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

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BRIEF OF NYU STERN CENTER FOR BUSINESS AND HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE**

The Center for Business and Human Rights (the Center) is part of the Leonard N. Stern School of Business at New York University (NYU). The Center researches the human rights implications of corporate conduct and uses this work as the basis for advocacy and consultation with corporations, lawmakers, and regulators. Instructors at NYU and other universities use the Center's published research in undergraduate and graduate-level classes.

Social media companies' impact on democracy ranks high among the topics the Center studies. The Center has published extensive research on how major social media companies are, and ought to be, held accountable for their policies and practices. As part of this research, the Center has analyzed Section 230's history, purpose, and effects. *See, e.g.*, P. Barrett, *Regulating Social Media: The Fight Over Section 230—And Beyond*, NYU Stern Center for Business and Human Rights (Sept. 2020), https://bit.ly/section-230-report.

The Center has criticized major social media companies, including YouTube, for allowing their platforms to be used to spread hateful, divisive content and misinformation about politics and public health. *See, e.g.*, P. Barrett & J. Hendrix, *A Platform*

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* Pursuant to Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no party or other person has made a monetary contribution intended to fund the preparation or submission of this brief. All parties granted blanket consent to the filing of amicus curiae briefs pursuant to Rule 37.3(a).

'Weaponized': How YouTube Spreads Harmful Content—And What Can Be Done About It, NYU Stern Center for Business and Human Rights (June 2022), https://bit.ly/yt-report. Based on these concerns, the Center has called for greater industry self-regulation as well as limited government oversight. The Center has also supported proposals to amend Section 230 to address these problems.

Despite these critiques and calls for reform, the Center recognizes the immense value Section 230 offers our democracy by protecting and facilitating valuable speech on the internet. The Center is deeply concerned that petitioners' and the government's position in this case would severely undermine those benefits. Petitioners and the government purport to seek a narrow exception to Section 230 for platform recommendations. But that exception would swallow the rule and gut the statute's protections. The result would be a loss of large amounts of valuable free speech from the internet. Given this risk, the Center urges this Court to affirm.

SUMMARY OF ARGUMENT

Section 230 is not a perfect law, but it is the law that created the internet—and its vast array of free speech—as we know it. Petitioners and the government seek to create a sea change in that law disguised as an exception for "targeted recommendations." But their proposed exception is illusory, because almost every social media platform, and any websites incorporating third-party content, present that third-party content in a manner that would be unprotected under

petitioners' and the government's rule—*i.e.*, by targeting a particular user based on an algorithm's assessment of what will most interest and engage that user. Petitioners' approach would thus eviscerate Section 230's free speech protections and the many platforms that exist because of them.

I. A. Section 230 promotes and protects free speech on the internet. Its dual protections ensure that "interactive computer service" providers can moderate third-party content on their platforms without becoming liable for all such content. This framework played a key role in generating today's internet.

B. Without Section 230's liability shield, internet platforms would reduce or eliminate third-party content, rather than take on the impossible and risky task of trying to filter all potentially actionable content. "Collateral censorship" would be the cheapest route, and the one most providers would take, to the detriment of valuable online speech.

II. Petitioners and the government seek to carve out "targeted recommendations" from Section 230's scope. But recommending is the core of what social media platforms—and most websites hosting third-party content—do.

A. These platforms use algorithms to sort the vast amount of user content produced in any given day to present a user with the content she is most likely to engage with and find relevant. That is what users *want* these platforms to do. And it is not just sophisticated social media entities that make "targeted recommendations." Everyone does it.

"Recommendations" are not a narrow category that can be easily excised from Section 230's scope. They are the essence of what today's internet platforms do.

B. Petitioners fail to identify any way to meaningfully distinguish "recommendations" from other approaches to third-party content. Search results on Google are the product of algorithmic recommendations, as is content "pushed" to a user. URLs and notifications are also ways that platforms make recommendations. There is no meaningful distinction between these ways of handling user content that cabins the scope of a proposed "recommendations" exception. And any distinction between "active" or "passive" treatment of user content has no application to today's internet, in which all or almost all platforms use some kind of "recommending" by algorithm.

III. A. An illusory exception for "targeted recommendations" would result in the loss or obscuring of a massive amount of valuable speech. Websites use "targeted recommendations" because those recommendations make their platforms usable and useful. Without a liability shield for recommendations, platforms will remove large categories of third-party content, remove all third-party content, or abandon their efforts to make the vast amount of user content on their platforms accessible. In any of these situations, valuable free speech will disappear—either because it is removed or because it is hidden amidst a poorly managed information dump.

B. The content that will disappear or be obscured will disproportionately come from marginalized or

minority speakers, as well as those voicing unpopular views or speaking out against powerful institutions.

IV. The Court should not adopt an imaginary "exception" to Section 230 that would destroy the statute and the free speech it enables. Rejecting the proposed exception does not let social media companies off the hook. They remain liable for an array of claims to which Section 230 does not apply. And if further exceptions to Section 230's liability shield are warranted, the legislature is well-equipped to craft them.

ARGUMENT

I. Section 230 protects valuable speech.

A. Section 230 plays a vital role in modern society as "the First Amendment of the internet." E. Harmon, *In debate over internet speech law, pay attention to whose voices are ignored*, THE HILL (Aug. 21, 2019), https://bit.ly/section230-opinion; *see* E. Goldman, *Why Section 230 Is Better Than The First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 34 (2019) (arguing that Section 230 "provides significant and irreplaceable substantive and procedural benefits beyond the First Amendment's free speech protections"). As Congress recognized when it passed the provision, "[t]he Internet and other interactive computer services 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). But Congress concluded that this forum could not flourish under the First Amendment alone because that provision "did not adequately protect large online platforms that processed vast

amounts of third-party content." J. Kosseff, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 9-10 (2019).

Congress thus enacted Section 230 to give interactive computer services two forms of protection that would facilitate free speech on the internet. First, under Section 230(c)(1), no "interactive computer service" provider "shall be treated as the publisher or speaker of any information provided by another information content provider." Second, no such provider will be liable for voluntarily and in good faith "restrict[ing] access to or availability of material that the provider" views as objectionable. *Id.* § 230(c)(2). Through these dual protections, Section 230 simultaneously (1) encourages (but does not require) providers to self-regulate and (2) shields providers from liability for third-party content when that self-regulation fails.

This framework, enacted in 1996, played a central role in creating the internet in its current form. "Because online service providers are insulated from liability, they have built a wide range of different applications and services that allow people to speak to each other and make things together." J. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 434 (2009). Now, without coding skills or deep pockets, ordinary people can use the internet—and specifically social media sites of all sizes and forms—to do everything from sharing family news to bringing human rights violations to the world's attention. This Court has celebrated the "wide array of protected First Amendment activity" this system

facilitates—one "as diverse as human thought." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735-36 (2017) (citations omitted).

Of course, Section 230 imposes social costs even as it promotes internet speech. These costs include terrorists exploiting YouTube, despite the platform's ban on inciting violent extremism. YouTube, Violent Extremist or Criminal Organizations Policy, https://bit.ly/3hi4G63. Although Section 230 "may be overprotective in some respects and underprotective in others," it remains "valuable nevertheless"—mainly by facilitating free speech across the internet. Balkin, *supra*, at 434.

B. The modern system of diverse platforms and websites hosting vast amounts of user-provided speech exists only because of Section 230's liability shield. With that shield, interactive computer service providers can regulate third-party content on their platforms without becoming liable for *all* such content. Without that shield, social media companies of all kinds facing civil liability for third-party content would almost certainly "reduce or entirely prohibit user-generated content"—thereby diminishing the quantity and quality of free speech on the internet. Kosseff, *supra*, at 4.

This "obvious chilling effect" would result because "[i]t would be impossible for service providers to screen each of their millions of postings for possible problems." *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Facing "potential liability" for the "staggering" amount of user content produced each

day, platforms would likely "choose to severely restrict the number and type of messages posted," rather than undertake the difficult task of deciding whether any such content was in fact defamatory or otherwise a basis for liability. *Id.* Such "collateral censorship" would be "the least costly method of avoiding liability." *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2038 (2018).

In sum, Section 230 plays the central role in facilitating free speech on the internet. Any proposal to restrict that role—especially judicially rather than legislatively—should be viewed with skepticism. And the proposal petitioners make here, which would gut that role, should be rejected.

II. An illusory exception for third-party content recommendations would gut Section 230.

Petitioners, joined by the government, seek to excise from Section 230's protections what they call "recommendations of third-party content." Pet. Br. 19; *see* U.S. Br. 12 (arguing platforms are not protected for using "targeted-recommendation algorithms"). Both appear to view this assertion as removing from Section 230's protections a small subset of what internet platforms do. But the exception they propose would swallow the rule. Employing algorithms to recommend third-party content is what social media platforms (and many other websites) do. To strip these platforms of protection for that function would render Section 230 all but meaningless in today's world.

A. Section 230 does not discuss "recommendations." There is no evidence that Section 230's authors meant to distinguish between "targeted recommendation algorithms" and other ways that "interactive computer services" might select, arrange, and deliver third-party content to users, such as ranking content in user feeds or generating results in a search engine. And, critically, in today's internet, there is no tenable distinction between these approaches to third-party content, however described. Internet platforms nearly all present third-party content by algorithmic recommendation: an automated system that identifies and retrieves material based on the priorities encoded in the algorithm. For platforms seeking to optimize user engagement and show users content that interests them—meaning most, if not all, platforms—this system almost inevitably includes assessment of users' past online preferences and behavior.

Take these examples: (1) YouTube *recommends* a Bruce Springsteen video to a user who has watched videos uploaded by Springsteen's marketer; (2) Facebook *prominently ranks* user-generated photos of dogs in the automated feed of a person who regularly shares dog images; and (3) Google *displays search results* that include articles from The Economist to a user who inquired about European election results and has an online history of reading news outlets like The Economist. In each case, an algorithm selects a few pieces of content from a universe of billions of posts uploaded by third parties, places the selections in a certain order, and shares these offerings with a user. And it does so by estimating what the user will find relevant and engaging based on what it knows about that user.

Algorithmic recommendation is what social media platforms do because it is what social media users want those platforms to do. Out of the vast amount of content produced on any given site in any given day, algorithms assess which content a particular user most wants to see. Most social media users do not want to see every user-generated post possible that is available on that platform, listed in chronological order. Presenting third-party content in that way would force users to sift through an immense quantity of content they do not care about to find anything of interest. In this scenario, they would be far less likely to find content they want to engage with and other users they want to respond to or interact with. Internet users do not go to the internet seeking an un-curated information dump. Users instead want to quickly and easily find the content most relevant to their particular interests, background, and behavior.

Thus, when a Facebook user logs into his account, he sees a vertically arranged series of posts that an algorithm has assembled from a far larger pool of content posted by the user's online "friends," among other material. Facebook, How Feed Works, https://bit.ly/how-feed-works. When a Twitter user opens her feed (or "timeline"), she sees a list of "tweets" by account holders she follows. Twitter will have algorithmically selected and ranked the tweets based on the user's online behavior and the perceived likelihood she will engage with the content by, for example, "liking" or "retweeting" it. Twitter, About Your Home Timeline, https://bit.ly/3BfVN3E.

Whether described as ranking, displaying, organizing, or something else, this activity is virtually indistinguishable from the recommendations petitioners and the government seek to exclude from Section 230's protections. *See* E. Douek, *The Cold Dose of Reality Awaiting Elon Musk*, THE ATLANTIC (Nov. 1, 2022) (explaining that "basically everything in most users' Twitter feed is 'recommended' in one form or another"), https://bit.ly/3WlqAne. The platforms are making choices on behalf of users, based on data the platforms have gathered about the users. The same is generally true of TikTok, YouTube, Instagram, "and any other service that ranks posts based on users' predicted level of interest in them." C. Newton, *Who's Responsible When Recommendations Kill?*, PLATFORMER (Dec. 2, 2022), http://bit.ly/3ZMkaR0.

This behavior, moreover, is not limited to the big social media brands. The New York Times' comment section, for example, lists or "recommends" specific comments as "NYT Picks" and "Reader Picks." If a Times reader downloads the paper's app on her phone, she will have access to a "For You" page with "[r]ecommended stories, games, and special collections." That page of recommendations will be populated by algorithmic targeting informed by her previous use of the site. Crowdsourcing platforms like Yelp, TripAdvisor, and the Ratingz Network that rely on user comments and reviews to produce most of their content similarly use algorithmic targeting based on geography, past interactions with the sites, and other factors.

B. Petitioners purport to cabin their expansive proposal by suggesting that the Court can distinguish

algorithmic recommendations from other ways of managing third-party content. None of their suggested distinctions hold. Nor do they avoid the massive problem that petitioners' and the government's position creates.

1. Petitioners suggest that the Court can draw a meaningful line between (1) search results responding to a user's query on a search engine and (2) content a platform "pushes" to a user via a ranked feed or recommendation. But no such distinction exists.

Both categories of content are the products of the platform's algorithmic predictions about what the user will want to see based on some combination of express and implicit user inputs. Users' explicit input to YouTube, for example, may include subscribing to specific channels or clicking "Not Interested" in response to recommended content. Explicit input to Google includes submitting a search query or enabling the "SafeSearch" filter. And for both YouTube recommendations and Google search results, what a user sees in response to those express inputs is also shaped by her implicit input, including past behavior and interaction with other content. The platform's algorithm will assess both the express and implicit inputs to produce a "targeted recommendation." Whether that recommendation takes the form of a list of search results ranked based on the algorithm's assessment or a list of video results produced by the same, it is a recommendation generated for that specific person, using all available inputs.

2. Also unavailing is petitioners' argument that embedding URLs or providing notifications about third-party content somehow makes that content the platform's rather than a third party's. URLs and notifications are ways that platforms of all kinds transmit their "targeted recommendations." Focusing on URLs or notifications does not make the scope of the "targeted recommendations" exception any smaller.

3. Finally, petitioners imply that when platforms recommend content they take a more active role than simply serving as a conduit or host for third-party material. Section 230 created a liability shield for internet entities that play an active role in deciding what content their users see and interact with—that is, in recommending content. Section 230(f)(4)'s definition of "interactive computer service" includes entities "that do one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache search, subset, organize, reorganize, or translate content." The idea that platforms must be passive conduits to avoid liability is one Congress rejected when it enacted Section 230. More to the point, requiring such an active role would do nothing to cabin petitioners' or the government's proposed exception.

In short, almost everything an internet user sees when she goes online is a "targeted recommendation" under petitioners' and the government's view. The modern internet is curated according to each user's preferences and past behaviors—and that is how most users want it to be. If algorithmic recommendations are not protected by Section 230, then little of what

interactive internet platforms do would be protected by Section 230. This focus on "recommendations" is not the narrow carve-out petitioners and the government claim. It would instead remove Section 230's protections almost entirely from the internet.

III. Adopting petitioners' exception would suppress significant amounts of free speech.

Because recommendations by algorithm are the essence of what interactive computer services do on today's internet, removing claims based on recommendations from Section 230's coverage would leave almost nothing for Section 230 to cover. And it would leave internet platforms no choice but to tamp down or otherwise obscure valuable free speech Section 230 is meant to promote. The cost to free speech on the internet—and thus the cost to our democracy—would be massive.

A. If Section 230 does not cover claims based on "recommendations," the only claims that Section 230 would block would relate to user-generated content that a platform made available with little sorting or ranking, and certainly not sorting or ranking designed to appeal to a particular user's interests. But again, today's websites employ algorithmic sorting and ranking—that is, recommendations—in connection with almost all the third-party content they display. A diluted version of Section 230 would thus push platforms to take one of three approaches: (1) removing all third-party content to avoid any potential liability, (2) removing large quantities of third-party content

seen as the most problematic, or (3) burying third-party content amidst an overwhelming, largely incomprehensible mass of all such content available on the platform. Each of these scenarios would suppress or eliminate valuable free speech.

Although platforms *can* display third-party content without "targeted recommendations"—say, by simply listing content chronologically—they generally do not, because most internet users do not want this kind of un-curated content dump. Indeed, a straightforward (not targeted) presentation of the vast quantity of user content produced daily online would likely prove unusable and unused by most. Billions use social media sites precisely because those platforms sort the unfathomable amount of material on the internet to give each user what they will find most relevant and engaging. And billions enjoy these same benefits of "targeted recommendations" on all kinds of websites not considered social media. *See* p. 11, *supra*.

Without Section 230's safeguard for such recommendations, almost no third-party internet content would appear or appear in the way users desire. Platforms would avoid liability by excising most or all third-party content from their platforms, or they would keep the content but forego organizing it in the ways that users find engaging and useful. Under these approaches, valuable free speech will disappear—either because it is removed from a platform or because it becomes impossible to find among a morass of third-party content.

B. The internet speech most likely to disappear is that of historically vulnerable or marginalized people expressing unpopular or minority views. Heckler's vetoes would run rampant: anyone "displeased with the speech of another party" could simply complain about that speech to the provider; these complaints would put providers in the impossible position of either "suppressing controversial speech" or evaluating whether that speech is actionable. *Zeran*, 129 F.3d at 333. "Even upon receiving notice that a statement is allegedly defamatory, a website does not know whether a complainant is correct or merely hoping to illegitimately induce takedown." *Section 230 As First Amendment Rule*, *supra*, at 2037. So providers are more likely to simply delete the complained-of content regardless of (and without investigating) the complaint's merit. *See id.* at 2038 ("Whether or not websites believe a potential lawsuit is meritorious, they will often default to removal because of the potential costs of litigation or an adverse result."). They may also cast a wide net, removing broad categories of content they fear are even potentially problematic. The result? The loss of massive amounts of content, much of which was "flagged strategically by bad actors for reasons having nothing to do with either safety or veracity." E. Brown, *Section 230 Is the Internet's First Amendment. Now Both Republicans and Democrats Want To Take It Away*, REASON (July 29, 2019), http://bit.ly/3ZHNfgx. "Silencing one's opponents will be easy." *Id.*

Among those most likely to be silenced are political dissenters, human rights advocates, and other minority groups, all of whom might struggle to make their

voices heard through non-internet avenues like print newspapers or television networks. Even with Section 230's full protections in place, well-intentioned efforts to remove dangerous or problematic speech from the internet often cast too broad a net, disproportionately impacting speech by these groups. *See* D. Keller, *Internet Platforms: Observations on Speech, Danger, and Money*, HOOVER INSTITUTION (June 28, 2018), https://bit.ly/3wcSVlq (describing removal of videos of "Syrian atrocities posted by a UK human rights watchdog" and deletion of posts "documenting Rohingya ethnic cleansing in Myanmar"). And in the current push to police violent extremism on the web, "[i]individuals' unremarkable and innocuous online speech" also "frequently disappears," disproportionately impacting users of "languages common in Muslim-majority countries." *Id.* Remove Section 230's protections, and even more valuable free speech will be silenced. Also at high risk of suppression would be those criticizing large corporations or other influential institutions or persons. Such entities could easily manipulate litigation-wary platforms with takedown demands, thereby muzzling their critics.

IV. Section 230 does not immunize social media platforms for their own misconduct and can be amended to address specific concerns.

To reject "recommendations" as a tenable exception to Section 230's coverage is not to write social media platforms a "blank check" or give them a "bulletproof shield" for their content-management choices. *Contra* Br. of Common Sense Media 1-2; Br. of Sen. Hawley 3.

Nor does it preclude targeted legislative exceptions of the kind Section 230 already contains.

A. Section 230, while protecting a platform's algorithmic sorting of user content, "does not insulate a company from liability for all conduct that happens to be transmitted through the internet." *Henderson v. Source for Public Data, L.P.*, 53 F. 4th 110, 130 (4th Cir. 2022). Courts have thus held, for example, that Section 230 does not protect interactive computer service providers against claims under the Fair Credit Reporting Act. *Id.* Nor does Section 230 insulate a short-term home-rental service against liability for violating an ordinance against unlicensed rentals. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682-83 (9th Cir. 2019). And websites cannot seek refuge in Section 230 for violating anti-discrimination laws by soliciting the sex, family status, and sexual orientation of users seeking roommates. *Fair Housing Council v. Roommates.com*, 521 F.3d 1157, 1165 (9th Cir. 2008). Platforms can be, and are, held liable for their own misconduct separate from displaying or otherwise "recommending" third-party content.

B. Section 230 itself also curtails its protections in specific situations. Since its enactment, Section 230 has excluded from its liability shield claims related to violations of federal criminal law, intellectual property rules, wiretapping statutes, and state laws "consistent with" Section 230. 47 U.S.C. § 230(e). In 2018, Congress added another exception for claims related to online sex trafficking. *Id.* If Section 230's coverage should be further limited, it is the legislature that should do it.

Petitioners' action raises deeply troubling issues surrounding online incitement of terrorism. But the legislature, not the judiciary, is best suited to address whether those issues warrant changing Section 230's scope. Lawmakers can properly weigh the costs and benefits involved in any new exclusion from Section 230's protections. They can also build in mechanisms to ensure continued safeguarding of online speech, like the formal system of notice, takedown, and appeals Congress devised for copyright infringement claims. 17 U.S.C. § 512. This quintessentially legislative assessment is a task for Congress, not this Court.

The same goes for other concerns about social media platforms, including intrusions on user privacy and stifling of competition. This action should not be used to address all issues (perceived or real) that social media creates. Other means exist for remedying such problems. For instance, federal agencies are pursuing civil antitrust actions against major technology companies. *See, e.g.*, *FTC v. Facebook, Inc., Federal Trade Comm'n*, No. 20-cv-3590 (D.D.C.). And Congress has debated tougher privacy and competition laws aimed at Silicon Valley. E. Birnbaum, *Big Tech Divided and Conquered to Block Key Bipartisan Bills*, BLOOMBERG (Dec. 20, 2022), http://bit.ly/3XHLXR5. This Court should refuse any invitation to address broad concerns about social media platforms using an exception to Section 230 that would snuff out the forum for free expression Congress created.

CONCLUSION

For the foregoing reasons, the Court should decline to interpret Section 230 in a manner that would eliminate the statute's critical role in protecting valuable free speech and should thus affirm.

Respectfully submitted,

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JANUARY 19, 2023