

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 WASHINGTON LEGAL FOUNDATION
AS *AMICUS CURIAE* SUPPORTING RESPONDENT**

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QUESTION PRESENTED

Whether a claim seeks to treat an interactive computer service provider as a “publisher,” and is thus barred by section 230, when the claim targets the provider’s display of third-party content of potential interest to individual users.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It has appeared as *amicus* urging courts to apply Section 230 of the Communications Decency Act of 1996, 47 U.S.C. § 230, as Congress wrote it. *See In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2022). WLF's Legal Studies division, its publishing arm, has published analyses by outside experts on the proper scope of Section 230 immunity. *See, e.g.*, Corbin K. Barthold, *Social Media and Common Carriage: Lessons From The Litigation Over Florida's SB 7072*, WLF LEGAL BACKGROUNDER (Sept. 23, 2021), <https://bit.ly/3Q7uMpv>.

INTRODUCTION

It is fundamental to the rule of law that a statute's text controls. The text puts parties on notice about what actions may subject them to liability and which actions they can take without fear of large adverse judgments. Sometimes policymakers don't like a statute's outcomes. But that does not mean that courts may blue-pencil laws. Rather, it means that the legislators must act if they want to amend the law.

Congress has set the parameters for liability for third-party content posted on the internet. In the Communications Decency Act of 1996, Congress

* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, paid for the brief's preparation or submission.

conferred broad immunity for providers and users of “interactive computer services,” dictating that they generally cannot be held liable for publishing third-party content. 47 U.S.C. § 230(c)(1). Congress also recognized the need for some specific exceptions to the rule—but no exception covers state civil claims inconsistent with Section 230’s purpose. *See id.* § 230(e).

The federal courts of appeals and many state courts of last resort have thus coalesced around a plain-language interpretation of Section 230(c)(1). Under this interpretation, Plaintiffs’ claims are barred because they seek to hold Google liable for publishing third-party content. In other words, Google acted as a bulletin board on which others could post their information. It did not create or endorse the videos at issue.

Plaintiffs ask this Court to upend this well-settled interpretation of Section 230. The *amici curiae* supporting Plaintiffs show why Plaintiffs seek this upheaval in the law. The *amici* are generally in two camps. The first believes in using the court system as a personal ATM machine for the plaintiffs’ bar. Anything that provides immunity for defendants is objectionable to these groups, like the American Association for Justice. The other groups, like Seattle School District No. 1, want the government controlling every aspect of our lives. In their view, the marketplace of ideas doesn’t work and Big Brother knows what is best for business and individuals. (It even knows better than parents what is appropriate for kids to learn.)

The marketplace of ideas works. The growth of the internet over the past three decades has been astonishing. Imagine the world trying to get through the COVID-19 pandemic without being able to conduct almost all business remotely over the internet. Companies and individuals far and wide have contributed to the internet's success through innovative ideas. If this Court were to adopt Plaintiffs' atextual reading of Section 230, however, that marketplace of ideas would shut down. This Court should not allow that to happen. Rather, it should encourage the continued exchange of information on the internet by affirming the Ninth Circuit's decision.

STATEMENT

Google owns and operates YouTube, a ubiquitous video-sharing platform. Every minute of every day, over one billion users worldwide upload over eight hours of video to YouTube. The videos range from pictures of this Court's building paired with audio of oral arguments to the Traditional Latin Mass offered at a small monastery in Stamullen, Ireland. Rather than consult instructions or ask friends how to make or do something, most people search YouTube for an instructional video. For example, the best way to learn how to get a mirror shine on that new pair of John Lobb shoes is to search YouTube and watch a video or two.

If you search a video on how to mirror shine a pair of shoes, YouTube's algorithms may recommend other shoe-care videos. For example, it might suggest a video about using Saphir sole protector on your shoes because you also watched videos about how to

shovel snow. The algorithm would predict that those who live where it snows and care about mirror shining their shoes are also interested in protecting the soles of their shoes using high-quality products.

Unsurprisingly given the volume of material uploaded to YouTube, some videos are controversial. Most can stay in the marketplace of ideas and foster productive debate. But Google uses artificial intelligence and humans to filter out those videos that violate YouTube's rules. Among those rules is a prohibition on videos that praise or promote terrorism. Users who violate this rule have their videos removed from the site and their accounts deleted. The removed videos cannot be uploaded again to YouTube because of automatic technology that Google employs.

Plaintiffs sued Google after their relative, Nohemi Gonzalez, was killed during a 2015 Paris terrorist attack. They argued that Google abetted an act of international terrorism by operating YouTube. Abetting international terrorism subjects a wrongdoer to liability under the Anti-Terrorism Act. According to Plaintiffs, the Islamic State of Iraq and Syria—the organization responsible for the Paris terrorist attack—used YouTube to recruit members. This, according to Plaintiffs' theory, made Google directly responsible for the 2015 terrorist attack.

The District Court properly saw how meritless Plaintiffs' claims were and dismissed the suit. On appeal, Plaintiffs tried a new tactic. Rather than focusing on holding Google liable for operating YouTube, Plaintiffs shifted to focusing on threadbare allegations that YouTube recommended to users

videos ISIS made. J.A. 169. Before the Ninth Circuit, Plaintiffs thus argued that these recommendations were not protected by Section 230 and Google should be held liable for its algorithms recommending ISIS videos. *See* Plaintiffs' CA9 Br. 62 n.21.

The Ninth Circuit rejected this argument. It recognized that Google is an interactive computer service that did not create or endorse the ISIS videos. As the plain language of Section 230(c)(1) bars claims against interactive computer services for third-party materials they host, the Ninth Circuit affirmed the District Court's order dismissing the claims against Google. This Court granted certiorari to consider the scope of Section 230(c)(1) immunity.

SUMMARY OF ARGUMENT

I.A. Plaintiffs' argument relies on two mistaken assumptions about preemption. First, they argue that the broader a statute's preemptive effect, the narrower it must be read. This is a baseless argument that finds no support in this Court's jurisprudence. When Congress preempts a broad range of federal and state laws, the Court should read the statute naturally. It should not read the provision narrowly as Plaintiffs argue.

Second, Plaintiffs contend that there is some type of presumption against preemption here. The Court's precedent is clear, however, that no such presumption against preemption exists for express preemption provisions. Because Section 230 contains an express preemption provision, there is no presumption against preemption here.

B. The plain language of Section 230(c)(1) bars Plaintiffs' claims against Google. First, YouTube is an interactive computer service that organizes and reorganizes videos that are uploaded by information content providers. The statute's language does not differentiate between organizing information using algorithms or people.

Second, allowing Plaintiffs' claims to proceed would allow courts to hold Google liable for material uploaded by information content providers. Plaintiffs' claims focus on what is said and shown in third-party videos, the quintessential speech that Section 230(c)(1) bars from imputing to an interactive computer service like YouTube.

Third, the Court should reject the emotional appeals to make Google and other interactive computer services liable for how they organize information. Other *amici's* responses to these emotion-based arguments—finding ambiguity in Section 230—lack merit. The statutory language is clear and, with few exceptions absent here, Section 230(c)(1) bars claims like Plaintiffs'.

II.A. A group of States that want to control the internet argues that affirming the Ninth Circuit's decision would weaken federalism. But the States' actual argument sounds in the clear-statement rule. There is no question that Section 230's language preempts state laws that treat interactive computer services like publishers or speakers.

B. Federalism worries are also unfounded. The Founding Fathers designed the Constitution so that Congress can regulate interstate and international

commerce. Allowing federal preemption of state-law claims fits with these principles of vertical federalism.

ARGUMENT

The question presented is critical to the future of the internet. Whether Section 230 protects interactive computer services' algorithmic recommendations will shape the economy as we know it for decades to come. Given the importance of this issue, the Court should not rush to decide the question absent an erroneous lower court decision.

Besides this case, the Court also is considering whether claims like Plaintiffs' are cognizable under the ATA. *See Twitter, Inc. v. Taamneh*, No. 21-1496. If the Court correctly reverses the Ninth Circuit there, it should dismiss this case as improvidently granted or affirm in a *per curiam* opinion because Plaintiffs cannot succeed on their ATA claim. But if the Court reaches the question presented here, it should affirm the Ninth Circuit's decision.

I. TOOLS OF STATUTORY CONSTRUCTION SHOW THAT SECTION 230(C)(1) BARS PLAINTIFFS' CLAIMS.

As Justice Kagan said, “[w]e’re all textualists now.” Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes* (Nov. 25, 2015), YouTube at 08:28 <https://perma.cc/6HMD727M>; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2442 (2019) (Gorsuch, J., concurring) (“[J]udges are, to one degree or another, ‘all textualists now.’” (quoting *Remarks of Judge Diarmuid F. O’Scannlain, “We Are All Textualists*

Now”: *The Legacy of Justice Antonin Scalia*, 91 St. John’s L. Rev. 303, 313 (2017); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1057 (1998)).

So what does being a textualist mean? It means “enforc[ing] plain and unambiguous statutory language * * * according to its terms.” *Intel Corp. Inv. Pol’y Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). In doing so, the Court interprets statutory “language according to its ordinary, contemporary, common meaning.” *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (cleaned up). Still, courts must “read[] the statute’s words in their context and with a view to their place in the overall statutory scheme.” *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (cleaned up). Here, applying these basic rules of statutory construction shows that Section 230(c)(1) bars Plaintiffs’ claims.

A. Plaintiffs’ Arguments Rely On Flawed Premises About Preemption.

Plaintiffs’ claims fall within the plain language of Section 230(c)(1)’s broad immunity provision. And Plaintiffs’ claims do not avoid preemption under the statute’s exceptions. So Plaintiffs ask this Court to ignore Section 230(c)(1)’s plain meaning through a series of arguments that circumvent the statute’s text. Plaintiffs superficially argue that the Court should read Section 230(c)(1) neither broadly nor narrowly. *See* Plaintiffs’ Br. 47-52. But despite their protestations to the contrary, Plaintiffs wrongly insist

that Section 230(c)(1) be read narrowly. This argument, however, relies on at least two mistaken premises.

First, Plaintiffs lean on *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) and *Cipollone v. Liggett Corp., Inc.*, 505 U.S. 504, 523 (1992) for their argument about construing federal statutes. But both cases addressed the scope of federal preemption of state-law claims. Plaintiffs, of course, are not pursuing state-law claims. Rather, they raise federal-law claims under the ATA. And they cite no cases from this Court holding that a federal statute barring federal civil claims must be narrowly construed. Rather, they make an amorphous argument about how, because Section 230(c)(1) also bars state-law claims, the Court should read the statute narrowly.

The only logical conclusion to be drawn from Plaintiffs' argument is that the scope of immunity for federal claims depends on whether the clause also preempts state-law claims. Yet Plaintiffs cite no cases suggesting that the breadth of immunity from federal claims depends on whether the statute preempts state-law claims. That is because no such case exists.

True, some statutes that preempt state laws are read narrowly because of federalism concerns. See *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 534 (2009). Because the States retain power to legislate in many areas, it makes sense that Congress's wielding the Supremacy Clause sometimes disrupts the balance of power between States and the Federal Government. The way to remedy this federalism problem is to read some preemption provisions of state law narrowly. There is,

of course, no federalism problem in having Congress bar federal claims through a federal statute. But Plaintiffs want this Court to assume otherwise when arguing that the Court should not give Section 230(c)(1) its plain meaning.

It is just one example of Plaintiffs' attempt at sleight of hand. They cobble together cases from different areas of the law to advance an argument that makes no sense when considered as a whole. In this example, it makes no sense to hold that an immunity provision that Congress specifically made as broad as possible (covering both state and federal claims) must be read narrowly because it preempts state-law claims. If anything, the opposite is true. Section 230(c)(1) should be read broadly because it covers both state- and federal-law claims.

Second, Plaintiffs' argument can also be seen as one applying a presumption against preemption. See Plaintiffs' Br. 16 ("there is ordinarily a presumption in favor of the narrow construction of [] preemptive measures"). This may be true for implied preemption. But this Court has rejected any argument that there is a presumption against preemption for express preemption. And Section 230(c)(1) expressly preempts claims against an interactive computer service for material that a third-party posts on that service.

CTS Corp.'s anti-preemption presumption—which Plaintiffs rely on—is no longer good law. The Court has "changed its position on the presumption against [express] preemption," *Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan*, 938 F.3d 246, 258 (5th Cir. 2019). Now when a "statute contains an

express pre-emption clause,” this Court does “not invoke any presumption against pre-emption but instead focus[es] on the plain wording of the clause, which necessarily contains the best evidence of Congress’ pre-emptive intent.” *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 125 (2016) (cleaned up).

Again, Plaintiffs’ attempts at drawing the Court’s attention away from Section 230(c)(1)’s plain language are telling. They are conscious that a plain-language reading will not permit their meritless suit to proceed past the motion-to-dismiss stage. And getting to summary judgment is a surefire way to put settlement pressure on Google to pay up and avoid the enormous costs of discovery and litigation. Plaintiffs’ worries are well-founded. The plain language of Section 230(c)(1) shows that it bars their claims and the Ninth Circuit properly affirmed the District Court’s dismissal.

B. Section 230(c)(1)’s Plain Language Bars Plaintiffs’ Claims.

1. With the correct preemption premises in mind, the next step is looking at Section 230(c)(1)’s plain language. That language shows that Section 230(c)(1) immunizes Google’s algorithmic recommendations on YouTube. YouTube is an interactive computer service, which the statute defines as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.” 47 U.S.C. § 230(f)(2). In turn, an access software provider is

defined as “a provider of software (including client or server software), or enabling tools that * * * organize, reorganize, or translate content.” *Id.* § 230(f)(4)(C).

YouTube uses a group of enabling tools that organizes and reorganizes content. Users upload their videos to YouTube. Then, based on algorithms, YouTube organizes that information so that it is easier for users to find interesting videos. For example, if a user is watching a video by chess grandmaster Hikaru Nakamura, YouTube may recommend a video by grandmaster Daniel Naroditsky. This recommendation occurs even though the two videos were uploaded years apart and the content creators took no affirmative steps to link the videos.

This is also how search engines work. If a user searches for Carlos Correa and then immediately searches for Twins, the search engine is likely to have the Minnesota Twins’s website listed first—not the Internet Movie Database page for the movie Twins. This is because the algorithms predict that if the user is searching for a baseball player that recently signed with the Minnesota Twins, that user is likely interested in the baseball team’s website and not the movie’s IMDb page.

It is of no moment whether the organizing and reorganizing of videos uploaded to YouTube is done using an algorithm or by Google employees watching and categorizing videos manually. Section 230 does not differentiate between different modes of organizing material on the internet. Rather, it covers all organizational methods—including algorithms. So

courts are unanimous that YouTube in an interactive computer service under Section 230. *See, e.g., Lancaster v. Alphabet Inc.*, 2016 WL 3648608, *2-3 (N.D. Cal. July 8, 2016) (citing *Gavra v. Google Inc.*, 2013 WL 3788241, *2 (N.D. Cal. July 17, 2013) (other citation omitted)).

2. Because YouTube is an interactive computer service, the analysis next turns to whether Plaintiffs' claims depend on making YouTube the publisher or speaker of material uploaded by an "information content provider." 47 U.S.C. § 230(c)(1). The statute defines that term as "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." *Id.* § 230(f)(3).

The term "treat[] as the publisher or speaker," 47 U.S.C. § 230(c)(1), seems odd at first glance. But it makes sense when viewed in the context of the Communications Decency Act. Before Section 230's enactment, treating an interactive computer service as a publisher or speaker saddled it with legal responsibility for whatever content others posted on its site. Section 230 eliminated this result by saying that only the person uploading the content can be held liable for its dissemination. In other words, Section 230 upset the default rule that online publishers could be held liable for others' content.

The parties agree that Google did not create any ISIS videos or otherwise make any original content that promoted ISIS. Nor did Google create other videos or content that promoted Islamic terrorism—or terrorism in general. Everyone agrees

that ISIS, its affiliates, and its supporters made the videos in question. Similarly, Google did not enhance or otherwise transform the videos that ISIS made and uploaded to YouTube. For example, Google neither added banners to the bottom of the videos nor added special effects to the videos. Rather, what ISIS and its supporters uploaded to YouTube was precisely what YouTube provided access to through its interactive computer service.

Because ISIS created the videos and then uploaded the videos to YouTube—without Google adding anything—that should be the end of the Section 230 inquiry. Plaintiffs seek to hold Google liable for publishing ISIS’s videos. That is exactly the type of claim that Section 230(c)(1) bars.

But abandoning meritless claims is not how the plaintiffs’ bar operates. It continually seeks to push the envelope and have courts overrule Congress’s intent as expressed in the United States Code. Here, that means arguing that Google is liable for the algorithmic recommendations that YouTube makes. This argument fails.

Plaintiffs try to distinguish between the everyday meaning of the word publisher and how it is used in defamation law. To support this argument, they must rely on a Senate report. *See* Plaintiffs’ Br. 22. That this is Plaintiffs’ first argument for why “publisher” should have the narrow meaning given to it in defamation law is telling. It underscores that the text of Section 230(c)(1) cannot bear Plaintiffs’ arguments.

True, the report says Congress passed Section 230 in response to several state-court defamation decisions. But that does not mean that the statutory language is limited to the defamation context. There is a “well-established rule that the plain language of the enacted text is the best indicator of intent.” *Nixon v. United States*, 506 U.S. 224, 232 (1993). Contrast that with legislative history which rarely shows what Congress’s intent was. “[E]ven assuming a majority of Congress read the” Senate report, “agreed with it, and voted for” Section 230(c)(1) “with the same intent, we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.” *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1077 (2020) (Thomas, J., concurring).

Because the “prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law,” “the ordinary meaning (or the everyday meaning or the commonsense reading) of the relevant statutory text is the anchor for statutory interpretation” in “hard cases as well as easy ones.” William Eskridge, *Interpreting Law* 33, 34-35 (2016) (cleaned up); see John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2392-93 (2003). Plaintiffs concede that the everyday meaning of the word publisher is much broader than the definition they advance. And it covers what they seek to hold Google liable for here. Plaintiffs ask this Court to allow liability for Google’s decisions about who may use its service, what videos may be uploaded to YouTube, and when to block or remove third-party content. This attacks Google’s “traditional editorial functions”—making decisions about “publish[ing], withdraw[ing], postpon[ing], or alter[ing] content.”

Jones v. Dirty World Ent. Recordings LLC, 755 F.3d 398, 416 (6th Cir. 2014) (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)).

This is exactly the type of claim that Congress sought to bar with Section 230(c)(1). See *Green v. Am. Online*, 318 F.3d 465, 470-71 (3d Cir. 2003). Congress purposely used the term “publisher” without defining that term in Section 230(f). As shown by the definitions in that subsection, Congress knew how to ensure that courts gave a term a specific meaning when interpreting Section 230. It chose, however, to give publisher its ordinary meaning—“an entity or person generally engaging in the activity of publishing.” Plaintiffs’ Br. 19.

This reading of Section 230(c)(1) draws support from the context of the statute’s passage. Section 230 seeks to protect internet communications. But the United States’s and Plaintiffs’ interpretation of the word publisher disregards this context. The United States, for example, argues (at 9) that an internet site’s “design choices” are not covered by Section 230(c)(1). But the reality of the internet is that these design choices are at the heart of the publisher’s discretion. Just view the outrage when Facebook changes the look of its newsfeed or Twitter changes the look of its timeline. People care deeply about these editorial decisions, and it is the job of the websites to make them.

This is like a book publisher’s decisions about how to design a Bible. The Vulgate has not changed since St. Jerome’s translation. But the way that information is presented—the design choices—vary among publishers. That is because the publishers are

putting their mark on the printing by designing the Bibles differently. It defies logic to say the design choices are not part of publishing. Yet that is what the United States and Plaintiffs want.

Another example shows why the Court should reject this argument. Under the United States's and Plaintiffs' definition, a website could be held liable if it groups passages from *The Adventures of Huckleberry Finn* that use anachronistic racial epithets and then someone attacks an African-American. Although this hypothetical may seem far-fetched, it is not as absurd as Plaintiffs' theory. Congress passed Section 230(c)(1) to ban such lawsuits that may have been permitted at common law.

Contrary to Plaintiffs' argument, Congress did not pass Section 230(c)(1) just to eliminate strict liability or distributor liability. Section 230 does not contain the phrase "strict liability" or the word "distributor." This Court cannot "add language to [a] statute." *United States v. Jacobs*, 306 U.S. 363, 373 (1939). But that is exactly what Plaintiffs ask this Court to do. It should reject this plea and give Section 230(c)(1) its ordinary meaning.

In short, the ordinary meaning of "publisher" in Section 230(c)(1) includes what Plaintiffs seek to hold Google liable for doing. The statute's context also suggests that this is the correct reading. Thus, the Court should reject the United States's and Plaintiffs' atextual reading of the word publisher.

3. Other *amici* suggest that Google may be held liable for some organization and reorganization

of information in certain cases. For example, they argue that Google could be held liable if a real estate agent's YouTube video promoting a house were disproportionately recommended to Caucasians. The Court should soundly reject this suggestion.

There is no ambiguity in the statute. Section 230(c)(1) bars all claims against an interactive computer service for third-party material if doing so treats the interactive computer service as a speaker or publisher. Holding Google responsible for how it organizes and reorganizes videos that promote housing options would be treating it as a publisher of that information. Again, Google is not adding anything to the video, nor is it promoting the ad. Rather, the algorithm is just showing the ad to a certain group of people who may like it. For example, perhaps a disproportionate number of Caucasians happens to be watching YouTube videos about McLean, VA. So the algorithm recommends videos promoting houses in McLean to that group.

The rest of Section 230 highlights that Google is not liable for how it organizes and reorganizes housing ads and similar information. The statute exempts from the immunity provision claims under 18 U.S.C. § 1595 if “the conduct underlying the claim [violates 18 U.S.C. § 1591].” 47 U.S.C. § 230(e)(5)(A). This shows that Congress knows how to carve out certain claims from Section 230(c)(1)'s broad immunity when it wants to. It did not do so for Fair Housing Act claims or similar claims based on who an algorithm recommends a video to.

In short, this is a case in which the analysis should begin and end with Section 230's plain

language. That language bars claims like Plaintiffs’ that seek to hold Google liable for third-party content on YouTube. The courts to address the issue have thus correctly construed the statute to bar claims like Plaintiffs’.

II. NO FEDERALISM CONCERNS ARISE FROM INTERPRETING SECTION 230(C)(1) TO BAR PLAINTIFFS’ CLAIMS.

A. Section 230 Contains A Clear Statement Preempting State Law.

Tennessee leads a group of States arguing that “due respect for federalism supports a narrow view of ‘publisher’ immunity that does not reach the targeted promotion of content.” Tennessee et al. Br. 10. Looking at the table of contents for the brief makes it seem as though five pages of the brief focus on this argument. But almost that entire section is filled with complaints about how social media companies operate. *See id.* at 12 (“Social media companies that now claim Section 230 immunity do not just ‘publish’ user-generated material; they actively exploit it.” (emphasis removed)). Those parts of the section not dedicated to attacking social media companies focus on the meaning of the word publisher in Section 230. *See id.* at 11.

In fact, Tennessee devotes only one paragraph to tangentially talking about federalism in that section of its brief. Even that paragraph is just an argument about the clear-statement rule. *See id.* at 14 (“At a minimum, Congress has not made its intention to displace state law in these circumstances

unmistakably clear in the language of Section 230.” (cleaned up)). Both arguments lack merit.

Section 230’s language could not be clearer. “It is the policy of the United States * * * 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) (emphasis added). To further this policy, “[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).

At bottom, Tennessee’s argument is just about the definition of the word publisher. Section 230’s text applies equally to federal and state claims. Just because Tennessee does not like the immunity that interactive computer services receive under the statute does not mean that it violates federalism principles. Rather, it means that those who disagree with Section 230’s immunity provision must lobby Congress to change the law.

The rest of Section 230 also is clear about the broad scope of immunity. It provides that “[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” 47 U.S.C. § 230(e)(3). Again, this language could not be clearer. State laws that conflict with Section 230 are preempted and those state laws that are consistent with Section 230 are not preempted.

The clear-statement rule is meant to protect “the traditional prerogative[s] of the States.” *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 429 (2002). The case that Tennessee relies on heavily illustrates the point. In *Gregory v. Ashcroft*, the Court considered whether a federal statute limited who States could select as their judges. 501 U.S. 452, 455 (1991). This implicated “the authority of the people of the States to determine the qualifications of their most important government officials.” *Id.* at 463.

It has traditionally been the States that have set the qualifications for their officers. For example, age and residency requirements vary greatly between States. What has not been traditionally the prerogative of States is internet regulation. Nor is States’ ability to hold interactive computer services liable for third-party content as important as who may serve as state-court judges. Tennessee can’t point to any case like this one in which the clear-statement rule has been used to narrow a statute addressing issues that were not traditionally left to the States. Yet that is what it asks this Court to do here.

Tennessee makes many uncontroversial statements about the clear-statement rule. But it then tries to tie those statements together to argue that federalism concerns caution against Google’s interpretation of Section 230(c)(1). Those arguments, however, ignore Section 230’s clear language. So the Court should reject Tennessee’s unfounded clear-statement argument.

B. Internet Regulation Falls Squarely Within Congress's Commerce Power.

If the Court considers federalism concerns, it should conclude that Google's reading of Section 230(c)(1) presents none. "There are * * * two sides to federalism: not just preserving state authority where appropriate, but also enabling the federal government to act where national action is desirable." Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1502 (1994). That is why the Constitution gives Congress the power to regulate interstate and international commerce. See U.S. Const. art. I, § 8, cl. 3. James Madison explained the Commerce Clause's delegation of power by noting that uniform national regulation benefited the States. The Federalist No. 42, 267-68 (James Madison) (Clinton Rossiter ed. 1961). Alexander Hamilton justified the delegation because national regulation created a unified market that made the United States a competitive force in international commerce. The Federalist No. 11, 85-87 (Alexander Hamilton).

Regulating the internet is at the core of the power allocated to the national government in our federal scheme. See Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 795 (2001). That partly explains why at the time of Section 230's passage the consensus was that States could not regulate the internet. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 Stan. L. Rev. 1367, 1374-75 (1996).

Courts have long agreed that internet regulation is a federal prerogative, not a state function. As the Second Circuit said, the internet “fall[s] within the class of subjects that [is] protected from State regulation because” regulating it “imperatively demand[s] a single uniform rule.” *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003) (quoting *Cooley v. Bd. of Wardens*, 53 U.S. 299, 319 (1851)). In other words, the internet “requir[es] national regulation.” *ACLU v. Johnson*, 194 F.3d 1149, 1162 (10th Cir. 1999) (citing *Wabash, St. L. & P. Ry. Co. v. Illinois*, 118 U.S. 557, 574-75 (1886)).

At the same time, the considerations that favor robust state power, such as protecting individuals by providing a check on national power and encouraging citizen involvement by localizing government, are not implicated here. Other federalism principles, such as allowing States to function as “laboratories” of democracy, see *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), and allowing States flexibility in responding to local issues, see *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), also have less force here.

Experience has shown that giving States a free hand to craft their own internet regulations leads to a chilling of speech and commerce. The decision that the parties cite, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. May 24, 1995) proves the point. Interactive computer services were afraid to provide a place for third parties to post information after the decision and needed federal protection.

One need only look at the pending petitions from Florida and Texas, and those States' regulation of the internet, to see the consequences of allowing each State to regulate the internet differently. Under Plaintiffs' theory, each State can require social media platforms to have different rules for removing content. That, of course, will lead to incompatible regulations that force companies to choose in which States they will offer their services. This will mean that many smaller States' residents will lose access to key services. But Plaintiffs do not acknowledge that. Rather, they paint a rosy picture while trying to line their attorneys' pockets with money.

States don't like federal statutes interfering with their ability to regulate commerce. And local politicians don't like federal laws that bar them from grandstanding against unpopular social media companies. But our Framers designed the Constitution so that Congress can regulate interstate and international commerce without state interference. Because Section 230 is a valid exercise of Congress's Commerce Clause power, there are no federalism concerns with affirming.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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