Court conceded that Defendant had acted as the "publisher or speaker" of user content (Doe's profile), a "but-for" cause of her injuries, but nonetheless rejected the but-for causation requirement as applied to Section 230 preemption, explaining that "[p]ublishing activity is a but-for cause of just about everything [Defendant] is involved in," however, "the CDA does not provide a general immunity against all claims derived from third-party content. . . . Congress has not provided an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses." *Id.* at 852–53.

> The Ninth Circuit refined the publisher liability analysis in *Lemmon v. Snap, Inc.*, 995 F.3d 1085 (9th Cir. 2021), asserting that whether a defendant is treated as a publisher or speaker depends on "the duty the plaintiff alleges." 995 F.3d at 1091. To that point, the Court

> added that the duty alleged in a products liability claim: "differs markedly from the duties of publishers as defined in the CDA. Manufacturers have a specific duty to refrain from designing a product that poses an unreasonable risk of injury or harm to consumers. Meanwhile, entities acting solely as publishers—*i.e.*, those that review material submitted for publication, perhaps edit it for style or technical fluency, and then decide whether to publish it—generally have no similar duty."

Id. at 1092. (internal citations and quotations omitted).

These Ninth Circuit decisions are informative as to the proper analysis of publisher liability under Section 230 in light of its text and history. The key lies in the careful evaluation of the claimant's cause of action to determine if the defendant's conduct—the alleged source of harm—goes beyond the entity's editorial functions. *See Bauer v. Armslist, LLC*, 572 F. Supp. 3d 641, 664 (E.D. Wis. 2021) (describing Section 230 as a "definitional provision" requiring a "fact-based inquiry"). While an online platform may be primarily designed for posting and exchanging content, that fact alone does not sweep all decisions made by the platform within the scope of its publishing function. Indeed, "Section 230(c)(1) limits liability *based on the function the defendant performs, not its identity*." *Force*, 934 F.3d at 81 (emphasis added). Simply put, "[w]hen a plaintiff brings a claim that is based not on the content of the information shown" but rather on the defendant's own conduct "the CDA does not and should

not bar relief." *Id*. at 82; *see also FTC v. Accusearch Inc*., 570 F.3d 1187, 1204 (Tymkovich, J.) (10th Cir. 2009); *Bauer*, 572 F. Supp. 3d at 663–64.

In the present case, Petitioner brings a claim under the Anti-Terrorism Act (ATA). 18 U.S.C. § 2333. The duty imposed pursuant to a cause of action under the ATA is the duty not to provide material support to terrorism. *Id*. In the context of content algorithms, this simply requires that Google not affirmatively utilize the data curated through its statistical analyses to target and connect users based on a shared interest in the illicit materials. Nonetheless, Google breached this duty when it affirmatively surfaced ISIS propaganda videos and targeted users based on their own products' analyses regarding user engagement. The harm alleged stems from Google's affirmative deployment of its own product which it designed to foster connections, both with other users and the content, even when they direct users to powerful terrorist organizations. Section 230 does not apply to Google's affirmative conduct and Google is not entitled to immunity from claims under the ATA, even if the third-party content (the ISIS videos) set Petitioner's injury in motion.

B. Courts Should Not Treat Interactive Computer Service Providers as Publishers Rather than Information Content Providers When Their Product Manipulates, Alters, or Develops Third-Party Content to Such a Degree that Is Clearly Outside the Scope of Traditional Editorial Functions

Unlike publishers, online companies are subject to liability when they create their own content or develop, even in part, content provided by another party. 47 U.S.C. § 230(f)(3). Thus, an internet service provider may become an internet content provider for Section 230 analysis purposes when their product manipulates, alters, or develops third-party content to such a degree that that they exceed the scope of traditional editorial functions. *See Zeran*, 129 F.3d at 330. Unfortunately, Courts have struggled to distinguish the appropriate boundary between publisher and content provider, and rather than analyzing the text of Section 230 itself, many have blindly followed their colleagues' decisions which misinterpret Section 230.

Carafano v. Metrosplash.com, Inc., was one of the first cases to interpret when an interactive computer service provider can transform into an information content provider by creating or developing content. 339 F.3d 1119, 1121 (9th Cir. 2003). The Court erroneously concluded that "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id*. *Carafano*

was subsequently narrowed by the Ninth Circuit's decision in *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008). In *Roommates*, Plaintiffs alleged that Defendant, an internet-based business that helps its users find roommates, violated the federal Fair Housing Act and California housing discrimination laws by designing their website to elicit information from subscribers regarding protected characteristics and discriminatory preferences and matching users based on those preferences. *Id*. The Court correctly held that "Roommate's own acts—publishing the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them. **Roommate is entitled to no immunity**." *Id*. (emphasis added). However, as to whether Defendant was an information content provider, the Court held that because Defendant had "materially contributed" to the unlawfulness of the content under the Fair Housing Act, Defendant had "developed" the content as understood in Section 230. *Id*. The *Roommates* decision generated significant confusion which other courts have attempted rectify by adding their own insights to the material contribution test. For example, the Sixth Circuit offered the following distinction between publication and content development: "[publishers] are necessary to the display of unwelcome . . . content," whereas the actions of developers are "[responsible] for what makes the displayed content illegal or actionable." *Jones v. Dirty World Entertainment Recordings L.L.C.*, 755 3d 398, 414 (6th Cir. 2014). While not formalized in the material-contribution test, whether an online service provider

generates revenue from the harmful content has also been an important consideration in the "developer" inquiry. *See, e.g.*, *FTC v. Accusearch Inc.*, 570 F.3d at 1200.

Courts regularly cite the *Roommates* material contribution test, but in so doing often ignore the Circuit Court's reasoning—Roommate's own conduct was illegal and thus any action it took after that point inherently "materially contributed to the unlawfulness." *Roommates*, 521 F.3d at 1168. What courts have largely failed to understand is that when an internet service provider's own actions are responsible for what made the content harmful, they may be held liable as a content developer, regardless of if "materially contribute" to the illegality.

As in *Roommates*, Google becomes a developer through their affirmative design decisions. The "material contribution" that makes the content harmful stems from the defectively designed algorithms that the company engineers to keep users engaged and increase revenue, a fact that serves to strengthen the relationship between the company and the harm. More precisely, what made the contents of these ISIS propaganda videos harmful was in the way in which Google affirmatively curated, presented, and targeted the material to foster connections amongst users with similar interests when they connected members of powerful terrorist organizations and those most susceptible to radicalization and violence. *See Gonzalez v. Google LLC*, 2 F.4th 871, 914 (9th Cir. 2021) (Berzon, J.,

concurring); *see also id*. at 924–25 (Gould, J., concurring in part and dissenting in part).

C. The Creation of Algorithms Designed to Maximize Company Profit by Exploiting User Vulnerabilities Is Not An Editorial Decision Within the Meaning of Section 230

Twenty-six years ago, the argument that internet service providers operate exclusively as passive conduits for third-party content and thus should not be liable for harms caused by the activities on their platforms may have been reasonable. Today, however, platforms such as Google and Facebook operate some of the most technologically advanced websites in the world. Online companies like Google can not only manipulate content and exploit user behaviors to drive up profits, but they also affirmatively exercise that ability as well. "Many . . . successful internet companies . . . design their applications to collect, analyze, sort, reconfigure, and repurpose user data for their own commercial reasons, unrelated to the original interest in publishing material or connecting users. These developments belie any suggestion that online intermediaries are merely conduits of user information anymore." Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 218 (2018); *see also* 164 CONG. REC. S1849-09 (daily ed. Mar. 21, 2018) (statement of Sen. Wyden).

Tech companies like Google have propelled much of the harmful content on their platforms to optimize

user engagement often with little regard to the collateral consequences. *Protecting Youth Mental Health*, U.S. SURGEON GENERAL'S ADVISORY (2021), https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf. For example, in 2017, a British teenager named Molly Russel took her own life after months of viewing pro-suicide and self-harm content recommended to her through social media. Adam Satariano, *British Ruling Pins Blame on Social Media for Teenager's Suicide*, THE NEW YORK TIMES (Oct. 1, 2022) https://www.nytimes.com/2022/10/01/business/instagram-suicide-ruling-britain.html. Following an intensive investigation, the Senior Coroner for the Northern District of Greater London issued a landmark ruling, that the teen "died from an act of self-harm while suffering from depression and the negative effects of on-line content." *Regulation 28 Report to Prevent Future Deaths*, NORTH LONDON CORONER'S SERVICE (Oct. 13, 2022), https://www.judiciary.uk/wp-content/uploads/2022/10/Molly-Russell-Prevention-of-future-deaths-report-2022-0315_Published.pdf. Specifically, the Coroner found that the platforms algorithmic tool fueled binge periods during which the teen was fed a stream of increasingly harmful content which ultimately "contributed to her death in a more than minimal way." *Id*.; Dan Milmo, *Molly Russell inquest must lead to action on internet dangers, says coroner*, THE GUARDIAN (Sept. 29, 2022) https://www.theguardian.com/technology/2022/sep/29/molly-russell-inquest-must-lead-to-action-on-internet-dangers-says-coroner. As news of the teen's death spread, thirty additional families came forward alleging that social media played a role in their

children's suicide as well. *See* Faith Ridler, *THIRTY Families Blame Social Media Firms for Their Roles in Children's Suicides as it Emerges Pinterest Sent a Personalised Email to Molly Russell's Account with Self-Harm Images AFTER She Took Her Own Life*, DAILYMAIL (Jan. 27, 2019, 1:20 PM), https://www.dailymail.co.uk/news/article-6636807/Now-30-families-blame-social-media-firms-roles-childrens-suicides.html.

Similarly, in 2019, the public learned that YouTube had been recommending compromising videos of young children, thus enabling a "pedophilia ring" to proliferate on its site. Ryan Broderick, *YouTube's Latest Child Exploitation Controversy Has Kick-Started A War Over How to Fix The Platform*, BUZZFEED NEWS (Feb. 22, 2019, 5:42 PM), https://www.buzzfeednews.com/article/ryanhatesthis/youtube-child-sexual-exploitation-creators-watson; K.G. Orphanides, *The Paedophile Scandal Shows YouTube is Broken. Only Radical Change Can Fix It*, WIRED (Feb. 23, 2019), https://www.wired.co.uk/article/youtube-paedophiles-boycott-algorithm-change.

These stories illustrate that Google is aware of its products' capabilities to manipulate human behavior both on and offline, and of the harms that have befallen its users as a result. Yet, Google is still refusing to take any responsibility by, for example, eliminating the targeting feature from its algorithmic design. Google designs mathematically sophisticated algorithms intended to curate, analyze, and exploit user data in pursuit of profit. This affirmative conduct is not, even by modern internet standards, within the scope of

traditional publisher function. Judge Katzmann states it best:

> "[t]he cumulative effect of recommending several friends, or several groups or events, has an impact greater than the sum of each suggestion. It envelops the user, immersing her in an entire universe filled with people, ideas, and events she may never have discovered on her own. Yet the creation of social networks goes far beyond the traditional editorial functions that the CDA immunizes."

Force, 934 F.3d at 82; *see also Gonzalez*, 2 F.4th at 914 (Berzon, J., concurring). Simply put, Section 230 does not apply to Google's affirmative conduct and they are not entitled to immunity for their violation of 18 U.S.C. § 2333.

III. This Court Should Interpret Section 230 Consistent with Its Text and Child Safety Purpose to Avoid Further Injustice and to Give Victims an Avenue for Meaningful Redress

The explosion of online abuse and the life-long impacts of that abuse on victims necessitate a return to the original intent of Section 230 protections.

A. Broad Construction of Section 230 Facilitates the Spread of CSAM

When Congress passed Section 230 as part of the CDA they promised some degree of protection for

children online—both from exposure to sexually explicit material and from the harms attendant to the production and distribution of child sexual abuse material (CSAM). See supra. In this respect, it has failed and in large part because of the expansive immunity read into Section 230 by federal courts. Indeed, the incentive Congress sought to provide has been twisted such that companies stand to gain significant profits from hosting illicit content on their platforms. The tragic result has been an explosion of growth in the online marketplace for the production and trafficking of CSAM. At any given time, there are at least one million child sex offenders searching for CSAM online. EUR. PARLIAMENTARY RSCH. SERV., CURBING THE SURGE IN ONLINE CHILD ABUSE: THE DUAL ROLE OF DIGITAL TECHNOLOGY IN FIGHTING AND FACILITATING ITS PROLIFERATION 2 (Nov. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/659360/EPRS_BRI(2020)659360_EN.pdf. In the last fifteen years alone, online exploitation and abuse of children has increased by 422 percent. U.S. SENT'G COMM'N, FEDERAL SENTENCING OF CHILD PORNOGRAPHY: PRODUCTION OFFENSES 3 (2021), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20211013_Production-CP.pdf. Millions of individual users consume more than 15 million child sexual abuse images in a market currently valued between $3 and $20 billion dollars annually. Michael H. Keller & Gabriel J.X. Dance, *The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?,* NYTIMES.COM (Sep. 2019), available at https://www.nytimes.com/

interactive/2019/09/28/us/child-sex-abuse.html?msclkid=531b2a24a55511ec9733999ed45d40bd.

These materials not only exist on the dark roads of the internet, but also on mainstream platforms as well. For example, Google returns 920 million videos on a search for 'young porn,' and Pornhub has facilitated and profited from the distribution of thousands of videos with violent titles such as "Screaming Teen" and "Degraded Teen." Nicolas Kristof, *The Children of Pornhub*, NY TIMES (Dec. 4, 2020), https://www.nytimes.com/2020/12/04/opinion/sunday/pornhub-rape-trafficking.html.

The harms of CSAM are also well documented. The trauma stemming from child sexual abuse is complex and individualized, and it impacts victims both in the short-term and throughout their lifetimes. *See generally*, BESSEL VAN DER KOLK, THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA (Viking 2014). It takes a significant toll on victims' overall health, increasing the risk for not only for depression, anxiety, substance abuse, post-traumatic stress disorder (PTSD), and suicidal ideation, but also physical ailments such as high blood pressure and chronic illness. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, DIVISION OF VIOLENCE PREVENTION, PREVENTING SEXUAL VIOLENCE (last reviewed by the CDC on Jan. 17, 2020), available at https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fsexualviolence%2Fconsequences.html. The paradigm shift from tangible to digital CSAM has

only exacerbated these effects, many of which are lifelong. Von Weiler, J., Haardt-Becker, A., & Schulte, S., *Care and treatment of child victims of child pornographic exploitation (CPE) in Germany*, 16 J. OF SEXUAL AGGRESSION 211, 216 (2010); NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, CHILD PORNOGRAPHY POSSESSORS ARRESTED IN INTERNET-RELATED CRIMES: FINDINGS FROM THE NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY, available at http://us.missingkids.com/en_US/publications/NC144.pdf; U.S. DEP'T OF JUSTICE, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION AND PREVENTION AND INTERDICTION, 11 at D-12 (2010), available at http://www.justice.gov/psc/docs/natstrategyreport.pdf; Leonard, M.M., '*I did what I was directed to do but he didn't touch me': The impact of being a victim of internet offending*, 16 J. OF SEXUAL AGGRESSION 249, 254 (2010). While perpetrators of online abuse are responsible for resulting harm to children, so too are online platforms that remain complicit in fostering the spread of abuse. The state of online abuse demands a recognition of Section 230's original text and intent.

B. Victims Have No Leverage to Hold Online Platforms Accountable and to Seek Redress for their Harms

In the physical world, when a Plaintiff is harmed as a result of a company's tortious conduct, they may seek redress by filing a lawsuit against the wrongdoer. Whereas courts generally consider elements like negligence, foreseeability, and intent where the allegations

involve real-world harm, they have largely failed to do the same when that harm occurs online. As a result, when victims of online harm seek redress, they may find their claims dismissed without the benefit of any fact-intensive inquiry into the company's functional role in the harm. Dismissal of such cases at the pre-discovery stage all but forecloses on victims' ability to prove that the defendants operated with a culpable mens rea. Indeed, courts have acknowledged the dangers of granting a motion to dismiss based on the CDA's limited immunity defense. *See, e.g.*, *CYBERsitter, LLC v. Google, Inc.*, 905 F. Supp. 2d 1080, 1086 (C.D. Cal. 2012). In fact, Congress has specifically acknowledged the importance of discovery in cases of online exploitation, trafficking, and abuse, observing that internet companies believed they "would be able to win again in court and deny us our opportunity to look at the documents and to look at the underlying evidence that one should always look at in an investigation." 164 CONG. REC. S1827, 1830 (Sen. McCaskill).

Without the ability to engage in discovery, there will be no serious consideration of how much companies like Google know about the likelihood of harm to children accessing their platforms. This is especially important given the sophisticated algorithms implemented by online platforms that prioritize user engagement and profitability, often at the expense of children's safety. *See, e.g.*, Wells, G., Horwitz, J., & Seetharaman, D., *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show,* THE WALL STREET JOURNAL (Sep. 14, 2021), https://www.wsj.com/

articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=hp_lead_pos7; Craig Timberg, *YouTube Says It Bans Preteens But It's Still Delivering Troubling Content to Young Children*, THE WASHINGTON POST (Mar. 14, 2019), https://www.washingtonpost.com/technology/2019/03/14/youtube-says-it-bans-preteens-its-site-its-still-delivering-troubling-content-young-children/. The decision to forgo discovery not only prevents victims from seeking any meaningful redress, but it also prevents online companies from learning about potentially dangerous features on their platforms and thus hinders discovery of new technologies that could increase user safety and promote growth.

By cutting off victims' opportunity to gather evidence into tech company practices, courts have thwarted the CDA's child protection purpose and denied countless victims the access to justice Congress so plainly promised. The opportunity to correct this miscarriage of justice is now before this Court. As Justice Thomas explains, "[p]aring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., statement respecting the denial of certiorari). Returning Section 230 to its text and original intent will serve

Congress's goal of ensuring accountability for companies that recklessly gamble with users' lives.

CONCLUSION

Fidelity to Section 230's text and express policy objectives will restore balance to the law in favor of child protection. For this reason, this Court should interpret Section 230 to provide petitioners access to justice for the harm done.

Respectfully submitted,

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