No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, ET AL., *Petitioners*

v.

GOOGLE LLC

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF OF *AMICI CURIAE* FORMER SENATOR RICK SANTORUM AND PROTECT THE FIRST FOUNDATION SUPPORTING RESPONDENT

GENE C. SCHAERR
Counsel of Record
DONALD M. FALK
H. CHRISTOPHER BARTOLOMUCCI
HANNAH C. SMITH
KATHRYN E. TARBERT
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

Counsel for Amici Curiae

JANUARY 19, 2023

QUESTION PRESENTED

The question on which this Court granted certiorari is:

Does section 230(c)(1) of the Communications Decency Act immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Cases (cont'd)

Statutes

Other Authorities

Other Authorities (cont'd)

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

Congress adopted Section 230 of the Communications Decency Act to ensure that internet-based platforms could host vast amounts of user speech on all manner of topics without the threat of being dragged into court for another author's speech. That law has created a thriving online marketplace of ideas in which diverse individuals can have their voices amplified and can freely associate with friends, journalists, thought leaders, and government officials.

But Petitioners and the United States ask this Court to interpret Section 230 so narrowly that it would cripple the free speech and association that the internet currently fosters. They would have this Court hold that, although internet platforms can *host* user content without fear of liability, they cannot *organize* that content to be relevant and interesting to users without forfeiting that immunity.

Such a holding would be inconsistent with Section 230's text. Section 230 not only bars claims that treat platforms that host third-party content provided by others as "publishers" of that content, but also identifies as protected services those that "filter," "choose" and "organize" content. Organization of content is an inherent aspect of any effort to effectively present vast quantities of information to the public, and it falls squarely within Section 230's bounds. Indeed, the tools used to organize online third-party content were available and in use when Section 230 was drafted and were

---

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward its preparation or submission.

contemplated in the statutory definition of covered entities and functions.

Sorting, grouping, and placing content are also editorial decisions presumptively protected by the First Amendment. Imposing liability and even allowing claims based on those protected decisions would lead platforms to suppress speech viewed as controversial—politically, religiously, or otherwise. The resulting litigation and risk of liability would cripple the algorithms that have enabled platform users to associate with like-minded thinkers and to avoid much of the cesspool that has infected some corners of the internet. And it would crush emerging social media platforms that are essential to a competitive online marketplace, one in which users can find platforms that are hospitable to their views.

The issue presented here is of particular importance to *amicus* former Senator Rick Santorum who voted for Section 230 because of the important protections it provides for freedom of speech and association.

The issue presented is also of great importance to *amicus* Protect the First Foundation ("PT1"), a nonprofit, nonpartisan organization that advocates for protecting First Amendment rights in all applicable arenas and areas of law. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people across the ideological spectrum, including people who may not even agree with the organization's views.

STATEMENT

Respondent Google LLC owns and operates YouTube, an online service through which users can post, share, and comment on videos. Pet. App. 6a. The sheer amount of content uploaded to YouTube is overwhelming: users upload more than 500 hours of content every minute. *YouTube for Press*, YouTube: Official Blog, https://bit.ly/3GLvLad (last visited Jan. 18, 2023). To help users find videos that interest them, YouTube uses algorithmic features based on user inputs. Pet. App. 7a. Although the internet has grown and algorithms are now more sophisticated, the tools necessary for these features existed when Section 230 was written, and Congress included services that use these "enabling tools" to "filter," "pick," "choose," "organize," and "display" content in the definition of covered entities and functions. 47 U.S.C. 230(f)(4).

Petitioners, the estate and family members of an American victim of a terrorist attack in Paris, sued Google under the Anti-Terrorism Act (ATA). They allege that ISIS used YouTube for recruitment and communication, and that by operating YouTube, Google is liable under the ATA for aiding and abetting ISIS. J.A. 64, 178. Specifically at issue here, Petitioners allege that YouTube "recommended" ISIS videos to users, although the complaint does not specify which of YouTube's algorithm-based features Petitioners' challenge. J.A. 169.

The district court dismissed the complaint on the ground that Section 230 bars Petitioners' claims. In so doing, it held that Google's display of videos using algorithms based on user inputs did not turn YouTube into a creator, developer or publisher of the content at

issue. Pet. App. 202a, 216a. The Ninth Circuit affirmed. Pet. App. 4a.

SUMMARY OF ARGUMENT

This Court should reject Petitioners' and the United States' narrow reading of Section 230 for three reasons. First, that reading disregards Section 230's express inclusion of First Amendment-protected editorial judgments of internet platforms as well as the free speech and associational interests of platform users. Their reading would effectively—and erroneously—remove any meaningful organization of user content from Section 230's ambit and would therefore erode its ability to protect First Amendment rights.

Second, that reading would chill a variety of speech and association. If platforms faced liability for merely organizing and displaying user content in a user-friendly manner, they would likely remove or block controversial speech from their algorithmic recommendations, thereby minimizing its impact. A ruling for Petitioners would also make it virtually impossible for platforms to use algorithms that allow users to find content from like-minded sources and, equally important, to *avoid* content, like pornography and bigoted speech, they find objectionable. And, faced with a flood of litigation based on their display of user content, emerging social media platforms would be unable to survive, eliminating alternative speech venues for users dissatisfied with "Big Tech."

Finally, Petitioners' and the United States' request that this Court rewrite the statute would displace Congress from its rightful role in deciding whether Section 230 should be amended. Indeed, Congress did so recently, eliminating Section 230 immunity when it would conflict with sex trafficking laws. And Congress

has recently considered, and will likely soon consider again, a variety of other bills that would amend Section 230, including bills that would directly address concerns about algorithm-based recommendations. While the judiciary is never authorized (absent compelling constitutional considerations not present here) to interpret statutes more narrowly than Congress wrote them, such rewriting is especially inappropriate when Congress is already considering whether and how to amend its own law.

ARGUMENT

I. Section 230 Complements the First Amendment by Protecting Internet-Based Platforms from Facing Liability for Exercising Their First Amendment Rights.

Algorithms based on user inputs are critical to platforms' ability to organize the vast amounts of third-party content they host. By immunizing platforms from liability for how they organize user content, Section 230 protects their First Amendment rights as well as the rights of their users.

A. Congress enacted Section 230 to protect the First Amendment rights of internet-based platforms as well as the free-speech and associational interests of their users.

Congress enacted Section 230 to reflect and safeguard important First Amendment rights and values. Finding that online platforms "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. § 230(a)(3), Congress sought to foster an online marketplace of ideas in which internet platforms could host a wide range of

speech—including controversial and unpopular speech—without facing liability. In doing so, Congress protected both the First Amendment rights of internet-based platforms *and* the free-speech and associational interests of platform users.

First, Section 230 was and is essential to creating an online marketplace of ideas in which users can speak—with their friends, their communities, and their government leaders. If internet platforms faced liability for the content they host, they would have a powerful incentive to block and remove wide swaths of speech, lest they be hauled into court for allowing users to post controversial views and information. See *infra* Section II. This Court has long held that facilitating such a marketplace of ideas is one of the central purposes of the First Amendment. *E.g., Reno* v. *ACLU*, 521 U.S. 844, 885 (1997); *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945) (The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public[.]").

Second, Section 230 protects the First Amendment rights of internet platforms. As this Court has held, First Amendment protection does not "require a speaker to generate, as an original matter, each item featured in the communication." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570 (1995). To the contrary, a "presentation of an edited compilation of speech generated by other persons" may "fall squarely within the core of First Amendment security." *Id.* (citing *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974)).

Moreover, and of particular importance to this case, the First Amendment presumptively protects not only

the speech itself, but also decisions of "editorial control and judgment." *Miami Herald*, 418 U.S. at 258. Governmental regulation of decisions inherent to the editorial process involved in the presentation of large amounts of information thus raises at least the specter of a First Amendment violation. *Id.*

Among these traditionally protected editorial decisions are those concerning "the size and content" of any presentation of speech. *Id.* And it logically follows that the *organization* of the content is similarly protected. For example, the First Amendment would not permit the government to require cable news companies to cover stories about government corruption *only* after midnight, when most viewers have turned off the TV. Nor would that Amendment permit the government to tell an online newsgathering website "how to rank the news stories or opinion articles to which they link." Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. Econ. & Pol'y 883, 887 (2012).

That social media platforms exist online does not remove their editorial decisions from the First Amendment's shelter. As this Court has recognized, "whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (internal quotation marks and citation omitted)*; see also Reno*, 521 U.S. at 874 (holding that other provisions of the Communications Decency Act restricting internet speech violated the First Amendment). And, as Justice Kavanaugh has recognized, this Court has established that "First Amendment principles apply to editors and

speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment." *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 427 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (opining that net neutrality rule violated First Amendment editorial discretion rights of internet service providers).

Thus, when internet platforms "select and arrange others' materials, and add the all-important ordering that causes some materials to be displayed" to a particular user, they are presumptively "engaging in fully protected First Amendment expression." Volokh & Falk, *supra*, at 891.[2] And Congress enacted Section 230 to protect that expression.

---

[2] This is not to say that *every* effort by a platform to organize its content in a user-friendly way is automatically shielded by the First Amendment from all government regulation. This Court has long recognized several categories of speech that can be regulated consistent with the First Amendment. These include so-called "fighting words," see, *e.g., Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969) (speech likely to produce imminent lawless action not protected); speech that puts the public in immediate danger, see, *e.g., Schenck* v. *United States*, 249 U.S. 47, 52 (1919) (false cry of "Fire" in a crowded theater not protected); and speech to and by children, see, *e.g., Morse* v. *Frederick,* 551 U.S. 393, 397 (2007) (holding school official did not violate First Amendment rights of student by confiscating a pro-drug banner). The Court has also long held that governments may regulate the "time, place and manner" of speech that is otherwise fully protected by the First Amendment. *E.g., Cox* v. *Louisiana*, 379 U.S. 536, 558 (1965) ("It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes, or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials.").

B. Section 230 ensures that internet platforms can exercise First Amendment-protected editorial discretion, including protected algorithm-driven choices, without facing liability.

By immunizing platforms from liability for their editorial decisions regarding how to "pick," "choose," "organize," "filter," and "display" user content, 47 U.S.C. § 230(f)(4), Section 230 ensures that platforms can meaningfully exercise their constitutionally protected editorial discretion. Petitioners and United States disregard these provisions in urging the Court to hold that algorithm-based "recommendations" of user content fall outside Section 230's protection. As a result, their theories are inconsistent with Section 230's text. As Respondent notes, virtually all speech, including isolated speech by an individual, entails "prioritizing some content over other content, grouping content together, and telling audiences what content they will encounter next." Resp. Br. 23. And any claim—like the one in this case—that predicates liability on editorial decisions that are inherent in any organized effort to present large amounts of information necessarily treats a platform as the "publisher" of user content and is therefore barred under Section 230.

Nor does a social media platform's use of algorithms change this calculus. Virtually all websites that host large amounts of user content sort and group user

---

Moreover, assuming it acts pursuant to an appropriate grant of authority, Congress is obviously free to protect expression beyond the minimum protected by the First Amendment itself. And thus, Section 230 may well protect some speech that is not itself protected against all regulation by the First Amendment.

content through algorithms. Indeed, algorithms of one kind or another have always been intrinsic to the exercise of editorial discretion on high-volume internet-based platforms. See Resp. Br. 1, 32-33. The vast amounts of submitted content would be an incoherent mess if platforms could *not* use algorithms to sort it into packages of interest to their users. Algorithm-based displays are thus, "at their core, editorial judgments about what users are likely to find interesting and valuable." Volokh & Falk, *supra*, at 885.

When it passed the Act, moreover, Congress understood that filtering and organizing was essential to hosting user content. Indeed, the early tools necessary for such organizing and filtering existed when Section 230 was drafted, and Congress specifically contemplated use of those tools in its grant of immunity to websites. 47 U.S.C. § 230(f)(2), (f)(4). As even the United States acknowledges, it "would make little sense for Congress to 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.'" Br. for U.S. 23.

Moreover, what Petitioners call "recommendations" are simply platforms' exercise of these editorial functions: Algorithms take third-party content and organize it into displays relevant to particular users. If Congress did not intend for algorithmic editorial functions to be immunized under Section 230, it would be puzzling for it to have included services that use "enabling tools" to "filter" and "organize" third-party content in the definition of the covered entities.

In sum, "organizing" content, besides being expressly protected by Section 230, is an act of editorial discretion inherent in any effort to present large quantities of information to any audience, large or small, And Section 230 bars claims that would hold a platform liable as a "publisher" of content provided by another. Petitioners' claim is thus barred, not only by the statute's express protection for "organizing" content created by another author, but also because the claim would subject Respondent to liability as if it were itself the publisher of user content.

II. Petitioners' and the United States' Constricted Interpretation of Section 230 Would Chill Protected Speech and Association.

For reasons explained above, a regime that immunized platforms for hosting user content but not for organizing it into user-friendly recommendations—as the Solicitor General urges—would depart from the policy of the United States articulated in Section 230. And that erroneous interpretation would hinder speech and association in myriad ways: It would encourage censorship of unpopular viewpoints. It would hinder users' ability to associate with those who share their values and *avoid* those who do not. And it would kill emerging platforms in the cradle, preventing users from seeking alternative online venues for speech suppressed by established platforms. This Court should reject Petitioners' and the United States' flawed interpretation.

A. An artificially narrow interpretation would encourage platforms to censor user content which challenges mainstream views.

As this Court recognized when invalidating a right-of-access statute, when the government interferes with editorial discretion, disseminators of information "might well conclude that the safe course is to avoid controversy." *Miami Herald*, 418 U.S. at 257. Such interference with editorial decisions "inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)).

This chilling effect would be even greater for internet platforms than for traditional news outlets. After all, a social media platform would be forced to monitor vastly more content than would a newspaper to ensure that it did not promote false or illegal speech. See*, e.g.*, Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. Free Speech L. 97, 130 (2021). And, because "the line between legal and illegal content is hardly clear," the consequence of imposing liability on platforms for their displays of user content would "almost certainly be platforms engaging in massively overbroad moderation of speech—*i.e.*, a major chilling effect on users' speech." *Id.* at 131.

The United States' approach would have a particularly devastating effect on political content, which is at the heart of the First Amendment's protection. See *Morse* v. *Frederick*, 551 U.S. 393, 403 (2007). To avoid liability, platforms would either reprogram their algorithms to minimize controversial content, or remove that content entirely, all to ensure it would not display

in any way that could be considered a "recommendation." For example, platforms might exclude pro-Second Amendment speech from their algorithms to avoid liability for gun violence. Or they might exclude criticisms of or concerns about the safety of COVID vaccines for fear of liability if someone chooses to forego vaccination and gets sick as a result. Platforms might do the same for content advertising protests of police brutality, or abortion, or *restrictions* on abortion, lest tensions escalate into violence for which the platform could then face liability. As a result, users of all ideological proclivities who challenge mainstream political views would be effectively excluded from the online marketplace of ideas.

Americans' ability to share diverse views, however controversial, is a critical bulwark against government tyranny. Interpreting Section 230 more narrowly than Congress drafted it would erode that bulwark.

B. An artificially narrow interpretation would make it more difficult for users to develop associations with like-minded individuals and organizations, and to limit or avoid associations with persons who do not share the user's values.

The hosting/recommendation distinction advanced by the United States would also make it harder for users to access content that aligns with their values and to avoid content that does not. As Professor Bhagwat explains, "it would seem fundamental to the very concept of democratic citizenship that we must permit individuals to choose what information and perspectives to focus on." Bhagwat, *supra,* at 113-114. Yet, if platforms faced liability for "recommending" content by

displaying it to users who have watched similar content in the past, users would instead face a barrage of content they would prefer to avoid.

Once again, users' ability to associate politically would be especially threatened by Petitioners' and the United States' approach. Imposing liability for decisions that are inherent in the presentation of large amounts of information "denies platforms the ability to create ideologically coherent packages of content, and so denies platform users the ability to select among such packages." Bhagwat, *supra,* at 113-114. Yet the First Amendment protects speakers' ability to promote and associate with like-minded individuals, including the creators of content for viewing and reading. For example, the government does not and could not—consistent with the First Amendment—interfere with the ability of MSNBC to promote the Rachel Maddow Show during Morning Joe, nor with the ability of Fox News to advertise Hannity during Tucker Carlson Tonight.

For the same reasons that the law does not permit government interference of that sort, this Court should not adopt a flawed interpretation of Section 230 that could, for example, subject Truth Social to ruinous litigation for recommending conservative content to its user—or, for that matter, Twitter for placing tweets from progressive users in the feeds of other progressive users.

Allowing claims against platforms for algorithm-based displays of user content would produce a related and equally perverse consequence: It would lead to users' being bombarded with offensive content. As Senator Santorum has said, the internet is "a wide-open

faucet for the worst user content, including bigotry, harassment, profanity, and pornographic images and videos."[3] For that and other reasons, rankings and recommendations of third-party content based on users' prior browsing habits are critical for users to *avoid* content they find distasteful. If employing recommendation algorithms suddenly exposed internet services to litigation and potential liability, those services would start displaying content in a chronological "neutral" order, rather than prioritizing information that is relevant to users' expressed interests. Unwilling users could thus be forced to interact with objectionable material, or even stop using internet-based platforms altogether.

This imposition on associational freedom would defeat the very purpose of Section 230, which Congress enacted "to encourage the development of technologies which maximize *user* control over what information is received by individuals, families, and schools" and "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b) (emphasis added). Indeed, the bill introducing Section 230 was named the Internet Freedom and Family Empowerment Act because it was designed to protect children and families from such filth. Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995).

---

[3] Rick Santorum, *What Justice Thomas Really Said About Regulating Social Media*, RealClear Politics (May 13, 2021), https://tinyurl.com/Santorum230.

C. An artificially narrow interpretation would undermine the ability of new platforms—which are critical to the online marketplace of ideas—to compete with incumbents.

The United States' and Petitioners' proposed interpretation of Section 230 would also crush emerging social media platforms. Facebook, Twitter, and TikTok might be able to afford the onslaught of litigation that would follow vacatur of the decision below. But small, recent market entrants like GETTR, Mastodon and Rumble may lack the resources to withstand a sudden influx of lawsuits. Limiting online services' ability to organize and display user content without fear of liability would cripple challengers of market incumbents straight out of the gate.

That would be tragic: A competitive market is necessary to ensure that social media platforms do not have the market power that would allow them to suppress dissenting views. If users do not like the content moderation decisions made by incumbent platforms, they should retain the ability to form and join new platforms whose guidelines and terms of service reflect their values. If, by contrast, existing platforms can monopolize online speech, they will remain free to prevent unpopular views from effective dissemination.

This would contravene one of the original purposes of Section 230, which was explicitly enacted to preserve the ability of up-and-coming platforms to offer users alternative venues for their speech. As Senator Wyden, who co-authored Section 230, explained, imposing liability on platforms for user-generated content "will kill the little guy, the startup, the inventor,

the person who is essential for a competitive marketplace. It will kill them in the crib."[4] That understanding is reflected in the text of Section 230, which states that "[i]t is the policy of the United States *** to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b). Yet the United States' proposed interpretation here would stifle competition and crush the online marketplace of ideas.

If social media platforms are acting irresponsibly, the answer is not for the courts to rewrite Section 230. Instead, "the remedy to be applied is more speech." See *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). And that is what Section 230 is designed to do: ensure that users can counter censorship, misinformation, and objectionable content with their own outpouring of speech on a multitude of competitive platforms. This Court should reject a cramped interpretation that is inconsistent with Section 230's text and history, not to mention First Amendment values.

---

[4] Emily Stewart, *Ron Wyden wrote the law that built the internet. He still stands by it – and everything it's brought with it*, Vox (May 16, 2019), https://tinyurl.com/Wyden230.

III. Any changes to Section 230 should be left to Congress, which has been considering numerous proposed bills addressing concerns about the scope of the statute's protections.

An additional, powerful reason to avoid such an untenable interpretation of Section 230 is that, as this Court has repeatedly held, the duty of the courts is to interpret and apply the law, not to write it. *E.g.*, *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1815 (2019) ("courts aren't free to rewrite clear statutes under the banner of our own policy concerns.").

1. In keeping with that principle, only Congress has the authority to decide whether, when, and how Section 230 should be amended. Yet Petitioners urge this Court to "bring its wisdom and learning to bear," Pet. 18, echoing Judge Gould's call for "the federal courts *** to provide" their own "regulation of social media companies" and unilaterally determine what is "an unreasonably dangerous social media product[.]" Pet. App. 94a-95a. Not so: Where Congress has spoken, as this Court has often said, the courts must defer to the wisdom and learning of the legislature, which can better weigh complex policy tradeoffs and is directly accountable to the people. See, *e.g., Wisconsin Cent. Ltd.* v. *United States,* 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences. Until it exercises that power, the people may rely on the original meaning of the written law.").

Nor would judicial revision of Section 230 be justified by any claimed "sustained inaction" by "the political branches," see Pet. App. 94a-95a—especially where, as discussed below, there is in fact no such "sustained inaction" at all. As this Court has held, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction" including the obvious possibility: Congress has actively chosen to keep the status quo. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (citation omitted). If there is a gap in the current law, "it is up to Congress rather than the courts to fix it." *Exxon Mobil Corp.* v. *Allapattah Servs.*, 545 U.S. 546, 565 (2005).

2. Furthermore, Congress has been anything but inactive when it comes to Section 230. In fact, Congress amended Section 230 to limit platforms' immunity just a few years ago when it enacted FOSTA (Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. 115-164, 132 Stat. 1253 (2018)), and its related bill, SESTA (Stop Enabling Sex Traffickers Act of 2017, S. 1693, 115th Cong.). Signed into law in April 2018, this sweeping legislation enacted multiple changes to Section 230, including modifying subsection (e)(5) to ensure that Section 230 would have "no effect on sex trafficking law." 132 Stat 1253. Congress has thus shown that it is perfectly capable of making significant changes to Section 230 when there is a genuine public threat.

Moreover, a bill addressing the *exact issue* that Petitioners say requires a judicial rewrite of the statute was introduced mere weeks ago. The Platform Integrity Act would have amended Section 230(c)(1) by adding "unless such provider or user has promoted, sug-

gested, amplified, or otherwise recommended such information on such interactive computer service." Platform Integrity Act, H.R. 9695, 117th Cong. (introduced Dec. 27, 2022, and referred to H. Comm. on Energy & Commerce).

And that is not the only bill to consider the issue of social media algorithms in ways directly relevant to this case. One bill proposed eliminating Section 230(c)(1) protections for websites with more than 10 million monthly visitors when "the claim involves a case in which the interactive computer service used an algorithm, model, or other computational process to rank, order, promote, recommend, amplify, or similarly alter the delivery or display of information (including any text, image, audio, or video post, page, group, account, channel, or affiliation) provided to a user of the service if the information is directly relevant to the claim." Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021). Another bill took a similar approach, but drew more heavily from existing tort concepts. It would have removed Section 230 protections for any interactive computer service that "recklessly made a personalized recommendation" where "such recommendation materially contributed to a physical or severe emotional injury to any person" and also would have removed protection for knowingly hosting another provider's personalized recommendations. Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong.

Representatives Cathy McMorris Rodgers and Jim Jordan also recently proposed a bill squarely addressing concerns over platforms' use of algorithms. That bill would have limited Section 230 protections for large companies and require an appeal process for de-

platforming. Press Release, House Energy & Commerce Committee, *Rogers, Jordan Release New Legislation to Rein in Big Tech Abuses of Section 230* (July 28, 2021), https://tinyurl.com/RodgersJordan.

Other bills, detailed in the Appendix, have addressed similar concerns. For example, the proposed Health Misinformation Act of 2021 provided that, during public health emergencies declared by the HHS Secretary, Section 230(c)(1) would be modified so a "provider of an interactive computer service *shall* be treated as the publisher or speaker of health misinformation that is created or developed through the interactive computer service during a covered period if the provider promotes that health misinformation through an algorithm used by the provider (or similar software functionality)[.]" Health Misinformation Act of 2021, S. 2448, 117th Cong. (emphasis added).

Other bills have addressed Section 230(c)(2) as well. For example, the Civil Rights Modernization Act of 2021 would have eliminated Section 230 protection for "targeted" advertisements. H.R. 3184, 117th Cong. And it defined "targeting" as "the use by a provider of an interactive computer service of any information technology, including an algorithm or a software application, to deliver or show a covered advertisement to any particular subset of users who are part of or have a protected class or status." *Id.*

Congress has also considered other ways to amend Section 230. The PACT (Platform Accountability and Consumer Transparency) Act would have added significant transparency and reporting requirements to social media companies. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong.

(2021). And less than a month ago, Senator Coons introduced a different mechanism to accomplish the same goal, proposing a bill tying Section 230 liability to a requirement to provide data to researchers. Platform Accountability and Transparency Act, S. 5339, 117th Cong. (introduced Dec. 21, 2022).

In essence, Petitioners argue that Congress is asleep at the wheel, so the courts must take it upon themselves to regulate social media. But that is not the role of the judiciary in our government of separated powers. And Congress in fact has been very active in this area. Congress has already amended Section 230, has recently considered numerous proposals to do so again, and will likely consider many other reform proposals in the new Congress. This Court should allow the legislative process to play out, then let its results be tested against the Constitution, rather than rewriting Section 230 to try to encompass the unusual fact pattern of a single case.

CONCLUSION

Contrary to the United States' and Petitioners' position, this Court need not and should not rewrite Section 230 to eliminate its protections for platforms' use of algorithmic recommendations. Such recommendations are a form of editorial discretion protected by both the First Amendment and Section 230. Removing that protection would chill free speech and association and would lead to users' being bombarded with offensive content. By passing Section 230, Congress chose to protect those editorial decisions. If that protection is to be removed, only Congress—the branch entrusted with policymaking and that answers to the people—should remove it.

Respectfully submitted,

GENE C. SCHAERR
Counsel of Record
DONALD M. FALK
H. CHRISTOPHER BARTOLOMUCCI
HANNAH C. SMITH
KATHRYN E. TARBERT
ANNIKA BOONE BARKDULL*
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com

*Not yet admitted in D.C.

Counsel for Amici Curiae

January 19, 2023

APPENDIX

Proposed Bills in the 117th Senate (2021-2022)

Bill	Sponsor	Description
See Something, Say Something Online Act of 2021, S. 27	Sen. Joe Manchin (D-WV)	Removes Section 230 immunity when the provider fails to report suspicious information
SAFE TECH Act, S. 299	Sen. Mark Warner (D-VA)	Changes Section 230 immunity to an affirmative defense, with new exceptions for criminal, intellectual property, civil and human rights, antitrust, wrongful death and harassment laws
PACT Act, S. 797	Sen. Brian Schatz (D-HI)	Removes Section 230 immunity when the provider knows of illegal content
21st Century Free Speech Act, S. 1384	Sen. Bill Hagerty (R-TN)	Repeals Section 230 and replaces it with a new standard under Section 232

Bill	Sponsor	Description
DISCOURSE Act, S. 2228	Sen. Marco Rubio (R-FL)	Changes Section 230 to an affirmative defense, with new exceptions for religious liberty burdens or amplifying harmful information
Preserving Political Speech Online Act, S. 2338	Sen. Steve Daines (R-MT)	Removes Section 230(c)(2) immunity for discrimination on the basis of race, religion, sex, nationality, political affiliation, or speech
Health Misinformation Act of 2021, S. 2448	Sen. Amy Klobuchar (D-MN)	Creates an exception to Section 230 immunity for recommending health misinformation
Accountability for Online Firearms Marketplaces Act of 2021, S. 2725	Sen. Richard Blumenthal (D-CT)	Removes Section 230 immunity for online firearm marketplaces

Bill	Sponsor	Description
A Bill to Repeal Section 230 of the Communications Act of 1934, S. 2972	Sen. Lindsey Graham (R-GA)	Repeals Section 230 immunity
Protecting Americans from Dangerous Algorithms Act, S. 3029	Sen. Ben Ray Lujan (D-NM)	Creates an exception to Section 230 immunity for recommending content that interferes with civil rights
EARN IT Act of 2022, S. 3538	Sen. Lindsey Graham (R-SC)	Creates an exception to Section 230 immunity for child sex exploitation
Don't Push My Buttons Act, S. 4756	Sen. John Kennedy (R-LA)	Creates an exception to Section 230 immunity for automated targeted advertising

Proposed Bills in the 117th House (2021-2022)

Bill	Sponsor	Description
Protecting Constitutional Rights from Online Platform Censorship Act, H.R. 83	Rep. Scott DesJarlais (R-TN)	Repeals Section 230 immunity and creates a private right of action against removal of information
Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277	Rep. Ted Budd (R-NC)	Requires adoption of and adherence to certain terms of service to qualify for Section 230(c)(1) immunity and revises definition of "good faith for purposes of that subsection

Bill	Sponsor	Description
CASE-IT Act, H.R. 285	Rep. Gregory Steube (R-FL)	Creates exceptions to Section 230 immunity for information harmful to minors and creates a private right of action against provider decisions inconsistent with standards found in the First Amendment
PLAN Act, H.R. 1107	Rep. Ed Case (D-HI)	Removes Section 230 immunity for some state and local law claims
Stop Shielding Culpable Platforms Act, H.R. 2000	Rep. Jim Banks (R-IN)	Strips 230(c)(1) immunity for distributor liability for websites
Protecting Americans from Dangerous Algorithms Act, H.R. 2154	Rep. Tom Malinowski (D-NJ)	Creates an exception to Section 230 immunity for recommending information interfering with civil rights laws

Bill	Sponsor	Description
Online Consumer Protection Act, H.R. 3067	Rep. Janice Schakowsky (D-IL)	Imposes requirements for terms of service and reporting to FTC. Provides for enforcement by FTC, state attorneys general, and private right of action. Provides that Section 230 shall not apply to any enforcement of the Act or to impair enforcement of any provision of law enforced by FTC
Civil Rights Modernization Act of 2021, H.R. 3184	Rep. Yvette Clark (D-NY)	Creates an exception to Section 230 immunity for ad targeting to users who are part of or have a protected class or status

Bill	Sponsor	Description
Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms Act, H.R. 3421	Rep. Donald McEachin (D-VA)	Creates exceptions for Section 230 immunity for civil and human rights laws, antitrust laws, harassment laws, wrongful death, and funded speech
Protect Speech Act, H.R. 3827	Rep. Jim Jordan (R-OH)	Provides that there is no liability for good faith removal of material and establishes requirements for "good faith" removal
Justice Against Malicious Algorithms Act of 2021, H.R. 5596	Rep. Frank Pallone Jr. (D-NJ)	Eliminates Section 230 immunity when providers make personalized recommendations of content
EARN IT Act of 2022, H.R. 6544	Rep. Sylvia Garcia (D-TX)	Creates an exception to Section 230 for child sex trafficking