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 AMICI CURIAE INSTITUTE FOR FREE SPEECH AND PROFESSOR ADAM CANDEUB IN SUPPORT OF NEITHER PARTY

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INTERESTS OF AMICI CURIAE[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to protecting the First Amendment rights of speech, assembly, press, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties and advancing free speech.

Adam Candeub is a professor of law at Michigan State University College of Law, where he serves as Director of its Intellectual Property, Information, and Communications Law Program. He also has served as Acting Assistant Secretary of Commerce for the National Telecommunications and Information Authority and Deputy Associate Attorney General. A leading communications law scholar, Prof. Candeub has researched and written extensively about section 230 of the Communications Decency Act, and federal and state courts have cited and relied upon his work.

The Institute and Professor Candeub file this brief to advise the Court on the scope of section 230 of the Communications Decency Act, 47 U.S.C. § 230, as the parties both appear to urge an incorrect interpretation

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[1] Pursuant to this Court's Rule 37.6, counsel for amici certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici or their counsel have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

of the provision that would stifle online freedom of expression.

SUMMARY OF ARGUMENT

Large social-media platforms predictably favor an expansive reading of section 230 immunity that maximizes their discretion while minimizing their potential liability. But while section 230 is important to preserving free expression, it was not designed to immunize platforms from traditional common law liability for their own speech. Nor was section 230 crafted to act as a blanket shield against liability for traditional causes of action unrelated to free expression, such as breach of contract, fraud, and discrimination.

In suggesting or allowing for such interpretations, both parties misread section 230. The statute protects platforms from liability arising from others' exercise of editorial discretion, but not from liability flowing as a consequence of the platforms' own speech. That same distinction extends to the promotion of content by way of an algorithm. An algorithm is just a formula for reaching a result. Accordingly, the courts need more information to resolve this case, because it is unknown whether Google's recommendations at issue here are simply a pass-through mechanism for third parties' speech, reflect users' deliberate choices, or are Google's own speech.

Section 230(c)(1) eliminates the speaker or publisher liability of "interactive computer services"—the

provision's term for internet platforms such as Google's YouTube—for user or other third-party content that the platform transmits. This provision ensures that Google has no speaker or publisher liability for "information provided by another information content provider," i.e., its users or other third parties. This legal protection mirrors that of telegraphs and telephones, which also enjoy limited liability when transmitting their users' or subscribers' messages or content, but which had been denied to platforms by the poorly reasoned decision in *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995) (unpublished).

But the parties have both argued for expanding section 230(c)(1)'s scope beyond its text, any imputable congressional purpose, and any historical precedent for communication network liability, claiming that section 230(c)(1) protects platforms from their own exercise of "traditional editorial functions."[2] This misreading of the statute would shield the platforms from liability for any decision they might make about the content they carry. Cloaking themselves with this protection, Google and other internet platforms have claimed that they can edit, censor, or ban users and their speech without regard for anti-discrimination, consumer protection, or even contract laws.

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[2] Petitioners' arguments have shifted from their petition, where they argued that section 230(c)(1) protected "traditional editorial functions," Pet. at i, to protecting Google's publisher function under its "legal meaning" in defamation law. *See* Pet. Br. at 19.

In addition to ignoring the statute's text and structure, the parties' interpretation of section 230(c)(1) overrides Congress's stated purpose: to encourage internet firms to "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). Congress enacted section 230(c)(1)'s liability relief as an incentive for interactive computer services (ICS) to offer consumers a variety of competing content moderation approaches, ranging from Prodigy's family-friendly approach that led to the law's enactment to a completely hands-off policy.

But an expansive reading of section 230(c)(1) that would shield platforms from consumer fraud or contractual claims based on their false representations (including representations as to content moderation) would undermine Congress's purpose. It would also stunt the operation of market forces, which depend on the enforceability of contracts and the prevention of fraud. By rendering the platforms' content-moderation promises illusory—unenforceable in court—the parties' interpretation of section 230(c) would decrease consumer incentives to seek out internet platforms with different content moderation policies, dampen competition, and give firms with market, or even monopoly power, greater discretion over content decisions, frustrating Congress's vision for section 230(c)(1) as a means of protecting expression and fostering diverse ways of communicating online.

Last, section 230(f)(3)—not section 230(c)(1)—answers the question presented. Petitioners argue that

"targeted recommendations" are Google's own speech, and thus fall outside section 230(c)(1)'s ambit of "information provided by another." But section 230(f)(2) excludes from (c)(1) protection any platform that "is responsible, in whole or in part, for the creation or development of information provided through the Internet."

When evaluating section 230 immunity, courts must distinguish between the speech of third-party users and an internet platform's own speech. The question of whether YouTube "creat[ed] or develop[ed]" targeted recommendations using its algorithms—or merely transmitted information requires factual development currently missing from the record. This case should be remanded to the district court to determine whether or how YouTube's algorithms create and develop recommendations.

ARGUMENT

I. The "traditional editorial function" interpretation and the three-prong test both ignore section 230's text

In statutory interpretation cases, "we start where we always do: with the text of the statute." *Van Buren v. United States*, 141 S. Ct. 1648, 1654 (2021). The statute at issue provides: "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). This text only frees Google, an "interactive computer service," from causes of action for which third parties would have publisher or speaker liability.

Applying this principle, when a Google user provides libelous or otherwise unlawful content or information, an aggrieved plaintiff can sue the user directly, but not Google. Communications networks have typically received such relief in regulatory tariffs, *see Cole v. Pacific Bell Tel. & Tel. Co.*, 246 P.2d 686, 687 (Cal. Ct. App. 1952) ("Since [the telephone company] renders a service affecting the public, the state shall regulate and control it in order to prevent injustice, and, further, in consideration of such regulation and control its liability is and should be defined and limited. . . .") (internal quotations omitted), as well as in common law, *see O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 541 (1st Cir. 1940) ("The immunity of the telegraph company from liability to a defamed person when it transmits a libellous message must be broad enough to enable the company to render its public service efficiently and with dispatch"). *Stratton Oakmont* wrongly denied platforms such immunity.

Congress separately addressed platforms' editorial function in section 230—but it did so in subparagraph (c)(2), not (c)(1). Section 230(c)(2)(A) protects Google when it removes, edits, or blocks certain types of material, namely "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content. "Applying the *ejusdem generis* canon, 'otherwise objectionable' should be read as limited to material that is likewise covered by the CDA"—that is,

obscene, lewd, lascivious, filthy, excessively violent, and harassing material—not as a catch-all for whatever material platforms do not like, which would defeat the purpose of itemizing the types of removable content. Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. Free Speech L. 175, 176-78 (2021).

At various stages in this lawsuit, the parties have both promoted the "traditional editorial function" interpretation of section 230(c)(1).[3] Whatever its virtues, that interpretation contradicts the statute's plain language.

In addition to the "traditional editorial function" test of section 230(c)(1), platforms have posited a "three-prong" approach to section 230(c)(1) immunity, which functions in the same way to expand the provision beyond any textual moorings. As Google proposes, immunity under this test applies whenever: (1) The defendant uses or operates "an interactive computer service;" (2) the plaintiffs' claim seeks to treat the defendant as "the publisher or speaker" of the content at issue; and (3) the content was generated by a

[3] Pet. at ii; *Gonzalez v. Google LLC*, 2019 WL 1644543 (9th Cir. April 5, 2019), Answering Br. at 25 ("By any measure, these claims would treat Google as a publisher. By seeking to impose liability on Google's decisions about who may use its service, what content may be posted, and when such content should be blocked or removed, Appellants aim directly at Google's 'traditional editorial functions' "); BIO at 14 (Courts "interpret section 230 to bar claims implicating 'traditional editorial functions.' ").

different "information content provider." BIO at 4; *see*, *e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019).

This would work, if Google's third prong required the provider of the information to be different from both the defendant platform *and* the plaintiff—that is, if the disputed content came from a third party. But if the plaintiff counts as a "different" content provider whose content can be removed, Google suddenly enjoys immunity for removing a user's content, and not just for a user's claim against harm done by third parties. And in practice, that is how Google, and the courts agreeing with it, understand the third prong—reading the requirement of a trilateral relationship out of section 230(c)(1) immunity and applying the provision in bilateral settings, such as when a user sues the platform for taking down that user's content.

By omitting this key element of third-party speech, courts have applied section 230(c)(1) to cases involving internet platforms' own speech or platform decisions that merely concern third-party content or information—but which third parties do not speak. *See*, *e.g.*, *Sikhs for Just. "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092-93 (N.D. Cal. 2015), *aff'd sub nom. Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017).

Responding to the *Stratton Oakmont* problem, Congress designed section 230(c)(1) to prevent Person A from suing a platform for content posted by Person B (a third party). But section 230(c)(1) does not address

the situation where Person A sues the platform for engaging in racial discrimination by excluding Person A, or violating its obligations to Person A by breaching its own terms of service (a bilateral dispute). "With no limits on an Internet company's discretion to take down material, § 230 now apparently protects companies who racially discriminate in removing content." *Malwarebytes, Inc. v. Enigma Software Grp., USA, LLC*, 141 S. Ct. 13, 17 (2020) (Thomas, J., concurring respecting the denial of certiorari).

If Congress wanted to do so, it would have written a different statute with vast liability protections unprecedented in the long history of communications law. But "Section 230 provides internet platforms with limited legal protections." *Henderson v. Source for Pub. Data, L.P.*, No. 21-1678, 2022 WL 16643916, at *3 (4th Cir. Nov. 3, 2022) (citing Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139 (2921)). Nothing in its text suggests otherwise.

II. The "traditional editorial function" interpretation and the three-prong test both ignore section 230's structure

Expanding section 230(c)(1)'s protections to include a platform's "traditional editorial functions" for its own speech, or applying the three-prong test in a manner that extends immunity to bilateral platform-user disputes, undermines other liability rules Congress carefully constructed as part of the Communications Decency Act. Both of these proffered tests would render section 230(c)(2) a nullity. If section 230(c)(1)

immunizes all of a platform's editorial judgments, then there is no need to specify what content platforms may suppress in good faith in the statute's next section.

Reading one provision of a statute to render another a nullity violates the rule against surplusage, one of this Court's "most basic interpretive canons," requiring "that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (internal quotation marks omitted); *see also RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("the canon avoids . . . the superfluity of a specific provision that is swallowed by the general one, violat[ing] the cardinal rule that, if possible, effect shall be given to every clause and part of a statute") (internal quotations omitted).

Indeed, this Court emphasizes that the canon "is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013) (citation omitted). Interpreting section 230(c)(1) as protecting platforms' "traditional editorial function" or otherwise immunizing a platform's conduct with respect to any speech that it did not generate would not only render superfluous another part of the same statutory scheme—it would render superfluous the *very next provision* in the same section.

III. Congress enacted section 230 to protect freedom of speech and increase user control, not to limit expression by expanding platform control

Congress passed section 230 of the Communications Decency Act as part of the Telecommunications Act of 1996, an enormous legislative overhaul of telephone regulation—and to a very much lesser degree, the nascent industry Congress called "interactive computer service providers." In contrast to the more regulatory Sections 223(a)(i) & (d) ruled unconstitutional in *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997), Congress intended section 230 to use market incentives to curb the dissemination of pornography and other offensive material on the internet. "The legislative history illustrates that in passing § 230 Congress was focused squarely on protecting minors from offensive online material, and that it sought to do so by 'empowering parents to determine the content of communications their children receive through interactive computer services.'" *Force*, 934 F.3d at 79–80 (Katzmann, C.J., concurring in part and dissenting in part) (citing S. REP. NO. 104-230, at 194 (1996) (Conf. rep.)). The statute and legislative history make this purpose obvious—and the parties' interpretation of section 230(c)(1) undermines it.

A. Congress intended section 230 to encourage competition, increase consumer choice, and enhance user control

To encourage the provision of diverse internet access solutions, Congress crafted section 230 to overturn *Stratton Oakmont, supra*, a pivotal New York state case from the online industry's early days. *Stratton Oakmont* held that Prodigy incurred publisher liability for all of its users' bulletin board postings by content-moderating the posts to ensure their suitability for families.

Under *Stratton Oakmont*, if an ICS moderated and edited bulletin board content, it faced tremendous legal liability. But, if it failed to edit or moderate posts, its bulletin boards could feature indecent material, inappropriate for families. Congress considered these incentives mismatched.[4] "The authors of § 230 saw the

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[4] 141 CONG. REC. S8345 (daily ed. June 14, 1995) (statement of Sen. Coats) ("I want to be sure that the intent of the amendment is not to hold a company who tries to prevent obscene or indecent material under this section from being held liable as a publisher for defamatory statements for which they would not otherwise have been liable. . . . Am I further correct that the subsection (f)(4) defense is intended to protect companies from being put in such a catch-22 position? If they try to comply with this section by preventing or removing objectionable material, we don't intend that a court could hold that this is assertion of editorial content control, such that the company must be treated under the high standard of a publisher for the purposes of offenses such as libel."); 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, referring to *Stratton* decision as "backward"); 141 CONG. REC. H8471 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte, criticizing *Stratton* decision).

Stratton-Oakmont decision as indicative of a 'legal system [that] provides a massive disincentive for the people who might best help us control the Internet to do so.'" *Force*, 934 F.3d at 79 (quoting 141 CONG. REC. 22,045) (statement of Rep. Cox)).

Congress corrected this incentive structure with section 230(c)(2). It states that internet platforms "shall not be held liable" for editing to remove content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2).

In comments on the House floor, the bill's sponsor, Representative Cox, explained that section 230 would reverse *Stratton Oakmont* and advance the regulatory goal of allowing families greater power to control online content, protecting them from "offensive material, some things in the bookstore, if you will that our children ought not to see."[5]

But Congress had a broader purpose in enacting section 230 that is often overlooked. Separated by nearly a generation, we may not recall that, in 1995, most interactive computer services, including those the legislative history mentions by name, Prodigy or CompuServe, were accessed via telephone dial-up. These services, before the introduction of the world-wide-web protocol, were so-called "walled gardens," offering limited access to bulletin boards, wire services,

[5] *Id.* at H8470.

and other services.[6] And, most important, they offered differentiated content-moderation policies, with Prodigy being more "family friendly" than its competitors.[7]

Congress's forgotten design, made clear in its stated findings and purposes, was to "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services." 47 U.S.C. § 230(b)(3).

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[6] Andrew Pollack, *Ruling May Not Aid Videotex*, N.Y. Times, Sept. 15, 1987, at D1, https://www.nytimes.com/1987/09/15/business/ruling-may-not-aid-videotex.html; John B. Morris, Jr., Cynthia M. Wong, *Revisiting User Control: The Emergence and Success of A First Amendment Theory for the Internet Age*, 8 First Amend. L. Rev. 109, 112–13 (2009) ("In 1995, it was far from clear what First Amendment standards would apply to the emerging online environment. It was also equally unclear exactly what form the online world would ultimately take. America Online (AOL) was rising as the leading path for consumers into the online environment, but it was only taking hesitant steps to allow its users to step outside of its 'walled garden' of content to access the Internet directly. Other online services—such as CompuServe and Prodigy—competed with AOL, and pure Internet access (as is common today) was still used mainly by academics and more technically advanced users."); Joanna Pearlstein, *MacWorld's Guide to Online Services*, MacWorld, Aug. 1994, at 90 ("Core services include general, business, and sports news; computer forums and news; reference materials; electronic mail and bulletin boards; business statistics and data; games; shopping services; travel services; and educational reference material. Still, the different online services do have different emphases, so even though they all offer a range of basic services, they are not interchangeable.").

[7] Peter H. Lewis, *The Compuserve Edge: Delicate Data Balance*, N.Y. Times, Nov. 29, 1994, https://www.nytimes.com/1994/11/29/science/personal-computers-the-compuserve-edge-delicate-data-balance.html.

This is what Prodigy seemed to be doing—but was penalized by *Stratton Oakmont*, with incredibly far-reaching liability for its efforts.

Overturning *Stratton Oakmont*, Congress aimed "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4).

It is vital to recognize that Congress's purpose was to give users *more* freedom to choose among content-moderation policies, essentially encouraging differentiated products that a competitive market would provide. It sought to encourage the development of "services [that] offer users a great degree of control over the information that they receive. . . ." 47 U.S.C. § 230(a)(2).

Congress, supporting both free speech and diversity of expression, thought these technologies would deliver Americans "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." 47 U.S.C. § 230(b)(3). It did not view section 230 as protecting platforms' own "editorial functions" from traditional liability for defamation and, where appropriate, fraud, discrimination, other torts, or breach of contract.

Amici note that Google obviously enjoys a First Amendment right to, for example, generate and post its own content on YouTube. But section 230 does not provide it with legal protection for that content beyond

that afforded by the First Amendment to all Americans. Nor does it shield a platform that posts its own message stating "we do not serve blacks, Baptists, or Basques," or that breaches a non-disclosure agreement or defrauds consumers, however much editorial discretion was exercised in generating such content. On the other hand, if a third party posted such content on a platform, then section 230 would likely apply to shield the platform—but not the poster—from liability.

Indeed, the Communication Decency Act's conference report provided that "the specific purpose of this section is to overrule *Stratton-Oakmont v. 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. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services." S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

Finally, the Senate Conference Report rejects section 230(c)(1) protection for censorship and deletion of content. "The conferees do not intend, however, that these protections from civil liability apply to so-called 'cancelbotting,' in which recipients of a message respond by deleting the message from the computer systems of others without the consent of the originator or without having the right to do so." S. REP. NO. 104-230, at 194 (1996) (Conf. Rep.).

Congress's vision of section 230's purpose as encouraging competitive firms to offer a diversity of content management approaches and thereby enhancing user control, contradicts the parties' interpretation. They claim that Congress intended section 230(c)(1) to protect platforms' decision to suppress speech, de-platform users, or content moderate for reasons not enumerated in section 230(c)(2).

While platforms can offer content controls or even methods to automatically deliver recommendations to users, it should be the user's choice to ask for or accept recommendations. A correctly cabined understanding of section 230 allows consumers to shop for different content-moderation and recommendation regimes. Importantly, it also allows all parties to enforce the terms of service.

B. Google's interpretation of section 230(c)(1) undermines the provision's goals of promoting free expression and empowering consumers

Google's reading expands section 230(c)(1) to protect platforms from traditional common law or other liability caused by their *own* speech, which the First Amendment does not otherwise abrogate. Whether Google should enjoy this immunity is a matter properly left in the first instance to Congress, or to the states. This Court should not constructively amend section 230 to grant platforms such sweeping immunity.

Courts adopting Google's interpretation use section 230(c)(1) to immunize platforms for their own activities—in suits ranging from contract liability concerning platforms' representations in their terms of service and elsewhere,[8] their own alleged fraud in their representations in their terms of services and elsewhere,[9]

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[8] *King v. Facebook, Inc.*, 572 F. Supp. 3d 776, 795 (N.D. Cal. 2021) ("the Court holds that Facebook has CDA immunity for the contract/implied covenant claim"); *Morton v. Twitter, Inc.*, No. CV 20-10434-GW-JEMX, 2021 WL 1181753, at *5 (C.D. Cal. Feb. 19, 2021) ("Even assuming Morton adequately pled a contractual duty on Twitter's part . . . a breach of contract claim . . . would be barred by Section 230."); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016), *aff'd*, 700 F. App'x 588 (9th Cir. 2017) ("the immunity bestowed on interactive computers service providers by § 230(c) prohibits all [including contract] of Plaintiff's claims against Facebook"); *Lancaster v. Alphabet Inc.*, No. 15-CV-05299-HSG, 2016 WL 3648608, at *5 (N.D. Cal. July 8, 2016) (where "plaintiff[s] asserting breach of the implied covenant of good faith and fair dealing sounding in contract . . . CDA precludes any claim seeking to hold Defendants liable for removing videos from Plaintiff's YouTube channel"); *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1307–08 (N.D. Cal. 2019) (CDA "immunizes Facebook from . . . the fourth cause of action for breach of contract [between plaintiff and Facebook]").

[9] *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 162 n.11 (D. Mass. 2015), *aff'd sub nom.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) ("Courts have also rejected consumer protection claims under section 230(c)(1) that seek to hold interactive service providers liable for third-party content."); *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) ("liability for Lycos under . . . the Florida securities statute . . . [is] barred by Section 230"); *Hinton v. Amazon.com.DEDC, LLC*, 72 F. Supp. 3d 685, 688–91 (S.D. Miss. 2014) (Section 230(c)(1) bars suits under Mississippi Consumer Protection Act); *Obado v. Magedson*, No. CIV. 13-2382 JAP, 2014 WL 3778261, at *1 (D.N.J. July 31, 2014), *aff'd*, 612 F. App'x 90 (3d Cir. 2015), at *1 (Section 230(c)(1) bars suits under New Jersey

and their own discrimination violating users' civil rights.[10]

These holdings have undermined Congress's purpose in passing section 230 by vastly expanding platform immunity. Moreover, because they bar actions based upon the platforms' failure to keep their own promises, these cases have the effect of *diminishing* consumer choice, user control, and free expression. Consumers have no reason to believe that platforms' promises about their different types of services will be enforceable—and, therefore, many will not seek out different types of services.

Even if a firm wanted to distinguish itself by offering different types of services, such as content moderation that allows for more expression, it could not do so in a legally enforceable manner because consumers would not consider the platform's representations about its services to be binding—thanks to the courts' erroneous adoption of Google's section 230(c)

Consumer Fraud Act); *Goddard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008) (Section 230(c)(1) bars suits under California Unfair Competition Law).

[10] *Wilson v. Twitter*, No. 3:20-CV-00054, 2020 WL 3410349, at *12 (S.D. W.Va. May 1, 2020), *report and recommendation adopted*, No. CV 3:20-0054, 2020 WL 3256820 (S.D. W.Va. June 16, 2020) ("Claims brought pursuant to federal civil rights statutes, such as Title II of the CRA, are not exempted from the immunity provided by the CDA"); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 377 F. Supp. 3d 49, 66 (D. Mass. 2019) ("The CDA exempts certain laws from its reach. Federal and state antidiscrimination statutes are not exempted."); *Sikhs for Just.*, 144 F. Supp. 3d at 1090–91 (Section 230 bars actions under the Civil Rights Act of 1964 and California Unruh Civil Rights Act).

interpretation. Of course, dominant or monopolist internet platforms might like a world in which competitors cannot credibly offer different, competing services. But that is certainly not what Congress intended in passing section 230.

IV. This case turns on whether "targeted recommendations" are YouTube's mere transmission of "content from another" or YouTube's creation or development of its own content

Just as Google errs in claiming blanket section 230(c) immunity for its algorithmic recommendations, petitioners oversimplify the issue in claiming that platforms should never enjoy section 230 immunity for offering recommendations. Algorithms cannot be casually tossed into editorial-discretion and not-editorial-discretion buckets. Some algorithms may involve platforms' expressive judgments, while others may simply respond to external inputs, such as user engagement with content; for example, promoting that content which gets the most clicks.

The question this case presents is *not* whether "targeted recommendations" fall outside Google's traditional editorial function, but whether targeted recommendations are either (1) "information provided by another information content provider [i.e., a user or users]," section 230(c)(1), or (2) a result of YouTube's *own* "creation or development." 47 U.S.C. § 230(f)(3). If the recommendations come from others, Google enjoys

immunity as a distributor of others' content. On the other hand, if the recommendations result from Google's own input or are based on its internal criteria, Google is making the recommendation itself—and while it enjoys any of the First Amendment's protections for its speech, it cannot claim that § 230 clothes its own actions and its own speech with any additional legal immunity.

And the statute tells us how to answer that question. "The term 'information content provider' means any person or 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." 47 U.S.C. § 230(f)(3). Thus, the statute more narrowly asks whether platforms are "responsible, in whole or in part, for the creation or development of information," in this case: recommendations.

The case thus turns on whether Google is merely transmitting targeted recommendations "from another," in which case section 230(c)(1) would apply. If, however, Google is going beyond mere transmission, and developing its own content, then section 230(c)(1) would not apply.

The parties make much ado about whether algorithms are speech. But an algorithm is simply "a step-by-step procedure for solving a problem or accomplishing some end." MERRIAM-WEBSTER, *Algorithm*, https://www.merriam-webster.com/dictionary/algorithm (last visited Dec. 2, 2022). Sometimes algorithms add additional information; and sometimes not. What

matters is how the algorithm is designed to work and who is asking it to do the work.

For instance, Twitter's first "algorithm" for posting tweets was a chronological listing. That algorithm does add some additional information, but not much; it tells you who tweeted before or after whom. As any mode of presentation or transmission conveys some basic information, mere transmission does not "develop" information under section 230(f)(3). On the other hand, an algorithm that deletes all posts that, in the platform's judgment, constitute "misinformation" might constitute development of information.

Drawing the line between mere transmission of content and creation or development of content—a question the statute inescapably presents—is a factual issue that turns on how precisely Google's algorithms work. The record in this case is currently devoid of facts necessary to resolve this issue. This case should be remanded to the district court for further factual development.

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded for further factual development to determine whether YouTube's algorithms create or develop information.

Respectfully submitted.

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