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
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF CHAMBER OF PROGRESS ET AL. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT


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## INTEREST OF *AMICI CURIAE*

*Amici* Chamber of Progress, Global Project Against Hate and Extremism, HONR Network, Information Technology Innovation Foundation, IP Justice, LGBT Tech Institute, and the Multicultural Media Telecom and Internet Council are non-profit organizations dedicated to building a fairer, more inclusive country in which all people benefit from technology and interconnectivity. Through advocacy and organizing, *amici* act to ensure that all Americans benefit from the speech opportunities available through a safe, open, and equitable Internet.

*Amici* submit this brief in support of Respondent Google LLC to prevent the destruction of vibrant and diverse speech communities that would follow if Petitioner's claims succeed.[1]

## SUMMARY OF ARGUMENT

The First Amendment traditionally protects intermediaries from liability for the third-party speech they publish. Long before the Internet, this Court recognized that those who transmit the speech of others are vulnerable targets for censorship. This is because constraining the messenger results in collateral censorship of all who rely on that intermediary to reach a wider audience.

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[1] Pursuant to Supreme Court Rule 37, no counsel for any party authored any part of this brief. Nor has any person or entity, apart from *amici curiae* and their counsel, made any monetary contribution to fund the preparation or submission of this brief. The parties have filed blanket-consent letters.

Intermediary liability has proven especially threatening to marginalized, dissident, and disfavored speakers, whose ability to reach an audience and contribute to global discourse depends upon intermediaries to disseminate their messages.

Congress enacted Section 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), to implement and adapt these First Amendment protections to the Internet medium. Online intermediaries handle billions of pieces of third-party speech and make publication decisions respecting millions of user-generated submissions each day. As a consequence, the threat of liability for online intermediaries—as opposed to their brick-and-mortar counterparts—silences substantially more speakers. Congress devised Section 230 to create a summary procedure to protect online intermediaries from the chilling effect of harassing litigation and to better protect against collateral censorship.

Section 230's liability shield reinforces the First Amendment's protection for intermediaries' exercise of editorial discretion. For that reason, intermediaries do not forfeit their Section 230 immunity by exercising their First Amendment right to select and promote content. Quite the opposite: Section 230 was designed to protect those decisions.

Intermediaries exercise both the active functions of publishers in selecting and presenting content as well as the more passive characteristics of distributors. The risks posed by collateral censorship apply equally to both. Just as the First Amendment limits a bookstore's liability when it places a given book in a display window rather than a back shelf,

the same principle applies when an online service employs an algorithm to more prominently display particular content.

Section 230's protections for content promotion are functionally inseparable from its protections for content publication or removal. All are part of a unified design that protects third-party content curation generally. Eliminating any portion of those protections would dramatically alter the Internet for the hundreds of millions of Americans, and billions of worldwide users, who depend on online services for information, education, entertainment, and income.

## ARGUMENT

### I. Section 230 Reinforces First Amendment Protections Online

The First Amendment is a bulwark against the use of power to stifle expression and the free flow of ideas. Nowhere is that shield more important than when it protects disfavored speakers who express dissent from society's margins. The First Amendment generally protects intermediaries from liability for the content they publish, and Congress enacted Section 230 to bolster that protection across the "vast democratic forums of the Internet." *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

### A. The First Amendment Protects Intermediaries to Prevent the Collateral Censorship of Disfavored Speakers

Long before the Internet, this Court recognized that imposing liability on intermediaries who provide speech forums also threatens the rights of speakers and readers who depend on those fora to share their messages.

In *Smith v. California*, 361 U.S. 147 (1959), this Court struck down a law holding booksellers strictly liable for selling "obscene" books because the law functionally compelled bookstores to self-censor. The problem, the Court noted, was "[t]he bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Id.* at 153-54. For similar reasons, this Court rejected Rhode Island's bookseller liability laws in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58 (1963), and later upheld cable programmers' First Amendment challenge to laws requiring cable operators to segregate and block certain sexual content. *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727 (1996).

The danger posed by intermediary liability is that it silences *all* speakers. "Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them."

*McConnell v. FEC*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part), *rev'd in part*, *Citizens United v. FEC*, 558 U.S. 310, 365-66 (2010). Censors from time immemorial have thus targeted intermediaries to preserve power and prevent change. To stanch the spread of early Protestantism, Pope Alexander VI banned the unlicensed printing of books. *See* Ithiel de Sola Pool, TECHNOLOGIES OF FREEDOM 14 (1984). The British Crown likewise sought to stifle American colonial dissent by restricting printing to members of an approved guild, licensing print shops when that failed, and ultimately settling upon a strategy of taxation and vexatious libel litigation to strong-arm intermediaries into self-censorship. *Id.* at 14-16.

In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court identified the risk that intermediary liability "would discourage" publishers "from carrying" controversial content and thus "shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266. Such "self-censorship" is especially pernicious since it functions as "a censorship affecting the whole public." *Id.* at 279 (quoting *Smith*, 361 U.S. at 154).

The laws invalidated in *Smith*, *Bantam Books*, *Sullivan*, and *Denver Area* all had enabled audiences to "censor[]" speech by threatening the intermediaries hosting it with a "heckler's veto." *Reno*, 521 U.S. at 880. The heckler's veto is a form of what First Amendment scholars call "collateral censorship." Michael I. Meyerson, *Authors, Editors,*

*and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 NOTRE DAME L. REV. 79, 117 (1995) (coining the term).

"Collateral censorship occurs when one private party *A* has the power to control speech by another private party *B*, the government threatens to hold *A* liable based on what *B* says, and *A* then censors *B*'s speech to avoid liability." Jack M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2298 (1999). The risk of collateral censorship from the heckler's veto is dangerous because intermediaries must often respond to complaints by deleting speech, or eliminating a forum, as it would be unduly burdensome to investigate the merits of every complaint. *Reno*, 521 U.S. at 880.

The typical victims of collateral censorship are marginalized speakers denied an outlet for disfavored points of view. *See* Harry Kalven, Jr., THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965) (coining the term "heckler's veto" and discussing its use as a barrier to civil rights advocacy). Perhaps no case better illustrates the censorial effects of the heckler's veto than *Sullivan*. Nominally a case about burdens of proof in defamation actions, the Court's decision "responded primarily to the core First Amendment problem of the abuse of power to stifle expression on public issues." Elena Kagan, *A Libel Story: Sullivan Then and Now*, 18 LAW & SOC. INQUIRY 197, 199 (1993).

*Sullivan* involved an advertisement placed in the *New York Times* by the Committee to Defend Martin Luther King and Struggle for Freedom in the South. *Sullivan,* 376 U.S. at 256-57. Titled "Heed

Their Rising Voices," the ad ran on March 29, 1960, and contained ten paragraphs of text describing attempts by "Southern violators of the Constitution" to deny Black Americans their civil rights. *Id.* at 257-58, 305. The case was "the first salvo in a concerted campaign against the northern establishment press by southern public officials." Kagan, *supra*, at 200. Mimicking tactics by earlier censors, the campaign's organizers openly sought to "curtail media coverage of the civil rights struggle" through punishing litigation. *Id.*

Alabama newspapers ran headlines hailing the "Formidable Legal Club to Swing at Out-of-State Press," and stories celebrating the prospect that the lawsuits "could have the effect of causing reckless publishers of the North" to revisit "their habit of permitting anything detrimental to the South and its people to appear in their columns." *Id.* at 200 (citations omitted). With a $500,000 jury award against the *Times*, the censorship strategy was beginning to bear fruit. While the *Times'* appeal was pending, it withdrew its reporters from Alabama. *Id.* at 201. And CBS News, arguably the nation's leading news source at the time, planned to stop reporting on the civil rights movement altogether if the *Sullivan* verdict were not reversed. *Id.*

As *Sullivan* illustrates, even when the putative targets of intermediary liability are large or mainstream businesses, it is almost always minority or marginalized voices that are silenced. *Smith*, for instance, involved an attempt to bar distribution of a book about a lesbian *femme fatale* who defied post-World War II sex and gender norms. *See* Mark

Tryon, SWEETER THAN LIFE (1953). A later case, *Bigelow v. Virginia*, 421 U.S. 809, 812, 822-23 (1975), invalidated a Virginia law that would have held publishers liable for disseminating informational advertisements for abortions legal in other states.

Despite all the current rhetoric about "Big Tech," the potential chilling effect of collateral censorship is magnified for the online medium because intermediaries curate speech "from a worldwide audience of millions." *Reno*, 521 U.S. at 853. And when that happens, minority and marginalized speakers are the first to pay the price. *See* Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2046-47 (2018) (citing research indicating that "marginalized communities" are "particularly vulnerable to the collateral censorship that would result from intermediary liability").

Already, the threat of intermediary liability "has 'shut down conversations among women of color about the harassment they receive online,' 'censor[ed] women who share childbirth images in private groups,' and 'disappeared documentation of police brutality, the Syrian war, and the human rights abuses suffered by the Rohingya.'" *Id.* (alteration in original) (quoting Corynne McSherry et al., *Censorship Is Not the Best Way to Fight Hate or Defend Democracy: Here Are Some Better Ideas*, Elec. Frontier Found. (Jan. 30, 2018)).

Decriminalization and reform movements have likewise seen their advocacy efforts undermined by laws that deter intermediaries from publishing online. *See, e.g.*, *Woodhull Freedom Found. v. United States*, 948 F.3d 363, 373 (D.C. Cir.

2020) (recognizing that a law creating online intermediary liability could collaterally censor "advocacy" and "educational activities" by persons who engage in sex work). And following this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the risk of liability has already chilled intermediaries from publishing even purely informational speech related to abortion in states where it is stigmatized. *See, e.g.*, Ashley Carman, *Deciphering Spotify's Ad Policy on Abortion Pills*, Bloomberg News (Nov. 17, 2022) (describing how the online music streaming service Spotify declined to air a healthcare non-profit's informational advertisement involving abortion access in light of state laws outlawing abortion), https://tinyurl.com/5n9xuuj2.[2]

The threat of collateral censorship defies our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270, 292. Where pressure can be exerted on the

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[2] Numerous states have not only passed or revived laws outlawing abortion, but also criminalized speech related to abortion. *See* Ashley Gold, *Next post-Roe battlefield: Online abortion information*, AXIOS (July 1, 2022), *available at* https://tinyurl.com/y56ktkvv; *e.g.*, Idaho Code § 18-603 (establishing a felony for any person who "willfully publishes any notice . . . of any medicine or means for producing or facilitating a miscarriage or abortion"); Nat'l Right to Life Proposed Post-*Roe* Model Abortion Law at § 4(c)(2) (June 15, 2022) (criminalizing the act of "knowingly or intentionally hosting or maintaining an internet website . . . that provides information on how to obtain an illegal abortion, knowing that the information will be used, or is reasonably likely to be used, for an illegal abortions [sic]"), https://tinyurl.com/3hxe2fpy.

distributor of speech, "the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted." *Smith*, 361 U.S. at 153. Courts in various contexts have reaffirmed the principle that "freedom from the harassment of lawsuits" must be "assured" lest intermediaries "become self-censors" who "affect[] the whole public" by denying speakers outlets for expression. *McBride v. Merrell Dow & Pharms. Inc.*, 717 F.2d 1460, 1467 (D.C. Cir. 1983) (Bork, J.) (citation omitted); *see also, e.g.*, *Washington Post v. McManus*, 944 F.3d 506, 517 (4th Cir. 2019) (Wilkinson, J.) (First Amendment protects against "foreclos[ing] channels" of expression "indirectly" by censoring online speech "platforms").

### B. Congress Codified First Amendment Protections in Section 230(c)(1) to Address Aggravated Risks of Intermediary Liability Online

Congress recognized online intermediaries' acute exposure to threats of collateral censorship and enacted Section 230 to reinforce First Amendment values and "to promote rather than chill internet speech." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018).

Stating "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1), the law "protects against the 'heckler's veto' that would chill free speech" online by enacting a prophylactic statutory "immunity" that "shields"

online intermediaries from having to either "remove the content" complained about "or face litigation costs and potential liability." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407-08, 417 (6th Cir. 2014) (explaining that the immunity "is an immunity from suit" intended to cut off protracted litigation at the start "rather than a mere defense to liability") (citation omitted).[3] As Judge Wilkinson explained in *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), the seminal case interpreting Section 230's text, "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

Section 230 thus ensures and bolsters the continued viability of preexisting First Amendment principles online by establishing "incentives to protect lawful speech" from the unique vulnerability online intermediaries face. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007). This protection applies to distributors of online content, as well as publishers, in order to protect "the vigor of Internet speech." *Zeran*, 129

[3] Section 230 thus is analogous to a federal anti-SLAPP law for the Internet, providing a summary procedure to vindicate First Amendment rights. *See, e.g.*, *Balliet v. Kottamasu*, 76 Misc. 3d 906, 916 (N.Y. Civ. Ct. 2022) ("[A]nti-SLAPP laws…further bolster First Amendment free speech procedural litigation protective procedures to enforce *Sullivan*'s principles[.]"); *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 340 (2004) (California's anti-SLAPP statute is "designed to protect citizens in the exercise of their First Amendment constitutional rights" by "provid[ing] a procedural remedy to resolve such a suit expeditiously").

F.3d at 332-33. Rejecting arguments that Section 230 should be construed more narrowly, Judge Wilkinson concluded that Section 230's text treats "distributor liability" as "merely a subset, or a species" of the "publisher liability" that it bars. *Zeran*, 129 F.3d at 332. And in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104-05 (9th Cir. 2009), Judge O'Scannlain similarly refused to "read the principles of defamation law into" Section 230 and dilute its effect since its text "does not mention defamation" and makes no "distinction between primary and secondary publishers."

Section 230 thus broadly immunizes online intermediaries from liability for "making the decision whether to print or retract a given piece of content." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014). By its plain terms, "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions" at issue. *Fyk v. Facebook, Inc.*, 808 F. App'x 597, 598 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1067 (2021). Nor does it matter whether a platform had "actual or constructive knowledge" that a given publication decision involved unlawful content. *Barnes,* 570 F.3d at 1104. "Subsection (c)(1), by itself, shields from liability *all publication decisions*, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." *Id.* at 1105 (emphasis added) (concluding that "the language of the statute" requires this conclusion).[4]

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[4] Although subsection (c)(1) squarely protects the removal as well as the publication of content, subsection (c)(2) "provides an *additional* shield from liability…for 'any action voluntarily

## II. Protections Against Intermediary Liability Align with Protections for Editorial Speech

It is entirely consistent for Section 230 to shield intermediaries from liability for third-party content they publish, as well their decisions to curate that content. Courts and others who have suggested such editorial actions are somehow at odds, *e.g.*, *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 465-70 (5th Cir. 2022), *pet. for cert. docketed*, No. 22-555 (U.S. Dec. 19, 2022), rest their conclusions on a false dichotomy between publishing and distribution.

Many who suggest Section 230 provides more limited immunity begin with the incorrect premise that an intermediary is *either* a "distributor" immune from most intermediary liability because it simply facilitates the dissemination of third-party content *or else* a "publisher" that picks and chooses content though an editorial process that makes it legally responsible for its choices. *Cf. Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC,* 141 S. Ct. 13, 14-16 (2020) (Thomas, J., statement respecting denial of certiorari) (suggesting this framework); *see also Amicus* Br. of Sen. Josh Hawley in Support of Petitioners at 4-13 (same).

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taken in good faith to restrict'" the dissemination of "obscene" or "otherwise objectionable" content. *Id.* (quoting 47 U.S.C. § 230(c)(2)) (emphasis added). This further protection underscores providers' ability to enforce their own rules, reinforcing that decisions *not* to carry content are as protected as decisions to carry or promote content in the first place.

This false dichotomy fails to recognize that intermediaries may both select *and* distribute content, and thus bear characteristics of both editors and distributors—even within the context of a single publication decision. A bookstore is one example. So are newspapers that print letters to the editor. The First Amendment *both* protects their right to select and promote the third-party content they host, *e.g.*, *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and also limits the types of intermediary liability they may face, *Smith*, 361 U.S. at 153-54; *Sullivan,* 376 U.S. at 266, 279.

Likewise with online platforms protected by Section 230. *See, e.g.*, *Barrett v. Rosenthal*, 40 Cal. 4th 33, 49-50 (2006) (concluding "it is far from clear how the distinction between traditional print publishers and distributors would apply in the Internet environment" because anytime "information is copied from another source, its publication might also be described as a 'distribution'") (citing *Reno*, 521 U.S. at 850-53). An online intermediary accordingly does not forfeit its First Amendment rights recognized in *Smith* and reflected in Section 230 whenever it exercises its First Amendment rights recognized in cases like *Tornillo*. The collateral censorship risks recognized by *Smith* and Section 230 exist whether or not an online intermediary actively or less actively edits third-party speech. In fact, the risks are *even more* acute than in print. *See supra*, Part I.A.

Recognizing the resulting need to bolster the protections the First Amendment provides, Congress rejected an "actual knowledge" standard to draft a

statute that immunizes even those publication decisions where an online intermediary is provided "notice" of allegedly unlawful content. *Zeran*, 129 F.3d at 332; *see also supra* Part I.B (discussing *Barnes*, 570 F.3d at 1104-05). The suggestion that online platforms cannot claim Section 230's protections because their exercise of protected editorial discretion "ensures that platforms have actual knowledge of unlawful content" they publish, *Amicus* Br. of Sen. Josh Hawley, *supra*, at 14-15, thus misinterprets what Section 230 protects.

It also misunderstands *how* content curation algorithms work by incorrectly assuming that an online platform's publication and promotion of content evidences knowledge of that content. A social media platform might promote some speech over other speech to different users based on third-party signals—such as the user posting the content, the content's title, or the viewing user's history querying, "liking," or viewing content with similar signals—that do not establish or reasonably imply the platform's knowledge of the speech's content, even if that were the test. *See* Tarleton Gillespie, *Do Not Recommend? Reduction as a Form of Content Moderation*, SOC. MEDIA & SOC'Y (July-Sept. 2022), at 6. Online services commonly use such "[s]ophisticated recommender systems" to "calculate hundreds of these signals, measure each signal against its own specific threshold, weigh them differently, and adjust dynamically depending on the user, region, situation, genre, or moment" without substantively reviewing the nature of each piece of curated content. *Id.*

Section 230's First Amendment-based protection to publish third-party speech is thus entirely consistent with the law's limitation of liability for intermediaries who make recommendations, even under the "actual knowledge" standard suggested by *amici* that Congress declined to adopt.

## III. Eliminating Section 230's Essential Protections for Algorithmic Curation Would Harm Internet Users, And Especially Marginalized Speakers and Audiences Expressing Dissent

The Internet is an indispensable global phenomenon because it enables the publication of third-party speech at scale, empowering individuals to reach broad audiences based on the strength of their ideas more than any other medium. Its potential to provide these "vast democratic forums," *Reno*, 521 U.S. at 868, however, is only realized if the platforms providing them are freed from any obligation or incentive to vet the information individual speakers provide.

Section 230(c)(1) solves that problem by eliminating the threat of insurmountable intermediary liability, liberating online platforms—and particularly small providers with the least ability to afford the risks of intermediary liability[5]—

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[5] Elizabeth Banker, Chamber of Progress, *Understanding Section 230 & the Impact of Litigation on Small Providers* at 4-8, 14-17, 29-51 (April 2022) (reviewing how "activists, professional associations and unions, hobbyists, local newspapers, community blogs, regional ISPs, business review

to publish vast amounts of third-party speech at their discretion. *See* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 433-34 (2009) (attributing "the vibrant culture of freedom of expression we have on the Internet" to this effect of Section 230); *see also* Jeff Koseff, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 1-10 (2019) (same).

This discretionary aspect of publishing is essential because content curation is what makes the Internet medium valuable to the audiences and speakers who rely on it. Eliminating protections that Internet services rely on to curate content would drain the medium of its utility, with particularly dire consequences for marginalized speakers who depend more than most upon the Internet to advocate, organize, find community, and make their voices heard.

### A. Section 230's Protections for Content Curation Are Essential to the Basic Function of the Internet

The choice to read, listen to, or watch content from a given intermediary is a choice based on some expectation as to how that entity curates content for consumption. This is especially true on the Internet, where the volume of information in circulation would be so overwhelming as to become useless were it not for some kind of curative exercise. "[M]oderation,"

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sites, anti-fraud and anti-scam services, and the individuals who create, manage, or own them" rely on Section 230), https://tinyurl.com/2p8jscx9.

consequently, "is the essence of platforms" like Facebook, Twitter, and YouTube, and "the commodity they offer." Tarleton Gillespie, *Moderation Is the Commodity*, TechDirt (Feb. 6, 2018), https://tinyurl.com/u7yhx2t6. "To produce and sustain an appealing platform requires moderation of some form." *Id.*[6]

Online service providers must have a way to organize and filter the speech they publish. And given the volume of information, this process requires automated tools. Online service providers thus employ algorithms to curate content through various methods. *See, e.g.*, Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 31-36 (2021) (reviewing a "taxonomy of remedy options"). Some of these methods involve the removal of content, but others involve reducing the "visibility" of content short of outright removal. *Id.*

Section 230's protections for content promotion and recommendation are essential to this curative process because reducing the visibility of *some* content on a social media platform—which even Petitioners concede is protected by Section 230(c)(1), *see* Pet. Br. at 25—necessarily entails the promotion of *other* content in its stead. There are two reasons for this. *First*, platforms use a single process to promote, demote, or remove content: an algorithm

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[6] As one commentator observed: "Twitter sells content moderation…. Twitter's one and only goal is to put the right message in front of the right person at the right time in the right place." *What Twitter Sells*, SHELLY PALMER (Oct. 30, 2022) https://tinyurl.com/58kmmzm7.

programmed to reflect a platform's editorial preferences will rank a given piece of user-generated content against all other content, then use the relative positions of all ranked user-generated content to make publication decisions. *See* Gillespie, *Do Not Recommend?*, *supra*, at 6 (describing reduction as part of the recommendation process "but flip[ped]"). Only by promoting some content that ranks high can a platform know to remove or demote other content that ranks low. *Second*, the promotion of highly ranked content is also *the mechanism* platforms use to demote low-ranked content, or backfill for its removal. *See, e.g.*, Goldman, *Content Moderation Remedies*, *supra*, at 34-35 (discussing this effect).

Acknowledging that Section 230 protects the removal of content, as Petitioners do, thus requires recognition that Section 230 likewise protects its promotion. Petitioners' proposal to bifurcate Section 230's protections by stripping immunity from platforms that promote content thus makes no sense: on the Internet, publication *is* promotion. *See* Daphne Keller, *Amplification and Its Discontents*, Knight First Am. Inst. at Columbia Univ., at 5 (2021) (observing that "the distinction between 'publishing' and 'amplifying' seem[s] indeterminate or artificial" online), https://tinyurl.com/22cuhbvb. The essential and uncontested salutary benefits provided by Section 230 simply cannot be obtained if the Court adopts the standard Petitioners propose.

### B. Withdrawing Section 230's Protections for Content Curation Would Especially Harm Marginalized Speakers and Audiences

Petitioners' proposed bifurcation would distort the Internet's fundamental design by restoring the threat of inherently acute intermediary liability that stands between the Internet and its potential. *See, e.g.*, Balkin, *Future of Free Expression*, *supra*, at 434; Kosseff, *supra*, at 1-10. "[P]roblematic content producers will overrun any undefended service, flooding it with material that other users don't want." Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 209 (2021). The result would degrade the Internet's utility, limit access to useful and potentially life-saving information, and drown out dissenting and marginalized voices in a sea of spam and misinformation.

Without protections to promote content, platforms would be discouraged from promoting public health and safety information—including information about access to vaccines or gender-affirming healthcare—for fear that doing so could expose them to liability. *Cf.*, *e.g., Atkinson v. Meta Platforms, Inc.*, 2021 WL 5447022, at *1 (9th Cir. Nov. 22, 2021) (Section 230(c)(1) protected Meta's right to demote *inter alia* vaccine misinformation and promote COVID-19 public health information instead); *Daniels v. Alphabet Inc.*, 2021 WL 1222166, at *12 (N.D. Cal. Mar. 31, 2021) (recognizing

YouTube's same right). So, too, with content recommendations promoting treatment to veterans suffering from PTSD, or other users who may be engaging in substance abuse, disordered eating, or self-harm. *See, e.g.*, Facebook Safety, *Suicide Prevention* (explaining how Facebook currently "us[es] machine learning" and "pattern-recognition signals" to "identify possible suicide or self-injury content" and recommend "help to people in need"), https://tinyurl.com/4cwn8m8y.

Platforms would also become more likely to foreclose discussions of controversial subject matter, including advocacy for rights and opportunities currently forbidden by law. Information about reproductive health services, for instance, would become less available. *See* Letter from Chamber of Progress to Merrick B. Garland, U.S. Att'y Gen. at 2 (Nov. 21, 2022), https://tinyurl.com/yc3dzmd4; *see also supra* note 1 (cataloging how this chilling effect has begun to emerge *even with* Section 230's protections). This is especially true because some states have threatened to enforce "aiding and abetting" laws against speech that generally promotes abortion. *See, e.g.*, Maggie Q. Thompson, *The "Aid and Abet" Abortion Era Begins*, AUSTIN CHRONICLE (Dec. 16, 2022) (explaining how threats to enforce Tex. Health & Safety Code § 171.208 has forced speakers to "tiptoe around even providing information on abortion access, lest they be prosecuted for 'aiding and abetting' a procedure"), https://tinyurl.com/bdzauz75.

This is no idle speculation. Even when Section 230's protections were selectively withdrawn only as

to just *some* kinds of disfavored speech involving sex work, online platforms reacted by shuttering "entire sections of their websites" relied on by sex workers and those who advocated for their "health, safety, and human rights" in order to "avoid liability" for hosting their proscribed speech. *Woodhull*, 948 F.3d at 368-69 (discussing FOSTA's amendments to Section 230). It made no difference that government enforcers claimed the withdrawal of immunity only permitted state prosecution and civil actions against integral criminal acts. Believing that they could become liable for publishing and thus promoting unlawful conduct, platforms like Reddit made the difficult but understandable decision to collaterally censor rather than risk exposure to crushing penalties. *Id.* Withdrawing Section 230's protections for algorithmic content curation *altogether* would have comparably nuclear effects for a wide range of disfavored speech and speakers threatened by a patchwork of proscriptive state laws.

Platforms would also be discouraged from downranking or hiding hate speech they do not condone, such as speech that attacks LGBTQ+ people or invalidates their identities. YouTube, for instance, has repeatedly relied on algorithmic ranking to deprioritize and even remove videos by PragerU that present discriminatory anti-LGBTQ+ rhetoric contrary to YouTube's values. *See* Brianna January, *YouTube Removed Anti-Trans PragerU Videos for Violating Hate Speech Policies*, Media Matters for America (Nov. 23, 2020), https://tinyurl.com/mrzjmdfe. Section 230 provides a summary procedure to protect this kind of algorithmic content curation from harassing

litigation designed to deter it. *See, e.g.*, *Prager Univ. v. Google LLC*, 85 Cal. App. 5th 1022, 301 Cal. Rptr. 3d 836, 848 (2022) (dismissing claims challenging YouTube's removal of PragerU content because YouTube's "algorithmic restriction of user content" fell "squarely within the letter and spirit" of Section 230's protections).

Deterring content curation through the greater threat of liability would likewise amplify the volume and risks posed by misinformation, including strategic misinformation deployed by foreign powers seeking to sow discord in the United States. *See* Jack Nassetta & Kimberly Gross, *State Media Warning Labels Can Counteract the Effects of Foreign Misinformation*, Harvard Kennedy School Misinformation Review (Oct. 30, 2020) (reporting results of peer-reviewed study showing that content moderation can mitigate the effects of misinformation). Rather than invite protracted litigation over a decision to promote some political statements over others, platforms would simply not curate political statements at all.

Without protection for their core curation services, research even indicates that some smaller platforms will cease to be economically viable. *See* Goldman & Miers, *supra*, at 209-10. Because advertisers do not want their advertising to appear alongside spam or other undesired content, and because users would withdraw from online services littered with such content, advertising dollars would dry up. Nor, for the same reason, could an online service expect to attract a paid subscriber base to replace lost advertising. *Id.* The victims, again, will

be speakers who depend on these smaller forums, and disproportionately likely to come from "marginalized communities." *Section 230 as First Amendment Rule*, *supra*, at 2046-47.

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Section 230's protections provide essential scaffolding integral to the modern Internet. Eliminating those protections as they relate to the promotion or recommendation of content would functionally eliminate all of Section 230's protections, deprive Internet users of the value social media provides, and disproportionately harm speakers on society's margins.

## CONCLUSION

The Court should affirm the decision below to preserve the "vast realms of human thought and knowledge" the Internet provides, *Packingham v. N. Carolina*, 137 S. Ct. 1730, 1737 (2017), from the risks that greater collateral censorship would entail.

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