No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, *et al.*,
Petitioners,
v.

GOOGLE LLC

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF INTERNET LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Page(s)

Miscellaneous

Page(s)

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Amici are an ideologically diverse group of law professors and scholars who are experts in internet law and related fields. They include the authors of leading internet law casebooks and numerous scholarly articles in this area. *Amici* have a professional and scholarly interest in the careful development of internet law, and in ensuring that internet speech remains free for a wide range of authors and readers. *Amici* are:

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DISCONTENT: HOW TO FIX SOCIAL MEDIA AND DEMOCRACY WITHOUT BREAKING THEM (2019)

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SUMMARY OF ARGUMENT

An interactive computer service's automated recommendations qualify for statutory immunity under Section 230(c)(1). Congress enacted this policy choice in clear text, supported by powerful statutory context, including express findings and purposes that it wrote into the statute itself. And Congress did so in service of a national policy favoring free and open discourse on the still-developing internet—a policy that has proved enormously successful in the years since. This Court should resist Petitioners' invitation to impose sweeping changes on the Nation's internet policy, and instead leave any such changes—if they ever prove necessary—to Congress.

Section 230's text should decide this case. Section 230(c)(1) immunizes the user or provider of an "interactive computer service" from being "treated as the publisher or speaker" of information "provided by another information content provider." And, as Section 230(f)'s definitions make clear, Congress understood the term "interactive computer service" to include services that "filter," "screen," "pick, choose, analyze," "display, search, subset, organize," or "reorganize" third-party content. Automated recommendations perform exactly those

functions, and are therefore within the express scope of Section 230's text.

Section 230(c)(1)'s use of the phrase "treated as the publisher or speaker" further confirms that Congress immunized distributors of third-party information from liability. At common law, a distributor of third-party information could be held liable only when the doctrine permitted the distributor to be treated as the publisher. As Petitioners and the United States agree, Congress understood and incorporated that common-law meaning of "treated as the publisher" into Section 230(c)(1). Given that a distributor cannot be "treated as the publisher" of certain third-party information, however, there is no alternative mechanism for holding the distributor liable based on the improper character of the information. Indeed, Congress enacted Section 230(c)(1) specifically to avoid the sweeping consequences that the common-law regime of knowledge-based distributor liability would inflict on the developing internet.

Section 230(c)(1)'s surrounding and subsequent statutory context bolsters this conclusion. Section 230(c)(1) provides the same protection to "user[s]" as to "provider[s]" of interactive computer services. Petitioners do not defend the position that users who like, retweet, or otherwise amplify third-party content should be held liable for the character of that content, but Section 230(c)(1)'s text renders that an inescapable consequence of their argument. The better inference is that Congress chose to protect a wide range of speech and speech-promoting conduct for providers and users of interactive computer services alike. In addition, other statutory enactments illustrate that Congress knew how to impose liability on distributors when it wanted to—such as in the Digital Millennium Copyright Act, for example, where

Congress also wrote a detailed notice-and-takedown framework into the statute to ensure that distributors received adequate procedural protections as well.

Petitioners' and the United States' attempts to distinguish between mere automated recommendations (for which distributors purportedly could be liable) and the recommended content (for which they could not) find no support in the text. To the contrary, the text makes clear that even a bare automated recommendation constitutes "pick[ing]" or "choos[ing]" content, an activity expressly contemplated by Section 230. Moreover, to hold a distributor liable based in part upon the improper content of information created by a third party would conflict with the common-law meaning of the terms Congress chose.

Congress enacted Section 230(c)(1) to protect the continuing development of the internet and ensure that it would remain a national forum for the free exchange of ideas. This is a case where the statutory text successfully implements Congress's purposes by providing broad protections to automated recommendations of third-party information. But this Court need not guess at Congress's purposes here, as it might be reluctant to do in a different case, because Congress enacted its purposes into the statute itself. Those purposes are part of the statutory text like any other statutory text, and deserving of the respect this Court would give to any text that passed through bicameralism and presentment into law. If any changes to our Nation's statutory regulation of the internet are necessary, this Court should leave them to Congress.

ARGUMENT

I. Interactive Computer Services' Automated Recommendations Fall Within Section 230(c)(1)'s Immunity.

As part of its ambitious policy to favor an open, innovative internet, Congress enacted Section 230(c)(1) to avoid the sweeping consequences that the common law's knowledge-based regime for distributor liability would have on the internet's development. It did so by expressly incorporating—and preempting—that common-law regime, and by providing clear textual indications throughout Section 230. Most relevant here, Congress expressly contemplated that both users and providers of interactive computer services would "pick" and "choose" content to amplify, would "organize," "filter," "screen," and "reorganize" third-party content, and would "display" such content to the public. And Congress provided that such "providers" and "users" could not be "treated as the publisher" of the third-party content they recommended. This Court should respect that deliberate textual choice.

A. Section 230's Text, Statutory Context, and Enacted Findings and Purposes All Support Section 230(c)(1) Immunity for Interactive Computer Services When They Make Automated Recommendations.

1. The Text of Section 230 Protects the Function of Automated Recommendations That "Filter," "Screen," "Pick, Choose, Analyze," or "Display, Search, Subset, Organize, Reorganize" Third-Party Content.

Section 230(f)'s definitions of "interactive computer service" and "information content provider" confirm that

Section 230(c)(1) immunizes recommendations of third-party content.

Section 230(f)(2) defines "[i]nteractive computer service" to mean "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Section 230(f)(4), in turn, defines "access software provider" to mean

> a provider of software . . . or enabling tools that do any one or more of the following:
>
> (A) *filter*, *screen*, allow, or disallow content;
>
> (B) *pick*, *choose*, analyze, or digest content; or
>
> (C) transmit, receive, display, forward, cache, search, subset, *organize*, *reorganize*, or translate content."

47 U.S.C. § 230(f)(4) (emphasis added). Section 230 accordingly contemplates that an "access software provider"—and therefore an "interactive computer service"—will as a matter of course "filter, screen, . . . pick, choose, . . . organize [or] reorganize" content. *Ibid.*

Petitioners do not address Section 230(f)(4), much less explain how "pick[ing]" and "choos[ing]" content differs from "recommending" content. Nor could they: picking and choosing are core acts of "recommending" and, according to the statutory text, core functions of an "interactive computer service." And, in turn, Section 230(c)(1) does not carve out "pick[ing]" and "choos[ing]" from its coverage: regardless of the specific activity in which an interactive computer service engages, that activity cannot lead to its "treat[ment] as the publisher" of information provided by a third-party "information content provider."

That conclusion, clearly supported by the statutory text, would have been anything but surprising to the Congress that enacted Section 230. By 1996, interactive computer services were already in the business of making automated recommendations of third-party content to their users. At the time, services like AltaVista, Geocities, AOL, and Lycos all offered search functions whereby a user would enter keywords and receive an automated response recommending sites that would likely be of interest to the user.[2]

2. By Forbidding "Treat[ment] as the Publisher or Speaker," of Information "Provided" by Another, Congress Expressly Abrogated the Traditional Common-Law Doctrines by Which Liability Could Extend from Creators to Secondary Disseminators of Information.

Congress employed the term "publisher" in Section 230(c)(1) in order to incorporate its meaning at common law, and to preempt the doctrinal means by which secondary disseminators of information could be held liable as though they were the information's "publisher."

By providing 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," Section 230(c)(1) expressly refers to and abrogates traditional common-law theories that extend liability from the originator of certain

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[2] *See* "AltaVista in 1996," Web Design Museum, https://perma.cc/UQA8-N3RA (last visited Jan. 18, 2023); "GeoCities in 1995," Web Design Museum, https://perma.cc/FC7K-9KSK (last visited Jan. 18, 2023); "AOL in 1996," Web Design Museum, https://perma.cc/Y8GH-E9GP (last visited Jan. 18, 2023); "Lycos in 1996," Web Design Museum https://perma.cc/9R3N-RB2U (last visited Jan. 18, 2023).

content to secondary disseminators of the same content. At common law, for a secondary distributor of information to be held liable on the basis of information originated by another *was* to be "treated as the publisher or speaker" of the information. By employing the phrase "treated as the publisher or speaker," Congress incorporated and preempted legal theories that would extend liability from content creators to secondary distributors.

"It is a settled principle of interpretation that, absent other indication, Congress intends to incorporate the well-settled meaning of the common-law terms it uses." *Sekhar v. United States*, 570 U.S. 729, 732 (2013) (cleaned up). A word "transplanted from another legal source, whether the common law or other legislation," thus "brings the old soil with it." *Id.* at 733 (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

Amici therefore agree with Petitioners (Petrs. Br. 19–23 & n.16) that, in Section 230(c)(1), "publisher" is such a word—though *amici* disagree about what consequences follow from that fact. At common law, a defendant's liability arising from disseminating information, whether or not the defendant was the first to do so, was predicated on the defendant being deemed a "publisher" of the information. *See, e.g.*, *Layton v. Harris*, 3 Del. 406, 407 (Del. Super. Ct. 1842) ("The innocent delivery of a sealed letter by a post-master, or by another at his request, would not be a publication of a libel contained in the letter, without his knowledge. But if he knew anything of it before delivery, or circulated others of the same kind after knowledge of the libel, *this would be a publication.*") (emphasis added); *see generally* Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L.

REV. 913, 966-70 (2021). Defamation liability imposed on booksellers, libraries, and other third-party content distributors thus depended on a finding that such a defendant was a "secondary *publisher*" of the content. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 803 (5th ed. 1984) (emphasis added). Put differently, in order to extend liability beyond the principal tortfeasor in such circumstances, courts would deploy a legal fiction that the defendant had acted tantamount to a publisher—and would, by imposing liability, quite literally treat them as one. *See, e.g.*, William L. Prosser, Handbook of the Law of Torts § 113, at 768–69 (4th ed. 1971) ("[E]very one who takes part in the publication, as in the case of the owner, editor, printer, vendor, or even carrier of a newspaper is *charged with publication* . . . .") (emphasis added).

The Second Restatement of Torts, published in relevant part in 1977 and still prevailing at the time Section 230 was enacted, exemplifies this approach. First, the Restatement defines "[p]ublication of defamatory matter" as "its communication intentionally or by a negligent act to one other than the person defamed." Restatement (Second) of Torts § 577 (1977). The Restatement then provides:

> (1) Except as stated in subsection (2), one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.
>
> (2) One who broadcasts defamatory matter by means of radio or television is subject to the same liability as an original publisher.

Id. § 581. Similarly—except for the harsher treatment for TV and radio broadcasts—the First Restatement provided that a defendant who "disseminates matter . . . originally published by a third person" would be "liable *as though* the dissemination were an original *publication* by him" unless the defendant had "no reason to know of its defamatory character." Restatement (First) of Torts § 581 (1938) (emphasis added). As early as 1939, one scholar was able to conclude that

> it is settled by the English decisions and the few American cases on the point that *such secondary publishers* who sell, rent, give, or otherwise circulate defamatory matter *originally published by a third person* will be excused from liability if they show that there was no reason to know of its defamatory character.

Ralph E. Helper, *Libel and Slander — Privilege of "Fair and Accurate Report" of Judicial Proceedings — Non-Liability of Vendor of Newspaper*, 37 MICH. L. REV. 1335, 1336 (1939) (emphasis added).

Congress's selection of the phrase "treated as the publisher" thus referred to a long history at common law of attaching liability to distributors or other secondary actors based upon a legal standard that, if satisfied, would treat those entities "as" a "publisher" of the disseminated information. In choosing those words, Congress also chose the "old soil" they carried with them. *Sekhar*, 570 U.S. at 733 (cleaned up).[3] Crucially, because at common law "distributor" liability existed as a *subset* of "publisher" liability—not as a distinct category—Petitioners' *amici* err in suggesting that a distinct

[3] As Petitioners recognize (Petrs. Br. 23–24), Congress's use of the term "speaker" alongside "publisher" only reinforces this conclusion.

category of "distributor" liability could have survived Congress's express elimination of "publisher" liability for disseminators of third-party information. *See* Brief of Senator Josh Hawley as *Amicus Curiae* in Support of Petitioners at 2–12; Brief of U.S. Senator Ted Cruz, et al., as *Amici Curiae* in Support of Petitioners at 7–14. As discussed above, if a disseminator cannot be "treat[ed] as the publisher," as a distributor would have to have been at common law, there is no basis for liability left.

3. Section 230(c)(1)'s Surrounding Text and Subsequent Statutory Context Confirm that Section 230(c)(1) Protects Interactive Computer Services that Make Recommendations.

Section 230 contains numerous other textual and contextual indications that Section 230(c)(1) immunizes recommendations of third-party content.

First, Section 230(c)(1) extends the same protection to "users" as to "providers" of an interactive computer service. 47 U.S.C. § 230(c)(1). As any user of YouTube, Twitter, or Facebook knows, promoting other users' content with "likes," "retweets," or "favorites" is a core part of the user experience. And, although the Twitter user's canonical disclaimer is that "retweets are not endorsements," the fact remains that retweets and their ilk are *recommendations*—in the sense that they amplify content, suggesting to other users that the retweeted or "liked" content may be worth a look. *Cf.* Brief of the United States as *Amicus Curiae* in Support of Vacatur at 27 (analogizing YouTube's recommendations to a message that says, "You should watch this"). Petitioners and the United States cannot justify or otherwise explain the enormous expansion of user liability that would be implied

by a holding that "recommendations" fall outside the scope of Section 230(c)(1)'s protection.

In addition to that historical context, surrounding and subsequent statutory context illustrate that Congress knew how to impose liability on online distributors of third-party information, including on the basis of the distributor's knowledge of the information's harmful nature. Other provisions of the Communications Decency Act *did* expressly impose such a regime for narrow categories of online activity: Among other things, the Act imposed criminal liability on anyone who "knowingly" uses an interactive computer service to "send" or "display" obscene material to minors. 47 U.S.C. § 223(a)(d)(1).[4] And, two years after the Communications Decency Act, Congress enacted the Digital Millennium Copyright Act of 1998, which included an extensive knowledge-based liability framework for internet intermediaries with respect to copyright infringement. Pub. L. No. 105-304, 112 Stat. 2860. In doing so, however, Congress crafted detailed rules to account for the risk to free expression that such a system would bring, including extensive procedural protections for service providers. *See generally* 17 U.S.C. § 512. If Section 230 had actually created the knowledge-based liability regime that Petitioners would impose on distributors of third-party information, Congress knew how to say so.

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[4] Enforcement of Section 223's criminal penalties for "interactive computer services" was expressly exempted from Section 230's scope. 47 U.S.C. § 230(e)(1). And, as the United States observes (at 20–21 n.4), civil liability for violations of Section 223 lay against a distinct set of defendants from those immunized by Section 230. *See* 47 U.S.C. § 207.

B. Given the Common-Law Roots of "Treat[ment] as the Publisher," Petitioners' and the United States' Attempt to Distinguish Between Imposing Liability for a Mere Automated "Recommendation" as Opposed to the "Recommended Content" Finds No Support in the Text.

Despite agreement with Petitioners and the United States on the common-law roots of Section 230(c)(1)'s text, *amici* part ways with Petitioners and the United States when they seek to avoid the consequences of that text by attempting to distinguish between a "recommendation and the recommended content." U.S. Br. 27; Petrs. Br. 26 (contemplating liability where "the claim asserted that the recommendation itself was a cause of the injury to the claimant"). Under the common-law understanding set forth above, which Petitioners have embraced, it is not practically possible to impose liability on an interactive computer service provider for a "message" implied by a mere automated "recommendation"—such as YouTube's automated selection and display of video thumbnails alongside the video a given user is watching—without predicating liability in some way upon "information provided by another" and thereby "treating" the recommender "as the publisher" of the information in violation of Section 230(c)(1).

As discussed above—and as Petitioners seemingly agree—to "treat" a distributor "as the publisher" at common law was synonymous with holding the distributor liable based upon the character of information created by another. As the United States recognizes, "[t]o hold someone liable as a publisher at common law was to hold them responsible for the content's improper character." U.S. Br. 16 (quoting *Henderson v. The Source for Public*

Data, L.P., 53 F.4th 110, 122 (4th Cir. 2022)). Although that does not occur "anytime there is a 'but-for' causal relationship between the act of publication and liability," *Henderson*, 53 F.4th at 122, it *does* occur any time there is a 'but-for' causal relationship between liability *and the improper content*. Prohibiting "treat[ment] as the publisher" means that an interactive computer service provider cannot be held liable for its automated filtering, picking, and organizing of content, consistent with Sections 230(c)(1) and 230(f), if its liability is based in part upon the character of information "provided by another." Otherwise, the service provider would be "treated as the publisher" of that information under the common-law meaning of that term.[5]

Petitioners and the United States seek to evade that conclusion by introducing a new distinction, between a "recommendation" and the "recommended content." Liability predicated upon the former is permissible, they argue, even if liability predicated on the latter is not. But automated recommendations—in the sense of the selection and display of video thumbnails, links, or excerpts based on an algorithmic inference about the

[5] The United States cites several cases (at 16) to support its argument that a mere "but-for" causal relationship between "the act of publication and liability" is insufficient to trigger Section 230(c)(1). But those cases are better explained (or should have been guided) by the *absence* of an alleged causal connection between liability and the "improper character" of information provided by another—which would otherwise be sufficient to trigger Section 230(c)(1). Unlike predicating liability upon a "product's defect," a review website's "manipulat[ion]" of reviews to "extort businesses," or a roommate-matching service's alleged violation of the Fair Housing Act by asking questions in a manner the Act forbids, Petitioners here seek to impose liability on Respondent in part based upon an automated algorithm that filters, picks, and chooses among third-party content. U.S. Br. 16–17.

user's interests—are *precisely* what § 230(f)(4) refers to and protects: they involve "software" and "tools" that "filter," "pick," and "choose" which material to present.

Seeking to make the distinction "clear," the United States hypothesizes a YouTube recommendation that "placed a selected ISIS video on a user's homepage alongside a message stating, 'You should watch this.'" U.S. Br. 27. According to the United States, "[e]ncouraging a user to watch a selected video is conduct distinct from the video's publication (*i.e.*, hosting). And while YouTube would be the 'publisher' of the recommendation message itself, that message would not be 'information provided by another information content provider.'" *Ibid.* But as the example drives home, the supposed "recommendation" is simply YouTube using software to pick and choose content.

The more apt analogy, which supports Respondent in this case, would be the difference between YouTube simply saying "Here are the videos we have picked and chosen for you based on your interests" (or a shortened version of that, such as "You might like . . . .") and one that consisted of the words "John Smith is a Murderer, Watch this Video to Learn More!" The former involves just the statutorily protected filtering, picking, and choosing, with a statement that YouTube has filtered, picked, and chosen. The latter involves the software adding defamatory material of its own, and not just filtering, picking, and choosing. Courts have observed, for example, that a platform loses the protections of Section 230 when it takes an active role in speaking or developing content. A foundational Section 230 case, *Roommates.com*, held that requiring users to complete mandatory questionnaires and creating pre-populated fields rose to the level of creating or developing content and was not

protected under Section 230. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1166–67 (9th Cir. 2008). The above examples easily map onto the *Roommates.com* framework, with the former comfortably within Section 230's scope of immunity and latter falling outside it.

Contrary to Petitioners' contention (Petrs. Br. 28), therefore, where "part of a recommendation is material created by a third party," to impose liability based upon the automated recommendation *is* to "treat" the recommender "as the publisher" of the third-party information. 47 U.S.C. § 230(c)(1).

Long before automated recommendations existed, moreover, the historical function of a "publisher" was practically inseparable from the task of "recommending" content. Newspapers published or republished what, in their implicit or explicit judgment, their editors thought readers should know. (Consider the New York Times' famous if hyperbolic motto, "All the News That's Fit to Print.") The role of a "publisher" throughout our Nation's history thus inevitably included the task of making recommendations. And today, newspaper publishers convey an implicit rank ordering when they choose where to place content—for example, above the fold, on page C10, or on the cutting room floor. Radio and TV publishers highlight stories at the top of the hour, interrupt with breaking news, and promote with announcements. That is, the act of recommending is a quintessential role of a publisher.

C. Automated Recommendations Are Consistent with Section 230's Enacted Purposes, Including the Enacted "Policy of the United States" to Promote the Continued Development of the Internet.

Section 230 has been a resounding success: it has been instrumental in enabling the proliferation and success of Silicon Valley and American internet enterprises for over the past two decades. Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L. J. 639, 642-45 (2014). Since its passage, services such as GitHub, YouTube, Wikipedia, and WordPress have provided platforms for others to share and connect without fear of liability for the actions of their users. Section 230's legal immunity has enabled these services to flourish, while also allowing them to establish content moderation rules that enable them to curate the material available to their users, thus promoting a more civil and safe online environment.

As explained above, Congress successfully implemented its purposes in its chosen statutory text. Section 230 presents an unusually strong occasion for considering statutory purpose, moreover, because Congress enacted its purposes expressly into the statutory text: (1) "promot[ing] the continued development of the Internet," (2) "preserv[ing] the vibrant and competitive free market," (3) "encourag[ing] the development of technologies which maximize user control," (4) "remov[ing] disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material," and (5) "ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity." 47 U.S.C. §§ 230(b)(1)–(5).

Such "[e]nacted findings and purposes should be properly understood as part of the statutory text, and they should be treated like other enacted text for purposes of interpretation," under a "more complete version of the whole act rule." Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 712 (2019). Because "the entire statute is the result of the legislative deal that led to enactment," "[e]nacted findings and purposes are law just like any other part of the law," and any distinction between them and "other provisions of an enacted text is a choice that is not connected to, or required by, Congress." *Id.* at 714.[6]

Narrowing Section 230 immunity would lead to over-moderation of speech to avoid liability, which would undermine the Congressional recognition of the diversity of discourse made possible by the internet and the development of interactive computer services that would foster user control. Rewriting the statute to remove its protections for a wide swathe of automated activity would lessen the speech-promotion possibilities of the internet.

Interactive services that offer algorithmic content ranking or recommendations are a vital part of the

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[6] *See also Negusie v. Holder*, 555 U.S. 511, 553 (2009) (Thomas, J., dissenting) (citing Congress's universal condemnation of persecution to support view that extent of immigration bar under the Displaced Persons Act of 1948 was indistinguishable from extent of the bar under the Immigration and Nationality Act); *Rapanos v. United States*, 547 U.S. 715, 737 (2006) (Scalia, J.) (examining the Clean Water Act's stated policy in interpreting "waters" under the Act); *H.J. Inc. v. Nw. Bell Tel. Co.*,492 U.S. 229, 255 (1989) (Scalia, J., concurring) (explaining that the stated focus on "organized crime" in the Organized Crime Control Act of 1970 showed that "the word 'pattern' in the phrase 'pattern of racketeering activity' was meant to import some requirement beyond the mere existence of multiple predicate acts").

modern internet ecosystem and play a significant role in achieving the above policy goals. These selection services enable platforms to provide users with personalized and relevant content, which fosters user engagement and encourages the creation and distribution of more diverse and valuable content. This, in turn, promotes the free exchange of ideas and information that is at the heart of Section 230's goals of fostering innovation and encouraging the development of new technologies and services. *See* 47 U.S.C. §§ 230(b)(1)-(5). These goals have driven the success of American internet services for over the last two decades.

In contrast to the United States' clear protections for Internet intermediaries, other regimes offer more limited protections. For example, the EU's Electronic Commerce Directive provides liability protections for Internet intermediaries, but only after following a notice-and-takedown system. Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 1, 13 [hereinafter "EU Directive"]. While the EU Directive disavows any duty to "monitor" content, *id.* at Art. 15, it leaves open significant liability under national laws that may impose "duties of care," *id.* at Recital 48.

Similarly, Japanese law enforces a notice-and-takedown approach, and allows for liability under a vague standard of having "reasonable ground" that a relevant service provider "could know" of illegal content on their platform. Chander, 63 EMORY L. J. at 687. South Korea goes even further, creating a liberal liability regime for defamatory statements made on an intermediary's platform. *Id.* at 674. Under this regime, the Korean

Supreme Court issued a decision holding Yahoo Korea and three other websites liable for the defamation of a person occurring on their sites and ruling that these sites must delete offending posts "even if not requested to do so by the victim." *Id.* (quoting Supreme Court [S. Ct.], 2008Da53812, Apr. 16, 2009 (S. Kor.)).

As a result of these contrasting approaches, the United States has become a leader in the global Internet landscape, offering a sanctuary for speech platforms and promoting content moderation standards that are not government-mandated. This approach has enabled the creation and flourishing of online services such as Google Search and Facebook's News Feed, which would likely have been hindered in jurisdictions with more stringent liability regimes. Chander, 63 EMORY L. J. at 686–689.

Any internet platform that hosts speech of others will, if it offers automated recommendations, inevitably end up promoting content that may be tortious or otherwise illegal. Automated recommendation systems that personalize content are commonplace among internet platforms. The home page for the leading source-code repository GitHub, for example, offers an automated feed that recommends software that may be of interest to its users. As American courts have observed, imposing liability based upon such targeted algorithmic recommendations would offer services a "natural incentive" to take down controversial material rather than face any potential liability. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 333 (4th Cir. 1997); *see also* Chander, 63 EMORY L. J. at 656-57. Petitioners' sweeping proposal would turn Section 230 against the national policy that Congress enacted, chilling the free development of the internet, and the open, diverse, discourse that Congress unleashed.

Amici acknowledge that these policies have costs, and that there are serious policy concerns that have been voiced regarding Section 230 immunity as-applied to particular substantive legal regimes. *See, e.g.* Brief of Former National Security Officials as *Amici Curiae* in Support of Neither Party. Here, however, the usual answer is the correct one: these are the policies that Congress chose, as reflected in the statutory text, and Congress is best positioned to revisit and revise those policies where national security, law enforcement, or other weighty concerns so require. As discussed above, Congress *has* demonstrated the ability to enact carefully tailored exceptions to Section 230 immunity where appropriate, while maintaining its broad policy favoring an open internet. *Supra*, at 13. For all the reasons stated above, it is Congress that should decide whether Section 230 requires further refinement, and if so, take on the task of balancing the complex set of technical questions and competing policy objectives at stake.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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