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 FREE SPEECH FOR PEOPLE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

COURTNEY HOSTETLER
*Counsel of Record*
RONALD A. FEIN
JOHN C. BONIFAZ
BEN T. CLEMENTS
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
chostetler@
freespeechforpeople.org

*Counsel for Amicus Curiae*

December 6, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

## STATEMENT OF INTEREST[1]

Amicus Free Speech For People is a national non-profit non-partisan organization dedicated to ensuring equal and meaningful participation in democracy by challenging big money in politics and corruption in government, confronting unchecked corporate power, fighting for free and fair elections, and advancing a new jurisprudence grounded in the promises of political equality and democratic self-government. As part of that mission, Free Speech For People works in courts and legislatures to ensure corporations can be held accountable under the law.

## SUMMARY OF ARGUMENT

The sole question here is whether Google's recommendations of videos to its users on its YouTube service are "information provided by *another* information content provider," which, under Section 230 of the Communication Decency Act, would shield Google from liability for any suits arising from that information. 47 U.S.C. § 230(c)(1) (emphasis added). When a provider of an interactive computer service like Google provides recommendations to users—including when these recommendations are developed by algorithms within Google's control—it acts as an information content provider in providing information to users. In such cases, companies are not shielded from liability for otherwise valid legal claims that may

[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties have granted blanket consent to the filing of amicus curiae briefs.

arise from the information that they provide to their users via targeted recommendations.

Google's recommendations are information that Google provides to its users—statements in which Google itself predicts that its users would like the identified videos. The Ninth Circuit reasoned that these algorithmically-generated recommendations were merely "neutral" functions, part and parcel of an interactive computer service's publisher function. The notion that recommendations could be considered "neutral" is both baseless and irrelevant. The only question remains whether Google itself—as opposed to "another information content provider"—provided the recommendations.

The Ninth Circuit's ruling significantly expands the immunity offered by Section 230 beyond the text and purpose of the statute. That expansion is not supported by statutory text, the policy goals identified by Congress, nor by any other policy considerations that this Court may properly consider when interpreting the plain text of an unambiguous statute. In fact, to the extent (if any) that policy considerations may be relevant, those considerations cut *against* the Ninth Circuit's expanded interpretation of Section 230 immunity.

## ARGUMENT

### I. GOOGLE'S RECOMMENDATIONS TO ITS USERS ARE NOT "INFORMATION PROVIDED BY ANOTHER CONTENT PROVIDER."

The text of Section 230 bestows a broad but not unlimited protection on both providers and users of interactive computer services. 47 U.S.C. § 230(c). The law is at the center of a lively, longstanding debate

about social media companies' power and protection, a debate that has evolved as social media companies evolve. But as this Court has recognized, "none of these contentions about what [a party] think the law was meant to do, or should do, allow [the Court] to ignore the law as it is." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1745 (2020). Instead, the proper limiting consideration is whether "'textual and structural clues' . . . enables [the Court] to resolve the interpretive question put before [it]." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021) (quoting *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). When such clues exist, then the Court's "'sole function' is to apply the law as [it] find[s] it." *Id*. (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004)). And the parameters of Section 230 immunity—its breadth and limitations—are clear from the text of the statute.

Here, the sole question is whether Google's recommendations of videos to its users are "information provided by *another* information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). The meaning of these terms, and the answer to the question, are clear: Google's recommendations are information that is created, developed, and provided *by Google*, not by "another information content provider." Therefore, Section 230 does not shield Google from liability for otherwise valid legal claims that may arise from the information it provides to its users.

### A. Google's recommendations are information provided by Google.

Section 230 provides no immunity at all for information provided by interactive computer service providers themselves. When Google, the "provider . . . of an interactive computer service," 47 U.S.C. §§ 230(c)(1),

230(f)(2), recommends videos to its YouTube users, Google does so as an "information content provider": an "entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." *Id.* § 230(f)(3). The underlying videos may have been created by other information content providers, but the recommendations themselves are "information" that Google itself created and developed. Under Section 230, Google may not be held liable for the content of those videos, but—where substantive liability theories allow—it may be held liable for its own recommendations.

These recommendations are information created or developed by Google itself, for which Google does not enjoy the special statutory immunity conferred by Section 230.

Google—like any interactive computer service provider—shall not "be treated as the publisher or speaker of any information *provided by another information content provider*." 47 U.S.C. § 230(c)(1) (emphasis added). Crucially, however, even the Ninth Circuit agrees that immunity does not extend to information provided by Google itself. Pet. App. 32a; *see also Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021) ("By its plain terms . . . § 230(c)(1) cuts off liability *only* when a plaintiff's claim faults the defendant for information provided by third parties. Thus, internet companies remain on the hook when they create or develop their own internet content.") (emphasis added) (citations omitted); *Doe v. Internet Brands, Inc.*, 824 F.3d 847, 853 (9th Cir. 2016) ("Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a

marginal chilling effect on internet publishing businesses."). Thus, the only question for Section 230 purposes is whether Google, or another information content provider, provided those recommendations.

The question answers itself: Google is the only entity that made and provided the recommendations.

The question at issue here is not whether that responsibility might or should render Google liable in tort, or in this case under the Anti-Terrorism Act, 18 U.S.C. § 2333; the question is simply whether Google provided the information in the first place. To determine whether Google has immunity from suit—whether Congress has barred the courts from even entertaining the idea of its culpability for making recommendations under state or federal law—the pertinent issue is whether a recommendation qualifies as "information" and if so, who created or developed it. It is clear that the recommendation is, itself, information and that Google is its creator and developer.

A hypothetical illustrates this point. Person A may recommend a YouTube video to Person B. By making the recommendation, Person A does not become creator or publisher of the recommended video; and conversely, the video's creator doesn't create, develop, or become responsible for Person A's recommendation just because they might benefit from that recommendation. The recommendation is Person A's own content.

This is true whether Person A makes their recommendation in person, via email, as their own YouTube video, or by means of highly sophisticated and highly profitable algorithms. Suppose Person A posts a YouTube video in which Person A recommends to Person B a YouTube video created by someone else (Person C). The original video may be information provided by

Person C. But Person A's video (recommending C's video to B) is information provided by Person A.

Google is situated identically to Person A in this context, because the language of Section 230(c)(1) places a "provider or user" of an interactive computer service on identical footing with respect to third-party content. Just as Person A has created and developed the content of their own recommendation video—although the video is *about* information provided by a third party—Google has created and developed its own recommendations. The method by which Google provides its recommendations does not change the fact that this is information created by Google, and that Google is the information content provider of those recommendations. If Google were to "recommend" a series of videos to a user via a video in which Google CEO Sundar Pichai appears and says "Hi, I'm the CEO of Google and we at Google think you might enjoy the following videos," and then lists these videos, the recommendation video would be incontrovertibly "provided by" Google. The same is true for the recommendations it provides in written and screenshot form on nearly every YouTube display.

### B. Google is the creator and provider of its recommendations even where it uses algorithms to develop those recommendations.

#### 1. Google and not its users control the YouTube algorithms and the information that these algorithms create.

Nothing in the text of Section 230 distinguishes recommendations created by algorithm from recommendations manually created by a company employee. Google cannot abdicate responsibility for its own

content merely because that content was generated by an algorithm. Google is the only entity that makes and controls the algorithms that produce those recommendations that appear to its users. It has spent millions of dollars to do so, with enormously lucrative results.

The profit of Google's YouTube platform is driven by the advertisements that Google attaches to the videos themselves, or to the display screens that users see when selecting which videos to watch. Users can find videos themselves by searching for key terms and can elect to subscribe to the content creators that they choose. *See* Br. in Opp. 5. YouTube also makes recommendations for its users, *see id.* at 5, which entices them to watch more videos and which increases Google's advertisement revenue and profit. *See* Pet. App. 97a n.3 (Gould, J., dissenting in part) (quoting Anne Applebaum, *Twilight of Democracy—The Seductive Lure of Authoritarianism* (1st ed. 2020)).

Google acknowledges that "[r]ecommendations drive a significant amount of the overall viewership on YouTube, even more than channel subscriptions or search . . . it's become an integral part of everyone's YouTube experience." Cristos Goodrow, *On YouTube's Recommendation System*, YouTube Official Blog (Sept. 15, 2021), https://blog.youtube/inside-youtube/on-youtubes-recommendation-system/. The recommendations are individualized, using information that Google has mined from the user, including user search history. YouTube may provide different targeted recommendations for two different users who start by searching the exact same terms, based on their different internet histories and characteristics. Br. in Opp. 5.[2]

---

[2] *See also* Jack Nicas, *How YouTube Drives People to the Internet's Darkest Corners*, Wall St. J. (Feb. 7, 2018), https://

Developing these algorithms is costly, and Google has expended billions of dollars across its interactive computer services to create and improve its algorithms. In the fiscal year 2021, Google's parent company Alphabet, Inc. spent more than $31.5 billion on research and development. Alphabet Inc. 2021 Annual Report 32 (February 1, 2022), https://abc.xyz/investor/static/pdf/2021_alphabet_annual_report.pdf.

Google, like many of its counterparts, staunchly defends its algorithms and those of its subsidiaries as proprietary information. Google's algorithms, by its own description, are its "most jealously guarded secrets," *See* Non-Party Google Inc.'s Opposition to Plaintiff Academy of Motion Picture Arts & Sciences's Motion to Compel Deposition 30(B)(6) Testimony at 7, *Academy of Motion Picture Arts and Sciences v. Godaddy.com, Inc.*, No. 5:12-mc-80192-EJD-PSG (N.D. Cal. Sep. 10, 2012), ECF No. 12; *see also id.* at 9 (describing its "search and advertising algorithms" as the company's "core stock in trade, and among the most valuable trade secrets in electronic commerce"), and Google has in the past taken swift action to protect its trade secrets from disclosure or theft. *See id.* (opposing a deposition that sought to depose Google, amongst other topics, on its search algorithms); Complaint, *Waymo LLC v. Uber Technologies Inc.*, No. 3:17-cv-939-WHA (N.D. Cal. Feb. 23, 2017), ECF No. 1 (intellectual

---

www.wsj.com/articles/how-youtube-drives-viewers-to-the-internets-darkest-corners-1518020478; Alexis C. Madrigal, *How YouTube's Algorithm Really Works*, The Atlantic (Nov. 8, 2018), https://www.theatlantic.com/technology/archive/2018/11/how-youtubes-algorithm-really-works/ 575212/; Zeynep Tufekci, *Opinion: YouTube, the Great Radicalizer*, N.Y. Times (Mar. 10, 2018), https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html.

property lawsuit brought by Google subsidiary against Uber).

In other words, Google is fiercely protective both of its algorithms and the specific information that their algorithms produce. Neither the algorithms nor the information that the algorithms create are content that can be ascribed to another. Algorithmically-produced information provided on the YouTube service, just like any video or written information that is posted on YouTube by a YouTube or Google employee on behalf of YouTube or its parent company, is information provided by Google.

### 2. Neutrality is not a relevant factor for determining whether a provider or user of an interactive computer service has created or developed content.

Google encourages the court to view its use of recommendation-generating algorithms as a "neutral" operation necessary to the functioning of its platform. Br. in Opp. 5, 8; Google C.A. Br. 23-24. Although several lower courts have adopted variations of this "neutrality" analysis, it is untethered from the language of the statute, *see* Pet. App. 34a, 37a-38a, 41a-42a; *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019); *Force v. Facebook, Inc.*, 934 F.3d 53, 66-67, 70 (2d Cir. 2019); *Marshall's Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1270-71, n.5 (D.C. Cir. 2019); *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008), as well as any reasonable understanding of the term "neutral." This judicially-created "neutrality" criterion cannot change the inescapable fact that algorithmically-produced content is properly attributable to the entity that controlled and utilized

that algorithm in order to create that content—not to "another" information content provider.

Google and those lower courts give the ambiguous (and statutorily irrelevant) term "neutral" two distinct meanings, neither of which bears on whether the algorithmically-produced content is "provided by *another* information content provider." First, "neutral" is used to explain that Google applies the algorithmic processes to all content on YouTube—in other words, the algorithm is alleged and presumed to be programmed to analyze all content on YouTube before it produces recommendations of content to each specific user. Pet. App. 37a-38a; 41a-42a; *Force*, 934 F.3d at 66 (citing *Roommates.Com*, 521 F.3d at 1172); *id.* at 69 (citing *Marshall's Locksmith Serv.*, 925 F.3d at 1270). Second, "neutral" is used to suggest that algorithms are an unavoidable component of hosting third-party digital content and should fall under the Section 230 protection because the providers could not function without them. *See* Pet. App. at 41a; *Force*, 934 F.3d at 67; Google C.A. Br. 23-24.

Both versions of "neutrality" elide the fact that Section 230 says nothing about *either* form of neutrality. Aside from being irrelevant to the language of Section 230, neither version of Google's "neutral" gloss stands up to scrutiny.

The fact that Google, as a provider of an interactive computer service, created an algorithm that "neutrally" considers all content posted on YouTube before deciding which recommendations to make does not change the fact that Google created, developed, and posted—in the language of the statute, "provided"—the recommendations.

Even assuming that Google's algorithms "neutrally" analyze every piece of content on YouTube, that does

not render the resulting recommendations "neutral." A restaurant guide claiming to use an objective analysis to rate every restaurant in New York City from one to five stars may be "neutral" in its analysis of each restaurant, but that does not render the resulting recommendations "neutral." Nor would the fact that the guide offers different ratings for different readers depending on their tastes. By the same token, Google's use of a supposedly "neutral" analysis (whatever that might mean) to customize recommendations for each user does not render those recommendations "neutral."

The same logic applies on YouTube. Return to the hypothetical "user" of the YouTube interactive computer service—who, as explained above, has the same immunities as a "provider" under Section 230. If Person A makes movie recommendations on their YouTube account, the fact that they considered all movies equally before selecting their recommendations does not change the fact that they still created and developed their recommendation. That remains true whether they personally selected which movies to recommended, or if they used an algorithm to do it for them. Or if Person A creates an algorithm that generates a comment for each video that appears in their feed, that generated comment would still be information provided by Person A—not by *another* information content provider. The same can be said of a provider that uses an algorithm to generate information based on the third-party content it feeds through its system.

Running all third-party content through the same algorithm does not mean either the algorithm or the resulting information is "neutral," or even that the motivation behind using the algorithm is "neutral." To the contrary, YouTube's algorithms are designed to

increase the likelihood that certain users will stay on the service longer; they are not remotely "neutral" on the question of whether the user should spend more time on YouTube. In fact, the algorithms are designed to recommend the videos most likely to entice the user even when those videos contain misinformation, violence, or, as in the case at hand, terrorism. As Judge Berzon explained below:

> Even if the algorithm is based on content-neutral factors, such as recommending videos most likely to keep the targeted viewers watching longer, the platform's recommendations of what to watch send a message to the user. And that message—"you may be interested in watching these videos or connecting to these people"—can radicalize users into extremist behavior and contribute to deadly terrorist attacks like these.

Pet. App. 91a (Berzon, J., concurring). If "neutrality" were a criterion under Section 230 (which it is not), YouTube's algorithms would fail that test.

Google's assertion that its recommendation-generating algorithms are necessary for the function of YouTube as a repository of third-party content is equally baseless. Recommendations have become commonplace on social media sites, but ubiquity should not be confused with necessity or "neutrality." No internet platform is forced by requirements of functionality to provide unsolicited recommendations to users. Recommendations—as well as recommendation-generating algorithms—should not be conflated with other steps that an internet platform may need to take to organize millions of pieces of third-party content.

Social media companies like Google could serve as a depository for their content, as well as organize and make searchable their content, without recommending any of them. Users could then choose, without input from the provider, what content to consume—whether that content is videos to watch, friend profiles to view, groups to join, or channels to subscribe to.

Indeed, in its earliest years, YouTube did just that. Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* 92-93 (2015). "Users uploaded millions of hours of their own content, and community members helped each other organize the material, developing a tagging 'folksonomy' so clever that searchers could find even the most obscure content." *Id.* at 93. YouTube did not begin building its targeted recommendation system until 2008. Goodrow, *supra*.

Even in the current age of algorithms, many interactive service providers—including some of the biggest websites in the world—continue to provide well organized, searchable data to their users in a manner that does not depend on making recommendations based on the users' perceived individual characteristics or history. One of the most visited websites in the world, wikipedia.org, actually does provide content to its users in an arguably more "neutral" manner in that search results are generated solely by the search terms the user chooses to enter, rather than based on their search histories or other personal information. Other examples abound across every subject and every industry. For example, when the judges, law clerks, and lawyers involved in this case do their research on Westlaw or Lexis, the searches that they conduct will produce the same results as any other lawyer using the same search terms, regardless of their internet

search history or other personal data. Whatever "neutrality" might mean, these examples demonstrate that it is at least possible to present data without personalizing it.

Companies like Google utilize recommendations not because recommendations are necessary for the functioning of the service, or even for its profitability, but because finely tuned recommendations *maximize* already immense profit. Google's YouTube recommendation algorithm has been described as "the single most important engine of YouTube's growth." Paul Lewis, *'Fiction is Outperforming Reality': How YouTube's Algorithm Distorts Truth*, Guardian (Feb. 2, 2018), https://www.theguardian.com/technology/2018/feb/02/how-youtubes-algorithm-distorts-truth; *see also* Pasquale, *supra*, at 80 (noting that "accurately targeted users attract advertisers"). In 2021, YouTube advertisements alone brought in $28.8 billion, a $9 billion increase from the previous year. Alphabet Inc. 2021 Annual Report, *supra*, at 28-29.

YouTube does not make recommendations to its users because it is *required* for the functioning of any online repository for third-party content. YouTube has recommended harmful content (including that which gave rise to this case, as well as extensive misinformation and hate speech) because those videos kept users engaged in the service.[3]

---

[3] In early 2018, YouTube revamped its algorithm to limit harmful content that appeared on users' recommended video feeds. In the short-term, this caused a slowdown in the YouTube click growth rate, a slowdown in advertisement growth, and ultimate a fall in Google stock. Steve Kovach, *Alphabet Had More Than $70 Billion in Market Cap Wiped Out, and It Says YouTube is One of the Problems*, CNBC (Apr. 30, 2019), https://www.

The point is not that interactive computer service providers are nefarious to make recommendations, or to seek to maximize profits. Rather, the point is simply that "providing recommendations" is not a *necessary* aspect of providing an interactive computer service. While providers of interactive computer services are free to make recommendations of third-party content, they cannot then claim to act merely as neutral organizers or publishers of third-party data. Instead, they act as information content providers, and have no immunity for the recommendations themselves.

Ultimately, the Court need not and should not determine whether the underlying purpose of an algorithm is "neutral" or not. Neither an algorithm's intended purpose nor its "neutrality" are relevant to the simple question before the Court: who "provided" the information that Google's recommendation-providing algorithms provide? The answer is simple: Google.

### C. The Ninth Circuit's inquiry into whether making recommendations is conduct of a 'publisher' is completely divorced from the statutory text.

The main argument that Google and the Ninth Circuit advance is that Google's recommendation creation (and that of similar providers of interactive computer services) is a standard activity of a "publisher." Section 230 provides that "no 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) (emphasis added). The Ninth Circuit has confused the issue by suggesting that Section 230—which, on its

---

cnbc.com/2019/04/30/youtube-algorithm-changes-negatively-impact-google-ad-revenue.html.

face, specifies when a provider or user of an interactive computer service shall *not* "be treated as [a] publisher"—in fact applies whenever the court determines that the provider of the interactive computer service acts as a publisher. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) ("To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.').

This is a diversion from the straightforward text of Section 230. The only question posed by Section 230(c)(1) is whether the information in question is provided by an information content provider *other than* the provider or user of an interactive computer service in question. If the information is in fact "provided by another information content provider," then neither provider nor user of the interactive computer service may be "treated as the publisher or speaker" of such information. If, on the other hand, the information is *not* "provided by another information content provider," then Section 230(c)(1) has nothing to say and provides no immunity.

Tests that focus Section 230 inquiries on ostensibly traditional publishing activities might have worked as a convenient shorthand during the early days of Section 230 analysis. When Section 230 became law, providers of interactive computer services like YouTube typically were not making recommendations or injecting their own information into users' displays. "The prototypical service qualifying for this statutory immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others." *Federal Trade Comm'n v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009); see also *Force*, 934 F.3d at 88 (Katzmann, J.,

dissenting in part) ("While the majority and I disagree about whether § 230 immunizes interactive computer services from liability for all these activities or only some, it is pellucid that Congress did not have any of them in mind when it enacted the CDA.").

As providers of interactive computer services have evolved, however, it has become apparent that the inquiry surrounding ostensibly traditional publishing activities is unmoored from the only question posed by the statute: who provided the information in question. The problem has become worse as courts broadly interpret "publisher" beyond the bounds of reasonable definitions of the word. As a result, the ruling below has leapt well beyond the text of Section 230 or anything that Congress intended.

In *Dyroff*, the Ninth Circuit held that "[b]y recommending user groups and sending email notifications, [defendant] Ultimate Software . . . was acting as a publisher of others' content. These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others. They are not content in and of themselves." 934 F.3d at 1098. The majority opinion below, beholden to the *Dyroff* majority ruling, then also held that recommendations are merely part and parcel of the interactive computer services' publisher role. Pet. App. 37a-38a.

The distance between the Ninth Circuit's judicially-adopted framework and the language of the statute is breathtaking—the Ninth Circuit has interpreted Section 230(c)(1) to mean its literal opposite. The entire purpose of Section 230(c)(1) is to specify that users and providers of interactive computer services shall *not* "be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Put another way, the

immunity that Congress provided to interactive computer service providers such as Google or Ultimate Software through Section 230(c)(1) is that they are *not* treated as the publisher of third-party content. Yet, under *Dyroff* and then *Gonzalez*, the Ninth Circuit has held that Ultimate Software and Google enjoy this immunity *precisely when* they are "acting as a publisher of others' content." *Dyroff*, 934 F.3d at 1098. Put concretely, under the statute, an interactive computer service provider such as Google or Ultimate Software wins a motion to dismiss by showing that the information in question was "provided by another information content provider" and, therefore, under Section 230(c)(1), the defendant legally *cannot* "be treated as the publisher" of that third-party content. But under the *Dyroff* test, it would seem that Google or Ultimate Software wins a motion to dismiss by showing that it *was, in fact,* "acting as a publisher of others' content." *Dyroff*, 934 F.3d at 1098.

Even indulging this bizarre reversal of Section 230(c)(1)'s test, neither ruling squares with the ordinary meaning of the word "publishing," nor with how the courts of appeals (including, in other contexts, the Ninth Circuit itself) have defined the word. Although Section 230 does not define "publisher," courts appropriately have applied its "ordinary meaning." *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2019); *see also Niz-Chavez*, 141 S. Ct. at 1480 ("When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them."); *Hamilton v. Lanning*; 560 U.S. 505, 513 (2010) ("When terms used in a statute are undefined, we give them their ordinary meaning." (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). The Ninth Circuit, in line with other circuits, has explained that

"publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102 (citing *Roommates.Com*, 521 F.3d at 1170-71); *see also Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("At its core, § 230 bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content.'" (quoting *Zeran v. America. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997))).

Providing recommendations does not involve any of these actions. As Judge Berzon explained in her reluctant concurrence, "neither the text nor the history of section 230 supports a reading of 'publisher' that extends so far as to reach targeted, affirmative recommendations of content or of contacts by social media algorithms." Pet. App. 86a (Berzon, J., concurring); *see also Force*, 934 F.3d at 76-77 (Katzmann, J., dissenting in part) (writing, in relation to Facebook's recommendations, "it strains the English language to say that in targeting and recommending these writings to users . . . Facebook is acting as 'the *publisher* of . . . information provided by another information content provider'" (quoting 47 U.S.C. § 230(c)(1)) (emphasis and second alteration in original)). Indeed, the Ninth Circuit essentially sidestepped the issue, stating simply that "the Gonzalez Plaintiffs assert that Google failed to prevent ISIS from using its platform, and thereby allowed ISIS to disseminate its message of terror" and "seek to treat Google as a publisher." Pet. App. 31a. It further posited that because Google did not make "a material contribution" to the videos, it is not responsible for those videos. Pet. App. 32a-33a. Neither reason gets to the heart of the issue: whether the

*recommendations themselves* are information provided by Google.

A reading of Section 230 that expands the term publisher beyond its "traditional activities of publication and distribution" to include "activities that promote or recommend content or connect content users to each other," Pet. App. 82a (Berzon, J., concurring), is neither consistent with the text nor supported by the policy considerations that prompted Congress to pass Section 230. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15-17 (2020) (Thomas, J., concurring in denial of certiorari).

In any case, this parsing of the term "publisher" has gone astray of a proper Section 230 analysis. If the information in question—namely, the recommendations—is "provided by" Google, or in other words, if Google is the information content provider of that information, then the plain text of Section 230(c)(1) does nothing to shield Google from liability; the debate about whether it is acting as a publisher is beside the point.

## II. POLICY CONCERNS DO NOT SUPPORT READING IMMUNITY INTO SECTION 230 THAT IS NOT PROVIDED FOR BY ITS TEXT.

### A. Policy and legal concerns about the proper scope of liability should not be conflated with the separate issue of immunity.

#### 1. A ruling in petitioners' favor will not open the floodgates to lawsuits.

Section 230 was developed in a different era of the internet, before Congress (or anyone else) understood what social media might become or what control social media platforms can exercise over the information its users see. Now, courts have construed Section 230 "to confer sweeping immunity on some of the largest companies in the world," at the expense of the law's statutory language. *See Malwarebytes, Inc.*, 141 S. Ct. at 13 (Thomas, J., concurring in denial of certiorari).

Below, Google and its amici suggested that Section 230 would effectively collapse, and social media companies will face a slew of unfair lawsuits, unless the courts overlook the text of the statute to extend the already considerable reach of Section 230 to immunize information created or developed by providers of interactive computer services. Google C.A. Br. 21 (claiming that its recommendations are merely "encouraging users to post material on its service," that "[a]ll user-submitted-content platforms do that," and that plaintiffs' argument threatens to "'swallow[] up every bit of immunity that the section otherwise provides'" (quoting *Roommates.Com*, 521 F.3d at 1167)); Electronic Frontier Foundation Amici Curiae

C.A. Br. 18-19. A correct ruling in petitioners' favor will lead to neither outcome, for two reasons.

First, Section 230 is not an all-or-nothing proposition. Providers of interactive computer services will not lose immunity for third-party content just because they sometimes act as information content providers themselves. Google will continue to have immunity for causes of action arising from information provided by other users of YouTube. The petitioners here ask only that Google be held responsible for its *own* information, which is precisely what the text of Section 230 requires. *See Force*, 934 F.3d at 82-83 (Katzmann, J., dissenting in part); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) ("Under the statutory scheme, an 'interactive computer service' qualifies for immunity so long as it does not also function as an 'information content provider' for the portion of the statement or publication at issue.").

Second, courts are well positioned to address any defenses that providers of interactive computer services may assert, including with regard to liability and First Amendment protections, and to address these defenses at early stages of litigation where appropriate. Just because Section 230 does not confer statutory immunity for information content provided by Google does not mean that Google will be held liable for a tort. Correctly interpreting the limits in Section 230 merely will give plaintiffs the opportunity to get into the courtroom to plead their case.

Properly limiting the overreach of Section 230 will not open a floodgate to nuisance litigation. What it may do—and should do—is provide opportunities for the courts to consider the correct parameters of liability in areas of law such as defamation, product liability, and negligence, as well as liability under

statutory provisions such as the Anti-Terrorism Act. To the extent necessary, courts are able to properly assess relevant factors. *See, e.g.*, *Smith v. California*, 361 U.S. 147, 150, 153 (1959) (striking down an ordinance that imposed "strict or absolute criminal responsibility" on booksellers that carried obscene books because strict liability would harm the public's access even to non-offensive print materials). Courts have long been capable of ensuring that liability for the actions of third parties is sufficiently limited so as not to restrict the public's access to constitutionally protected speech. *See id.* at 153-54.

Of course, determining what liability Google has, if any, for damages suffered by the petitioners in this case—or in other cases—may involve assessing what knowledge Google had or should have had regarding the content of the third-party materials that it recommended to YouTube users. This does not mean that—and should not be conflated with the idea that—Google is being treated as publisher of those materials. As Judge Katzmann explained in his dissent in *Force:*

> The fact that Facebook also publishes third-party content should not cause us to conflate its two separate roles with respect to its users and their information. Facebook may be immune under the CDA from plaintiffs' challenge to its allowance of Hamas accounts, since Facebook acts solely as the publisher of the Hamas users' content. That does not mean, though, that it is also immune when it conducts statistical analyses of that information and delivers a message based on those analyses.

*Force*, 934 F.3d at 83 (Katzmann, J., dissenting in part).

Returning to our hypothetical Person A, who recommended a video created by someone else: just as Person A might recommend a defamatory film, article, or content created by another, any suit against Person A will derive from their recommendation but still require an analysis of their knowledge of what they were recommending. *See, e.g.*, Restatement (Second) of Torts § 581 (1977); *Smith*, 361 U.S. at 154 (noting that some mental element of knowledge would be required to prosecute a bookseller for carrying an unlawful obscene book). This does not mean Person A committed a tort by recommending the defamatory film; that question would be assessed under traditional liability and First Amendment principles that long predate Section 230. So too here: even if future cases consider what knowledge Google, as the information content provider of its own recommendations, had or should have had of the content it recommended, this alone does not therefore allow Google to claim Section 230 immunity for the information it voluntarily provided to its users.

**2. Policy concerns weigh in favor of limiting, not expanding, immunity for social media companies.**

Section 230 may not be the perfect piece of legislation for addressing the shifting landscape of digital information sharing in the age of social media. It was written when the landscape looked very different, and when providers of interactive computer servers acted very differently. Some may advocate for expanding Section 230; others—including amicus here—argue that reasonable amendments should be made to the law. *See* Ben Clements, *The Big Tech Accountability Act: Reforming How the Biggest Corporations Control and Exploit Online Communications*, 44 W. New Eng.

L. Rev. 5 (2022). Judge Christen, Judge Berzon, and Judge Gould all articulated concern about the scope of Section 230 below, Pet. App. 80a; *id.* 82a-85a, 90a (Berzon, J., concurring); *id.* 94a-95a (Gould, J., dissenting in part), as have judges in other cases. *See Force*, 934 F.3d at 76-77, 80 (Katzmann, J., dissenting in part).

But such policy determinations should be made by Congress, and policy concerns should not be used to *expand* immunity beyond what Congress wrote into law. Section 230 does not shield either users or providers of interactive computer services from liability for their own content, whether produced by an algorithm or otherwise. Indeed, such an expansive reading of Section 230 serves to undermine the statute's purpose and improperly allows the biggest social media companies to escape accountability for causing serious public harm.

In enacting Section 230, Congress found that interactive computer services "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops," and that they "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)(2)-(3). Those findings may have held up in the context where Congress provided immunity—interactive computer services that simply host content *provided by others*. However, by creating targeted recommendations for users based on data mined from those users, it is Google itself—and not its users—that controls the information that the users receive. And far from expanding diverse political discourse, cultural development, and intellectual activity, Google's algorithm-based recommendations *narrow* the universe of

information available to users and limit their control over the content they view, often without their full understanding of how these decisions were made. Nicas, *supra*, at n.2; *see also* Meghan J. Ryan, *Secret Algorithms, IP Rights, and the Public Interest*, 21 Nev. L.J. 61, 96 (2020) ("algorithm secrecy makes it exceedingly difficult to assess biases baked into the algorithms themselves").

Recommendation-producing algorithms can spur radicalization and direct people to potentially dangerous or harmful information they would not have otherwise sought out.[4] The threats are not limited to international terrorism; social media companies have benefited significantly by recommending disinformation, violence, and hate speech to viewers more likely to stay longer and watch more sensationalist content. *See, e.g.*, Jessie Daniels, *The Algorithmic Rise of the 'Alt-Right,'* 17 Contexts 60, 61 (2018).

Indeed, the use of algorithmic targeting by Google and other global social media platforms has been associated with a staggering array of serious public harms, including physical and psychological disorders and suicidal ideation among young people;[5] the

---

[4] Paul Lewis & Erin McCormick, *How an Ex-YouTube Insider Investigated its Secret Algorithm*, Guardian (Feb. 2, 2018), https://www.theguardian.com/technology/2018/feb/02/youtube-algorithm-election-clinton-trump-guillaume-chaslot; *see also Force*, 934 F.3d at 87-88 (Katzmann, J., dissenting in part).

[5] *E.g.*, Georgia Wells et al., *Facebook Knows Instagram Is Toxic for Teen Girls, Company Documents Show*, Wall St. J. (Sept. 14, 2021), https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739; Karen Feldscher, *How Social Media's Toxic Content Sends Teens into 'A Dangerous Spiral'*, Harv. T.H. Chan Sch. Pub. Health (Oct. 8,

inability to effectively address major healthcare issues including the COVID-19 pandemic;[6] facilitating sexual predation and exploitation;[7] violence and genocide;[8] interfering with free and fair elections;[9] and inciting a violent insurrection at the United States Capitol.[10]

---

2021), https://www.hsph.harvard.edu/news/features/how-social-medias-toxic-content-sends-teens-into-a-dangerous-spiral/.

[6] Terry Collins, *'This Deception Must End Now': Facebook Gets Letter from 500 Health Professionals Demanding Data on COVID Misinformation*, USA TODAY (Nov. 5, 2021), https://www.usatoday.com/story/tech/2021/11/05/facebook-covid-misinformation-doctors-letter/6275730001/; *See* Victor Suarez-Lledo & Javier Alvarez-Galvez, *Prevalence of Health Misinformation on Social Media: Systematic Review*, 23 J. Med. Int. Rsch., no. 1, 2021, at 1, https://www.jmir.org/2021/1/e17187/PDF.

[7] Kari Paul, *Over 300 Cases of Child Exploitation Went Unnoticed by Facebook – Study*, Guardian (Mar. 4, 2020), https://www.theguardian.com/technology/2020/mar/04/facebook-child-exploitation-technology.

[8] *E.g.*, Paul Mozur, *A Genocide Incited on Facebook, With Posts from Myanmar's Military*, N.Y. Times (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

[9] Geoffrey A. Fowler, *Twitter and Facebook Warning Labels Aren't Enough to Save Democracy*, Wash. Post (Nov. 9, 2020), https://www.washingtonpost.com/technology/2020/11/09/facebook-twitter-election-misinformation-labels/.

[10] Craig Timber et al., *Inside Facebook, Jan. 6 Violence Fueled Anger, Regret over Missed Warning Signs*, Wash. Post (Oct. 22, 2021), https://www.washingtonpost.com/technology/2021/10/22/jan-6-capitol-riot-facebook; Rebecca Heilweil & Shirin Ghaffary, *How Trump's Internet Built and Broadcast the Capitol Insurrection*, Vox (Jan. 8, 2021), https://www.vox.com/recode/22221285/trump-online-capitol-riot-far-right-parler-twitter-facebook; Paul Barrett et al, *How Social Media Intensifies U.S. Political Polarization—And What Can Be Done About It*, N.Y.U. Stern Ctr. Business & Human Rights (Sept. 2021), https://bhr.stern.nyu.edu/polarization-report-page.

Neither courts nor Congress should accept at face value the straightforward assumption that unchecked and broadly immunized social media companies work for the betterment of our democracy, diversity of thought, or the public interest. Discussion about what Section 230 *should* do is a question for Congress. But to the extent that policy concerns inform the question of how best to interpret this text, these concerns do not support the Ninth Circuit's decision below, expanding statutory immunity beyond the text in order to further inoculate social media companies from suits arising from content that they themselves create and provide to their users.

## CONCLUSION

The text of Section 230 does not immunize Google for information that it provides to its users. The Court should reverse the judgment below.

Respectfully submitted,

COURTNEY HOSTETLER
*Counsel of Record*
RONALD A. FEIN
JOHN C. BONIFAZ
BEN T. CLEMENTS
FREE SPEECH FOR PEOPLE
1320 Centre St. #405
Newton, MA 02459
(617) 244-0234
chostetler@
freespeechforpeople.org

*Counsel for Amicus Curiae*

December 6, 2022