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 PUBLIC KNOWLEDGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN BERGMAYER
ALEX PETROS
HAROLD FELD
Counsel of Record
PUBLIC KNOWLEDGE
1818 N St. NW Suite 410
Washington, DC 20782
(202) 861-0020
hfeld@publicknowledge.org

January 18, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

In the Supreme Court of the United States

No. 21-1333

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 PUBLIC KNOWLEDGE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

Public Knowledge is a non-partisan, non-profit consumer rights organization dedicated to promoting freedom of expression, an open internet, and access to affordable communications tools and creative works. It has worked for many years to defend the pro-competitive, pro-free expression goals of Section 230,

[1] Pursuant to S. Ct. Rule 37.6, Public Knowledge states no counsel for a party authored this brief in whole or in part and no person or entity made a monetary contribution to its preparation or submission.

while promoting policies designed to reduce online harms.

SUMMARY OF ARGUMENT

1. Congress enacted Section 230 to permit interactive computer services ("providers") to exercise editorial discretion when publishing third-party content, without facing liability.

This case seeks to hold YouTube liable for publishing objectionable third-party content. Section 230 does not allow this. Petitioners and some of their amici try to work around this clear statutory prohibition by characterizing their theory of liability in different terms. They say that they seek to hold YouTube liable, not for publishing third-party content, but for "recommendations," Pet. 29-33, or for what the United States calls "YouTube's own conduct in designing and implementing recommendation algorithms that result in the communication of a distinct message from YouTube." Brief for the United States as Amicus Curiae in Support of Vacatur ("United States") 12. But this attempt to plead around Section 230 must fail. YouTube's conduct in this case may be culpable, but that conduct was publishing and immunized by Section 230. Characterizing content recommendations as something other than "publication," or pleading causes of action that do not name publication as an element does not change this. Theories of liability that depend on the harmful contents of third-party material constitute "treating" a provider as a publisher and are barred by the statute.

2. Section 230 protects the publication of third-party content, and it does so robustly. But it protects only that. Just as some plaintiffs attempt to evade Section 230 by characterizing their claims in other terms, some defendant providers attempt to use

Section 230 as a defense in situations where it simply does not apply. As this case is the Court's first full opportunity to consider the meaning and scope of Section 230, it has the opportunity to provide clarity to both lower courts and litigants as to both the reach, and the limits, of Section 230.

3. Section 230 is intended to promote free expression and competition online and to maximize the ability of internet users to control the information they see online. It is not a perfect statute, but its fundamental policy goals of free expression, competition, and user control are sound. Congress, and not the courts, is the best avenue for policy changes designed to better promote these goals while reducing online harms.

ARGUMENT

I. YouTube's Recommendations Are a Form of Publishing

Petitioners and their amici are correct to note that Section 230 does not shield providers from liability for their general business activities. Rather, it is better understood to prevent liability for the act of publishing in the common law sense. In the tort of defamation, "publication" is an essential element. Restatement (Second) of Torts § 558 (1977) ("Restatement"). In this context, "publication" refers to the dissemination or communication of material to at least one other person (other than the person defamed). The United States correctly explains that publication "refers broadly to the communication of expressive material to another." United States 20 (citing Restatement § 577).

According to Petitioners,

> YouTube selected the users to whom it would recommend ISIS videos based on what YouTube knew about each of the millions of YouTube viewers, targeting users whose characteristics suggested they would be interested in ISIS videos. The selection of the users to whom ISIS videos were recommended was determined by computer algorithms created and implemented by YouTube.

Pet. 9 (citations omitted). This meets the common law understanding of "publication" discussed above.

The fact that a publication is to a single individual, uses an algorithm, or is targeted to specific users based on a trove of personalized information does not transform it into something other than a publication. As the Second Circuit recently observed, the selection of an audience, and matching content to likely readers, has been a part of publishing content online from the beginning, and "it would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability." *Force v. Facebook*, 934 F.3d 53, 67 (2d Cir. 2019). By recommending videos to users, YouTube is disseminating them to new viewers. Communicating expressive material to another is the essence of publication, and presenting already-published material to a new audience is considered a new publication. *See Giuffre v. Dershowitz*, 410 F. Supp. 3d 564, 571 (S.D.N.Y. 2019) ("Republication to a new audience or in a new forum does not come within the single publication rule."); *Firth v. State*, 98 N.Y.2d 365, 371 (2002) ("The justification for this exception to the single publication rule is that the subsequent publication is intended to and actually reaches a new audience"); *Salyer v. S. Poverty Law Ctr.*, 701 F. Supp. 2d 912, 916 (W.D. Ky. 2009) (same); *cf. Banaian v.*

Bascom, 281 A.3d 975, 980 (2022) (Section 230 protects Twitter users from claims of defamation for republishing [retweeting], but not for their additional commentary).

Of course, not all recommendations or references to content (*e.g.*, a positive movie review) constitute a "publication" at all. As one court explained,

> [T]he common thread of traditional republication is that it presents the material, in its entirety, before a new audience. A mere reference to a previously published article does not do that. While it may call the existence of the article to the attention of a new audience, it does not present the defamatory contents of the article to that audience. Therefore, a reference, without more, is not properly a republication.

Salyer, 701 F. Supp. 2d at 916. Unlike the references discussed in *Salyer*, YouTube's recommendation systems present the contents of third-party content directly to viewers. YouTube hosts the content itself, and places recommended content before viewers in a form where they can immediately view it. Because its recommendations make the contents of the video immediately available to viewers, they are "publications" of user-uploaded videos under the common law. Section 230 straightforwardly precludes liability.

A. Section 230 Precludes Liability Under All Causes of Action That Seek to Impose Liability for User Material

Many forms of "recommendation" are not republications. For example, "though a link and reference may bring readers' attention to the existence of an article, they do not republish the

article." *In re Phila. Newspapers*, 690 F.3d 161, 175 (3d Cir. 2012). But Section 230 precludes liability under all causes of action that seek to impose liability for recommendations, including those causes of action that do not specifically name "publication" as an element. By the terms of the statute, "*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) (emphasis added). This shows that Congress intended Section 230 to bar any cause of action that seeks to hold a provider liable for the contents of third-party material, however it is phrased or re-characterized. Plaintiffs are creative and can find causes of action that seek to treat providers as "publishers" without expressly saying so. In one case, "Plaintiffs do not contend that [defendants] 'published' the tapes and pictures for purposes of defamation and related theories of liability... Instead, they say, [defendant] is liable for 'negligent entrustment of a chattel.'" *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). But "a plaintiff cannot sue someone for publishing third-party content simply by changing the name of the theory from defamation to negligence." *Barnes v. Yahoo!*, 570 F.3d 1096, 1102 (9th Cir. 2009). "Nor can he or she escape section 230(c) by [re]labeling . . . an action that is quintessentially that of a publisher." *Id.* at 1102–03. Courts have interpreted Section 230 to preclude word games of this sort and to give the statute its intended effect. As the 9th Circuit found,

> [W]hat matters is not the name of the cause of action—defamation versus negligence versus intentional infliction of emotional distress—what matters is whether the cause of action inherently requires the court to treat the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the

> defendant violated derives from the defendant's status or conduct as a "publisher or speaker." If it does, section 230(c)(1) precludes liability.

Id. at 1101–02. *See also id.* at 1101 (overview of cases in different circuits where plaintiffs have advanced various causes of action in attempts to work around Section 230).

As the Fourth Circuit recently explained, treating someone "as a publisher" means that liability is "on account of some improper content within their publication." *Henderson v. Source For Pub. Data*, 53 F.4th 110, 122 (4th Cir. 2022). "[T]o hold someone liable as a publisher at common law was to hold them responsible for the content's improper character." *Id.* Section 230's prohibition on treating providers as the publishers or speakers of third-party information content therefore bars torts that require that the provider have communicated or disseminated objectionable material, or to have communicated or disseminated material in a wrongful way. Any claim where liability depends on the improper content of third-party material is barred. *See also Herrick v. Grindr*, 765 F. App'x 586, 590–91 (2d Cir. 2019) ("manufacturing and design defect claims seek to hold Grindr liable for its failure to combat or remove offensive third-party content, and are barred by § 230").

In this case, YouTube faces liability only because of the content of some of the videos it recommended. Plaintiff's claims are precluded by Section 230, because they inherently depend on the objectionable contents of user-uploaded material, not just YouTube's own words or conduct. Thus, YouTube's content recommendations are shielded by Section 230 even if they are characterized as something other than "publishing."

Recommending content (either implicitly or expressly) does not somehow adopt it such that it is no longer "information provided by another information content provider." An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information." 47 U.S.C. 230(f)(3). When a provider recommends third-party content, it does not retroactively become its co-creator. As the United States explains in its brief, the "development" of information does not include measures providers employ to make third-party information more available to users without altering its content. United States 21–23. In other words, the "development" of material refers to its creation, not measures taken to publish it to new audiences. Providers can always be held responsible for material they have helped create—for example, in *Roommates*, the provider was liable because the unlawful content was a "collaborative effort between Roommate and the subscriber" *at the time of its creation*. *See Fair Hous. Council v. Roommates.com,* 521 F.3d 1157, 1167 (9th Cir. 2008) ("Roommates"). If the "development" of material includes publishing, then section 230 would be an empty statute.

Of course, if a provider so significantly transforms third-party content so as to change its fundamental character, it becomes new content created by the provider. *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (Section 230 applies when providers edit third-party content as long as they do not change "its basic form and message."). Providers are always liable for their own words, including those that refer to third-party content. But a provider does not lose its Section 230 protection for third-party content by commenting on it, referencing it, or promoting it.

A provider that creates a "Recommended Videos of the Week" list and writes its own descriptive copy would be liable for its own words. But when a provider recommends third-party videos, those videos remain "information provided by another information content provider." Thus Petitioner's insistence that "URLs and notifications" are "information within the meaning of Section 230(c(1)," Pet. 14, is immaterial. Even if they are, they contain no objectionable content in themselves. The objectionable content is the video, not the URL for the video. "Information provided by another information content provider" does not stop being so when a provider gives it a new URL or generates notifications to direct viewers to it. The harms alleged in this case stem from the content of ISIS videos. YouTube's role was that of a publisher, not a content creator. Therefore Section 230 precludes Petitioner's claims.

B. Publishing Is Expressive Activity That Often Conveys a Message of Endorsement

Publishing is a typically expressive activity that often sends a message of agreement, recommendation, or endorsement. While this is not a First Amendment case, focusing on how publishing can send a message in itself, in addition to (and commenting on) the nature of what is being published, can help clarify the nature of what Section 230 protects.

Analogizing print media to electronic media must be done cautiously. "Accordingly, in search of cogent principles, we compare the Internet to other media with great care." *Oja v. United States Army Corps of Engineers*, 440 F.3d 1122, 1129 (9th Cir. 2006). But while the scale and scope of internet publishing may be relevant to policymakers, the same principles of tort law apply. Thus, "the analogy between Internet

and print publication is sufficiently apt to be serviceable." *Id.* at 1131 (discussing defamation and the single publication rule). In the print context, this Court has already found that publication (including what to publish, how to present it, and what not to publish) are expressive activities protected by the First Amendment. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Miami Herald Pub. Co., Div. of Knight Newspapers. v. Tornillo*, 418 U.S. 241, 258 (1974).

In this account by the Court, the action of publication, the manner of presentation of material, and the message being communicated are not each distinct actions where liability could attach to the presentation of material, but not its publication, or to the message being expressed by the newspaper, but not the means by which it expressed it. These are not analytically distinct concepts and trying to distinguish them leads to absurdities. It is illogical to say that an entity cannot be held liable for publishing objectionable material but *can* be held liable for the manner in which it publishes, or for the "separate" message the fact of its publication communicates. Yet this is precisely the path urged by Petitioners and the United States, who urge the Court to perceive a distinction between "publishing" content and "recommending" it. But these different concepts are inextricable in practice.

The act of publication, without more, might constitute a recommendation. When a newspaper publishes a letter to the editor, it is communicating to its readers that this letter, among the many it has received, is worthy of attention. When it publishes an

op-ed—by placing it in the editorial section, copy-editing it, and fitting it in with the overall design of the newspaper—it is likewise sending a message of endorsement (or even respectful disagreement), apart from the content of the op-ed itself. The choice of what to publish (and what not to publish), how to publish it, and who to publish it to are inherently communicative activities. Apart from First Amendment concerns, holding a provider liable for the expressive content of its publishing activities, but not for the activities themselves, as the United States suggests (at 27), is illogical.

According to the Second Circuit, attempting to exclude "matchmaking" (a way of describing content recommendations) from Section 230 would imperil "the editorial decisions regarding third-party content that interactive computer services have made since the early days of the Internet." *Force*, 934 F.3d at 66. It continued,

> The services have always decided, for example, where on their sites (or other digital property) particular third-party content should reside and to whom it should be shown. Placing certain third-party content on a homepage, for example, tends to recommend that content to users more than if it were located elsewhere on a website. Internet services have also long been able to target the third-party content displayed to users based on, among other things, users' geolocation, language of choice, and registration information. And, of course, the services must also decide what type and format of third-party content they will display whether that be a chat forum for classic car lovers, a platform for blogging, a feed of recent articles from news sources frequently visited by the user, a map or directory of local businesses, or a dating service to find romantic partners.

Id. 66–67. This passage shows how Plaintiff and the United States attempt to create a form of "publishing" that does not include the selection of content for an audience makes no sense. That simply is what publishing consists of.

Any sense of what "publishing" means under Section 230 includes full editorial discretion. The Fourth Circuit recognized that Section 230(c)(1)'s prohibition on treating providers as publishers means that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions" with respect to user-submitted material "such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997). (Section 230(c)(2) also covers content removals, and is broader than (c)(1), because it immunizes content removals from all causes of action, not just those that "treat" a provider as a publisher or speaker. However, unlike (c)(1), (c)(2) is subject to a "good faith" limitation.)

This does not expand the protections of 230 beyond "publishing" understood in the common law sense. Consistent with the Supreme Court's analysis in *Tornillo*, *Zeran* is a recognition that "publishing" in the narrowest sense is an expressive, communicative act. And it recognizes that a liability shield for publishing cannot just apply to the affirmative act of publishing, but the failure to publish, the decision to stop publishing, and the manner of publication—all choices that inherently require subjective editorial determinations, including whether to "recommend" certain content through its manner of presentation.

YouTube's content recommendations are protected by Section 230 because they are the publication of information provided by another information content provider. Providers can be held liable for their own

conduct, but only to the extent that conduct is not publishing, and liability does not depend on the contents of third-party material. Internet publishers like any others may intend to send a message of endorsement or quality control in the selection of what they publish and how they present it. But this has no bearing on Section 230.

C. Congress Enacted Section 230 To Encourage Providers to Use Their Independent Editorial Judgment to Moderate Content

Section 230 was adopted to make it easier for providers to refuse to publish material they find objectionable, by removing "serious obstacles," S. Rep. No. 104-230, at 194 (1996), that would otherwise disincentivize them from performing this editorial function.

Section 230 was indisputably enacted to reduce the amount of "obscene, lewd, lascivious, filthy, excessively violent, harassing" content online, 47 U.S.C. § 230(c)(2), and to protect those providers who "edit the smut from their systems." Statement of Rep. Goodlatte, 141 Cong Rec H 8460, 8471. It does this, not only by stating that providers cannot be "treated" as publishers of third-party content, but by immunizing them from all torts (including those that do not treat them as publishers) over removing content they "consider[]… objectionable." 47 U.S.C. 230(c)(2)(A). Both the words "consider" and "objectionable" indicate that providers are expected to use their own, independent editorial judgment in determining both what criteria to apply, and how to apply them. In addition to being a constitutional necessity, ensuring that online publishers could continue to use their own judgment to curate the content on their services is the best way to achieve the statute's objective to protect the internet's nature as

"a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. 230(a)(3).

This is consistent with the legislative history. Rep. Barton, for instance, saw the provision as offering providers a way "to help them self-regulate themselves without penalty of law." Statement of Mr. Barton, 141 Cong Rec H 8460, 8470. And numerous statements in the legislative record saw Section 230 as a means for private actors, rather than the government, to make editorial choices with respect to online content. *See* Congressional Research Service, *Section 230: An Overview* 5 (April 7, 2021).

Because Section 230 was intended to encourage providers to take a more active role in curating third-party content, it should not be interpreted in a way that penalizes providers who do so.

D. "Recommendations" Are Not Distinct from Other Features of Interactive Computer Services

Petitioners and their amici advance a reading of Section 230 that is so narrow that it would not apply to nearly any feature of popular websites that existed in 1996, much less today. They would effectively limit Section 230 to services that acted as mere file hosts, exercising little editorial control over what they publish. But as the United States observes,

> Interactive websites invariably provide tools that enable users to create, and other users to find and engage with, information. A chatroom might supply topic headings to organize posts; a photo-sharing site might offer a feature for users to signal that they like or dislike a post; a classifieds website might enable users to add photos or maps

> to their listings. If such features rendered the website a co-developer of all users' content, Section 230(c)(1) would be a dead letter.

United States 23. Section 230 was intended to apply to interactive computer services. Therefore, as the United States explains, the content discovery, search, and organization features that interactive computer services provide must be consistent with Section 230. In other words, they are the publication, not the "development," of content.

This equally applies to the recommendation features Petitioners, the United States, and others try to distinguish. There is no basis in the statute to conclude that an organizational tool that "recommends" content should be treated any differently. Such a tool could be, for example, a topic heading of "Today's Most Important Posts." Or a modern website might have "Today's Most Important Posts, Selected for You," based on a user's past activity. It's not that there is no clear line to be drawn between organizing and "recommending" content; it's that there is no line to draw. To "recommend" content is simply one way of organizing it.

Invocation of the word "algorithm" does not change this. An algorithm is merely a sequence of steps that a person or a computer might follow. In this context, a provider's algorithms determine how it organizes content. One provider's algorithm might be very simple: "Display the most recent content first." Another's might be more complex: "Display the most clicked-on content first." Section 230 protects a provider's publishing activities whether they are performed by an algorithm it has deployed, or by human moderators using their best judgment.

Of course, the "computer algorithms created and implemented by YouTube," Pet. 9, are enormously

more sophisticated than the ones mentioned above. But they are still algorithms, different in degree, but not kind, from simpler ones. Section 230 is a forward-looking statute, which Congress expressly intended "to promote the continued development of the Internet." 47 U.S.C. 230(b)(1). The Internet has developed significantly since 1996, and there are good public policy reasons to subject complex algorithms to regulatory scrutiny. But that is not a matter for the courts.

Petitioner's attempt to distinguish YouTube's recommendations from search results is factually and legally flawed. Pet. 15–16. Content recommendations are not distinguishable from search results in a way where Section 230 can be interpreted to cover one, but not the other.

Search terms themselves might be algorithmically auto-completed. Indeed, a "recommendation" may be nothing more than a preemptively supplied search result. Content recommendations, like providing search results, are a way of communicating third-party material to a new audience. Section 230 immunizes providers from liability when they do this, whether in search results or some other means.

Petitioner's argument that Section 230 only applies to actions "the user has actually requested," Pet. 15, does not withstand scrutiny. A platform might publish material at the request of a user, or unprompted. It is publishing in either case. Section 230 might only apply to "interactive computer services," but the behavior it shields, publishing, does not have a requirement of interactivity. Indeed, the suggestion that it does is squarely at odds with the Petitioner's claim (at 13, 32) that publishing should be understood in its common law context. The common law definition of publication does not hinge

on whether the recipients have requested the material or not.

More broadly, search engines do not "only provide users with materials in response to requests from the users themselves." Pet. 15. They attempt to provide users with what they want, and different search engines use different algorithms to both determine and order (recommend) results. Search engines like Google and Bing provide results customized to individual users, based on their location, past search history, and other criteria. By contrast, DuckDuckGo argues that personalized results like this contribute to "filter bubbles." DuckDuckGo, Measuring the Filter Bubble (December 4, 2018), https://spreadprivacy.com/google-filter-bubble-study. Allowing competing search engines to develop their own means to rank and order potential responses for each individual is precisely the sort of "vibrant and competitive free market," 47 USC 230(b)(2), Congress intended to promote via Section 230. It would make no sense to impose liability for the kind of differentiated, individualized determinations Congress states it is the policy of Section 230 to encourage.

II. Section 230 Applies to Publishing, Not Publisher Business Models

Section 230's few words have profound effects. People rely on the internet for news, entertainment, and connecting with their friends and family. The content moderation practices of social media sites make national news. At the same time, section 230 is not a deregulatory charter for the online businesses that have become so central to culture, democracy, and the economy. *See* Claire Cain Miller, *When Uber and Airbnb Meet the Real World*, NY Times (Oct. 17, 2014), https://www.nytimes.com/2014/10/19/upshot/when-uber-lyft-and-airbnb-meet-the-real-world.html.

Understanding what Section 230 covers also clarifies what it does not.

A. Section 230 Does Not Prevent Holding Online Marketplaces Accountable for Selling Dangerous Products

Online marketplaces allow users to post items for sale (or apartments to rent, or job vacancies to fill). The different ways they are structured and differences in state law mean that there is no simple answer to the question of whether they are "sellers" of goods transacted on their sites for the purposes of consumer protection law and determining liability for defective or dangerous products.

While it is true that these providers often function as a forum for communication between buyers and sellers, they also play a much more active role in facilitating transactions. Online marketplaces often handle payment processing, offer buyer protection programs, and can even handle shipping and returns. This level of involvement in the sale process goes beyond simply publishing third-party content and suggests that online marketplaces could be considered a party to the sale.

This form of liability does not run afoul of Section 230 because holding someone liable as a seller is not treating them as a publisher. *See Oberdorf v. Amazon.com Inc.*, 930 F.3d 136 (3rd Cir. 2019), *vacated and reh'g en banc granted*, 936 F.3d 182 (3d Cir. 2019); John Bergmayer, *Section 230 Protects Speech, Not Business Models*, CPI Antitrust Chronicle (May 2021). Selling goods on the internet is not "publishing." Moreover, seller liability does not depend on the contents of third-party communications, even when the sale listing was created by a user, and not the provider itself. Liability

would depend on the sale of a defective product, not how it was described or who described it.

B. Section 230 Does Not Prevent State and Local Business Regulation

Section 230 does not prevent normal business regulation, even of businesses that are in part shielded by Section 230. While Section 230 prevents state and local regulation of "publishing," it does not shield any company's business model, and does not prevent the imposition of liability on activities that may be supported by or ancillary to "publishing," but are not publishing themselves.

For example, states and local governments are free to regulate online transactions without interference from Section 230. The Ninth Circuit correctly pinpointed this distinction in a recent case concerning local laws that imposed liability on short-term home rental companies for booking unlawful rentals that were initially posted by users. The court noted "the Platforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings." *HomeAway.com v. City of Santa Monica*, 918 F.3d 676, 684 (9th Cir. 2018). Short-term rental companies would be held liable for completing transactions, not publishing third-party content. Their liability does not depend necessarily on the content of published material, and the publishing components of their business can continue unchanged.

C. Section 230 Does Not Shield the Collection and Use of Personal Data

Section 230 shields providers from liability for publishing third-party information content. As discussed above, organizing, formatting, and

recommending content to users is "publishing" in the common law sense. But Section 230 protects publishing, not publisher business models, or activities ancillary to publishing. For example, while Section 230 shields publishers to the extent they are targeting content to specific users, it does not stand in the way of efforts to limit the collection of personal information—even if a publisher plans to use that information solely for publishing or collected it in the course of publishing. The collection of data on provider users is not the same thing as communicating third-party content to an audience. Nor does it authorize providers to use third-party content or data derived from third-party content in ways that go beyond publication or permit them to escape liability for information content they themselves have created or developed.

For example, in *Brooks v. Thomson Reuters*, the defendant data broker argued that the creation of "detailed cradle-to-grave dossiers" about "millions of people" was shielded by Section 230. *Brooks v. Thomson Reuters Corp.*, No. 21-cv-01418-EMC, 2021 U.S. Dist. LEXIS 154093, at *2 (N.D. Cal. Aug. 16, 2021). The dossiers it sold contained "name[s], photographs, personal identifying information, [and] other personal data." *Id*. The court found that these dossiers were not "third-party content," but "created by Thomson Reuters, albeit from third-party sources." Id at *8, and that Section 230 did not apply. *Id*. at *39. *See also Roommates*, 521 F.3d at 1171 ("Providing immunity every time a website uses data initially obtained from third parties would eviscerate the exception to Section 230 for "develop[ing]" unlawful content "in whole or in part.") Section 230's protections apply to the extent that a provider is publishing "information content," actual expressive material, from third parties. It does not permit them to repackage data, facts, and claims from third parties

into their own expressive content and escape liability. (For example, a YouTube user that repeats a dangerous or defamatory claim in their video, in their own words, cannot escape liability by later claiming that the "information" in question was first "provided by another information content provider.")

III. Section 230 Was Intended to Promote Competition, Free Expression, and User Control

In enacting Section 230, Congress recognized that free, online communication would be stifled if providers were responsible for each word their users post and if the fear of legal liability prevented them from moderating their services according to their individual criteria. While the moderation choices of online providers are protected by the First Amendment, Section 230 makes it easier for providers to exercise those rights. Section 230 also makes it easier for Internet users to express themselves, and is a pro-competitive statute intended to maximize their sources of information online. However, a repeal of the statute, or its substantial weakening either legislatively or through judicial decree, would harm both free expression and competition.

A. Section 230 Protects and Promotes a Competitive Market

Section 230 was intended "to encourage the development of technologies which maximize user control," 47 U.S.C. 230(b)(3) over online information, and to give online providers a freer hand in moderating content. These goals work in tandem with its pro-competitive purpose "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," 47 U.S.C. 230(b)(2).

Without Section 230, smaller online providers would be at a significant disadvantage due to their limited resources. Any lawsuit brought against them for the content of their users' speech would have the potential to bankrupt them, even if the suit was ultimately found to be baseless. This risk of litigation would make it much more difficult for smaller providers to attract investment and grow their user base. As discussed below, weakening Section 230 would make it more difficult for a new generation of more decentralized, competitive online services to emerge.

Larger online providers have the resources to weather lawsuits and would be less affected by the risk of litigation. Section 230 may have helped today's internet giants grow, but their continued dominance has many causes, including lax antitrust enforcement (*see*, *e.g.*, *Verizon Communs. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *Brooke Group v. Brown & Williamson Tobacco*, 509 U.S. 209 (1993)), economies of scale (including economies of scale with respect to content moderation), network effects, and winner-take-all market dynamics. Careful public policy is needed to bring about more online competition. Making it riskier and more difficult for new entrants to take on incumbents would have the opposite effect.

The recent growth of the decentralized social network Mastodon is an example of how Section 230's protections can foster a new generation of more competitive, decentralized internet services. The operator of each Mastodon "instance" sets its own content moderation policy, which applies to posts from its own users, as well as the content from other instances that appears on their service. *See* Mastodon, Moderation actions, https://docs.joinmastodon.org/admin/moderation

(user guide for providers). An instance might have a strict content moderation policy and might only interoperate with instances that have similar policies. Some instances are only open to specific kinds of users (*e.g.*, journalists). *See* Joseph Bernstein, *Chaos on Twitter Leads a Group of Journalists to Start an Alternative*, NY Times (Nov. 21, 2022), https://www.nytimes.com/2022/11/21/style/mastodon-twitter-adam-davidson.html; Mastodon, Servers, https://joinmastodon.org/servers (updated guide to different instances). Other instances might have more lax policies. Section 230 protects all these different editorial choices, and the ability of users to select providers with policies they agree with. The sole operator of a Mastodon instance could not take on liability as the "publisher" of the thousands of pieces of content that might flow across her service daily. Yet services such as Mastodon were not only what Congress squarely intended to promote in 1996, but a more decentralized approach to social media might be an important solution to combating the abuses and deleterious social role of current major platforms. Such an approach would be imperiled if Plaintiffs prevail in their claims.

B. Only Congress Can Update Section 230 to Better Fulfill Its Purposes in Today's Circumstances

Different Courts of Appeal have independently interpreted Section 230 in a way that Petitioners challenge, not because they have all fallen prey to the same interpretive error, but because they are compelled by the logic and words of the statutory text, along with the legislative history behind the statute. The job of the courts is to give effect to Congress' choices, not to substitute their own.

Section 230 like any other law should be periodically reexamined and updated when

circumstances change. Possible revisions can help it address new online challenges and better achieve its pro-competitive, pro-free expression goals. More than 25 years later, it may be wise to revisit these choices. But that is the job of Congress, not the judiciary. See *Arizona v. Mayorkas*, 598 U.S. __ (2022), Gorsuch, J., statement respecting denial of certiorari ("We are a court of law, not policymakers of last resort."). The Court is not made up of legislative draftsmen nor legislative custodians, cleaning up the messes and mistakes of legislators past. Any fixes to Section 230 must come from Congress. Indeed, there is a litany of proposed Section 230 amendments in both the past and current Congress, *see, e.g.*, *Platform Integrity Act*, H.R. 9695, 118th Cong. (2022); *PACT Ac*t, S. 797, 117th Cong. (2021), and Congress recently enacted the *Allow States and Victims to Fight Online Sex Trafficking Act of 201*7, PL. 115-164 (2017).

Present amicus has supported regulating platforms to better achieve Section 230's goals. See John Bergmayer, *It Doesn't Make Sense to Treat Ads The Same As User Generated Content*, Techdirt (Aug. 17, 2020), https://www.techdirt.com/2020/08/17/it-doesnt-make-sense-to-treat-ads-same-as-user-generated-content (proposing a legislative change to Section 230). As discussed above, reinvigorated antitrust policy will help check the market power of dominant providers, allowing users more choice. A new sector-specific digital regulator would have the flexibility to address a tech industry that is complex and subject to different competitive chokepoints, *see* Harold Feld, The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms (2019), https://publicknowledge.org/policy/the-case-for-the-digital-platform-act/, and granting users of dominant providers due process rights can promote the goals of free expression. *See* John Bergmayer, Even Under Kind Masters: A Proposal to Require that

Dominant Platforms Accord Their Users Due Process (2018), https://publicknowledge.org/policy/paper-on-dominant-online-platforms-and-due-process.

As this case shows, the availability and reach of harmful content online is a serious problem. Providers do not always use the flexibility afforded to them by the law wisely. In this case, material that violates YouTube's terms of service was instead promoted and recommended to users. That content promoted and glorified terrorism. Other cases have involved providers endangering the lives of children through easy access to pro-suicide content and even the means to efficiently commit suicide. *See*, *e.g.*, *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093 (9th Cir. 2019); *Anderson v. TikTok*, 2022 U.S. Dist. LEXIS 193841 (E.D. Pa. 2022); *Maynard v. Snapchat*, 357 Ga. App. 496 (Ga. Ct. App. 2020). These are grave societal problems that demand attention from policymakers.

However, addressing these issues this must be a job for Congress, not the courts. There is no way to creatively interpret Section 230 to cover some forms of publishing but not others, or to allow liability for third-party content in some cases but not others, or for some kinds of digital providers, but not others. Any judicially-created loopholes would inevitably swallow the statute, as plaintiffs and lower courts would have little trouble expanding any loophole to cover new circumstances. The theory put forth by Petitioners in this case and supported by various amici, whereby a provider becomes liable for content if it "recommends" it, is one such theory. It does not require much imagination to see how nearly any means YouTube selects to present videos to users could be framed as a "recommendation"—for example, any video on a user's front page.

More than that, under Petitioner's theory, users (and potential plaintiffs) would not know, on seeing a video, whether YouTube could be held liable or not, since YouTube might be potentially liable if it shows a user a video one way, but not another way, or liable to one set of users but not another. At best, judicially revising Section 230 to exclude recommendations would cause chaotic results. Congress and not the courts can best craft policies that are not only sound from a policy perspective, but administrable, narrowly targeted, and that protect free expression.

CONCLUSION

For the above reasons, the Court should reject Petitioner's claims and uphold the court below.

Respectfully submitted,

JOHN BERGMAYER
ALEX PETROS
HAROLD FELD
Counsel of Record
PUBLIC KNOWLEDGE
1818 N St. NW Suite 410
Washington, DC 20782
(202) 861-0020
hfeld@publicknowledge.org

Counsel for Amicus Curiae