No. 21-1333

IN THE

Supreme Court of the United States

REYNALDO GONZALEZ ET AL.,
Petitioners,

v.

GOOGLE LLC,
Respondent.

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

BRIEF OF SENATOR RON WYDEN AND FORMER REPRESENTATIVE CHRISTOPHER COX AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. CONGRESS ENACTED SECTION 230 TO PROTECT INTERNET PLATFORMS' ABILITY AND INCENTIVE TO ENGAGE IN CONTENT MODERATION AND CURATION. 6

II. SECTION 230 CONFERS IMMUNITY THAT IS LIMITED TO SUITS PREMISED ON AN ONLINE PLATFORM'S PUBLICATION OF THIRD-PARTY CONTENT. 14

A. To be entitled to immunity, a provider of an interactive computer service must not have contributed to the creation or development of the content at issue. 15

B. A provider of an interactive computer service is immune only if the claim treats the provider as the publisher or speaker of the content. 18

III. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS' CONCLUSION THAT GOOGLE IS IMMUNE FROM PETITIONERS' CLAIMS BASED ON TARGETED RECOMMENDATIONS. 22

CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Cubby, Inc. v. *CompuServe, Inc.*,
776 F. Supp. 135 (S.D.N.Y. 1991) 7

Dowbenko v. *Google Inc.*,
582 F. App'x 801 (11th Cir. 2014) 23

Fair Hous. Council of San Fernando Valley v. *Roommates.com, LLC*,
521 F.3d 1157 (9th Cir. 2008) (en banc) 17

Force v. *Facebook, Inc.*,
934 F.3d 53 (2d Cir. 2019) 25

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570 F.3d 1187 (10th Cir. 2009) 16

FTC v. *LeadClick Media, LLC*,
838 F.3d 158 (2d Cir. 2016) 17, 18

Goddard v. *Google, Inc.*,
640 F. Supp. 2d 1193 (N.D. Cal. 2009) 17

Henderson v. *The Source for Pub. Data, L.P.*,
53 F.4th 110 (4th Cir. 2022) 19

HomeAway.com, Inc. v. *City of Santa Monica*,
918 F.3d 676 (9th Cir. 2019) 19, 20

TABLE OF AUTHORITIES
(continued)

Page(s)

Klayman v. *Zuckerberg*,
753 F.3d 1354 (D.C. Cir. 2014) 18

Lemmon v. *Snap Inc.*,
995 F.3d 1085 (9th Cir. 2021) 19

Marshall's Locksmith Serv., Inc. v.
Google, LLC,
925 F.3d 1263 (D.C. Cir. 2019) 17, 21

STATE CASES

Bolger v. *Amazon.com, LLC*,
267 Cal. Rptr. 3d 601 (Ct. App. 2020).................. 19

Stratton Oakmont, Inc. v. *Prodigy Servs.*
Co.,
No. 31063/94, 1995 WL 323710 (N.Y.
Sup. Ct. May 24, 1995)........................... 2, 6, 7, 8, 9

FEDERAL STATUTES

47 U.S.C. § 230.. 1

47 U.S.C. § 230(b)(1)-(4) 26

47 U.S.C. § 230(b)(3)-(4) 11

47 U.S.C. § 230(c)(1) ... 2-4, 10-11, 13-15, 18, 20, 25-26

47 U.S.C. § 230(e) 20, 21

47 U.S.C. § 230(e)(3) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

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47 U.S.C. § 230(f)(3) 3, 5, 14-15, 22-24

47 U.S.C. § 230(f)(4) 11, 13

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H.R. Rep. No. 104-458 (1996) 6, 21

TREATISES

Restatement (Second) of Torts § 558 20

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INTEREST OF AMICI CURIAE[1]

Amici Christopher Cox (R-CA) and Ron Wyden (D-OR), at the time both U.S. Representatives, co-authored Section 230 of the Communications Decency Act, 47 U.S.C. § 230, in 1995. The following year, Representatives Cox and Wyden shepherded Section 230 through near-unanimous passage in the House of Representatives (420-4). See Christopher Cox, *Section 230: A Retrospective*, 30 Cath. U. J.L. & Tech. (forthcoming 2023) (manuscript at 8-9) (on file with authors) [hereinafter Cox, *Section 230: A Retrospective*], *available at* Christopher Cox, *Section 230: A Retrospective* (The Ctr. for Growth & Opportunity Working Paper).[2] Since then, amici have closely followed judicial decisions interpreting and applying Section 230, and they have publicly commented on their view of the provision's proper interpretation. Amici are therefore well-placed to explain the plain meaning of Section 230, the history that led to its enactment, and the policy balance that Section 230 reflects.

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[1] Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief. The brief does not represent the views of Yale Law School or Yale University, if any.

[2] https://www.thecgo.org/wp-content/uploads/2022/11/Section-230-Retrospective-Cox.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted Section 230 of the Communications Decency Act in order to protect Internet platforms' ability to publish and present user-generated content in real time, and to encourage them to screen and remove illegal or offensive content. Section 230 was in part a direct response to the New York Supreme Court's decision in *Stratton Oakmont, Inc.* v. *Prodigy Services Co.*, No. 31063/94, 1995 WL 323710, at *4-5 (N.Y. Sup. Ct. May 24, 1995), which held that early Internet message-board platform Prodigy could be liable for publishing harmful user-generated content because it had tried but failed to screen all harmful content from its site. In order to ensure that Internet platforms would not be penalized for attempting to engage in content moderation, Congress enacted Section 230, which provides in relevant part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Congress drafted Section 230 in light of its understanding of the capabilities of then-extant online platforms and the evident trajectory of Internet development. Even at the time, Internet platforms made numerous decisions about how to present, arrange, and screen content. For example, Prodigy enabled users to post messages on various message boards, and it necessarily decided how to arrange and present voluminous amounts of user content in a useful and digestible form. Congress sought to protect platforms from liability for those content moderation and curation activities.

At the same time, Congress drafted Section 230 in a technology-neutral manner that would enable the provision to apply to subsequently developed methods of presenting and moderating user-generated content. The targeted recommendations at issue in this case are an example of a more contemporary method of content presentation. Those recommendations, according to the parties, involve the display of certain videos based on the output of an algorithm designed and trained to analyze data about users and present content that may be of interest to them. Recommending systems that rely on such algorithms are the direct descendants of the early content curation efforts that Congress had in mind when enacting Section 230.[3] And because Section 230 is agnostic as to the underlying technology used by the online platform, a platform is eligible for immunity under Section 230 for its targeted recommendations to the same extent as any other content presentation or moderation activities.

Whether an interactive computer service like YouTube enjoys immunity under Section 230 turns on two prerequisites that work together to meaningfully limit the situations in which platforms may be immune from suit. An interactive computer service is immune only if (1) it is not "responsible, in whole or in part, for the creation or development of" the content at issue, 47 U.S.C. § 230(f)(3), and (2) the claim seeks to

[3] The discussion in this brief pertains only to the algorithmic recommendation systems at issue in this case. Some algorithmic recommending systems are alleged to be designed and trained to use information that is different in kind than the information at issue in this case, to generate recommendations that are different in kind than those at issue in this case, and/or to cause harms not at issue in this case. Amici do not express a view as to the existence of CDA immunity in a suit based on the use of algorithms that may operate differently from those at issue here.

"treat[]" the platform "as the publisher or speaker" of that content, *id.* § 230(c)(1). Under the ordinary meaning of those terms, a platform thus is entitled to immunity with respect to a claim only if it is not complicit in the creation or development of the allegedly harmful content the claim puts in issue, and only if the claim would impose liability on the platform for communicating the content to others. But a platform does not enjoy immunity when it has, for instance, solicited or encouraged the creation of illegal content, or when the suit is based on conduct other than publishing third-party content, such as completing particular transactions or participating in the supply chain.

Under that ordinary-meaning interpretation of Section 230, Google is entitled to immunity from petitioner's claims. At the outset, it is important to keep in mind that, because Section 230 immunity turns solely on the third-party provenance of the content at issue and the legal theory asserted by the lawsuit, a finding of immunity does not condone the content at issue here or minimize the grave harm that petitioners suffered. Indeed, YouTube's terms of service affirmatively prohibit material intended to promote terrorist organizations. Pet. App. 39a ("The Gonzalez Plaintiffs concede Google's policies expressly prohibited the content at issue."). The record establishes that YouTube employs both automated and manual tools to enforce those terms. Br. in Opp. 5. Despite those good-faith efforts, the videos were nonetheless recommended and displayed through YouTube's site, and petitioners seek to hold Google liable for harms allegedly caused by their being present on the site.

Petitioners' suit satisfies both conditions for Section 230 immunity. Petitioners contend that YouTube

"assists ISIS in spreading its message" by allowing users to see ISIS videos posted by users, and by automatically presenting on-screen videos that are similar to those that the user has previously watched. J.A. 169-173. Petitioners thus seek to hold Google liable for the harms caused by ISIS's videos, on the ground that YouTube has disseminated that content and, through its recommendation algorithms, made it easier for users to find and consume that content. Petitioners' claims therefore treat YouTube as the publisher of content that it is not responsible for creating or developing. The fact that YouTube uses targeted recommendations to present content does not change that conclusion; those recommendations display already-finalized content in response to user inputs and curate YouTube's voluminous content in much the same way as the early methods used by 1990s-era platforms. The principal differences, of course, are the size of the data set the modern system must curate and the speed at which it does so.

Contrary to the government's argument, U.S. Br. 26-28, Section 230 does not permit the Court to treat YouTube's recommendation of a video as a distinct piece of information that YouTube is "responsible" for "creat[ing]," 47 U.S.C. § 230(f)(3). Although amici agree with the government that platforms' recommending systems could cause harms that become the subject of claims for which there might be no Section 230 immunity, that is the extent of their agreement. The government's attempt to define the category of non-immune, recommendation-based claims by positing that a recommendation constitutes a new piece of "information" ineligible for immunity finds no support in the statute and would preclude even the *possibility* of immunity for recommendation-based claims. Moreover, the government's reasoning—that presenting a

video to a YouTube user amounts to an implicit statement by YouTube—would apply equally to *all* content presentation decisions, not just recommendations. For instance, whenever a platform's content moderation is less than perfect, the platform could be said to send an implicit message that users would like to see the harmful content remaining on the site. If that were sufficient to deny immunity, platforms would be subject to liability for their decisions to present or not to present particular third-party content—the very actions that Congress intended to insulate from liability. The Court should affirm.

ARGUMENT

I. CONGRESS ENACTED SECTION 230 TO PROTECT INTERNET PLATFORMS' ABILITY AND INCENTIVE TO ENGAGE IN CONTENT MODERATION AND CURATION.

A. Congress enacted Section 230 in response to the New York Supreme Court's decision in *Stratton Oakmont, Inc.* v. *Prodigy Services Company*. See H.R. Rep. No. 104-458 (1996) (Conf. Rep.); see also *Stratton Oakmont*, 1995 WL 323710, at *3. There, the New York Supreme Court held that the online platform Prodigy could be held liable for defamation based on an anonymous user's posting of defamatory statements on one of Prodigy's online bulletin boards. *Stratton Oakmont*, 1995 WL 323710, at *4. The court reasoned that Prodigy should be subject to liability because it had made a "conscious choice" to exercise editorial control over the user-generated content posted on its site by removing or editing some offensive content. *Id*. at *3-5. Because Prodigy removed *some* content, the site could be held responsible for its failure to remove *all* problematic content, including the defamatory statement,

from its site. *Id.* at *5. In so holding, the court distinguished an earlier decision that had refused to impose defamation liability on another message board website, CompuServe, on the ground that CompuServe had *not* attempted to moderate the content on its site. See *Cubby, Inc.* v. *CompuServe, Inc.*, 776 F. Supp. 135, 137 (S.D.N.Y. 1991); see Cox, *Section 230: A Retrospective*, *supra* (manuscript at 7). The *Stratton Oakmont* decision thus penalized an Internet platform for engaging in less-than-perfect content moderation—that is, for failing in its attempt to remove every piece of potentially unlawful content from its site. See Cox, *Section 230: A Retrospective*, *supra* (manuscript at 7).

Congress understood that decisions like *Stratton Oakmont*—and the differing treatment of CompuServe and Prodigy—would create "powerful and perverse incentive[s] for platforms to abandon any attempt to maintain civility on their sites." *Id.*; see also Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Richmond J.L. & Tech. Blog (Aug. 27, 2020)[4] (noting that amicus Rep. Cox was "a user of both services" when *Stratton Oakmont* was decided). To impose liability on an Internet service because it had made decisions concerning which content to present and which to remove, even if those decisions were imperfect, was, in the words of Representative Cox, "backward." 141 Cong. Rec. 22,045 (1995) (statement of Rep. Christopher Cox). Congress therefore sought to encourage Internet service providers to engage in content moderation, recognizing that there was "no way" that Internet services would be able to perfectly screen all "information that is going to be coming in to them from all manner

[4] https://jolt.richmond.edu/2020/08/27/the-origins-and-original-intent-of-section-230-of-the-communications-decency-act.

of sources." 141 Cong. Rec. 22,046 (1995) (statement of Rep. Goodlatte).

B. In drafting Section 230, Congress took into account the ways in which Internet platforms of the time presented, moderated, and curated content in order to make their websites useful to, and safe for, users. Particularly relevant here, many of the major Internet platforms engaged in content curation that was a precursor to the targeted recommendations that today are employed by YouTube and other contemporary platforms.

Prodigy, the website at issue in the *Stratton Oakmont* decision, provides a salient example of early content moderation and curation. Prodigy often categorized its message boards by topic, allowing a user to choose to read a message board dedicated to a subject of interest. See Iris Ferosie, Comment, *Don't Shoot the Messenger: Protecting Free Speech on Editorially Controlled Bulletin Board Services by Applying* Sullivan *Malice*, 14 J. Marshall J. Computer & Info. L. 347, 362, 368 & n.148 (1996). For example, Prodigy's "Money Talk" board, which presented the alleged defamatory content in *Stratton Oakmont*, was the "most widely read financial computer bulletin board in the United States" in 1995, and members posted statements on it regarding "stocks, investments and other financial matters." *Stratton Oakmont*, 1995 WL 323710, at *1. Beyond organizing its content by subject, Prodigy "employ[ed] a stringent editorial policy" that relied on "editors" to screen potential messages by making "subjective determinations" as to whether and to what extent particular messages would be posted. Ferosie, *supra*, at 363-365 & n.131. In addition, Prodigy used prescreening technology to automatically review all potential message board posts for offensive language,

similar to the systems in place today. See *Stratton Oakmont*, 1995 WL 323710, at *2. In short, Prodigy provided curated, topic-specific boards where users could post and read messages, and it held itself out as exercising editorial control over those messages and when, how and where they appeared on its platform. See *id.* at *1-2.

Other Internet platforms similarly exercised discretion concerning whether and how they presented user-generated content, and some also attempted to tailor displayed content to particular users. For instance, early search engine Lycos experimented with various ranking systems for organizing search results, presenting users with curated results and relevant information depending on the query. See Danny Sullivan, *Lycos Adds New Features, Reorganizes Suggested Links*, Search Engine Watch (Dec. 3, 1997).[5] Other platforms, including Amazon, created recommendation systems for their wares, helping customers find precisely what they needed based on their past purchases. See Hannah Aster, *Amazon's Growth: Timeline of Events from 1996–1999*, ShortForm (May 31, 2021).[6] And still others, such as WebConnect and DoubleClick, deployed user-targeted advertisements, allowing businesses to home in on potential customers. See *Origins and Pioneers of AdTech: 1990s-2010*, TheViewPoint (Apr. 6, 2022).[7]

The wide variety of content presentation and moderation technologies in use and development at the

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[5] https://www.searchenginewatch.com/1997/12/03/lycos-adds-new-features-reorganizes-suggested-links.

[6] https://www.shortform.com/blog/amazon-growth.

[7] https://theviewpoint.com/insights/blog/origins-and-pioneers-of-adtech-1990s-2010.

time informed Congress's consideration of Section 230. See Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Richmond J.L. & Tech. Blog (Aug. 27, 2020) (noting that in 1996, "Prodigy, America Online, and the fledgling Microsoft Network included features we know today as content delivery," and Congress sought to protect and encourage those features). Congress sought in Section 230 to afford platforms leeway to engage in the moderation and curation activities that were prevalent at the time, and to encourage the development of new technologies for content moderation by both platforms and users. Congress was well aware that, in view of the then-exponential growth in Internet usage, the challenge of moderating user-generated content was only going to increase. Platforms would need to experiment with new technologies that would be capable of screening and organizing increasingly voluminous amounts of real-time third-party content. See Cox, *Section 230: A Retrospective*, *supra* (manuscript at 10) ("This focus of Section 230 proceeded directly from our appreciation of what was at stake for the future of the internet.").

Congress therefore sought to encourage that evolution by enacting a technology-agnostic immunity provision that would protect Internet platforms from liability for failing to perfectly screen unlawful content. Section 230 furthers that purpose through immunity and preemption provisions. Section 230(c)(1), the immunity provision, states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). An interactive computer service's immunity under Section 230(c)(1) turns on whether (1) the content that is the subject of the lawsuit is "provided

by another," rather than the platform itself; and (2) the plaintiff's claim seeks to "treat[]" the platform "as the publisher or speaker" of the content in question. 47 U.S.C. § 230(c)(1). The provision does not distinguish among technological methods that providers use to moderate and present content, thereby allowing for innovation and evolution over time. Indeed, Congress declared that Section 230 is intended to "encourage the development of technologies which maximize user control over what information is received," and to "remove disincentives for the development and utilization of blocking and filtering technologies." 47 U.S.C. § 230(b)(3)-(4). And it broadly defined the "interactive computer service[s]" eligible for immunity, to include platforms that provide "software" or "tools" that "filter," "choose," and "display" content, among other things. 47 U.S.C. § 230(f)(2), (4).

Section 230 also protects platforms' leeway to use and develop new forms of content presentation and moderation by ensuring that they are not subject to varying state-law rules requiring or encouraging them to remove or retain content or to display it in certain ways. Section 230 preempts any inconsistent state laws while allowing consistent state laws to remain. 47 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

C. In the decades since Section 230's enactment, methods of content presentation and moderation have indeed advanced. That is in no small part because the immunity provided by Section 230 has enabled platforms to experiment with new ways to present content

and to enable users to choose what content they see. See Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepp. L. Rev. 427, 434 (2009) ("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.").

Targeted recommendations are one such innovation in content presentation. A platform that offers targeted recommendations like those at issue in this case displays particular content to users by using algorithms that are designed to analyze user data and predict what the user might want to see. Targeted recommendations are now ubiquitous across the Internet and exist in fields from social media to commerce. For instance, video discovery platforms like YouTube and Vimeo present particular videos to a user based on the videos that the user has previously watched and other data. Pet. App. 7a; Chris Meserole, *How Do Recommender Systems Work on Digital Platforms?*, Brookings (Sept. 21, 2022).[8] Similarly, e-commerce platforms such as Amazon and Etsy recommend products to users based on their preferences. A host of online advertisers rely on targeted recommendations to reach consumers efficiently. E.g., Etsy, *How Etsy Search Works*[9]; Google, *Types of Recommendations*.[10]

Targeted recommendations are a direct descendant of the curation and presentation methods that were

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[8] https://www.brookings.edu/techstream/how-do-recommender-systems-work-on-digital-platforms-social-media-recommendation-algorithms/.

[9] https://help.etsy.com/hc/en-us/articles/115015745428-How-Etsy-Search-Works?segment=selling.

[10] https://support.google.com/google-ads/answer/3416396?hl=en.

extant when Section 230 was enacted, even if the technology used to decide which recommendations to make has advanced significantly. Where earlier Internet platforms catered to user tastes by, for instance, arranging content by subject or by manually deciding what content to prioritize, the sheer volume of user-generated content on today's platforms makes those methods impracticable. See Cox, *Section 230: A Retrospective*, *supra* (manuscript at 10) ("Not only have billions of internet users become content creators, but equally they have become reliant upon content created by other users."). Without more targeted content recommendations, users would have no efficient way of navigating among innumerable pieces of information to find the content in which they are most interested.

Because Section 230(c)(1)'s immunity provision does not turn on the particular methods of content presentation used by an Internet platform, immunity is available, or not, on the same terms for all methods of content presentation. Indeed, Section 230(f)(2) expressly references platforms that use targeted recommendations in its definition of an "interactive computer service" eligible for liability protection under Section 230(c)(1). An "interactive computer service" includes an "access software provider," defined to include a provider of "software" or "enabling tools" that "filter, screen, allow, or disallow content," "pick, choose, analyze, or digest content," or "transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content." 47 U.S.C. § 230(f)(2), (4). Interactive computer services that engage in targeted recommendations are doing just that—analyzing, picking, and screening content for display to users. They are therefore plainly eligible for immunity if they meet the other prerequisites set forth in Section 230.

II. SECTION 230 CONFERS IMMUNITY THAT IS LIMITED TO SUITS PREMISED ON AN ONLINE PLATFORM'S PUBLICATION OF THIRD-PARTY CONTENT.

In Section 230, Congress sought to protect online platforms for their content moderation and presentation efforts. At the same time, that protection has meaningful limits: Congress did not intend to insulate Internet platforms from liability for claims that are based on a platform's *own* unlawful content, or that are based on its actions that go beyond publishing third-party content and do not depend on the publishing of any such content.

Section 230(c)(1)'s text reflects those principles. Under that provision, a provider of an interactive computer service such as YouTube is immune from suit (1) when the content at issue is "provided by another information content provider" (that is, when the platform is not "responsible, in whole or in part, for the creation or development of" the allegedly illegal content), 47 U.S.C. § 230(c)(1), (f)(3); and (2) when the claim seeks to "treat[]" the provider of an interactive computer service as "the publisher or speaker" of that content, 47 U.S.C. § 230(c)(1). Both requirements must be satisfied for the platform to be entitled to Section 230 immunity. Construing these requirements according to their plain meaning ensures that Internet platforms have adequate leeway to experiment with moderating and presenting content provided by others, while also appropriately limiting immunity to those suits that seek to impose liability on platforms for publicly communicating content provided by others.

A. To be entitled to immunity, a provider of an interactive computer service must not have contributed to the creation or development of the content at issue.

Section 230's first significant limitation on immunity is that a platform is immune only with respect to information "provided by another information content provider." 47 U.S.C. § 230(c)(1). An "information content provider" is defined as any entity "that is responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). To be entitled to the immunity provided in Section 230(c)(1), then, the platform must not be wholly or partially "responsible" for the "creation or development" of the information in question.

A platform "creates" information when it brings that information into existence. See, *e.g.*, *Create*, Merriam-Webster's Collegiate Dictionary 293 (11th ed. 2003) (defining "create" as "to bring into existence"); *Create*, The Oxford English Dictionary Online.[11] And a platform "develops" information by transforming it into a new state, that is, by altering or transforming its substance. See, *e.g.*, *Develop*, Merriam-Webster's Collegiate Dictionary 341 (11th ed. 2003) (defining "develop" as "to expand by a process of growth"); *Develop*, The Oxford English Dictionary Online (defining "develop" as "[t]o bring (something) to a fuller or more advanced state; to improve, extend").[12] Two aspects of the statutory context confirm that conclusion. First, the object of the preposition following "development" is "information" ("development *of information*"). That

[11] https://www.oed.com/view/Entry/44061.

[12] https://www.oed.com/view/Entry/51427.

is the same "information" that is covered by the protection from liability in subsection (c)(1). "Development" therefore refers to transforming the information *itself* into a more advanced state. Second, "development" and "creation" both clearly connote actions that affect the information's substance.

In addition, to be entitled to Section 230's protections, the platform cannot be wholly or partially "responsible" for the creation or development of the information in question. The term "responsible" implies that, as a factual matter, the platform is a cause of the creation or development of the information. See, *e.g.*, *Responsible*, Merriam-Webster's Collegiate Dictionary 1062 (11th ed. 2003) (defining "responsible" as "liable to be called to account as the primary cause, motive, or agent" or "being the cause or explanation"); *Responsible*, Black's Law Dictionary (11th ed. 2019). In the context of Section 230, the term also implies *legal* responsibility, that is, complicity or culpability. See, *e.g.*, *Responsible*, The Oxford English Dictionary 742 (2d ed. 1989) (defining "responsible" as "[m]orally accountable for one's actions"). That connotation arises from the fact that the "information" for which the platform is "responsible" is information that gives rise to potential liability. Thus, to be "responsible" for the creation or development of the information is to contribute to the development of aspects of the information that allegedly caused injury. See *FTC* v. *Accusearch, Inc.*, 570 F.3d 1187, 1198-1199 (10th Cir. 2009) (stating that "[i]n this context—responsibility for harm—the word responsible ordinarily has a normative connotation," and stating that a platform becomes "responsible" for developing information by "specifically encourag[ing] development of what is offensive about the content").

The plain meaning of "creation or development" supports Congress's objective of clearly allocating liability in a way that promotes innovation in content moderation. A platform is not "responsible" for "develop[ing]" particular information when it merely provides a generally available "means by which third parties can post information of their own independent choosing online." *Marshall's Locksmith Serv., Inc.* v. *Google, LLC*, 925 F.3d 1263, 1270-1271 (D.C. Cir. 2019). Such a broad understanding would "defeat the purposes of Section 230 by swallowing up every bit of the immunity that the section otherwise provides." *Fair Hous. Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157, 1167 (9th Cir. 2008) (en banc). But where a platform has actually contributed to the creation or development of illegal content, even in part, the platform will not be immune. Actions such as designing a tool that specifically induces the creation of illegal user-generated content, or "requir[ing] users to input illegal content," would render a platform "responsible" for developing the illegal content. See *id.* at 1169; *Goddard* v. *Google, Inc.*, 640 F. Supp. 2d 1193, 1197-1198 (N.D. Cal. 2009); *FTC* v. *LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016). This ensures that Section 230 immunity does not enable platforms to contribute to illegal content with impunity.

B. A provider of an interactive computer service is immune only if the claim treats the provider as the publisher or speaker of the content.

1. Section 230's second prerequisite for immunity turns on the nature of the plaintiff's claim: "no provider * * * of an interactive computer service shall be treated as the publisher or speaker of" a third party's information. 47 U.S.C. § 230(c)(1). A provider is thus immune from claims that seek to hold it liable for communicating or making public the allegedly unlawful third-party content—but not from claims based on other acts.

That conclusion follows from Section 230's plain text. A "speaker" is someone who speaks, and a "publisher" is someone who makes public or otherwise communicates content, *Publisher*, Webster's Third New International Dictionary 1837 (1981), *quoted in Klayman* v. *Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); see also *Publisher*, Webster's Third New International Dictionary 1837 (Philip Babcock Gove ed., 1986). Moreover, by providing that the claim must treat the platform as "*the* publisher or speaker *of*" third-party content, 47 U.S.C. § 230(c)(1) (emphases added), Section 230 makes clear that the relevant question is whether the claim treats the platform as the publisher or speaker *of the third-party content at issue*—not whether the platform is behaving as a publisher in the abstract, see *LeadClick Media*, 838 F.3d at 175. Finally, the requirement that the claim "treat[]" the platform as the publisher or speaker of the third-party content is best understood to ask whether the claim purports to use the platform's publication of the information as the basis for holding the platform liable for harms caused by that information.

See *Henderson* v. *The Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022) ("[T]o hold someone liable as a publisher at common law was to hold them responsible for the content's improper character.").

To determine whether a claim treats a provider as a publisher or speaker of third-party information, then, a court need only ask whether the plaintiff's cause of action seeks to hold the platform liable for communicating or otherwise making public the third-party content. If so, Section 230 provides immunity from the action. But if the platform would be liable regardless of the publication of the third-party content, or if a claim concerns the platform's non-publishing actions, then Section 230's immunity does not apply.

Courts have applied this basic principle to effectively distinguish between liability based on publication and liability based on other activities. See, *e.g.*, *HomeAway.com, Inc.* v. *City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (ordinance prohibiting platforms from completing transactions for certain short-term rentals did not treat platforms as publishers because the ordinance did not impose liability for making rental listings public); *Lemmon* v. *Snap Inc.*, 995 F.3d 1085, 1093-1094 (9th Cir. 2021) (holding that Section 230 did not apply because claim as alleged "present[ed] a clear example of a claim that simply does not rest on third-party content," did "not fault Snap in the least for publishing" any particular content, and did "not depend on what messages" were sent on the platform, and instead was based on a specific feature allegedly encouraging dangerous behavior without any connection to published content); *Bolger* v. *Amazon.com, LLC*, 267 Cal. Rptr. 3d 601, 627 (Ct. App. 2020) (Amazon not immune from products liability

claims arising from defective batteries that a third-party seller sold on Amazon's marketplace because the claims "d[id] not depend on the content of" the product listing, but rather on "Amazon's role in the chain of production and distribution of an allegedly defective product").[13]

2. Section 230's text and structure make clear that the immunity conferred extends beyond common-law claims for defamation like the one at issue in *Stratton Oakmont*. The statute on its face applies equally to any cause of action not specifically exempted from Section 230's reach in Section 230(e) (e.g., federal criminal laws, intellectual property laws, communications privacy laws). 47 U.S.C. § 230(e). Although the term "publisher" has sometimes been used by courts as a term of art in defamation cases, here the term has its ordinary meaning—i.e., one who makes information public. That conclusion follows from the fact that the term "speaker," which appears together with "publisher" in Section 230(c)(1), is not a term of art in common-law defamation. See Restatement (Second) of Torts § 558 (a defamation claim requires the "publication" of a defamatory statement "to a third party"; there is no separate concept of "speaking" a defamatory statement).

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[13] In other words, Section 230 immunity does not apply simply because "information provided by another" provides one link in a causal chain leading to a provider's liability. In *HomeAway*, third-party rental listings were a but-for cause of incoming requests to complete booking transactions. But because the ordinance in question imposed liability on the platforms for completing illegal booking transactions rather than for publishing the third-party rental listings, Section 230 did not preempt the ordinance. See, *e.g.*, *HomeAway.com*, 918 F.3d at 682.

Moreover, had Congress intended to limit immunity to defamation claims, it could have said so explicitly. But it did not. Indeed, it would hardly have made sense for Congress to limit immunity to defamation claims, as the objectives stated in the statutory preamble would be undermined if all claims other than defamation could be used to hold platforms liable for illegal content produced by others. Moreover, Section 230(e), which clarifies the specific causes of action to which Section 230 does not extend, would have been unnecessary if the statute provided immunity only against defamation claims. 47 U.S.C. § 230(e).

Finally, the concerns that Congress sought to address in enacting Section 230 confirm that its focus was broader than the specific defamation claims at issue in *Stratton Oakmont*. The House Report emphasized that Congress sought broadly to provide "'Good Samaritan' protections from civil liability" generally, not just liability for defamation. And it was meant to overrule not just *Stratton Oakmont*, but also "any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own." See H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.); *Marshall's Locksmith*, 925 F.3d at 1267 ("Congress[] inten[ded] to confer broad immunity for the re-publication of third-party content.").

* * *

Section 230 provides immunity from claims premised on a platform's publication of allegedly harmful content that has been created and developed wholly by third parties. Although that immunity extends well beyond defamation claims, Section 230 does not offer blanket protection to all online platforms against any

claim, or broadly immunize platforms simply because they could be considered "publisher[s]" in the abstract.

III. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS' CONCLUSION THAT GOOGLE IS IMMUNE FROM PETITIONERS' CLAIMS BASED ON TARGETED RECOMMENDATIONS.

Google is entitled to Section 230's protection from liability in this case. Petitioners contend that YouTube "assists ISIS in spreading its message" by allowing users to see videos that users have posted and by automatically presenting on-screen videos that are similar to those that the user has previously watched. J.A. 169-173. Petitioners thus seek to hold Google liable for the harms caused by ISIS's videos, on the ground that YouTube has presented that content to the public, i.e., it has disseminated that content and, through its recommendation algorithms, made it easier for users to find and consume that content. Petitioners' claims therefore treat YouTube as the publisher of content that it is not responsible for creating or developing.

First, Google is not "responsible, in whole or in part, for the creation or development of the content." 47 U.S.C. § 230(f)(3). Google did not have any hand in "creat[ing]" the ISIS videos, nor did it "develop[]" that content by altering it or transforming it in any way. The allegations in the complaint, moreover, establish that Google did not require, or even encourage, the illegal content in a way that would render it "responsible" for developing that content. See p. 4, *supra*. Indeed, petitioners conceded that "Google's policies expressly prohibited the content at issue," Pet. App. 38a-39a, and they do not allege that "Google specifically

targeted ISIS content, or designed its website to encourage videos that further the terrorist group's mission," Pet. App. 38a.

Petitioners allege that "YouTube * * * recommend[s] ISIS videos to users 'based upon the content and what is known about the viewer.'" Pet. App. 175a. Yet the record establishes that the recommendation "algorithms do not treat ISIS-created content differently than any other third-party created content." Pet. App. 37a. That is, the recommendations do not pick and choose ISIS content in particular. Instead, like a search engine, YouTube's recommendation algorithm works to "deliver content in response to user inputs." Pet. App. 34a; see Pet. App. 41a ("Google's algorithms function like traditional search engines that select particular content for users based on user inputs."); see also *Dowbenko* v. *Google Inc*., 582 F. App'x 801, 805 (11th Cir. 2014) (Google immune under CDA for claim it "manipulated its search results to prominently feature the article at issue").

When a platform's recommendation algorithm merely responds to user preferences by pairing users with the types of content they seek, the algorithm functions in a way that is not meaningfully different from the many curatorial decisions that platforms have always made in deciding how to present third-party content. Since the days of Prodigy and CompuServe, platforms have sought to arrange the voluminous content on their sites in a way that is useful to users and responsive to user interests. In so doing, platforms do not "develop[]" the user-generated content within the meaning of Section 230(f)(3), because decisions about how to present already-finalized content do not transform or alter the content *itself* in any way. See pp. 15-17, *supra*. Moreover, YouTube's

presentation decisions—which act on the already-finalized content at issue in the same way that YouTube would act on any other content—cannot be said to have rendered YouTube "responsible" for the illegality of the content.

The United States argues, U.S. Br. 26-28, that YouTube's recommendation algorithm produces an implicit recommendation ("you will enjoy this content") that should be viewed as a distinct piece of content that YouTube is "responsible" for "creat[ing]," 47 U.S.C. § 230(f)(3). But the same could be said about virtually any content moderation or presentation decision. Any time a platform engages in content moderation or decides how to present user content, it necessarily makes decisions about what content its users may or may not wish to see. In that sweeping sense, *all* content moderation decisions could be said to implicitly convey a message. The government's reasoning therefore suggests that any content moderation or presentation decision could be deemed an "implicit recommendation." But the very purpose of Section 230 was to protect these decisions, even when they are imperfect.

Under the government's logic, the mere presence of a particular piece of content on the platform would also send an implicit message, created by the platform itself, that the platform has decided that the user would like to see the content. And when a platform's content moderation is less than perfect—when it fails to take down some harmful content—the platform could then be said to send the message that users would like to see that harmful content. Accepting the government's reasoning therefore would subject platforms to liability for all of their decisions to present or not present particular third-party content—the very

actions that Congress intended to protect. See pp. 6-8, *supra*; cf. *Force* v. *Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) ("Accepting plaintiffs' argument [that platforms are not immune as to claims based on recommendations] would eviscerate Section 230(c)(1); a defendant interactive computer service would be ineligible for Section 230(c)(1) immunity by virtue of simply organizing and displaying content exclusively provided by third parties.").

Second, petitioners seek to treat YouTube "as the publisher or speaker" of the third-party content at issue. Their claim is that YouTube "assists ISIS in spreading its message," J.A. 169, by making ISIS's content available to viewers. Petitioners expressly seek to impose liability on YouTube for the harm caused by ISIS's content—on the ground that YouTube communicated that content to others. See p. 22, *supra*. Petitioners therefore seek to hold YouTube liable for the harmful nature of third-party content by treating YouTube as the publisher or speaker of that content.

The fact that YouTube's recommendations are automated algorithmically does not change that conclusion. Because decisions about what a viewer might want to see are inherent in the act of communicating or publishing information, "actively bringing [a speaker's] message to interested parties * * * falls within the heartland of what it means to be the 'publisher' of information." *Force*, 934 F.3d at 65. Indeed, because Internet platforms like YouTube communicate within a visual medium, a platform's decision to communicate or publish a given piece of third-party content necessarily includes decisions about where on the website content will appear, and in what manner or through what method of prioritization it will be communicated.

Petitioners' claims therefore seek to impose liability for YouTube's decisions about what third-party content to present "as the publisher or speaker" of that content. Imposing liability on YouTube for targeted recommendations of unlawful third-party content would, in practice, require YouTube to monitor the content posted by third parties and alter the mix of content it displays—thus confirming that petitioners' claims treat YouTube as a publisher of others' content and are precisely the sort of claims that Congress sought to foreclose in enacting Section 230. 47 U.S.C. § 230(b)(1)-(4). Accordingly, Plaintiffs' claims are barred by Section 230(c)(1).

* * *

Section 230 protects targeted recommendations to the same extent that it protects other forms of content curation and presentation. Any other interpretation would subvert Section 230's purpose of encouraging innovation in content moderation and presentation. The real-time transmission of user-generated content that Section 230 fosters has become a backbone of online activity, relied upon by innumerable Internet users and platforms alike. Given the enormous volume of content created by Internet users today, Section 230's protection is even more important now than when the statute was enacted.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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