

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 SOFTWARE & INFORMATION
INDUSTRY ASSOCIATION AS *AMICUS
CURIAE* IN SUPPORT OF RESPONDENT**

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Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998)	10
Protecting Americans from Dangerous Algorithms Act, S. 3029	11
Telecommunications Act of 1996 § 509.....	1, 7

Other Authorities

141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995)	8
144 Cong. Rec. H.7102 (daily ed. Aug. 4, 1998)	10
<i>American Heritage Dictionary of the English Language</i> 44 (2016)	13
Christopher Cox, <i>Section 230: A Retrospective</i> (Nov. 10, 2022), https://www.thecgo.org/research/section-230-a-retrospective/#congressional-intent-in-practice-how-section-230-works	7
Devin Desai & Joshua Kroll, <i>Trust but Verify: A Guide to Algorithms and the Law</i> , 31 <i>Harv. J. L. & Tech.</i> 1, 23 (2017)	13
Domain.com, <i>Enter the Global Online Marketplace with a .Store Domain</i> , https://www.domain.com/blog/choose-domain-name-for-online-store/ (last visited Jan. 18, 2023).....	27

	<i>Page(s)</i>
Emily Stewart, <i>Why Every Website Wants You to Accept Its Cookies</i> , Vox (Dec. 10, 2019), https://www.vox.com/recode/2019/12/10/ 18656519/what-are-cookies-website- tracking-gdpr-privacy	22
H.R. 2154, 117th Cong. (2021).....	11
H.R. 8636, 116th Cong. (2020).....	11
Jesus Diaz & Rory Mellon, <i>What Is Reddit and How to Use It</i> , Tom’s Guide (Oct. 27, 2021), https://www.tomsguide.com/reference/ what-is-reddit	20
Josie Fischels, <i>A Look Back at the Very First Website Ever Launched, 30 Years Later</i> , NPR (Aug. 6, 2021), https://www.npr.org/ 2021/08/06/1025554426/a-look-back- at-the-very-first-website-ever-launched- 30-years-later	27
Kate Conger et al., <i>Two Weeks of Chaos: Inside Elon Musk’s Takeover of Twitter</i> , NY Times (Nov. 11, 2022), https://www.nytimes.com/ 2022/11/11/technology/elon-musk- twitter-takeover.html	27

	<i>Page(s)</i>
Melvin M. Vopson, <i>The World’s Data Explained: How Much We’re Producing and Where It’s All Stored</i> , Conversation (May 4, 2021), https://theconversation.com/the-worlds-data-explained-how-much-were-producing-and-where-its-all-stored-159964	27
<i>New on Reddit: Comment Search, Improved Search Results Relevance, Updated Search Design</i> , Upvoted: The Official Reddit Blog (Apr. 14, 2022), https://www.redditinc.com/blog/new-on-reddit-comment-search-improved-search-results-relevance-updated-search-design	23
Nicholas J. Belkin & W. Bruce Croft, <i>Information Filtering and Information Retrieval: Two Sides of the Same Coin</i> , 35 Commn’s of the ACM, no. 12, 1992, at 29, 30	14, 17
Philip Sales, <i>Algorithms, Artificial Intelligence, and the Law</i> , 105 <i>Judicature</i> 23, 24 (2021)	13
Protect Speech Act, H.R. 3827, 117th Cong. (2021).....	11
See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. (2020)	12

SG Analytics, <i>2.5 Quintillion Bytes of Data Generated Everyday Top Data Science Trends 2020</i> (Aug. 14, 2020), <a href="https://us.sganalytics.com/blog/2-5-
quintillion-bytes-of-data-generated-
everyday-top-data-science-trends-2020/...">https://us.sganalytics.com/blog/2-5- quintillion-bytes-of-data-generated- everyday-top-data-science-trends-2020/...	26
Steven Vaughan-Nichols, <i>Before Google: A History of Search</i> , Hewlett Packard Enter. (Mar. 24, 2017), <a href="https://www.hpe.com/us/en/insights/
articles/how-search-worked-before-
google-1703.html">https://www.hpe.com/us/en/insights/ articles/how-search-worked-before- google-1703.html	14

INTEREST OF *AMICI CURIAE*¹

The Software & Information Industry Association (SIIA) is the principal trade association for those in the business of information. SIIA's membership includes more than 500 software companies, platforms, data and analytics firms, and digital publishers that serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230 of the Communications Act² protects the use of technological tools that organize and deliver third-party generated content over the internet. The Ninth Circuit was correct to find in Respondents' favor upholding such protection from potential liability. Existing interpretations of

¹ Pursuant to this Court's Rule 37, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* funded its preparation or submission.

² Although commonly referred to as Section 230 of the Communications Decency Act, the provision appeared as Section 509 of the Telecommunications Act of 1996, which contained the Communications Decency Act. It was codified as Section 230 of the Communications Act of 1934. *See* Communications Decency Act of 1996, Pub. L. No. 104-104, Tit. V § 509, 110 Stat. 137-139.

Section 230 affirming protection are essential to the business of information and, as Congress intended, have fostered the growth of the modern internet and empowered information delivery platforms to innovate and provide an ever-improving experience for users.

Respondents are correct that the plain language of Section 230(c)(1) resolves this case in its favor. *Amici* write to emphasize how the text, structure, and history of Section 230(f)(4)'s definition of "access software providers" confirms Respondents' and the Ninth Circuit's interpretation. Perhaps recognizing that Section 230 protects information service providers for exactly the kind of activity that Petitioners have based their case on, Petitioners wholly ignore this provision.

Section 230(f)(4)'s inclusion of terms such as "pick," "choose" and "filter" reflect Congressional intent to protect and foster the tools powering today's internet. These user-focused³ algorithms and enabling tools are designed to solve the fundamental problem of information retrieval in a large, dynamic, and unstructured data set: How to provide users with information that is relevant to them. The modern artificial intelligence and machine learning tools powering search, retrieval, and publication of digital information differ in scale from those extant in 1996,

³ The term "user-focused" refers not only to the specific user being recommended the content, but also other users of the platform whose preferences inform the recommendation algorithm and other enabling tools.

but not in substance. Even back then, self-improving probability-based tools existed to try to mimic human decisions and provide users appropriate and relevant information. Such tools, that analyze and categorize the ever-growing terabytes of content and information generated daily on the internet, are the exact types of tools and activity described in Sections 230(f)(4) and 230(c)(2) and were intentionally encompassed by Congress' statutory scheme.

Petitioners and the government incorrectly argue that algorithms reflecting organizational choices for how best to sort and deliver information depart from the Good Samaritan activity that Section 230(c) expressly contemplates and protects. Notably, the government acknowledges Congress' express protection of a platform's selection, organization, and display of content as part of the publishing process, it concedes that it would be entirely unreasonable for Congress to extend Section 230 protection to tools that perform certain enumerated activities, to then disqualify those tools from that same protection. Unfortunately, the government ultimately fails to come to terms with the logical conclusion of its own argument. The government attempts to sidestep the fundamental similarity between modern information delivery tools and their pre-Section 230 predecessors by offering a confusing and unworkable reading of when a platform "develops" third-party information and thereby steps outside Section 230's protection. The government's distinction between "recommendations" and "searches" displays a fundamental misunderstanding of how information filtering tools

work and directly contradicts the language and intent of the statute. Their tortured understanding cannot (and should not) supplant the plain meaning of Section 230(f)(4), which encompasses content recommendations, because it would create disastrous consequences that would stymie the information delivery economy.

SIIA's members are part of the complex, thriving, dynamic, and ferociously competitive information ecosystem that Congress intentionally fostered. The vitality of that ecosystem is not an accident, but the direct result of legislative design. Information businesses succeed by accurately predicting what information or content users wish to receive. Companies whose recommendation and predictive tools fail cease to exist in the marketplace. Congress recognized the value of innovation and intentionally foresaw and fostered the modern internet and information economy through legislation protecting and prioritizing innovation. Petitioners and the government ask the courts to upset the complex ecosystem Congress created. This Court should decline their offer.

ARGUMENT

I. The Ninth Circuit correctly applied Section 230 to the tools at issue in this case and dismissed Petitioners' claims.

The twenty-six words of Section 230(c)(1) prohibit the imposition of liability on an interactive computer service for the publication of information published

by another information content provider (ICP). Section 230(c)(2), colloquially named the “Good Samaritan” provision, similarly prohibits interactive computer services from being liable for excluding lewd, obscene, or otherwise objectionable content, as well as making technical means available to users to do the same. Read together, these provisions are content agnostic: They protect interactive computer services both from liability for third-party content and their efforts (successful or not) to organize and moderate that content.

Amicus agrees with Respondents that the Ninth Circuit correctly applied the plain text of that statute to shield Google’s recommendation from liability because they do not create or “develop” content such that Google must be considered the information content provider. Its decision correctly recognizes that Section 230’s text and structure reflect Congress’s intent to protect algorithms, software, tools, and services that organize and display the vast array of third-party content. *Gonzalez v. Google, LLC*, 2 F.4th 871 (9th Cir. 2021).

Amicus writes to emphasize the role of “access software providers” (ASPs) defined in Section 230(f)(4) in construing both the Section 230(c)(1) and Section 230(c)(2)’s Good Samaritan protections. More specifically, the term “interactive computer service” in Section 230’s operative provision expressly encompasses ASPs, which it defines as “provider[s] of software” or “enabling tools” that “filter, screen, allow, or disallow content,” “pick, choose, analyze, or digest content” or “transmit, receive,

display, forward, cache, search, subset, organize, re-organize, or translate content.” 47 U.S.C. § 230(f)(4).

In their merits brief, Petitioners nowhere mention Section 230(f)(4) or its interrelationship with the rest of the statute. The government, for its part, acknowledges the existence of ASPs, but its proposed distinction does not exist in the technology or the statute.

A. The plain meaning of Section 230(f)(4) encompasses the modern tools that enable platforms to organize and deliver content, including Google and YouTube’s predictive algorithms.

As this Court has repeatedly affirmed, “Congress’ intent is found in the words it has chosen to use.” *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring); *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98 (1991). Where the text of a statute is clear, the sole role of the courts is to enforce it according to its terms. *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (“It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.”). In addition, laws should be interpreted “so that no part is rendered superfluous” and “should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Hibbs v. Winn*, 542 U.S. 88, 89, 101 (2004); see also *Astoria Fed. Sav. & Loan Ass’n v. Solimino*,

501 U.S. 104, 112 (1991); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002).

The language of Section 230(f)(4)—and the policies animating Section 230 (*see* Res. Br. 3-5)—reflects Congress’ overriding aim of ensuring that websites and other online services may take an active role in arranging, displaying, and filtering user material without fear of becoming liable for such content. Suggesting that actions such as “pick[ing]”, “[choos]ing,” and “organiz[ing]” are not part of “publishing” as contemplated by the statute would require courts to ignore Congress’ express language. Congress anticipated the explosion of information that platforms would be faced with, and the need for a legal protection that would enable websites to sort, screen, organize, and display third-party information.⁴ It specifically included a series of activities that serve as the foundation for how modern platforms publish third party content. As Rep. Goodlatte noted on the House floor when explaining the need for Section 230’s liability protection, “[w]e are talking about something that is far larger than our daily

⁴ Christopher Cox, *Section 230: A Retrospective* (Nov. 10, 2022) (working paper), <https://www.thecgo.org/research/section-230-a-retrospective/#congressional-intent-in-practice-how-section-230-works> (“This focus of Section 230 proceeded directly from our appreciation of what was at stake for the future of the internet. As the debate on the Cox-Wyden amendment to the Telecommunications Act made clear, the bill’s authors and a host of members on both sides of the aisle all understood that without such protection from liability, websites would be exposed to lawsuits for everything from users’ product reviews to book reviews.”).

newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong.” 141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte).

In defining ASPs to include activities such as “pick,” “analyze,” and “organize,” Congress expressly contemplated the array of tools and functions that interactive computer services rely on to publish third-party content and extended them protection through that definition. Congress specifically sought to encourage platforms to filter and screen (and, in turn/by necessity) to organize and prioritize content, and to promote individualization online. *See* 47 U.S.C. § 230(b)(3)-(4); (c)(2)(A)-(B). These actions all fall under the publishing functions that Congress sought to protect when platforms handle third-party content.

Petitioners’ silence on the existence of “access software providers” results in a backwards reading of Section 230’s provisions: Under that reading, use of the tools that expressly qualify an ASP for Section 230’s shield protection disqualifies an interactive computer service from being a publisher entitled to such liability protection.

The government appears to agree with this point and emphasizes the importance of plain-language construction. The government expressly relies on Section 230(f)(4) to distinguish the act of organizing and displaying third-party content to enhance user access from the act of creating or “developing”

content itself. *See* U.S. Br. 23. This position is internally inconsistent with both the plain meaning of Section 230 and Congress’s express intent in enacting the statute.

B. Congress’ statutory design choices, and subsequent action, indicate awareness and approval of a broad Section 230 liability protection, encompassing the tools involved in this case.

Congress can, and has, demonstrated an ability to craft liability shields more restrictive than Section 230, and there is no indication that Congress intended to exclude the tools at issue in this case. Where Congress has demonstrated its ability to establish a legal regime, it is inappropriate for the Court to read in additional restrictions where Congress chose not to. *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996); *FCC v. Next Wave Personal Commc’ns, Inc.*, 537 U.S. 293, 302 (2003); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003); *Whitfield v. United States*, 543 U.S. 209, 216 (2005).

For its part, the government uses Section 230(f)(4) to assert that “[c]ontextual considerations” suggest that the use of recommendation engines ought to be excluded from Section 230’s protection. U.S. Br. 22. These considerations ignore the express exclusion of intellectual property from the scope of the liability shield. 47 U.S.C. § 230(e)(2). Two years later,

Congress established a more restrictive, almost binary, liability shield for online service providers in the Digital Millennium Copyright Act's (DMCA). Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998). The DMCA provides a narrow, detailed, and conditional liability shield to online service providers if they promptly remove or block access to alleged infringing copyrighted material when they either receive notification of an infringement claim or have knowledge from which infringing activity is apparent. *See* 17 U.S.C. § 512(c). Notwithstanding the role of scienter, Section 512(g) also immunizes service providers from Good Samaritan activity to prevent infringement. 17 U.S.C. § 512(g).

No comparable notice or knowledge conditions appear in Section 230 as it serves a different purpose. With Section 230, Congress broadly sought to “promote the continued development of the Internet and other interactive computer services and other interactive media,” and provide platforms cover to select and screen nearly all content. 47 U.S.C. § 230(b)(1), (c)(2). The DMCA, on the other hand, reinforced narrower incentives to protect copyright, a traditional and familiar subject of legislation since the adoption of the Constitution itself. *See* 144 Cong. Rec. H.7102 (daily ed. Aug. 4, 1998). Understanding this distinction between different types of content is critical for applying Section 230 in a manner that correctly reflects the provision's language, structure, and intent.

Not only did Congress expressly make this distinction, it repeatedly ratified it. Resp. Br. at 30 (citing *Tex. Dep't. of Hous. & Cmty Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 537 (2015); see *In re Facebook, Inc.*, 625 S.W.3d 80, 92-93 (Tex. 2021). Courts have therefore correctly interpreted Section 230's liability shield broadly to embrace organizational and curatorial functions.

The situation in which Congress acted to impose broader obligations on platforms further supports that understanding. In 2018, Congress added Section 230(e)(5) to permit civil actions against platforms in civil child trafficking cases where the defendant "knew or should have known" of illegal conduct. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018); 47 U.S.C. § 230(e)(5); 18 U.S.C. § 1595(a). There, Congress added a new exception to Section 230 protection *only* for content involving sex trafficking or prostitution, but failed to narrow the broad interpretation of Section 230 protection for all other types of objectionable content. It has had dozens, if not hundreds, of opportunities to revise Section 230 over the years, including through proposals containing specific carve outs for terrorism/Anti-Terrorism Act (ATA) claims. See Protecting Americans from Dangerous Algorithms Act, S. 3029 and H.R. 2154, 117th Cong. (2021) (explicitly removing Section 230 protection for ATA liability (18 U.S.C. § 2333)); H.R. 8636, 116th Cong. (2020); see also Protect Speech Act, H.R. 3827, 117th Cong.

(2021); See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. (2020). It has not.

Recommendation algorithms and other enabling tools have received significant attention by Congress and the public at large, but Congress has abstained from restricting the scope of Section 230 to exclude such tools from its ambit. The tools that ASPs use to solve the problem of organizing third-party content was well-known to Congress, and (outside of a context not relevant here), it has chosen to protect them.

II. Section 230 expressly anticipated and encompasses the use of modern algorithms and machine learning in content moderation, and there is no reasonable distinction for exempting Google or YouTube’s predictive tools.

Congress passed Section 230 with both an awareness of how the internet functioned at the time and a desire to ensure it could proliferate in ways it could not predict. 47 U.S.C. § 230(b)(1) (stating it is the policy of the United States “to promote the continued development of the Internet and other interactive computer services and other interactive media”). Even at that early time, search engines used algorithms to determine what content to “pick,” “choose,” or “filter” for users. Even at the time of the passage of the Communications Decency Act, algorithms were required to retrieve relevant information for users. Section 230 arose in part to respond to this need and it has allowed systems

that organize and deliver information to users to flourish.

Although today’s algorithms are more complex than the algorithms employed in the infancy of the internet, they still boil down to the same principles: Following a step-by-step procedure for solving a problem or accomplishing some end. *See American Heritage Dictionary of the English Language* 44 (2016) (“An algorithm is [a] finite set of unambiguous instructions that . . . can be performed in a prescribed sequence to achieve a certain goal”); *see also* Philip Sales, *Algorithms, Artificial Intelligence, and the Law*, 105 *Judicature* 23, 24 (2021) (“An algorithm is a process or set of rules to be followed in problem solving. . . . It proceeds in logical steps. This is the essence of processes programmed into computers. They perform functions in logical sequence.”); Devin Desai & Joshua Kroll, *Trust but Verify: A Guide to Algorithms and the Law*, 31 *Harv. J. L. & Tech.* 1, 23 (2017) (“[A]n algorithm is a step-by-step process and ‘each of the steps must be absolutely precise, requiring no human intuition or guesswork.’”). Here, the problem is data retrieval.

From the viewpoint of the statutory language, there is no difference between a search and a recommendation. Both search and recommendations are different solutions to solving a well-known problem in information retrieval: picking, choosing, and filtering relevant information from massive, unstructured data sets. In one solution, the user creates search criteria through textual references, as in a search query. In the other, the users create

persistent search criteria through actions (which may include textual searches): what they watch, what they “like,” and what they report as in violation of the terms of service, and the recommendation algorithm provides responsive results from the data set. Both a recommendation and a “search” result represent different ways of querying an unstructured data set. These problems (and their potential solutions) were well-known before enactment of Section 230. See Nicholas J. Belkin & W. Bruce Croft, *Information Filtering and Information Retrieval: Two Sides of the Same Coin?*, 35 *Commun. of the ACM*, no. 12, 1992, at 29, 30, 36; see also *Gonzalez v. Google LLC*, 2 F.4th 871, 895 (9th Cir. 2021), cert. granted, 214 L. Ed. 2d 12 (2022), and cert. granted sub nom. *Twitter, Inc. v. Taamneh*, 214 L. Ed. 2d 12 (2022) (“[Google’s search] system is certainly more sophisticated than a traditional search engine, which requires users to type in textual queries, but the core principle is the same: Google’s algorithms select the particular content provided to a user based on that user’s inputs.”).

Indeed, Congress was aware that some tools would need to be employed to review and organize all of the data generated on the internet, as even early search engines used algorithms to determine responses.⁵ To

⁵ For example, Ask Jeeves, a popular search engine in the 1990s, offered natural language search queries. Steven Vaughan-Nichols, *Before Google: A History of Search*, Hewlett Packard Enter. (Mar. 24, 2017), <https://www.hpe.com/us/en/insights/articles/how-search-worked-before-google-1703.html> (“Ask’s claim to fame was its attempt to support search by

safeguard this activity, Congress explicitly protected entities that “filter,” “pick,” or “organize” content, labeling them “access software provider[s]” and including that term in the definition of interactive computer service. 47 U.S.C. § 230(f)(4). This legislative judgment has been emphatically borne out, as this is how YouTube, and countless other access software providers, function: They filter, pick, and organize videos based on an algorithm that matches information generated by a user’s actions or profile, including searches, clicks, and other datapoints they provide while visiting the website to match the user with content generated by a third party.

The government tries to separate these two functions. In the government’s view, YouTube “communicate[s] a message . . . that is distinct from the messages conveyed by the videos themselves[.]” by placing “a selected ISIS video on a user’s homepage alongside a message stating, ‘You should watch this[.]’ ” U.S. Br. 27. According to the government, the combination of the message and video link renders YouTube a producer of content, in this case the recommendation, rather than an “access software provider” providing tools that “filter,” “pick,” and “organize” content most relevant to users. U.S. Br. 22-33. The government appears to recognize this view is in tension with the statute, as it concedes that “[i]t would make little sense for Congress to

natural language. So you could ask it, ‘Tell me about New York baseball history, but I don’t want to hear about the Yankees.’ ”).

specifically include entities that provide ‘enabling tools’ that ‘filter,’ ‘organize,’ and ‘reorganize’ content as among those to which Section 230(c)(1) applies, only to categorically withdraw that protection through the definition of ‘information content provider.’” U.S. Br. 23. But the government then insists that a recommendation is YouTube’s own potentially liable content because “the effect of YouTube’s algorithms is still to communicate a message from YouTube that is distinct from the messages conveyed by the videos themselves.” U.S. Br. 27.

The government’s strained attempts to distinguish searches from recommendations fails. YouTube (and all modern content organizing tools) are content-agnostic: They engage in selection and display of existing third-party content, not the production of new content. YouTube systematically correlates information generated by a user’s actions or profile, including searches, clicks, and other data points they provide while visiting the website, with the third-party generated content. YouTube also uses tools such as cookies that facilitate the recommendation by storing a user’s history and preferences on the user’s device. At its core, YouTube’s tools interpret data provided by a user and display the user with content generated by third-parties to the user.

Similarly, search engines do not simply apply Boolean logic to binarily list every website containing a given set of search terms in chronological

order.⁶ Finding a result in that list would be a fruitless endeavor as some sort of filtering must take place. See Nicholas J. Belkin & W. Bruce Croft, *Information Filtering and Information Retrieval: Two Sides of the Same Coin*, 35 Comm'n's of the ACM, no. 12, 1992, at 29, 30 ("Information retrieval systems share many of the features of information filtering."). Search engines now use a more sophisticated approach. Take, for example, a user searching for a restaurant for dinner. When Section 230 was first passed, a user might enter "restaurant" into a search box and receive hundreds of results for restaurants all over the world. Now, by relying on data points such as time of day and past searches, newer tools can predict with better accuracy local restaurants that would be more useful to the user. Data collected from other users, such as ratings or number of searches for a specific establishment, further hone and improve the results, but they are the results of probabilities.

The government's reading upends this system, harming users who rely on interactive computer services to access the internet and find content. Because every choice to publish and where to publish something could communicate some kind of message about the content, no interactive computer service could claim protection under Section 230. If the government were correct on this theory, the

⁶ Boolean logic uses the values true and false combined with logical operators such as "and," "or," and "not" to evaluate logical statements.

organization and display of content would always be plausibly alleged to “develop” some implied message. This outcome would vitiate the statute, rendering it internally inconsistent and eliminating its liability protections. This is not what Congress intended: rather, the focus of Congress was on who created or developed the content, not whether some message could be gleaned about how the content was displayed. Put another way, a website is not responsible for retrieving a third party’s message, but it is responsible for authoring (or co-authoring) one.

A. Petitioners and the government ignore the fact that Section 230 allows web sites to filter third-party information and is generally agnostic about that information’s content.

To get around this basic reality of how search engines and recommendations work, Petitioners ignore the statute’s definitions of “access software provider” and “information content provider” to attempt to distinguish modern algorithms and machine learning from their enactment-era predecessors. The government, for its part, relies upon “access software provider” to rebut the Petitioners’ claims but fails to follow its argument to its logical conclusion.

Petitioners create the more grievous error of the two by failing to engage with the definition of “access software provider.” Instead, they contend that because YouTube is making a prediction about what a user will want, and recommending it, YouTube is

not acting as a provider of an interactive computer service and should not be subject to the protections of Section 230(c)(1). This is incorrect for three reasons.

- 1. Petitioners’ ignore “access software provider,” a key component of the statute.**

Petitioners’ reading would rewrite “access software provider” out of the statute. Congress, given that it wanted interactive computer service providers to actively moderate content, chose to allow them to “filter,” “pick,” and “organize” content, which is precisely what a recommendation does. 47 U.S.C. § 230(f)(4).

- 2. Petitioners misunderstand how recommendation algorithms work.**

This view also misunderstands the nature of the algorithms by presuming that the algorithms (such as those used by the YouTube platform) *know* the content of the videos they recommend. This is not accurate; the algorithms do not know the content of the individual videos and instead treats all videos equally, relying upon other data points to determine whether a user would enjoy viewing the video. Resp. Br. 27. YouTube does not tell a user that a video is ISIS content and they will like it. Rather, it says that this video is similar to content the user has already selected. Resp. Br. 27. The actual content of the video does not matter; it could be harmful or

objectionable content or a video of dancing and prancing cats. What happens is that YouTube’s algorithm picks and chooses in an automated way to deliver individualized results to a user based on a virtually instantaneous, data-driven prediction of what content is most relevant or useful to the user. Section 230 encourages interactive computer services to provide this level of individualization. 47 U.S.C. § 230(b)(3)-(4), (c)(2)(B). YouTube does this through algorithmic analysis of probabilities based on data points provided by the user without any reference to the content’s substance.

To provide a concrete example, when a user enters Reddit.com into their internet browser for the first time, they are taken to the site’s main page, which simply displays the threads receiving the most amount of traffic at that moment.⁷ If there was a post that was popular across Reddit, it would likely be on the Reddit home page when a new user first navigates to it. Reddit’s process for selecting that content predicts that most users coming to the website for the first time would like to see items that other users are discussing. Reddit’s tools track the user’s engagement, including a user’s votes⁸ and browsing activity to prioritize content that then

⁷ Jesus Diaz & Rory Mellon, *What Is Reddit and How to Use It*, Tom’s Guide (Oct. 27, 2021), <https://www.toms-guide.com/reference/what-is-reddit>.

⁸ Users on Reddit can either “upvote” content that they like or find interesting by clicking an upward facing arrow by the content or “downvote” content that is irrelevant or they do not like by clicking a downward facing arrow by the content.

appears in the user’s feed. Through engagement with the website, the user provides relevant feedback that allows Reddit to better match results. Reddit’s algorithm is consistently searching through its database and updating a user’s feed to reflect new content generated by third-parties that more closely matches a user’s profile. In this way, each time a Reddit user engages with Reddit, through votes or browsing activity generally, they are refining their ongoing search through the database for relevant material. Yet it would be absurd to claim that Reddit is now the producer of the information that was uploaded by third parties and was brought to a user’s attention due to their own actions.

By Petitioners’ reasoning, the rules governing these content delivery choices—showing content to new users based on what is popular—renders Reddit the creator or originator of the popular posts. They are incorrect. The ranking of the content is not adoption nor endorsement, nor, more importantly, is it the creation of content. Instead, it is an automated process of curation that involves a complex content-agnostic system engaging in functionally the same activity that Congress sought to protect with Section 230 in the first place—efficiently organizing and delivering content on the internet.

3. Petitioners adopt a narrow and incorrect view of “computer server.”

Petitioners’ mistaken understanding of “access software provider” and “interactive computer service” is also demonstrated by their claim that

YouTube goes beyond the traditional functions of a server. Petitioners claim that because YouTube provides material that the user has not requested, it does not fit within the definition of “interactive computer service” in Section 230(f)(2) because a “computer server” only sends information requested by the user, not the server’s operator. Pet. Br. 46.

This position is incorrect for at least two reasons. First, Congress has already spoken on this issue: It included “display[ing]” and “forward[ing]” material in the definition of an “access software provider.” 47 U.S.C. § 230(f)(4)(C). Displaying additional files and forwarding additional files necessary to help display and enhance the results of a search are encompassed by this definition. Indeed, forwarding is a type of recommendation, as it gathers and sends to the user items that are likely to be relevant. Second, although the Petitioners state that a search “enable[s] a user to select the information to be received[,]” they ignore that the results often include targeted results that are based on the same data points that are used for recommendations. Pet. Br. 47. Moreover, all modern web sites and search engines use a variety of tools such as cookies that are not explicitly requested by the user, but enhance a user’s experience.⁹

⁹ See Emily Stewart, *Why Every Website Wants You to Accept Its Cookies*, Vox (Dec. 10, 2019), <https://www.vox.com/recode/2019/12/10/18656519/what-are-cookies-website-tracking-gdpr-privacy>.

B. Generating URLs and screenshots does not eliminate Section 230’s protections.

Petitioners also claim that the generation of unique URLs and screenshots render the content generated by a third party somehow YouTube’s content. Pet. Br. 37-39. First, as a threshold matter, any interactive computer service that had an internal search engine to find pages or posts by third parties would lose Section 230 protection—an absurd result. For instance, Reddit generates unique URLs for posts submitted by its third-party users; under Petitioners’ theory, its own search engine would remove Section 230’s liability protections, which would incentivize Reddit to not have a search engine, harming its users’ experiences.¹⁰ Second, Petitioners misunderstand URLs and screenshots. These are automatically generated tools for users; with respect to URLs, they are simply addresses to a website and have nothing whatsoever to do with the content the website displays. Screenshots are simply thumbnail images to help a user identify the video. Both are organizational tools intended to help a user find potentially relevant third-party video content on YouTube. Petitioners’ argument is akin to saying that UPS should be liable for the contents

¹⁰ *New on Reddit: Comment Search, Improved Search Results Relevance, Updated Search Design*, Upvoted: The Official Reddit Blog (Apr. 14, 2022), <https://www.redditinc.com/blog/new-on-reddit-comment-search-improved-search-results-relevance-updated-search-design>.

of a delivery merely because it generated the address label.

The government takes a subtler, but equally flawed approach. It relies upon a strained reading of “develop” in Section 230(f)(3) to argue that YouTube’s recommendations “substantially add[] or otherwise contribute[]” to user-provided videos such that YouTube’s recommendations “can fairly be deemed the joint product” of YouTube and the video uploaders.¹¹ U.S. Br. 24. The government concedes, however, that Section 230 describes as protected “actions a website takes to better display preexisting third-party content or make it more usable.” U.S. Br. 22.

The government’s reading contradicts the expansive language of Section 230(f)(4), and artificially restricts those described functions to a website’s “basic organization or display tools that Congress viewed as inherent in an interactive online service.” U.S. Br. 23. Congress did not technologically limit the activities of ASPs to “basic” kinds of picking, choosing or filtering. It is impossible to reconcile the government’s admission with the government’s strained reading of “develop,” as a recommendation does little more than make preexisting third-party content more usable. To adopt the government’s position of view of “develop” requires this Court to insert words into the statute that do not exist, causing endless confusion in the lower courts and render

¹¹ Of course, Petitioners never address 230(f)(4), as it dooms their argument.

Section 230’s protections a dead letter. Finally, assuming that the government were correct that recommendations amount to a platform’s actionable contribution, there would still be no liability, as liability would be premised on the unlawful, underlying third-party content, which here are ISIS videos. Neither the text, structure, purpose or history of the statute supports that result.

C. Section 230 expressly anticipated and encompasses the use of modern algorithms and machine learning in content moderation, and there is no reasonable distinction for exempting Google or YouTube’s predictive tools.

Defining a platform’s use of user-focused tools to select and display content as “development” of content would create a seismic and harmful shift in how information is organized and delivered on the internet. Predictive analytics inherently relies on historical data points to identify patterns and anticipate a future result. User-generated information is selected and analyzed to show the user a series of potential options that may be useful or interesting to them. In the case of video suggestions, a user’s search terms, engagement level, watch time, and other metrics serve as a series of user-generated inputs that are collated and evaluated by an algorithm to display third-party videos that are tailored to that particular user.

In that immense sea of information, modern user-focusing tools—like recommendation algorithms—

are critical for ensuring that users receive the content that is most relevant to them. If YouTube and other platforms were treated as “information content providers” instead of ASPs when they provide predictive tools that generate content options based on a user’s engagement patterns, it would be impossible to organize and deliver the 2.5 quintillion bytes of data generated on internet platforms every day.¹² Accepting Petitioners’ and the government’s positions on what constitutes content “development” or “creation” would lead to absurd outcomes, and render the internet unusable.

III. Congress’s decision to provide interactive computer services with Section 230 protection has fostered growth and innovation in the business of information, and it is Congress’s prerogative to change the legal incentives.

One of Congress’s expressed policy objectives in passing Section 230 was to “promote the continued development of the internet[,]” 47 U.S.C. § 230(b)(1), and by any measure it was successful. This policy is rooted in an understanding that the internet would and should evolve, and that the protection afforded by Section 230 is essential for its continued development and growth. In our dynamic and competitive

¹² SG Analytics, *2.5 Quintillion Bytes of Data Generated Everyday Top Data Science Trends 2020* (Aug. 14, 2020), <https://us.sganalytics.com/blog/2-5-quintillion-bytes-of-data-generated-everyday-top-data-science-trends-2020/>.

internet marketplace, changes can materialize very quickly, as evidenced by the latest developments at Twitter.¹³

At Section 230's genesis, there were about 2 million websites total, most of which could be reliably catalogued by a team of humans creating recommendations under sub-headings.¹⁴ Efficient delivery of content relevant and desirable to a user is key to the success of information delivery companies and the internet at large. In our modern internet, 252,000 websites are created every day.¹⁵ That does not include the content created for platforms such as Twitter or YouTube where upwards of 500 million tweets and 700,000 hours of new content are generated daily.¹⁶

¹³ Kate Conger et al., *Two Weeks of Chaos: Inside Elon Musk's Takeover of Twitter*, NY Times (Nov. 11, 2022), <https://www.nytimes.com/2022/11/11/technology/elon-musk-twitter-takeover.html>.

¹⁴ Josie Fischels, *A Look Back at the Very First Website Ever Launched, 30 Years Later*, NPR (Aug. 6, 2021), <https://www.npr.org/2021/08/06/1025554426/a-look-back-at-the-very-first-website-ever-launched-30-years-later>.

¹⁵ Domain.com, *Enter the Global Online Marketplace with a .Store Domain*, <https://www.domain.com/blog/choose-domain-name-for-online-store/> (last visited Jan. 18, 2023).

¹⁶ Melvin M. Vopson, *The World's Data Explained: How Much We're Producing and Where It's All Stored*, Conversation (May 4, 2021), <https://theconversation.com/the-worlds-data-explained-how-much-were-producing-and-where-its-all-stored-159964>.

The business of information is a ferociously competitive space. Users expect tailored results on all information-based platforms and ASPs that fail to achieve that goal will not survive in the market. Platforms that fail to create and refine tools that enhanced their predictive ability for the modern internet to function will quickly join the ranks of MySpace, Geocities and CompuServe in the same way that early search engines such as Lycos and AltaVista have largely been replaced by more efficient and better search engines like Google and Bing.

Congress intended to preserve a “vibrant and free market” for the internet. 47 U.S.C. § 230(b)(2). Section 230 does not differentiate between large and small platforms any more than it differentiates between “basic” and “advanced” ASPs. Recasting the treatment of enabling tools under Section 230 will create additional barriers to entry in that business, as only large established platforms will have the resources and expertise required to absorb new costs and adapt to evolving legal standards. This would come at the expense of small and industrious creators nimbly navigating an internet designed to match them with users. Content creators may reconsider whether certain content is worth developing, particularly creators without large platforms who rely so heavily on recommendation algorithms to get their content in front of interested parties. Anyone who consumes content would lose in that scenario. Without continued innovation in the tools that connect users to content they find most useful and

relevant, the internet would devolve into an unnavigable sea of information steered by the whims and objectives of those platforms able to afford the risk of litigation, rather than the users themselves. Congress recognized at the time the impending problems arising from the rapidly evolving technology and information landscape. It passed Section 230 as a clear and explicit response to that problem.

Congress used broad, technology-neutral language used to describe the activity of ASPs to protect innovation so that large amounts of information could be made relevant to users. Every tool that selects, organizes, and displays third-party content based on a holistic assessment of a user's historical preference—as opposed to a singular search bar entry—would be subject to challenge and would surely disincentivize platforms from employing predictive and enabling tools to better serve users by delivering the most relevant information possible. The hundreds of millions of new pieces of information and terabytes of data generated daily would no longer be efficiently and reliably delivered to interested parties. This would strangle continued growth and innovation in the most vital element of our modern economy—the ability to connect users with the goods, services, and information they seek. Adopting Petitioners' and the government's reasoning that recommendation algorithms produce their own distinct content would frustrate that intent, and call into question every major content delivery process currently driving the internet.

This Court should decline their invitation.

CONCLUSION

For the foregoing reasons, and those stated by the Respondent, this Court should affirm the Ninth Circuit's judgment.

Respectfully submitted,

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