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 FOR ZIPRECRUITER, INC. AND INDEED, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

ZipRecruiter, Inc. and Indeed, Inc. host two of the leading online employment marketplaces. *Amici* have connected hundreds of millions of job seekers around the world with millions of businesses of every size and in nearly every industry sector. Organizing and presenting all of the job listings and résumés that are posted on these marketplaces so that job seekers and employers are efficiently connected is an enormous task that is made possible only through the use of organizational algorithms, such as search and matching algorithms.

This case presents the question whether the results generated by algorithms that sort, filter, prioritize, and display online content created by third parties may be treated as "recommendations" of that content, Pet. i, and on that basis excluded from the legal protections granted by Congress to interactive computer services under 47 U.S.C. § 230(c)(1). As the operators of platforms that are reliant on algorithms that match third parties with each other, *amici* have a strong interest in preserving Section 230 immunity for internet platforms that use algorithms to organize content.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity or person—other than *amici curiae*, their members, or their counsel—made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230 has enabled the rise of all manner of online platforms and marketplaces that allow third parties to connect with each other for all manner of purposes, most of them benign. These platforms depend on the efficient organization and presentation of vast quantities of data. Such data management relies on sophisticated computational algorithms that can recognize and anticipate what those third parties might be looking for on those platforms. Without such algorithms, users would face a senseless cacophony of irrelevant content, and would be deprived of the "control over . . . information" that Section 230 was designed to protect. 47 U.S.C. § 230(a)(2). Whether a user is performing a Google search, perusing cat videos on YouTube, or seeking a new job by searching on Indeed or ZipRecruiter, her ability to find what she is looking for rests in substantial part on the efficiency of those platforms' algorithms.

This case threatens all of that. Petitioners seek to hold YouTube liable for disseminating depraved propaganda posted by terrorists. But their arguments have profound implications that range far beyond terrorism: Petitioners assert that for purposes of Section 230, any distinction between platforms like YouTube and third-party content providers disappears once such platforms use "recommendation algorithms" to "determine what [content] to recommend to each user." Pet. Br. 17. The United States correctly recognizes that petitioners' argument is unworkable and would make Section 230(c)(1) "a dead letter." U.S. Br. 23; *see id.* at 32-34. But in its effort to develop a more nuanced

position, the government nevertheless adopts the core fallacy underlying petitioners' case: that "the effect of YouTube's algorithms is . . . to communicate a message from YouTube." *Id.* at 27.

The use of algorithms to organize information on an internet platform no more communicates a message than does sorting millions of documents into filing cabinets and then indexing the location of those materials. In performing these tasks, YouTube acts as an "internet computer service," not an "information content provider," within the meaning of Section 230, as the government correctly acknowledges. And as the Ninth Circuit correctly held—in accord with a stable body of precedent in the federal courts of appeals—a plaintiff whose case rests on the allegation that a platform's algorithms disseminates particular items of objectionable third-party content seeks to "treat[ ]" an interactive computer service as a "publisher or speaker" of that content.

Adoption of petitioners' position, or even the government's, would reverberate far and wide, undermining Section 230 protection for a broad array of platforms that use algorithms to get information to those who need it. Petitioners intimate that there is something nefarious about the workings of such algorithms. But algorithmic computations are the building blocks of the modern internet, used by billions of people to ease basic search processes, like finding a job. ZipRecruiter and Indeed are submitting this brief to alert the Court of the significant role that organizational algorithms play on their platforms—algorithms that enable people to search for and find the right job more quickly. Withdrawal of Section 230 protection with respect to those algorithms would impair this important and beneficial work.

This Court has repeatedly noted that in cases implicating "new innovations," it must "tread carefully" so as not to "'embarrass the future.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018) (quoting *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944)). That cautionary note resounds in this case. Petitioners' legal theory attacks a longstanding legal framework that has facilitated the beneficent organization of information in all corners of society. Judicial reconstruction of that framework at this late date would not only embarrass the future; it would embarrass the present.

The Ninth Circuit's judgment should be affirmed.

ARGUMENT

I. ONLINE PLATFORMS NEED ALGORITHMS TO ORGANIZE CONTENT

A. Algorithms Enable Users To Navigate Large Databases

1. In computer science, algorithms are series of precise, step-by-step instructions that tell a computer how to solve computational problems. Such algorithms are everywhere, and they perform all kinds of routine and familiar tasks: In GPS and internet mapping systems, navigational algorithms help drivers find the fastest way to their destinations; on internet retail platforms, encryption algorithms protect buyers' credit-card information and personal data; and when those buyers receive what they purchased online through a delivery service, that delivery service will use prioritization algorithms to determine the order in which different packages are delivered. *See* Thomas H. Cormen, *Algorithms Unlocked* 1 (2013). Algorithms are particularly

helpful for sorting large databases of information and prioritizing that information which is of the greatest "relevance" to the user. *Id.* at 26.

The internet is an information-management tool and an information-management challenge. When Sir Tim Berners-Lee invented the system that became the World Wide Web in 1989, he summarized his idea in a memorandum titled "Information Management: A Proposal." Within just a few years, Berners-Lee's proposal had triggered an information avalanche, as countless users around the world flocked to the web to provide and consume what Congress described in 1996 as a "variety of political, educational, cultural, and entertainment services" in a "vibrant and competitive free market." 47 U.S.C. § 230(a)(5), (b)(2). What was revolutionary about the web was not only that it enabled an "extraordinary advance in the availability" of information, but that it also offered users "a great deal of control over the information that they receive." *Id.* § 230(a)(1)-(2).

Yet the web's growth also presented "new challenges for information retrieval." Sergey Brin & Lawrence Page, *The anatomy of a large-scale hypertextual Web search engine*, 30 Computer Networks & ISDN Sys. 107, 107 (1998). Navigation of the early web depended in large part on "human maintained indices," which were "subjective, expensive to build and maintain, slow to improve," and incapable of "cover[ing] all esoteric topics." *Id.* Such indices could not possibly keep up with the exponential growth of information on the web. And the earliest automated search engines, which relied on basic keyword entry, usually "return[ed] too many low quality matches." *Id.* For example, the top result for the search query "Bill Clinton" on one of the most

popular search engines of the 1990s was "Bill Clinton Joke of the Day: April 14, 1997." *Id.* at 116 (emphasis omitted).

Improving this state of affairs required the development of sophisticated algorithms that could sort through the rapidly growing corpus of material online, identify those webpages that matched a user's search terms, and, critically, *prioritize* those pages which were most likely to be relevant or topical to the user. The solution was found by Google co-founders Sergey Brin and Larry Page, who developed a "simple iterative algorithm"—Google PageRank—that could sift through the mountain of information online and "prioritize the results of Web keyword searches" by accounting for the degree to which a certain webpage was linked to by other webpages. *Id.* at 109-10. That innovation provided "an excellent way to prioritize the results of Web keyword searches," and brought "order to the Web." *Id.* at 109 (emphasis omitted). Thus, for example, on an early version of Google's PageRank-powered search engine, the first result for the search query "[B]ill [C]linton" was the landing page for the "Office of the President" at www.whitehouse.gov. *Id.* at 114.

Brin and Page also recognized that they could improve search results by incorporating not only *objective* or *general* measures of relevance, but also *personalized* measures of relevance. Thus, their algorithms incorporated "user context," such as by taking account of the "user's location," or "increasing the weight of a user's home page or bookmarks" in PageRank matching. *Id.* at 115-16. This makes obvious good sense: A person in New York who searches for "Chinese takeout" should obtain search

results that prioritize webpages from Chinese takeout places in New York, not Chicago or San Francisco.

Search algorithms—by prioritizing results in this manner, whether through general formulae or through "user context"—are simply engaged in the task of ordering certain search results based on anticipated relevance to the user. Viewing this ordering as a "recommendation" is a mistake. All these algorithms are doing is grouping different pieces of information and prioritizing results according to preset criteria: creating the equivalent of millions of file drawers whose contents are set out in a prescribed order based on numerous factors, including user-specific factors. Such algorithmic sorting is vitally necessary in order to avoid the kind of unhelpful search results yielded by early search engines.

2. Around the same time that Google began systematically indexing and organizing information on the web, Congress enacted the legal foundation for that project, and all that was to follow. In Section 230 of the Communications Decency Act, Congress distinguished between "information content provider[s]" responsible "for the creation or development of information," 47 U.S.C. § 230(f)(3), and "interactive computer service[s]" that did things like "filter," "choose," "digest," "cache," or "organize" content on the web, *id.* § 230(f)(2), (4). It then stipulated 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." *Id.* § 230(c)(1). Search engines could use algorithms—which "organize" and "filter" content that is posted online by third parties—without fear that they would be held liable as the

publishers of the content of the webpages to which they directed users.

Nearly every American who has used the internet has encountered Google Search, but it is far from the only online platform that makes use of these kinds of algorithms and which rests on the protections afforded by Section 230. To the contrary, such sorting and filtering algorithms are ubiquitous as a matter of simple necessity in the face of overwhelming amounts of online information. *See, e.g.*, Liesel L. Sharabi, *Finding Love on a First Data: Matching Algorithms in Online Dating*, Harvard Data Science Review (2022), https://hdsr.mitpress.mit.edu/pub/i4eb4e8b/release/2; Yao Yao et al., *Yelp's Review Filtering Algorithm*, 1 SMU Data Science Rev. 3 (2018), https://scholar.smu.edu/datasciencereview/vol1/iss3/3; Daria Sorokina & Erick Cantú-Paz, *Amazon Search: The Joy of Ranking Products*, SIGIR Conference (July 2016), https://assets.amazon.science/89/cd/34289f1f4d25b5857d776bdf04d5/amazon-search-the-joy-of-ranking-products.pdf.

B. Online Employment Marketplaces Depend On Algorithmic Matching

The internet is the most important job search resource in the U.S. labor market: Nearly 80% of Americans rely on internet resources in job searches, and Americans are more likely to rely on internet resources for their employment search than on personal connections, professional connections, employment agencies, or job fairs. *See, e.g.*, Pew Research Ctr., *Searching for Work in the Digital Era* at 3 (2015), https://www.pewresearch.org/wp-content/uploads/sites/9/2015/11/PI_2015-11-19-Internet-and-Job-Seeking_FINAL.pdf. Such online

resources are especially crucial for Americans who cannot easily call upon broad social or professional networks for assistance in the job search process. *See* Philip S. DeOrtentiis et al., *Different Starting Lines, Different Finish Times: The Role of Social Class in the Job Search Process*, 107 J. Applied Psych. 444, 446-48, 453 (2022). As described further below, the internet offers Americans from all walks of life access to a previously unthinkable range of job opportunities around the country and around the world.

Amici operate two of the leading online employment marketplaces, providing job search engines to aid job seekers in finding open job opportunities, and other matching tools that help connect employers and job seekers. Indeed is the most-visited employment platform in the world, garnering over 300 million unique visitors every month from over 60 different countries. Over 200 million job seekers have uploaded their résumés to Indeed, and in the last calendar year over 20 people were hired through Indeed *every minute*. ZipRecruiter is likewise one of the most-visited and top-ranked employment platforms in the United States. Over 135 million job seekers have used ZipRecruiter, and over 3.3 million businesses have come to ZipRecruiter for their hiring needs. Employers in nearly every industry, and of every size—from Fortune 50 companies to mom-and-pop storefronts—use Indeed and ZipRecruiter to find candidates for new openings.

Use of these platforms would not be possible without sophisticated matching algorithms that enable job seekers and employers to find the information that is most relevant to them. ZipRecruiter and Indeed do not operate like

traditional recruiters or headhunters; they are platforms whose function is to provide a virtual marketplace that allows employers and employees to discover each other and connect. In building a marketplace of this kind, it is not enough to host third-party content provided by job seekers (i.e., résumés) and employers (i.e., job postings); rather, that content must be organized and presented in some coherent and useful fashion. Furthermore, given that these platforms host *millions* of résumés and *millions* of job postings, users cannot navigate such information unless it is prioritized in ways that will deliver the most relevant information for a particular user's needs. The only way of accomplishing these organizational tasks is through the use of algorithms. Indeed and ZipRecruiter help job seekers and employers cut through the noise with a number of different algorithmic matching tools.

First, both Indeed and ZipRecruiter provide internal search engines that permit job seekers to enter search queries for specific types of job openings in a given geographic market (or without respect to geography). But, as the developers of Google Search recognized, simple keyword matching is not good enough, given the large volume of information on the system.[2] Search results must be prioritized for users on the basis of additional factors, including data about

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[2] For instance, a keyword query for "engineer" in the Washington, DC area on the ZipRecruiter search engine delivers over 53,000 results. *See* Engineer Jobs, ZipRecruiter, https://www.ziprecruiter.com/jobs-search?search=Engineer&location=Washington%2C+DC&radius=25 (search results as of Jan. 18, 2023).

the job seeker or the job opening that can be used to anticipate the results that might be most relevant.

Second, both Indeed and ZipRecruiter populate registered job seekers' account homepages on their sites with jobs that are closely related to the job seekers' previous search queries, click or apply history, geographic location, or résumé information. This helps job seekers discover potentially relevant job openings without the need to repeat previous searches through the sites' search engines—an important feature that saves precious search time when looking for a job.

Third, both Indeed and ZipRecruiter allow users to sign up to receive email "Job Alerts" that notify job seekers of new job listings that match their previous search criteria or that are related to previous application or click activity. Again, this feature saves job seekers the trouble of refreshing previous job searches through the sites' internal search engines. And by giving job seekers prompt notice of new openings, this feature gives them the opportunity to apply early for those openings.

Fourth, both Indeed and ZipRecruiter engage in more active algorithmic matching by identifying job seekers who are potential high-match candidates for a given position. Job seekers may then be notified of the opportunity to apply for that position, and employers may be notified of the opportunity to reach out to those candidates and invite them to apply. These notifications are generated by highly sophisticated algorithms that pick up information from or about the job seeker, and the position, in order to identify and recommend potential high-match candidates for that position.

The matches generated by these algorithms are sometimes non-intuitive, and the platforms' algorithms are able to greatly expand the range of positions that the job seeker might be interested in—or, looked at another way, these algorithms can expand the pool of applicants that an employer might consider for a certain position. For example, ZipRecruiter recently fielded a large number of openings for baggage-handler positions at a major airline. When ZipRecruiter determined that there were very few job candidates on its platform with baggage-handler experience, its complex algorithms analyzed large stores of information in the company's database to reveal that many successful baggage handlers had previous experience as retail cashiers. Based on this background data, ZipRecruiter's algorithms matched job seekers who had work experience as cashiers and invited them to apply for positions as baggage handlers. By uncovering candidates with surprising career paths, these kinds of algorithms open up new worlds of possibilities for job seekers and employers.

The job search process has come a long way in the internet age. But both Indeed and ZipRecruiter are committed to making it even better by continuing to refine their algorithms. With better algorithms, Indeed and ZipRecruiter can more effectively capture the nuances of job seekers' skills and the needs of various employers, resulting in more efficient matching between employers and job seekers. And while algorithms enable these crucial connections, the platform connections are just that—connections between different pieces of third-party content that are neither generated nor edited by Indeed or ZipRecruiter.

II. SECTION 230 PROTECTS ALGORITHMS

This case specifically concerns the treatment of "recommendation algorithms" under Section 230. Pet. Br. 17. As explained below, such algorithms are properly understood as "enabling tools" that are distinct from "content." 47 U.S.C. § 230(f)(4). Where, as here, a plaintiff seeks to hold an interactive computer service liable for the "information provided by another information content provider," *id.* § 230(c)(1), and such information is presented to a user by operation of those algorithms, that suit is barred by the plain terms of Section 230. Such protections from liability are essential to companies like Indeed and ZipRecruiter. Without Section 230, such companies might regularly face lawsuits in connection with third-party job postings and résumés, whose contents they do not generate, and which they cannot possibly screen through human review.

A. Under Section 230, Algorithms Are Enabling Tools, Not Content

In Section 230, Congress distinguished between two basic types of activity on the internet. The first is the "creation or development of information provided through the Internet." 47 U.S.C. § 230(f)(3). When Netflix makes a movie for its streaming service, when a reporter for the *Wall Street Journal* writes a news story for the *Journal*'s website, or when a hiring manager writes an online job advertisement for an open position at her company, they are all "responsible, in whole or in part, for the creation or development of information provided through the Internet." *Id.*

The other type of activity identified in Section 230 is the provision or enabling of "computer access by

multiple users to a computer server." *Id.* § 230(f)(2). Such activity is carried out by an "interactive computer service," which can include "any information service, system, or access software provider." *Id.* An "access software provider," in turn, is any entity that provides software or other "enabling *tools*" that "filter, screen, allow, or disallow content," or "pick, choose, analyze, or digest content," or "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." *Id.* § 230(f)(4) (emphasis added).

Algorithms that sort and prioritize information are unquestionably "enabling tools," distinct from "information content," under the plain terms of Section 230. An online platform that uses algorithms to "organize," "reorganize," or "display" information content, or that uses algorithms to "filter," "choose," or "analyze" such content, acts as an "access software provider" pursuant to Section 230(f)(4). And an access software provider that "provides or enables computer access by multiple users to a computer server" is an "interactive computer service" within the express terms of Section 230(f)(2).

Thus, when Netflix's algorithms determine how to "organize" or "reorganize" the movies and TV shows that are "display[ed]" on users' home pages while enabling computer access by multiple users to Netflix's computer servers, Netflix is acting as an interactive computer service with respect to any display or organization of the content—even if Netflix is *also* an information content provider with respect to some of those movies and TV shows. When the *Wall Street Journal*'s algorithms determine how to "organize" or "reorganize" the content that is "display[ed]" on the front page of its website, while

enabling multiple users to its computer servers, it is acting as an interactive computer service with respect to any display or organization of those news stories—even if the *Journal* is *also* an information content provider with respect to the news stories that it writes and edits. And when ZipRecruiter and Indeed use algorithms to determine how to "organize" or "reorganize" third-party job postings that are "display[ed]" to job seekers on those platforms, even in the form of suggesting a job or job seeker based on a match, ZipRecruiter and Indeed are acting as interactive computer services within the meaning of Section 230.

B. Cases Like This One Strike At The Heart Of Section 230

This case is a direct assault on the kind of information-sorting algorithms that platforms like Indeed and ZipRecruiter use every day to connect job seekers with employers. Petitioners' suit against Google seeks to treat an interactive computer service—i.e., YouTube's algorithms—as the publisher or speaker of videos that were posted to YouTube by ISIS terrorists, and seeks to hold YouTube's owner, Google, liable for having "assist[ed] ISIS in spreading its message and thus provid[ing] material support to ISIS." Pet. Br. 10 (quoting JA169 (Compl. ¶ 535)). Section 230 expressly bars that sort of claim.

1. Under Section 230, no "provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). As petitioners correctly recognize, this means that a claim for liability is barred by Section 230 if the claim "(1) bases the defendant's liability on

the disseminating of [third-party-provided] information to [other] third parties and (2) imposes liability based on the information's improper content." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 123 (4th Cir. 2022); *see* Pet. Br. 24 (adopting this rule) (citing *Henderson*); U.S. Br. 16 (noting that to "hold someone liable as a publisher at common law was to hold them responsible for the content's improper character" (quoting *Henderson*, 53 F.4th at 122)).

Section 230 therefore bars any suit against an interactive computer service—i.e., a platform like Indeed or ZipRecruiter that "transmit[s]," "display[s]," or "organize[s]" third-party content, 47 U.S.C. § 230(f)(4)—if that suit seeks to base the platform's liability on the dissemination of that third-party content because of the content's allegedly "improper" character. *Henderson*, 53 F.4th at 123. Thus, for example, if a plaintiff were to allege that the content of a particular job-posting generated by an employer and displayed on Indeed or ZipRecruiter were somehow discriminatory, Section 230 would protect Indeed and ZipRecruiter from liability for the dissemination of that allegedly discriminatory job posting.[3]

Here, YouTube acts as an interactive computer service when its algorithms "organize" and "reorganize" the videos that are "display[ed]" to users on its website, 47 U.S.C. § 230(f)(4)(C), which "enables computer access by multiple users" (indeed, billions of users) to YouTube's "computer server[s]," *id.* § 230(f)(2). Thus, YouTube is a provider of an

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[3] Both Indeed and ZipRecruiter actively monitor for and exclude discriminatory job postings.

interactive computer service, as was undisputed below. *See* Pet. App. 29a; *id.* at 193a n.8.

The remaining question is whether petitioners' case seeks to "treat[ ]" a provider of an interactive computer service (YouTube) as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Petitioners' lawsuit alleges that YouTube's algorithms prioritized and displayed certain recruitment videos created by ISIS terrorists, and that these prioritized displays "assist[ed] ISIS in spreading its message and thus provid[ing] material support to ISIS." Pet. Br. 10 (quoting JA169 (Compl. ¶ 535)). In other words, petitioners assert that the videos themselves were unlawful—they constituted material support to ISIS—and that YouTube's promotion of those videos (through its algorithms) helped "spread[]" the terrorists' unlawful "message" to others. *Id.* Thus, petitioners' suit seeks to "base[ ] the defendant's liability on the disseminating of information" generated by a third party (ISIS terrorists) to other "third parties" (viewers), and seeks to "impose[ ] liability based on the information's improper content" (i.e., the fact that the videos were terrorist recruitment videos). *Henderson*, 53 F.4th at 123; Pet. Br. 24. Under petitioners' own legal rule, petitioners seek to "treat[ ]" YouTube as the "publisher or speaker of . . . information provided by another information content provider." 47 U.S.C. § 230(c)(1). Any such claim must be dismissed, as the Ninth Circuit correctly held.[4]

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[4] Recognizing that Section 230 bars petitioners' liability theory here does *not* require this Court to treat Section 230 as a blanket grant of immunity in all cases touching upon the content

2. Departure from the plain language of Section 230 in this case—and adoption of petitioners' novel reading of Section 230—would pose a significant obstacle to the use of algorithms on internet job platforms like Indeed and ZipRecruiter.

As noted above, these platforms have hosted millions of job postings and millions of résumés, in addition to employer reviews and other content generated by third parties. That information must be efficiently sorted and automatically organized, prior to being displayed to users by platform algorithms. Both Indeed and ZipRecruiter undertake numerous measures to ensure that job postings conform to platform rules and guidelines, including through the use of algorithms and human moderators who screen out such content.[5] But they cannot possibly undertake the human review necessary to eliminate *each and every* job posting that may not perfectly conform to and align with those rules and guidelines. By virtue of the fact that such content may make its

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that appears on internet platforms. For instance, where an internet platform intentionally requires users to include in their content impermissible preferences on the basis of gender or sexual orientation, such unlawful classifications are subject to legal challenge against the platform. That much is already clear under Section 230 case law in the lower courts. *See, e.g.*, *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

[5] Indeed and ZipRecruiter make clear that job postings that do not conform to platform rules and guidelines will be removed or receive reduced visibility. *See* Indeed, Job Posting Guidelines, https://www.indeed.com/hire/job-posting-guidelines (last visited Jan. 16, 2023); ZipRecruiter, Job Posting Rules, https://www.ziprecruiter.global/en/job-rules (last visited Jan. 16, 2023).

way onto these platforms, it is inevitably organized and displayed to users by platform algorithms.

Petitioners' case rests on the suggestion that the mere operation of these algorithms eliminates the distinction that Section 230 draws between interactive computer services and information content providers. If that were so, then Section 230 would offer no real protection to online job platforms like Indeed and ZipRecruiter, which prioritize and display content to users through such algorithms. Such organization and prioritization is *inherent* to those platforms' carriage of third-party content, and is thus protected by Section 230.

In the absence of Section 230 protection for algorithms, employment marketplaces like Indeed or ZipRecruiter may have only limited routes out of liability for content appearing on their platforms. First, for example, they could undertake extensive manual review to root out all potentially problematic or objectionable third-party content before it is posted to the platform. But even if that were a plausible option—and it isn't—such a manual process would significantly disrupt job seekers' ability to quickly find new openings of interest, and would impose barriers on employers' ability to efficiently find qualified candidates. Alternatively, platforms like Indeed and ZipRecruiter could simply give up trying to connect users to the most relevant third-party content through the use of sophisticated, specialized matching algorithms. Instead, at best, they could try to use only general knowledge related to the exact query terms entered. But that would turn these sophisticated platforms into massive, hard-to-navigate job boards. Either way, the job search process would regress.

Section 230 prohibits no more than—and no less than—the "treat[ment]" of "an interactive computer services" as the "publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Because a plain reading of that statutory provision bars petitioners' liability theory here, the Ninth Circuit's judgment should be affirmed.

III. THE THEORIES ADVANCED BY PETITIONERS AND THE GOVERNMENT THREATEN THE BASIC STRUCTURE OF INTERNET PLATFORMS

In their effort to get around Section 230's plain language, petitioners have pressed the argument that YouTube is *not* acting as an interactive computer service with respect to the videos it "recommends" via algorithms on its website. This novel argument appears to have been reverse-engineered for the purpose of distinguishing YouTube's alleged recommendation algorithms from search algorithms. But petitioners' argument—which has sweeping implications beyond YouTube and the facts of this case—clearly runs aground on the text of Section 230, as the United States correctly recognizes.

For its part, the government properly treats algorithms as a form of enabling tool through which an internet platform acts as an internet computer service. But the government then embarks on a misguided effort to characterize YouTube's algorithms as having "communicate[d] a message from YouTube that is distinct from the messages conveyed by the videos themselves." U.S. Br. 27. This argument is conceptually flawed, conflating *organization* of content with *endorsement* of that

content. And it notably fails to draw any line distinguishing YouTube's algorithms from the prioritization algorithms that drive search engines like Google or the internal search engines at Indeed or ZipRecruiter.

Properly understood, these algorithms simply organize information; they do not carry any distinct messages of their own. Adoption of the United States' position would pose a grave threat to the operation of internet platforms.

A. Petitioners' Arguments Flout The Text Of Section 230

Petitioners ask this Court to treat a platform's organization of third-party videos on its website as implicating the creation or development of information—thereby turning the platform into a creator or developer of "information content" with respect to those videos. But the United States warns that petitioners' arguments are "unpersuasive," U.S. Br. 32, rest on "a misunderstanding," *id.* at 33, and would make Section 230(c)(1) a "dead letter," *id.* at 23. On this much, the government is correct.

1. *Amici* take no issue with the starting point of petitioners' argument: that Section 230 bars only those claims that seek to "(1) base[ ] the defendant's liability on the disseminating of information to third parties and (2) impose[ ] liability based on the information's improper content." Pet. Br. 24. But, as explained above, that is plainly the kind of claim at issue here.

In order to avoid that conclusion, petitioners assert that Section 230 does not block their suit because YouTube *has not acted as an interactive computer service* within the meaning of Section 230.

Petitioners say that this is because YouTube itself is actually publishing its *own* "information" or "content" under Section 230, *see, e.g.*, Pet. Br. 41 ("Defendant-created information . . . is still 'information' within the meaning of section 230 . . . ."); *id.* at 40 (arguing that a "website-created notification is clearly information"); *id.* at 35 (arguing that a "URL is information"). Or it is because YouTube's algorithms, by "recommend[ing] [third-party] content," cause YouTube's website not to "operat[e] as a server within the meaning of section 230(f)(2)." *Id.* at 43-44 (quoting Pet. App. 38a).

Either way, the argument fails. For starters, petitioners' attempts to treat URLs or notifications of videos uploaded by third parties on YouTube as "information" or "content" of YouTube's own creation are manifestly contrary to statutory text. Section 230 makes clear that "enabling tools" that "transmit," "forward," or "display . . . content" are distinct from "content." 47 U.S.C. § 230(f)(4)(C). URLs are enabling tools: Unless a web platform wishes to host all third-party content on a single webpage, it must create distinct URLs for different webpages on which content is hosted. When a web platform creates a URL to "display . . . content," it is acting as an "access software provider" within the meaning of Section 230, not as an information content provider. *Id.* As the United States correctly notes, a "website does not act as an information content provider by taking the technical steps necessary to render user-generated online content visible to others." U.S. Br. 33.

The same goes for "website-created notification[s]." Pet. Br. 40. It is not entirely clear what petitioners mean by "notifications," but a notification of the presence of third-party content on

an online platform is simply another form of "transmi[ssion]" or "display" of such content. A user's Yelp homepage, for instance, might notify the user that Max K. "[w]rote a review" of a nearby restaurant, with a link to Max's review. *See* Yelp, https://www.yelp.com/ (last accessed Jan. 12, 2023). This is a "display" of third-party content within the meaning of Section 230, *see* 47 U.S.C. § 230(f)(4)(C), and the use of algorithms to determine *which* reviews the user receives notification of reflects an "organiz[ation]" of content, *id.* Again, the tools that "render user-generated content visible to others," U.S. Br. 33, are "enabling tools," not information content. As the United States elsewhere explained in its brief, "[i]nteractive websites invariably provide tools that enable users . . . to find and engage with[] information." *Id.* at 23. "If such features rendered the website a co-developer of all users' content, Section 230(c)(1) would be a dead letter." *Id.*[6]

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[6] The United States also correctly notes that online platforms that directly *edit* or *revise* third-party content are not engaged in providing "enabling tools," but are rather engaged in the "creation or development" of content, making those platforms information content providers within the meaning of Section 230 with respect to that content. *See* U.S. Br. 23-24; *see also* 47 U.S.C. § 230(f)(3) (defining "information content provider" as any person or entity "that is responsible, in whole *or in part*, for the creation or development of information") (emphasis added). But that only further highlights why petitioners' argument about notifications is mistaken. If petitioners were correct, a platform that notified users that Max K. "[w]rote a review" of a particular restaurant would be treated on the same plane with respect to that review as a platform that posted its own revised version of Max's review. But in the former case, the platform is disseminating Max's review; in the latter case, the platform is disseminating content that is partly Max's and partly its own.

Petitioners' argument that YouTube fails to "enable[ ] [computer] access . . . to a computer server" when it uses its algorithms, Pet. Br. 44-45 (emphasis omitted) (quoting 47 U.S.C. § 230(f)(2)), is even more misguided. The government rightly notes that this argument is based on a simple lack of understanding of "what the statute requires" of interactive computer services. U.S. Br. 33. When a user accesses YouTube, YouTube provides the user with access to YouTube's servers. Everything that the user sees on YouTube's website—including through the operation of YouTube's algorithms—happens while the user is accessing YouTube's servers. *Id.* YouTube's provision of such access makes it an "interactive computer service" within the meaning of Section 230. *See* 47 U.S.C. § 230(f)(2).

But petitioners' argument is flawed on a deeper level, too. Petitioners argue that when a platform displays content to a user based "not in response to a specific request *from the user*, but 'based upon' *what [the platform] thinks* the user would be interested in," that display of content is somehow fundamentally different from "the case of a search engine," which supposedly operates only on the basis of the "user's inputs," such as "'queries' from the user." Pet. Br. 44. Petitioners' premise is mistaken: all effective search engines are based on algorithmic guesses about "what the user would be interested in," and search engines prioritize search results accordingly. *See supra* at 6-7. In order to make those algorithmic guesses, search engines utilize a wide array of data sources that

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Petitioners' argument—which would obviate the distinction between those two platforms—would wipe away the distinction at the heart of Section 230.

extend far beyond the "user's inputs," such as a user's geography or search history. If it were otherwise, the user would be presented with information of far less relevance: Hungry pizza buyers in Los Angeles who searched for "pizza" might receive puzzling results for pizza delivery shops in London. *See supra* at 6-7. Or a civil engineer searching for "engineering jobs" on ZipRecruiter or Indeed would get a host of potentially irrelevant results touting jobs with "engineer" in the job description, *see supra* 10 n.2, rather than a set of more tailored civil-engineering positions based on the user's résumé and search history.

When platforms offer users access to information on their servers on the basis of factors other than the users' own exact query terms (whether in a search-engine context or otherwise), they do not cease to offer "access . . . to a computer server." 47 U.S.C. § 230(f)(2). It cannot be the case that an internet platform may avoid being treated as an information-content provider for purposes of Section 230 only by making the platform significantly less functional.

B. The Government Mischaracterizes Algorithms

1. The government rightly recognizes that the arguments presented by petitioners are not viable. Instead, the government seeks vacatur of the judgment below on a more nuanced theory. In the government's view, even though YouTube acts as an interactive computer service when it uses its algorithms, it may nevertheless be held liable in connection with the content called up by those algorithms because such algorithms "communicate a message from YouTube that is distinct from the messages conveyed by the videos themselves." U.S.

Br. 27. That purported "message" is that "YouTube 'thinks you, the [user]—you, specifically—will like this content.'" *Id.* at 28 (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 82 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part), *cert. denied*, 140 S. Ct. 2761 (2020)). Thus, according to the government, a "claim premised on YouTube's use of its algorithms falls outside of Section 230(c)(1) because it seeks to hold YouTube liable for its own conduct and its own communications." *Id.*

That characterization of YouTube's algorithms is unsound as a matter of statutory text and as a matter of how such algorithms function.

As for the text, the government does not square its argument that "the effect of YouTube's algorithms is . . . to communicate a message," U.S. Br. 27, with its acknowledgment elsewhere that the "actions a website takes to better display preexisting third-party content" do not constitute a "'development'" of "content" within the meaning of Section 230, U.S. Br. 22. Indeed, the government's argument that the operation of YouTube's algorithms amounts to a "message from YouTube" rests on an explicit equivalency between the operation of those algorithms—which simply call up videos related to the one that a user is currently watching—with a message from YouTube stating "'You should watch this.'" *Id.* at 27.

In the government's view, a message from YouTube stating "'You should watch this'" would "fall outside Section 230(c)(1)" because YouTube would be the "'publisher'" of such a recommendation message, and that message would be YouTube's own. *Id.* According to the government, for purposes of Section 230, the operation of a platform's algorithms should

be treated the same as such an express recommendation message because the "effect" is the same. *Id.*

But in drawing that equivalency, the government treats the product of platform algorithms as a form of content that is "published" by the platform, *id.*, notwithstanding that Section 230 draws a clear definitional line between "content" and "enabling tools" that merely "transmit, . . . display, . . . [or] organize . . . content." 47 U.S.C. § 230(f)(4)(C). Section 230's structure reflects the reality that algorithmic "enabling tools" simply pass along the third-party content that is hosted on the platform: Their operation is incidental to the publication of those third-party messages, and they do not convey any other distinct message or content. As noted, unless a platform like YouTube intends to place all third-party content onto a single webpage, it must organize and prioritize that content in some manner. *See supra* at 22.[7] And in order to provide users with effective access to third-party content, such a platform must use algorithms that make predictions about what content a user might be interested in

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[7] In the course of its argument, the government suggests (at 27) that "publication" of third-party content on a web platform consists solely of "hosting" third-party content. But that suggestion is in significant tension with the government's acknowledgment elsewhere (at 23) that "basic organizational or display tools" are "inherent in an interactive online service." The government is right at page 23 of its brief and wrong at page 27: A third-party-generated video, restaurant review, or job posting cannot be "[p]ublishe[d]"—that is, "communicat[ed] or disseminat[ed]," U.S. Br. 9—by an interactive online service if users cannot find effectively find it among millions of other items of third-party content that are hosted on the platform.

based on keyword search terms, prior browsing history, prior search history, and the like.

Furthermore, contrary to the government's assertions, the operation of a platform's algorithms carries no distinct message from the platform. The algorithms simply organize and prioritize third-party content based on an assessment of what might be most relevant to the user—much as an archivist might organize millions of documents into certain filing cabinets and folders, or prioritize certain documents or groups of files, on the basis of inferences about what is most likely to be relevant or important to a user of the archive. The content of the archive might be benign or malignant. But the archive's method of organization—drawn, as here, in the absence of any knowledge about the particular content that is being organized—does not constitute an endorsement of that content. It simply embodies a prediction that the organization of the archive will allow a user to rapidly find what he is seeking.

In short, so-called "recommendation algorithms" are tools for organizing information, and they are necessary for publication of third-party content on an online platform. Thus, when plaintiffs like petitioners sue a platform like YouTube on the basis of their objection to the content called up by an algorithm, they are suing the platform for acting as the "publisher" of that objectionable third-party content. 47 U.S.C. § 230(c)(1); *see Henderson*, 53 F.4th at 123. The government's argument that the operation of YouTube's algorithms should be understood as a publication of YouTube's own messages is mistaken.

2. If accepted, the government's position would have broad—and truly revolutionary—consequences

for the internet as we know it. Unlike petitioners—who are at pains to distinguish the functions of search engines, *see, e.g.*, Pet. Br. 15-16, 38-39, 44, 47—the government does not even try to show how its proposed rule would preserve Section 230 immunity for the operation of search algorithms. It offers *no* basis for distinguishing the algorithms that prioritize certain videos for YouTube viewers from the algorithms that prioritize certain search results on Google and other large search platforms like those offered by Indeed and ZipRecruiter.

That is likely because no such basis exists. As the Ninth Circuit correctly recognized below, YouTube's "algorithms function like traditional search engines that select particular content for users." Pet. App. 41a. Like those algorithms, search engines prioritize certain content based on algorithmic predictions about what results might be most relevant to the user. Many of those predictions are based on "user context"—data about the user drawn from their search history, geographic location, and the like. *See supra* at 6-7, 10-11.

If those data-driven predictions are treated as "messages" to the user, there is no end to the liability that search engines—including internal search engines like those hosted by Indeed and ZipRecruiter—might face in connection with their purported "recommendation messages." The rule pressed by the government would be no less disruptive than that pressed by petitioners.

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Congress's enactment of Section 230 made the modern internet possible. *See, e.g.,* Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (2019).

Countless innovative companies have been built on the foundational statutory distinction between internet platforms and the third-party content they distribute. That is certainly true for ZipRecruiter and Indeed, which have improved the job search and hiring process through the use of algorithms that efficiently match employers and job seekers, and which are engaged in a line of business that underpins the smooth working of the labor market.

Now, nearly thirty years after Section 230 was enacted, and as this Court undertakes its first construction of the statute, continuity and stability in that construction has never been more important. Organizational algorithms are protected by Section 230. This Court should reject any effort to unsettle the law in this vital area.

CONCLUSION

The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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