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 THE NATIONAL CENTER ON SEXUAL EXPLOITATION, THE NATIONAL TRAFFICKING SHELTERED ALLIANCE, AND RAINN, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI

Amici are organizations dedicated to serving survivors of sexual abuse and exploitation.[1]

The National Center on Sexual Exploitation ("NCOSE") is a nonprofit organization, founded in 1962, that combats sexual exploitation and abuse by advocating in state and federal courts for survivors, engaging in corporate advocacy to encourage companies to adopt responsible and safe practices, and advocating for legislative change that protects survivors and promotes human dignity.

The National Trafficking Sheltered Alliance ("NTSA") is a network of service providers committed to enhancing services and increasing access to care for survivors of human trafficking and sexual exploitation. NTSA provides a collaborative community and extensive resources to its over 100 member organizations and accredits long-term residential programs that meet NTSA's Essential Standards of Care.

RAINN is the nation's largest anti-sexual violence organization, whose purpose is to provide services to victims of sexual violence and advocate for improvements to the justice system's response to sexual violence. RAINN founded and operates the National Sexual Assault Hotline, and in its more than 25 years of operation has

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

helped more than 4 million survivors of sexual assault and their loved ones. RAINN is a leader in public education on sexual violence, provides consulting services to various industries on best practices for prevention of and response to sexual assault and harassment, and advocates on the state and federal levels to improve legislation on sexual violence.

Amici write to highlight the harmful impact the broad interpretation of Section 230(c)(1) has had on survivors of sexual abuse and exploitation and to encourage the Court to restore an interpretation that gives effect to the provision's plain language as well as Congress's original intent to protect children from harmful online content.

SUMMARY OF THE ARGUMENT

Today, the Internet is the primary location for the sexual exploitation of children. Predators from around the world can reach into homes and abuse children they never could have accessed pre-internet. Child pornography—or child sex abuse material ("CSAM")[2]—which used to have reports in the hundreds, has become an epidemic with reports in the tens of millions each year.[3] It did not have

2. This brief refers to child pornography as child sexual abuse material (CSAM) to more accurately reflect that its creation necessarily involves the sexual abuse and exploitation of children. *See generally*, U.S. Dep't of Justice, *Child Pornography* (May 28, 2020), available at https://www.justice.gov/criminal-ceos/child-pornography (noting that the statutory term "fails to describe the true horror that is faced by countless children every year.")

3. *See* Michael H. Keller and Gabriel J.X. Dance, *The Internet Is Overrun With Images of Child Sexual Abuse. What Went Wrong?* N.Y. Times (Sept. 29, 2019) available at https:// www.nytimes.com/interactive/2019/09/28/us/child-sex-abuse.html.

to be this way. Criminals, and criminal enterprises, have flocked online where they can enjoy near total anonymity. The internet is their base of operations because the technology platforms they use as tools in their predation protect them and profit off them brazenly as they enjoy near total immunity for anything that happens on their platforms.[4] This is the result of an interpretation many courts have given Section 230 of the Communications Decency Act—a law passed to incentivize websites to take proactive action to prevent exactly this type of activity. Instead, large sections of the technology industry enjoy unprecedented immunity, even against allegations of knowing possession and distribution of CSAM.[5]

This inverts what Congress sought to accomplish when it adopted the Communications Decency Act. Congress sought to encourage internet companies to be "Good Samaritans"—good corporate citizens that work with families to address the dangers of harmful content, rather than to standby, taking no action—or worse, facilitate sexual abuse and exploitation at scale. At the dawn of the internet, Congress passed §230 in a modest attempt to address a state-law defamation case, which it feared would incentivize websites to take a "do nothing" approach to moderation. That effort has been misconstrued to be a near-impenetrable immunity causing the very harm Congress sought to prevent.

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4. *See, e.g., M.H. v. Omegle.com*, LLC, No. 8:21-CV-814-VMC-TGW, 2022 WL 93575 (M.D. Fla. Jan. 10, 2022), *appeal docketed*, No. 22-10338 (11th Cir. 2022).

5. *See, e.g., John Doe, et al. v. Twitter, Inc.*, 555 F.Supp.3d 889 (N.D. Cal. 2021), *appeal and cross appeal docketed*, Nos. 22-15103 and 22-15104 (9th Cir. 2022); *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137 (9th Cir. 2022).

By its plain language, §230 accomplishes two things. First, §230(c)(1) provides a specific definition for the type of legal result that it sought to preclude: a website provider or user being "treated as" the "publisher or speaker" of information provided by a third party. Second, §230(c)(2)—which is entitled "civil liability"—limits liability for specific actions "voluntarily taken in good faith" by an internet provider "to restrict access to or availability of [objectionable] material. . . ." Beginning with the Fourth Circuit in 1997, courts have misinterpreted §230(c)(1) to create blanket immunity from suit for any situation involving "traditional editorial functions." This broad category involves any action (or inaction) by an internet company regarding third-party content, regardless of how irresponsible, harmful, or dangerous that content may be. This approach mistakenly looks to whether the internet company functions as a "publisher." Under this theory of immunity, many courts have read §230(c)(1) so broadly that it swallows subsection (c)(2), making it superfluous. That is why this case, and most other cases, have been dismissed on subsection (c)(1) alone. The actual text of subsection (c)(1), however, only applies to legal scenarios that *treat* an internet company as "the publisher or speaker" of someone else's information. This makes sense given that Congress was responding to a case concerning defamation.

The broad-immunity interpretation is also heavily premised upon a myopic reading of the purpose of §230. In enacted findings, Congress noted the importance of both fostering a vibrant, free internet and making sure that the internet was safe for children. 47 U.S.C. §230(a-b). Moreover, Congress's driving concern for the safety of children is clear from the rest of the CDA. Yet court

decisions have focused almost exclusively on the purpose of internet freedom, devastating internet safety.

The broad-immunity interpretation of §230 has vitiated access to justice for CSAM survivors. Several cases hold that internet companies are immune even when they fail to remove child pornography that they know is present on their platform, concluding that such a decision falls within a "traditional publishing function." As a result of these decisions, internet companies have a *de facto* immunity for knowing violations of federal law concerning CSAM. This is the opposite of what Congress intended.

Congress's efforts to combat sex trafficking have also been thwarted by the misinterpretation of §230. Congress enacted comprehensive restrictions on human trafficking. Congress followed up by giving survivors of sex trafficking a civil cause of action against those who either directly participated in their trafficking, or those that benefited from it. *See* 18 U.S.C. §§ 1591, 1595, and 2255. In 2016, the First Circuit held that the website Backpage.com was immune under §230(c)(1) for claims that it knowingly facilitated the trafficking of three girls. Congress responded to this decision by saying that §230 "was never intended to provide legal protection to websites that . . . facilitate traffickers in advertising the sale of unlawful sex acts" and amended §230 itself.[6] Yet, even after this instruction from Congress, courts have read the amendment to §230 for sex-trafficking survivors narrowly and dismissed their claims based on the broad-immunity interpretation.

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6. Allow States and Victims to Fight Online Trafficking act of 2017, Pub. L. No. 115-164 §§ 2, 4 (Apr. 11, 2018).

When Congress singled-out claims that "treat" an internet company "as the publisher or speaker" of someone else's information, it focused with precision on claims where knowledge was unfairly imputed to an intermediary, who would have no reasonable chance to detect or prevent the harm of publication. Courts have turned this into an immunity for all third-party content, even when an internet company knows of its harmful or unlawful nature. This Court should reverse the decision below and restore the original balance that was codified by Congress.

ARGUMENT

The courts have exceeded §230's plain text, taking a rule designed to protect an emerging industry from crippling liability and have allowed it to protect a now powerful industry from ordinary liability. Amici argue that I) §230(c)(1) is not an immunity provision, but II) courts have wrongly treated it as one, and III) this has led to a massive expansion of sexual abuse and exploitation on the internet.

I. Under the Plain Text, §230(c)(1) is Not a Grant of Immunity but Rather a Prohibition Against Defining an Interactive Computer Service (ICS) as a Publisher of Third-Party Content for the Purposes of Establishing Liability, and §230(c)(2) Provides Immunity for Certain Actions Taken by an ICS in Good Faith to Restrict Offensive or Harmful Content.

The plain text of §230 of the Communications Decency Act ("CDA 230" or "§230") does not immunize a

technology company from liability for their own knowing and intentional acts, such as enabling and profiting from sexual exploitation (or terrorist activity) that they know is taking place on their platform. Instead, a plain text interpretation shows that first, §230(c)(1) is a definitional provision which prohibits an ICS from being defined or treated as the legal equivalent of the publisher of third-party content. And second, that §230(c)(2) is the statute's focused immunity provision, which only protects ICSs' "Good Samaritan" acts to restrict harmful content.

A. Section 230(c)(1) is a Definitional Provision, Not an Immunity Provision.

Section 230 (c)(1)'s plain language is that of a definitional or instructional provision.[7] Indeed, it "does not include the term or any synonym of 'immunity,'" *J.S. v. Vill. Voice Media Holdings, L.L.C.,* 184 Wash. 2d 95, 104, 359 P.3d 714, 718 (2015) (Wiggins, J. concurring), and it "does not create an 'immunity' of any kind." *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (citing *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003)). It merely "limits who may be called the publisher of information that appears online". *StubHub!, Inc.,* 624 F. 3d at 366.

Properly understood, Subsection (c)(1) forbids treating two distinct categories as the same. It instructs: "No provider or user of an interactive computer service shall

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7. *See Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) ("Why not read § 230(c)(1) as a definitional clause rather than as an immunity from liability, and thus harmonize the text with the caption?").

be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C.A. § 230(c)(1). From its first word, the provision defines through a prohibition. The action that is prohibited is the verb phrase "treating as."[8]

The word "treat" or verb-phrase "treat as" is not defined in the statute, so we look to its ordinary meaning. *See Smith v. United States*, 508 U.S. 223 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). Webster's Dictionary defines "treat" as, "to regard and deal within a specified manner—usually used with *as*."[9] This statement is defining the *manner* in which "providers or users" of ICS's should be *dealt with*, which is: not as publishers or speakers of third-party content. In other words, "providers or users" of an ICS do not meet the definition of "publisher or speaker" of information provided by a third party.

A similar use of "treat as" appears elsewhere in the Telecommunications Act of 1996 (which includes the

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8. The fact that treatment is the focus of the provision is reinforced by its heading "Treatment of publisher or speaker." *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (*quoting Bhd. Of R.R. Trainmen v. Balt. & Ohio R.R.,* 331 U.S. 519, 528–29 (1947)); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, § 35 at 221 (2012) ("The title and headings are permissible indicators of meaning.").

9. "Treat," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/treat (last visited Nov. 29, 2022).

CDA) in this same definitional way. In the *definitions* section, under "telecommunications carrier" the statute says, "A telecommunications carrier *shall be treated as* a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . ." The Telecommunications Act of 1996, Pub. L. 104–104, 3 February 8, 1996, 110 Stat 56. (emphasis added). In both these provisions from the same Act, Congress has defined when one legal status can be considered the same as another.

Therefore, subsection (c)(1) forbids drawing a legal correlation such as a quasi-relationship between two categories.[10] *See e.g.*, *In re Radway*, 20 F. Cas. 154, 162–63 (E.D. Va. 1877) (describing "quasi ex delicto" as "what the law chooses to treat as a tort."). Through its instruction, subsection (c)(1) lays out who can be treated as a publisher or speaker of content online and who cannot.[11] "In other words, subsection (c)(1) is neither an immunity nor a defense; it is a prohibition against considering the provider as a publisher or speaker of content provided by another." *J.S.,* 184 Wash. at 107.

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10. The "quasi" label "points out that [different] conceptions are sufficiently similar for one to be classed as the equal of the other."). "Quasi," Black's Law Dictionary (11th ed. 2019) (quoting 74 C.J.S. Quasi, at 2 (1951)).

11. Additionally, §(c)(1) does not apply if the ICS itself has developed or created the content at issue. *See Doe #1 v. MG Freesites, LTD*, 7:21-CV-00220-LSC, 2022 WL 407147, at *22 (N.D. Ala. Feb. 9, 2022); *see also Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F. 3d 1157, 1163 (2008).

B. Section 230(c)(1)'s Publisher Definition Only Limits Liability for ICSs for Claims Which Seek to Hold an ICS Liable for Making Third-Party Information Available to the Public, but it Does Not Protect Against Any Other Claims Involving Third-Party Content.

Subsection (c)(1) is a definitional provision, only limiting liability for claims that seek to define the ICS as "the publisher" or "the "the speaker" of third-party content – understanding "publisher" in the ordinary sense as "one who makes information available to the public." An ICS can fall outside of the publisher role depending on its own conduct. Put another way, §230(c)(1) only precludes liability where liability depends solely on holding the ICS responsible for the *initial* publication; where liability attaches at the time the information is made available to the public. It does not protect an ICS that becomes aware of harmful content and chooses to do nothing, or worse, makes use of it for profit.

Webster's Dictionary defines the word "publish" as, "to make generally known," or "to disseminate to the public."[12] And a "publisher" is "one that publishes something."[13] *See Mid-Continent Cas. Co. v. Kipp Flores Architects, L.L.C.*, 602 Fed. Appx. 985, 993 (5th Cir. 2015) (" . . .publish" is much more comprehensively defined as "to

12. "Publish," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/publish. (last visited Nov. 16, 2022).

13. "Publisher," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/ publisher. (last visited Nov. 16, 2022).

make public or generally known" or "to make generally accessible or available for acceptance or use (a work of art, information, etc.); to present to or before the public."). This is particularly relevant given that the statute arose in the context of defamation law.

For defamation claims, publisher status can determine liability. For example, in *Stratton Oakmont v. Prodigy*, which influenced and was specifically overruled by §230, a state-court allowed claims for libel against an internet company for libelous statements posted on its computer bulletin board by a third-party. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* ("Prodigy"), 1995 WL 323710 (Sup. Ct. N.Y. Cnty. May 24, 1995). The court's analysis focused on whether the bulletin-board service was a "publisher" of the third-party statements thereby making it *per se* liable for them. *Id.* at *3 ("A finding that [*Prodigy*] is a publisher is the first hurdle for Plaintiffs to overcome in pursuit of their defamation claims, because *one who repeats or otherwise republishes a libel is subject to liability as if he had originally published it.*") (emphasis added). Congress found this *per se* standard of liability unworkable and rejected it in the online context. Accordingly, it crafted §230(c)(1) to preclude *per se* liability, based solely on treating an ICS like the initial publisher of content: that is, the one who made it available to the public.[14]

Because §230(c)(1) is not an immunity provision, it does not preclude any claims related to an ICS's own

14. *See* H.R. Rep. No. 104-458 at 194 ("One of the specific purposes of this section is to overrule *PRODIGY* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.").

knowing and intentional acts, even if third-party content is involved. It merely prevents claims which—like the defamation claim in *Prodigy*—seek to treat an ICS wholly responsible for a third-party's initial publication of allegedly harmful content. *See Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 121 (4th Cir. 2022) ("Thus, for a claim to treat someone as a publisher under §230(c)(1), the claim must seek to impose liability based on the defendant's dissemination of information to someone who is not the subject of the information.").

C. By contrast, Subsection 230(c)(2) Immunizes an ICS's Good Faith Actions to Remove Harmful or Offensive Content.

While subsection (c)(1) prevents liability for *claims* which treat an ICS as a publisher, subsection (c)(2) provides immunity for an ICS's *actions,* taken in good faith, to remove content that is harmful or offensive. Unfortunately, the lower courts have often ignored (c)(2) altogether. *See, e.g., Roommates.com,* 521 F.3d at 1179 ("The second part of this subsection, § 230(c)(2), is more accurately characterized as an immunity provision, but is not relevant to our discussion here.") A proper plain language interpretation requires both sections be considered. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) (citing *Williams v. Taylor,* 529 U.S. 362, 404 (2000)) (Congress "must give effect … to every clause and word of a statute.").

"No provider … of an interactive computer service shall be held liable on account of …any action voluntarily taken in good faith to restrict access to or availability of material that the provider … considers to be …

objectionable."47 U.S.C.A. § 230 (c)(2)(A).*Cf. Henderson,* 53 F.4th at 119 (contrasting §230(c)(1) and (c)(2)). In other words, §230(c)(2) provides limited immunity for actions ICS's face *as a consequence of* voluntarily restricting offensive or harmful content in good faith. Current interpretations of §230 have disregarded the "good faith" element in §230(c)(2). The lower courts agree that Congress intended to protect ICS's through §230 *for the purpose of* incentivizing them to voluntarily remove harmful and offensive content. *Roommates*, 521 F.3d at 1163-63. (citing *craigslist,* 519 F.3d) (quoting *GTE Corp.,* 347 F.3d at 659–60). However, the lower courts have used the "editorial functions" test in §230(c)(1), to protect an ICS's actions (or inactions) while ignoring §230(c)(2). *See Zeran v. America Online, Inc.*,129 F. 3d 327, 330 (4th Cir. 1997). Not only is this a severe departure from the plain language but it has completely thwarted Congressional intent. This is because such an interpretation provides immunity for actions taken by an ICS without the good faith element. This removes the incentive structure Congress designed. "Extending immunity to Bad Samaritans undermines § 230's mission by eliminating incentives for better behavior by those in the best position to minimize harm."[15] Additionally, protecting an ICS's

15. Danielle Keats Citron and Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 416 (2017) at https://ir.lawnet.fordham.edu/flr/vol86/iss2/3. *See also GTE Corp.,* 347 F.3d at 660 ("If this reading is sound, then § 230(c) as a whole makes ISPs indifferent to the content of information they host or transmit: whether they do (subsection (c)(2)) or do not (subsection (c)(1)) take precautions, there is no liability under either state or federal law. As precautions are costly, not only in direct outlay but also in lost revenue from the filtered customers, ISPs may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1).").

actions under §230(c)(1), instead of properly under §230(c)(2), makes §230(c)(2) irrelevant. *See* Gregory M. Dickinson, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 Harv. J.L. & Pub. Pol'y 863, 869 (2010).

Therefore, a proper interpretation of §230 adheres to the plain language by narrowly preventing certain *claims* in §230(c)(1), and certain *actions* taken by an ICS in §230(c)(2), if taken in good faith.

II. Courts Have Incorrectly Interpreted §230(C)(1) As a Broad Immunity Provision, In Defiance of The Plain Language, Thereby Expanding Protections For ICSs To Include Even Their Own Knowing and Intentional Wrongful Conduct.

A. Lower Court Interpretations of §230 have Incorrectly Interpreted and Expanded the Meaning of "Publisher" Under §230(c)(1) and Ignored §230(c)(2) Altogether.

Courts have interpreted §230(c)(1) as a stand-alone immunity provision for virtually any claims against a website where third-party information is implicated. At the same time, courts have often ignored §230(c)(2)—which does contain a specific limitation on liability for actions to remove offensive content. The result is websites have received broad immunity for *any* decisions related to removing, or not removing content. Instead, courts should have analyzed §230(c)(1) by looking at whether the *claims* sought to treat the ICS as the publisher in order to establish liability, and recognized that §230(c)(2) is the place to analyze whether *good faith* removal protections

were at issue. The failure to adhere to the plain language has produced a long line of flawed reasoning and unjust results. This began with *Zeran*.

The Fourth Circuit decision in *Zeran* is the progenitor of the theory that subsection (c)(1) is a stand-alone immunity provision. *See generally Zeran*,129 F. 3d at 327. The court proclaimed with no analysis or support that, "By its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Id.* at 330. Instead of looking to a dictionary, or other authority for a definition of "publisher," the court proffered its own articulation of the publishing *function*: "Thus, 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—are barred." *Id.*

The statute addresses these two issues separately and the plain language should control. By protecting ICSs for *any* action related to decisions whether to remove, or not remove, content in §230(c)(1), this interpretation has swallowed §(c)(2) and eliminated the good faith element, effectively rendering §230(c)(2) useless and protecting ICS's even for failing to remove content in *bad faith*.[16]

16. *See* Danielle Keats Citron and Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 416 (2017). ("Extending immunity to Bad Samaritans undermines § 230's mission by eliminating incentives for better behavior by those in the best position to minimize harm.").

B. The Ninth Circuit in *Gonzalez v. Google* Incorrectly Interpreted §230(c)(1) as a Broad Immunity Provision and Incorrectly Held it Immunized Google's Own Knowing and Intentional Conduct Through its Recommendation Algorithms.

Addressing the case at hand, *Gonzalez v. Google*, and the issue on appeal, whether §230(c)(1) immunizes targeted recommendations by a platform, the Ninth Circuit erred where it interpreted §230(c)(1) as an immunity provision and applied this "immunity" to Google's own conduct. *Gonzalez v. Google LLC*, 2 F.4th 871, 887 (9th Cir. 2021), *cert. granted*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022).

From the outset, the Ninth Circuit erred by espousing the reductionist *Zeran* line of reasoning: Publishing encompasses "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online...." *Roommates.com*, 521 F. 3d at 1170-71. Instead of focusing on whether plaintiffs' *claims* in this case depended on *treating* Google as the publisher of third-party content for liability, the Ninth Circuit concluded, "[t]his element is satisfied when the duty that the plaintiff alleges the defendant violated derives from the defendant's *status* or conduct as a 'publisher or speaker." *Gonzalez*, 2 F. 4th at 891 *(quoting Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (emphasis added).

Incorrectly, the Ninth Circuit focused on whether "editorial decisions" were implicated to determine if Google was a "publisher" and therefore deserving of "immunity." Because third-party content was implicated, and because at least part of the complained of behavior

by Plaintiffs could be traced to removing, or failing to remove content, concluded Google must be a publisher and therefore must have "immunity." This was error. Virtually anything a website does can conceivably be traced to "deciding whether to exclude material that third parties seek to post online." Instead, the key inquiry under §230(c)(1) is whether the claims turn on the initial publication for liability. The claims in this case do not and therefore should not have been precluded by §230(c)(1).

Furthermore, the Court magnified its error by finding Google's proprietary algorithms to be neutral tools engaged in editorial functions. First, the "neutral tools" argument has no connection to the plain language of the statute.[17] But regardless, algorithms are not neutral tools. A recommendation algorithm is much different than a tool which determines how content is displayed on a website for example. Rather, it is an interactive tool designed to shape user behavior in order to maximize profit. Google is in control of its algorithm and makes changes to increase profit and could easily make changes to increase safety. This is all part of Google's own product design and therefore Google has a duty to make it safe against known dangers. The Ninth Circuit's mistake was focusing on the involvement of third-party content and overlooking that the claim was focused on Google's own conduct.[18]

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17. A claim that seeks to treat an ICS as the publisher of third-party content would be precluded under §230(c)(1) no matter the tools involved in displaying the content originally. And tools involved in the good-faith removal of content would be protected under §230(c)(2) so any theory regarding an ICS's tools being "neutral" should be limited to these two contexts.

18. Similarly, the Ninth Circuit was correct that the Plaintiffs' claims for revenue sharing are outside of immunity

III. The Courts' Misinterpretation of §230(c)(1) has Disregarded the Statute's Stated Child Protection Purpose, Leading to Children Suffering Harm without Recourse.

The expansive interpretation of CDA §230(c)(1) has effectively closed the courthouse doors to survivors of technology-enabled sexual abuse and exploitation. The lower courts have incorrectly elevated the purpose of encouraging internet growth while disregarding §230's other purpose: the safeguarding of children. §230's text does not require blanket immunity for internet companies and both purposes of §230 should inform its interpretation. Instead, in case after case, courts have summarily turned away civil plaintiffs seeking to hold online platforms accountable if their allegations had any nexus to content posted by a third-party. This is incorrect, unjust, and not what §230(c)(1) requires. Congress never intended these companies to be shielded for serious harm caused by their own conduct.

A. The Stated Purposes of CDA 230 Include Protecting Children from Harmful Content.

The lower courts incorrectly prioritize one of §230 purposes over both the provision's plain language and its child-protection and safety purpose. Courts that immunize websites from sexual abuse survivors' claims routinely cite *Zeran*'s broad language about Congress's purpose in adopting §230. According to these courts, Congress's overriding concern was catalyzing the growing internet

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because they do not treat Google as the publisher of third-party information. *Gonzalez*, 2 F.4th at 898.

as a vibrant marketplace of ideas. But these decisions often overlook another focus of Congress that was just as formative for §230—the protection of children from harmful online content.

In §230 Congress codified five policies of the United States. The first two policies address the development of the internet and the desirability of preserving it as a "vibrant and competitive free market." 47 U.S.C. § 230(b)(1-2). The final three policies are focused on the fact that not everything on the internet is safe or desirable. Specifically, Congress announced its policy of (1) encouraging technology that will give users, like families and schools, control over the information they receive; (2) removing disincentives for the development and utilization of filtering and blocking technologies to help parents restrict their children's access to objectionable and inappropriate content online; and (3) ensuring "vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id*. at § (b)(3-5).

Congress's concern for the protection of children from harmful and objectionable material is evident in the rest of the Communications Decency Act. When it enacted §230, Congress also created sweeping actions to protect children from obscene and harmful material.[19] It is not reasonable

19. *See* TELECOMMUNICATIONS ACT OF 1996, Pub. L. 104-104, February 8, 1996, 110 Stat 56 at § 502 (prohibiting the display of obscene material to children); § 508 (criminalizing enticing minors to "engage in prostitution or any sexual act for which any person may be criminally prosecuted") § 551 (requiring ratings as to whether programing contains sexual, violent, or other indecent material so that parents can prevent their children

then, to maintain that Congress simultaneously sought to protect children from harmful material through the CDA *and* give internet companies carte blanch immunity for knowingly allowing their platforms to be the means of child sexual exploitation. However, the precedent set by *Zeran* has done exactly that.

The *Zeran* court improperly used purpose to drive interpretation instead of the plain language. *Zeran*, 129 F.3d at 330; s*ee also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 2 at 56-57 (2012) (" . . . the purpose must be defined precisely, and not in a fashion that smuggles in the answer to a question before the decision-maker."). *Zeran* then doubled its error by letting only one purpose drive and leaving the other on the curb. *Id.* at 333, 334, 335 (expounding at length on Congressional intent to encourage the growth of the internet and protect internet speech but giving only one brief mention of §230's child protection purpose.). This approach launched a long line of improper §230 interpretations, which thwarted congressional intent by not only protecting ICSs for knowingly subjecting people, and especially children, to harmful content, but for disseminating abuse material where children and other vulnerable people were the subject of the content.

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seeing programing they deem inappropriate); § 552 (encouraging the creation of a technology fund to facilitate the development of technology to block objectionable content); and § 641 (requiring television channels to scramble sexually-oriented programing).

B. The Courts' Expanded Interpretation of §230(c)(1) has Led to Harmful and Unjust Results for Survivors.

The misinterpretation of §230 has led to results entirely at odds with the statutory purposes discussed above, particularly with respect to sexual abuse and exploitation, in cases involving child pornography and sex trafficking violations.

1. The Misinterpretation of §230(c)(1) has Improperly Immunized Websites that Knowingly Violate Laws Against Child Pornography.

Although it didn't deal with technology-facilitated sexual abuse, the *Zeran* decision's expansive approach to interpreting §230(c)(1) looms large every time a survivor seeks justice for harm involving the internet. §230(c)(1) has even been construed to immunize knowing violations of laws prohibiting child pornography leaving immensely harmed children without relief and providing perverse incentives for ICSs.

In one of the earliest cases to address CDA §230 in the context of sexual abuse, a 4-3 majority of the Florida Supreme Court held that §230(c)(1) provided immunity for a negligence claim brought by a mother on behalf of her eleven-year-old son, who had been victimized by a sexual predator using the online platform America Online ("AOL"). *Doe v. Am. Online, Inc.,* 783 So.2d 1010 (Fla. 2001). In *AOL*, the mother sought to hold AOL accountable for allowing the advertising of "a visual depiction of sexual conduct involving [her son]" on the AOL platform. *Id.* at

1012. Quoting at length from both the Fourth Circuit and District Court decisions in *Zeran*, the *AOL* majority followed *Zeran*'s logic to determine that "AOL falls squarely within this traditional definition of a publisher and, therefore, is clearly protected by § 230's immunity." *Id.* at 1017.

Writing for a three-justice minority, Justice Lewis dissented. *Id.* at 1018. "Through the majority's interpretation, the so-called 'Decency Act' has, contrary to well-established legal principles, been transformed from an appropriate shield into a sword of harm and extreme danger which places technology buzz words and economic considerations above the safety and general welfare of our people." *Id.* at 1019. Justice Lewis was incredulous that an internet company's conduct and knowledge regarding child pornography being advertised on its platform could be irrelevant to its liability under CDA § 230.

> [I]t is inconceivable that Congress intended the CDA to shield . . . an ISP alleged to have taken absolutely no actions to curtail . . . conduct defined as criminal, despite actual knowledge that . . . child pornography was being advertised and delivered through . . . its service by an identified customer, while profiting from its customer's continued use of the service.

Id. at 1028. (emphasis added). He warned, "I fear that the blanket immunity interpretation adopted by the majority today thrusts Congress into the unlikely position of having enacted legislation that encourages and protects the involvement of ISPs as silent partners in criminal enterprises for profit." *Id.* His words were prescient.

This Court has said that child pornography (i.e. CSAM) is "intrinsically related to the sexual abuse of children," and recognized a compelling state interest in targeting CSAM production and distribution. *New York v. Ferber*, 458 U.S. 747, 759 (1982). Because CSAM is uniquely harmful, Congress has given victims of CSAM civil causes of action for knowing violations of federal law concerning CSAM. *See* 18 U.S.C. §§ 2252A(f) and 2255. Tragically, however, the broad-immunity courts have read into §230(c)(1) has repeatedly been used to dismiss civil claims at their earliest stage.[20]

For example, in *Doe v. Bates,* parents sued the ICS Yahoo! alleging that it stored child pornography depicting their son on its computers, knowingly permitting it to be "distributed [] to pedophiles all over the world" and

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20. Earlier this year, Judge Coogler in the Northern District of Alabama, reached a different conclusion.

> Section 230 does not apply to their claim that Defendants knowingly received, possessed, and distributed child pornography, for several reasons. First, child pornography is not lawful "information provided by another information content provider" as contemplated by Section 230. …. Rather, it is illegal contraband, stemming from the sexual abuse of a child, beyond the covering of First Amendment protection, and wholly outside any other protection or immunity under the law, including Section 230. In other words, Section 230's prohibition on ICSs being treated as "speaker[s]" of "information" is not implicated here because child pornography is not protected speech and conveys no legally cognizable information.

Doe #1 v. MG Freesites, LTD, 7:21-CV-00220-LSC, 2022 WL 407147, at *22 (N.D. Ala. Feb. 9, 2022).

"profited from its actions." *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *6 (E.D. Tex. 2006). Despite these allegations, the district judge dismissed the parents suit under 18 U.S.C. § 2252A, concluding that "§230 generally 'creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party of the service and have applied the immunity to a wide variety of claims regardless of the terms in which they were described.'" *Id*. at 19 (quoting *Zeran*, 129 F.3d at 330); *see also M.A. ex rel. P.K. v. Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1055 (E.D. Mo. 2011) (dismissing civil child-pornography claim under §230).

More recently, in *John Does #1 and #2 v. Twitter*, a district judge held that §230 gave full immunity to Twitter for a claim under 18 U.S.C. § 2252A that it knowingly possessed and distributed the child pornography of two 13-year-old boys on its platform. *Twitter*, 555 F. Supp. at 926-28. The plaintiffs argued that *Bates* was wrongly decided and *Zeran* was inapposite, given the uniquely harmful character of child pornography, which as contraband was not information subject to "traditional editorial functions." "While this argument has some force," the district judge answered, "it does not square with Ninth Circuit authority, which has found that 'to avoid chilling speech, Congress 'made a policy choice ... not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.'" *Id.* at 928 (quoting *Gonzalez*, 2 F.4th at 886 (citing *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (quoting *Zeran*, 129 F.3d at 330)).

In each of the §230 cases dealing with child pornography the internet company did not dispute the allegations that it had knowingly violated the law. Instead, all defended solely based on §230. The *Zeran* decision stressed that its interpretation of 230(c)(1), which gives absolute immunity regardless of knowledge, is correct because "liability upon notice reinforces service providers' incentives to restrict speech and abstain from self-regulation." *Zeran,* 129 F.3d at 333. As these cases make clear, however, when platforms have an ironclad safe harbor from civil liability for child pornography laws, they are decidedly less likely to self-regulate.

By applying *Zeran*'s interpretative approach to grant *per se* immunity for knowing possession and distribution of child pornography (something no non-internet industry has ever enjoyed), courts have thus interpreted §230 not only in contravention of its plain language but also its purpose. As Justice Lewis stated:

> What conceivable good could a statute purporting to promote ISP self-policing efforts do if, by virtue of the courts' interpretation of that statute, an ISP which is specifically made aware of child pornography being distributed by an identified customer through solicitation occurring on its service, may, with impunity, do absolutely nothing, and reap the economic benefits flowing from the activity?

AOL, 783 So. 2d at 1024–25.

2. The Misinterpretation of §230(c)(1) has Immunized Websites that Knowingly Violate Laws Against Sex Trafficking.

Under the *Zeran* interpretative model, sex-trafficking victims have also been denied access to the courthouse as §230 has been construed to immunize knowing violations of laws prohibiting sex trafficking. Lower courts have clung fiercely to the idea that §230 is meant to protect the internet, and by extension ICSs, at all costs. This position has continued, even after Congress acted in the interim to expand protections for victims of sex trafficking.[21]

Congress directly addressed human trafficking when it enacted the Trafficking Victims Protection Act of 2000 (TVPA).[22] "Trafficking in persons"—Congress found—"is a modern form of slavery, and it is the largest manifestation of slavery today." 22 U.S.C. § 7101(b)(1). Congress noted the need for a more comprehensive approach to address trafficking. "Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme." Id. at § 7101(b)(14).

With regard to sex trafficking, Congress created a criminal offense for knowing acts to cause an adult or minor to engage a commercial sex act – 18 U.S.C. § 1591(a)

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21. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018).

22. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466, 1487–88.

and a private right of action for sex-trafficking victims.[23] As internet websites were increasingly used to facilitate sex buying and selling, sex-trafficking victims have sought to bring TVPA claims against online platforms that facilitated their trafficking. However, many courts applied *Zeran*'s broad-immunity interpretation of §230 to dismiss these claims. For example, in *M.A.*, *supra*, a district court found that a victim of trafficking had no recourse against a website that participated in her "horrific victimization" at the age of 14. *M.A.,* 809 F.Supp.2d at 1043. Citing *Zeran*, the district court found that it made no difference that the website was aware of sex-trafficking on its platform: "even if a service provider knows that third parties are posting illegal content, the service provider's failure to intervene is immunized." *Id.* at 1051 (quotation omitted).

In *Jane Doe No 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), the First Circuit affirmed the dismissal of civil claims of sex-trafficking victims. The *Backpage.com* decision is built upon *Zeran*'s expansive approach to interpreting §230(c)(1). First, it adopted the nebulous but expansive concept of immunity for any conduct or content that could fall within "traditional publishing or editorial functions." *Id.* at 20. Second, the *Backpage.com* decision relies heavily on a purposive construction of §230. The *Backpage.com* court acknowledged that its broad interpretation of §230 was premised on policy considerations. "[W]ebsites that display third-party content may have an infinite number of users generating an enormous amount of potentially harmful content, and holding website operators liable for that content 'would have an obvious chilling effect' in light of the difficulty of

23. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595).

screening posts for potential issues." *Id.* at 19 (quoting *Zeran*, 129 F.3d at 331). Significantly, the *Backpage.com* court illustrated the breadth of its interpretation of §230 immunity by noting that it would make no difference if it could be conclusively established that Backpage.com knowingly committed the predicate acts in violation of 18 U.S.C. § 1591(a)(2). *Id.* at 21.

Congress responded to the First Circuit's *Backpage.com* decision by specifically amending CDA § 230. See H.R. Rep. No. 115-572 at 4-5 (2018); and S. Rep. No. 115-199 at 2, n. 6 (2018) (both referencing *Backpage.com*, 817 F. 3d at 19-22). That amendment—the Allow States and Victims to Fight Online Trafficking Act of 2017 ("FOSTA")—announces its purpose with an enacted preamble. "It is the sense of Congress that… section 230 … was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims. . . ." Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164 (2018) at 2 (emphasis supplied).[24] FOSTA's purpose statement is reinforced by the clarification that Congress added to CDA 230: "Nothing in this section . . . *shall be construed to impair or limit*--any claim in a civil action brought under section 1595 of Title 18, if the conduct

24. An enacted preamble, such as this one is a helpful indicator of the amendment's meaning because an enacted preamble such as this one "set[s] forth the assumed facts and the purposes that the majority of the enacting legislature [] had in mind, and these can shed light on the meaning of the operative provisions that follow." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, § 34 at 218 (*citing* Joseph Story, Commentaries on the Constitution of the United States, § 459 at 326 (2d ed. 1858).

underlying the claim constitutes a violation of section 1591 of that title." 47 U.S.C. § 230(e)(5)(A) (emphasis supplied).[25]

Notwithstanding Congress's clarification through FOSTA, courts continue to follow *Zeran* and *Backpage.com* and hold that internet companies are immune from civil sex-trafficking claims. For example, in *Doe v. Kik Interactive, Inc.,* a federal judge dismissed the claims of a minor plaintiff who was sexually exploited on the online platform *Doe v. Kik Interactive, Inc.*, 482 F.Supp.3d 1242 (S.D.Fla. 2020). The *Kik* court noted *Zeran*'s pronunciation of Congress's intent, *id*. at 1248, and went on to state that "if it were not for FOSTA, Defendants in this case would be completely immune from liability under the CDA." *Id.* at 1250 (citing § 230(c)(5) and *Doe v. MySpace, Inc.*, 528 F.3d 413 (5th Cir. 2008). Considering the court's view, it is unsurprising, though no less disturbing, that it found complete immunity under the CDA despite FOSTA. *Id.* at 1252.

Even after Congress's intervention, history seems to be repeating itself as some courts have followed the *Kik* approach to interpreting FOSTA rather than looking to the plain language. In a dynamic very similar to the *Zeran* court's interpretation of §230, these courts have construed FOSTA by relying heavily on their interpretation of legislative intent, which supposedly provides only narrow (some would say impossibly narrow) relief for victims in

25. This is classic instructive language on Congress's part. *Cf., N. L. R. B. v. Drivers, Chauffeurs, Helpers, Loc. Union No. 639*, 362 U.S. 274, 282 (1960) (recognizing "shall be construed" was "a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation … as understood prior to" legislative developments).

favor of continued protections for platforms. *Id.* at 1250-51. Most recently, the Ninth Circuit affirmed dismissal of sex-trafficking claims by minors whose abuse images were distributed broadly on the online platform Reddit, despite hundreds of notices and pleas for removal. *Reddit*, 51 F.4th. *See also, M.H.*, 2022 WL 93575, at *1; and *G.G. v. Salesforce.com, Inc.*, No. 20-CV-02335, 2022 WL 1541408, at *15 (N.D.Ill. May 16, 2022).[26]

By applying *Zeran*'s interpretative approach to grant *per se* immunity for enabling and profiting from sex trafficking, courts have departed from §230's plain language, with unjust results that Congress never intended.

Rather than incentivizing "Good Samaritan" behavior by internet companies, the prevailing misinterpretation of §230 shields them from accountability for the harm their own conduct causes, even when they knowingly facilitate sexual abuse and exploitation. Returning to the plain language of §230 would restore access to justice for survivors. It doesn't mean that every claim will be successful—only that they will have their day in court.

26. Other courts have held that FOSTA only requires that a Plaintiff alleged a violation of 1595. *Twitter*, 555 F. Supp. 3d at 894, *abrogated by Reddit*, 51 F.4th; *Doe v. Mindgeek USA Inc.*, 574 F. Supp. 3d 760, 763 (C.D. Cal. 2021), *abrogated by Reddit*, 51 F.4th; *Fleites v. MindGeek S.A.R.L.*, No. CV2104920CJCADSX, 2022 WL 4456077, at *1 (C.D. Cal. July 29, 2022).

CONCLUSION

For the reasons above the decision of the Ninth Circuit Court of Appeals should be reversed.

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