No. 21-1333

IN THE

Supreme Court of the United States

REYNALDO GONZALEZ, *et al.*,
Petitioners,

v.

GOOGLE LLC,
Respondent.

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

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND FIVE CIVIL RIGHTS ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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December 7, 2022

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

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INTERESTS OF THE AMICI CURIAE[1]

Formed in 1963, the Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization that uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. To that end, the Lawyers' Committee has frequently participated before this Court representing parties or as amici. *See, e.g., Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, 142 S. Ct. 896 (2022); *303 Creative LLC v. Elenis*, No. 21-476 (2022); *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529 (2013). The Lawyers' Committee has an interest in ensuring that this Court interprets Section 230 of the Communications Decency Act (Section 230) in a way that does not adversely impact the manner and extent to which civil rights laws can be enforced against discriminatory practices occurring through the internet. It is a leader on digital justice issues and participates in cases combatting online discrimination and unfair or deceptive data practices targeting Black communities and other communities of color. The Lawyers' Committee has represented parties or served as amici in various federal court cases involving Section 230. *See, e.g.*, *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110 (4th Cir. 2022); *Vargas v. Facebook, Inc*., No. 21-16499 (9th Cir.); *Nat'l Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020) ("*NCBCP I*").

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[1] Pursuant to Supreme Court Rule 37.6, counsel represent that they authored this brief in its entirety and no one else made a monetary contribution for it. Pursuant to Rule 37.3(a), counsel represent that all parties consented to the filing of this brief as reflected by their blanket consents on file with the Clerk.

The other amici are Asian Americans Advancing Justice – AAJC, National Coalition on Black Civic Participation, National Council of Negro Women (NCNW), Office of Communication of the United Church of Christ, Inc., and Take Creative Control. Amici appreciate how expanding or contracting immunity under Section 230 could affect people of color and other historically underserved communities. Amici are committed to ensuring the communities they serve have recourse against online discrimination while preserving the internet as a forum for diverse voices and perspectives.

SUMMARY OF ARGUMENT

The internet promises the freedom to define oneself, organize, advocate, learn, play, pray, and work. It is central to economic, cultural, political, and social life. These opportunities are particularly important for people of color, women, religious minorities, LGBTQ people, people with disabilities, and other historically underserved groups because the internet enables circumvention of traditional gatekeepers—economic and political—and creation of new communities.

True equality online depends on whether we allow the data-driven economy to magnify and reinforce existing inequities. As society has moved online, so too have discrimination, redlining, voter suppression, and harassment.

The explosive growth of artificial intelligence and other automated decision-making systems in everyday commerce, and the prevalence of biases in these systems, threaten large-scale denials of equal opportunity. These systems pose the risk of what has been called "'the New Jim Code': the employment of new technologies that reflect and reproduce existing inequities but that are promoted and perceived as more objective or

progressive than the discriminatory systems of a previous era." Ruha Benjamin, *Race After Technology* 5-6 (2019).

Limiting liability for internet companies through Section 230 creates benefits and challenges. Section 230 reflected Congress' intent that the internet remain "a forum for a true diversity of . . . myriad avenues for intellectual activity." 47 U.S.C. § 230(a)(3). The immunity Section 230 provides allows free expression to flourish on diverse platforms, but also creates barriers to accountability for platforms that facilitate discrimination and other illegalities. "The Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc).

When interpreting Section 230, this Court must adopt a balanced approach that neither impedes enforcement of civil rights laws, nor increases censorship of people of color and other historically underserved communities. An immoderate decision in either direction could imperil equal opportunity on the one hand and free expression on the other.

The Court should look to the consensus interpretation of the lower courts. First, it should recognize that Section 230 does not immunize platforms for civil rights violations that do *not* involve publishing, such as discriminatory hiring and mortgage approval algorithms, illegal privacy practices, and unlawfully biased facial recognition systems. Section 230 only applies when a claim seeks to treat a defendant as a publisher of third-party content. *See* 47 U.S.C. § 230(c)(1) ("No provider . . . shall be treated as a publisher or speaker of any information provided by another information content provider."); *Henderson*, 53 F.4th at 119.

Second, the Court should recognize that even if a defendant is engaged in publishing, it can still lose immunity under Section 230 if it "materially contributes" to the illegality, meaning it is "responsible for what makes the displayed content allegedly unlawful." *Jones v. Dirty World Enter. Recordings LLC*, 755 F.3d 398, 410 (6th Cir. 2014). If a platform takes benign third-party content and transforms it into discriminatory conduct—such as steering housing ads based on race—it is responsible for the illegality and should not be immune. A defendant is also "responsible," *id*., when it actively aids illegal conduct—such as helping to target voter intimidation communications, *see Nat'l Coal. on Black Civic Participation v. Wohl*, No. 1:20-CV-8668, 2021 WL 4254802, at *8 (S.D.N.Y. Sept. 17, 2021) ("*NCBCP II*").

Consequently, Section 230 must extend *only so far as Congress intended, and no further*. The Court should thus reject the "neutral tools" test that immunizes publishers who use purportedly neutral tools to manipulate user-generated information. *See Roommates*, 521 F.3d at 1169. This test has no basis in the statutory text and can improperly immunize artificial intelligence algorithms that are procedurally indiscriminate but make substantive decisions that are discriminatory.

Accountability for civil rights violations by online platforms, such as voter suppression and discrimination in housing and employment, is necessary to achieve the full measure of equality in a data-driven economy. The ability to effectively enforce civil rights laws like the Civil Rights Act of 1964, the Voting Rights Act, and the Fair Housing Act in an internet-enabled economy depends on a properly balanced interpretation of Section 230.

Though it is important to recognize Section 230's limits, the statute should not be undermined. Section 230 empowers people from underrepresented backgrounds to leverage online platforms to express themselves, build communities, engage in social activism, and pursue entrepreneurship. Because of Section 230, activists can use social media to build modern civil rights movements, LGBTQ people can find supportive and inclusive online communities, and creators of color can launch new ventures. We ask this Court to be mindful of the higher rates of censorship people of color and other historically underserved communities already face online, and the increase in disproportionate censorship that would occur and harm these communities if Section 230 immunity is diminished.

We urge the Court to preserve the benefits of Section 230 without allowing it to become a "get-out-of-jail-free card" for civil rights violations. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

ARGUMENT

I. Section 230 does not apply to civil rights violations or other illegal conduct that do not involve publishing.

Online platforms engage in practices that can gravely harm historically underserved communities, such as deploying discriminatory algorithms to make lending or hiring decisions, using unlawfully biased facial recognition technologies, or infringing on privacy rights. Holding these companies accountable for their civil rights violations depends on recognizing when Section 230 applies and when it does not.

Although Section 230 grants significant protections, "it is not a license to do whatever one wants online." *Henderson*, 53 F.4th at 117. Section 230 "only protects

from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat … as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!*, 570 F.3d. 1096, 1100-01 (9th Cir. 2009). To preserve strong enforcement of anti-discrimination laws, amici urge the Court to adopt this test, consistently used by the lower courts, which in essence focuses on (1) whether the *claim* treats the defendant as a publisher of third-party content and, (2) if yes, whether the defendant materially contributed to what made the conduct at issue illegal. *See Roommates*, 521 F.3d at 1168; *Henderson*, 53 F.4th at 127-29; *Jones*, 755 F.3d at 410. Publication means "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 681 (9th Cir. 2019).

The "publisher" question matters because many civil rights violations that occur through the internet have nothing to do with publishing—even though they may use third-party content. This limitation on Section 230 immunity is essential for holding tech companies accountable for discriminatory decisions, such as recruiting algorithms that discriminatorily and unlawfully screen women from job opportunities, mortgage approval algorithms that disproportionately and unlawfully reject applications on the basis of race, and facial recognition systems that produce inaccurate matches on the basis of race or sex. *See* Jane Chung, *Racism In, Racism Out: A Primer on Algorithmic Racism*, Pub. Citizen (2022).[2]

[2] https://www.citizen.org/article/algorithmic-racism/.

Similarly, a company does not engage in publishing when it harvests or uses personal information, like sensitive financial or health data, in violation of privacy laws. *See Fed. Trade Comm'n v. Accusearch*, 570 F.3d 1187, 1204 (10th Cir. 2009) (Tymkovich, J., concurring) ("The CDA says nothing about immunizing publishers or speakers for their own conduct in *acquiring* the information.") (emphasis in original). Such privacy invasions can enable damaging surveillance. One investigation showed telecommunications companies and data brokers sold customers' cellphone location data to property managers, bail bondsmen, "bounty hunters and others not authorized to possess it." Joseph Cox, *I Gave a Bounty Hunter $300. Then He Located Our Phone*, Motherboard (Jan. 8, 2019);[3] *see also Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (location data "provides an intimate window into a person's life" and reveals their "familial, political, professional, religious, and sexual associations") (citation and quotation marks omitted).

The first step in the analysis of a Section 230 invocation, therefore, is to identify whether the claim treats the defendant as a publisher of content provided by someone else. *See Henderson*, 53 F.4th at 119. The focus is "on whether 'the duty the plaintiff alleges' stems 'from the defendant's status or conduct as a publisher or speaker.'" *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021) (quoting *Barnes*, 570 F.3d at 1107). A claim only treats a defendant as a publisher "if it (1) bases the defendant's liability on the disseminating of information to third parties and (2) imposes liability based on the information's improper content." *Henderson*, 53 F.4th at 123. For the first

[3] https://www.vice.com/en/article/nepxbz/i-gave-a-bounty-hunter-300-dollars-located-phone-microbilt-zumigo-tmobile.

factor, "a third party is someone other than the subject of the information disseminated." *Id*. at 121.

Whether a defendant is an online publisher is not, on its own, sufficient to confer immunity. "To be held liable for information 'as the publisher or speaker' means more than the publication of information was a but-for cause of the harm." *Id*. at 122. Rather, the *claim* must be aimed at a specific publishing activity to trigger Section 230.

In *Henderson*, a plaintiff alleged he was not hired for a job because the defendant, a background check company, furnished a misleading and inaccurate criminal history report and violated his rights under the Fair Credit Reporting Act (FCRA). *See id.* at 118. Defendant claimed that because it provided these background reports through its website and they contained information from third parties (public records), Section 230 exempted it from FCRA compliance. The Fourth Circuit disagreed. Section 230 "does not provide blanket protection from claims asserted under the FCRA just because they depend in some way on publishing information." *Id*. at 123. Courts "must instead examine each specific claim" to see if it necessarily treats a defendant as a publisher of someone else's information. *Id*. The court concluded that claims alleging failure to comply with FCRA's disclosure and certification requirements do not seek to treat the defendant as a publisher. *Id*. at 123-25. Significantly, the Fourth Circuit held that a claim treats a defendant as a publisher, and triggers Section 230 immunity, "only when the claim depends on the content's impropriety." *Id*. at 125. Otherwise, the alleged impropriety does not derive vicariously from another actor.

Internet companies do not get a blanket exemption from complying with laws of general applicability,

including civil rights laws, just because they happen to do business online. *HomeAway* is particularly instructive because it shows the limits of immunity for conduct adjacent to publishing. 918 F.3d 676. In *HomeAway*, a municipal ordinance restricted short-term property rentals, banned online platforms from transacting prohibited rentals, and required the platforms to pay taxes and make disclosures. *Id*. at 680. Vacation rental websites challenged the ordinance. The court held Section 230 does not immunize "any time a legal duty might lead a company to respond with monitoring or other publication activities. . . . We look instead to . . . whether the duty would necessarily require an internet company to monitor third-party content." *Id*. at 682. Section 230 did not apply because the ordinance only required monitoring "incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic." *Id*. (emphasis in original). "Even assuming that removing certain listings may be the Platforms' most practical compliance option, allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations." *Id*. In sum, Section 230 does not apply because "[p]latforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings." *Id*. at 684.

Other cases agree. *See Lemmon*, 995 F.3d 1085 (negligent design claims); *Erie Ins. Co. v. Amazon.com*, 925 F.3d 135 (4th Cir. 2019) (product liability claims); *Internet Brands*, 824 F.3d at 852-53 (a failure to warn claim does not treat a defendant as a publisher even when "[p]ublishing activity is a but for cause of just about everything [defendant] is involved in"); *Barnes*, 570 F.3d at 1107 (promissory estoppel claims).

The conclusion is that Section 230 only applies when a claim is dependent on the defendant publishing illegal third-party content—even if the platform may otherwise act as a publisher in other aspects of their business. Section 230 does not "render unlawful conduct 'magically . . . lawful when [conducted] online. . . . Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning." *HomeAway*, 918 F.3d at 683-84.

II. When a publisher materially contributes to a civil rights violation, it loses Section 230 immunity.

Protecting civil rights online requires that when a platform materially contributes to illegal conduct, it be held accountable. When a defendant merely publishes unlawful third-party content, Section 230 applies. But when a defendant takes benign third-party content and uses it to engage in discrimination or other unlawful acts—such as steering predatory lending ads based on race—it is not immune because it is responsible for the development of the illegality. *See Roommates*, 521 F.3d at 1165 (no immunity from Fair Housing Act (FHA) claims when website induced users to make discriminatory selections). Likewise, a defendant is not immune when it is a co-developer of the illegality, such as when a platform helps target voter intimidation messages to specific neighborhoods. *See NCBCP II*, 2021 WL 4254802, at *8.

Creating accountability for platforms that engage in discrimination, while preserving Section 230's ability to foster free expression by diverse voices, requires a balanced approach. The material contribution test is rooted in the statutory text and strikes this appropriate balance. Section 230 gives publishers immunity for

"any information provided by another information content provider." 47 U.S.C. § 230(c)(1). An information content provider ("ICP") is "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). The statute recognizes that more than one person can co-create or co-develop information. When the *publisher* is "responsible . . . in part" for the "creation or development" of information, it qualifies as an ICP with regard to that information. *Id*. If that is the case, then the information was not "provided by another" ICP, and (c)(1) does not apply. *See Roommates*, 521 F.3d at 1162-63; *Henderson*, 53 F.4th at 126.

Publishers are co-developers of information when they materially contribute to the illegality arising from that information. Material contribution means "being responsible for what makes the displayed content allegedly unlawful," *Jones*, 755 F.3d at 410. "An interactive service provider becomes an information content provider whenever their actions cross the line into substantively altering the content at issue in ways that make it unlawful." *Id.* at 129. In *Henderson*, the Fourth Circuit held that defendants materially contributed to an alleged FCRA violation and blocked plaintiff from a job opportunity when they allegedly "omitted or summarized information in a way that made it misleading" in background check reports. *Id.* at 128. This conduct went beyond "formatting or procedural alterations" and instead "change[d] the substance of the content altered." *Id*. at 129.

When applied properly, the test should lead to liability for publishers that materially contribute to discrimination in housing, employment, credit, and

other economic opportunities. In *Roommates*, for example, a rental housing website allegedly "induced third parties to express illegal preferences" in housing advertisements in violation of the FHA by requiring users to fill out forms that included discriminatory criteria. 521 F.3d at 1165. "Roommate designed its search and email systems to limit the listings available to subscribers based on sex, sexual orientation and presence of children" and "selected the criteria used to hide listings" from renters. *Id*. at 1169. "Roommate's work in developing the discriminatory questions, discriminatory answers and discriminatory search mechanism is directly related to the alleged illegality of the site." *Id*. at 1172.

A publisher can materially contribute by taking benign information and using it in an unlawful manner. For example, the United States recently filed and settled a FHA case against Meta, alleging that, "Testing has demonstrated that, even when advertisers do not employ discriminatory targeting options, Facebook's Personalization Algorithm nonetheless steers certain housing ads disproportionately to White users and away from Black users, and vice versa." Complaint at 30, *United States v. Meta Platforms, Inc.*, No. 22-cv-5187, ECF No. 1 (S.D.N.Y. June 21, 2022).

A publisher can also materially contribute to illegality by taking unlawful content and exacerbating the injury. *See, e.g.*, Till Speicher et al., *Potential for Discrimination in Online Targeted Advertising*, 81 Proc. Mach. Learning Rsch. 1, 2 (2018) ("The potential for discrimination in targeted advertising arises from the ability of an advertiser to use the extensive personal (demographic, behavioral, and interests) data that ad platforms gather about their users to target

their ads.").[4] For example, the Southern District of New York held that a service provider was not entitled to Section 230 protection when it allegedly helped select ZIP codes to target Black neighborhoods with voter intimidation robocalls. *NCBCP II*, 2021 WL 4254802, at *9-10. "Defendants' active efforts in targeting Black neighborhoods for dissemination of the robocall message so as to maximize its threatening effect" materially contributed to the alleged Voting Rights Act violation. *Id*. at *8.

Similarly, *Accusearch* demonstrates that a platform is not immune when it illegally uses personal information. The Tenth Circuit held a data broker was responsible "for the conversion of . . . legally protected records from confidential material to publicly exposed information." 570 F.3d at 1199; *see also Fed. Trade Comm'n v. LeadClick Media, LLC*, 838 F.3d 158, 176 (2d. Cir. 2016) (defendant participated in the development of the illegality by using affiliates to engage in deceptive online marketing). In contrast, in *Jones*, a website did not materially contribute when it published defamatory statements and added its own non-defamatory comments. 755 F.3d at 416. There is a "crucial distinction between, on the one hand, taking actions (traditional to publishers) that are necessary to the display of unwelcome and actionable content and, on the other hand, responsibility for what makes the displayed content illegal or actionable." *Id*. at 414.

In sum, Section 230 should not provide immunity when the publisher does something to either (1) co-develop illegal user-generated content to make it more injurious, or (2) transform benign content into illegal

[4] https://proceedings.mlr.press/v81/speicher18a/speicher18a.pdf.

conduct. This balanced approach will ensure that civil rights laws can be enforced against the party responsible for the violation.

III. The atextual "neutral tools" test for material contribution could improperly immunize discriminatory algorithms.

Many artificial intelligence algorithms make consequential decisions with important personal economic implications. Time and again, research has found that poorly designed algorithms can replicate, reinforce, and amplify historic and current inequities—even when they are intended to be neutral arbiters. *See generally* White House Off. of Sci. & Tech. Pol'y, *Blueprint for an AI Bill of Rights* (2022).[5] If Section 230 broadly immunizes any publication activity conducted with a purportedly "neutral tool," the limits on the statute would evaporate. "Before giving companies immunity from civil claims for . . . race discrimination, we should be certain that is what the law demands." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 18 (2020) (Thomas, J., statement respecting denial of certiorari).

"Neutral tools" has no textual foundation in Section 230 and consequently no limiting principle. Introduced by the Ninth Circuit in *Roommates*, it was never defined except by analogy to a search engine. *See* 521 F.3d at 1169 ("providing *neutral* tools to carry out what may be unlawful or illicit searches does not amount to 'development' for purposes of the immunity exception") (emphasis in original).

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[5] https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

Amici ask this Court to focus on whether a publisher is "responsible for what makes the displayed content allegedly unlawful," *Jones*, 755 F.3d at 410, and discard the "neutral tools" test because the latter is divorced from the statutory text and could immunize systems operated by the publisher that are procedurally indiscriminate but nonetheless materially contribute to discriminatory outcomes.

Courts have employed "neutral tools" when analyzing myriad types of publisher conduct in inconsistent ways, including: content recommendations and platform notifications, *see Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1096 (9th Cir. 2019); generating and encouraging deceptive content, *see LeadClick Media*, 838 F.3d 158; content moderation of social media posts, *see Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014); the design of a website, submission form, and categorization labels, *see Jones*, 755 F.3d 416; soliciting and selling confidential information unlawfully, *see Accusearch*, 570 F.3d at 1201; videoconferencing services, *see In re Zoom Video Commc'ns Inc. Priv. Litig.*, 525 F. Supp. 3d 1017, 1035 (N.D. Cal. 2021); "offering ancillary services such as user information verification, messaging systems, photography, local occupancy tax collection and remittance, a pricing tool, host insurance, a guest refund policy, or an autocomplete search function," *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1104 (C.D. Cal. 2017); pairing targeted advertisements to user-generated content, *see Pennie v. Twitter*, 281 F. Supp. 3d 874, 891 (N.D. Cal. 2017); and platform-generated advertisements containing discount offers, *see Fed. Trade Comm'n v. Match Grp., Inc.*, No. 3:19-CV-2281-K, 2022 WL 877107, at *8 (N.D. Tex. Mar. 24, 2022).

The undefined and arbitrary nature of "neutral tools" does not help determine whether a defendant is "responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). "Responsible" means "[h]aving caused a change, event, problem, etc.; specif., bearing fault for an accident, mistake, crime, or other unfortunate consequence[.]" *Responsible*, Black's Law Dictionary (11th ed. 2019). One can be bear fault for mistakes and accidents, not just intentional acts. *See id.* Thus, whether a "tool" is "neutral" is not dispositive because even a purportedly neutral tool can cause, in whole or in part, the creation or development of information.

As the Court evaluates the role of advanced technologies using machine learning or other artificial intelligence techniques, it should remember that these systems do not operate on neutral starting positions. These algorithms are not passive conduits that treat all content or users equally. All too often, a dataset will reflect race, sex, disability, and other protected characteristics. Even when these traits are not explicitly part of a dataset, they can creep into an algorithm's decision-making process via proxies. *See* Omer Tene & Jules Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making*, 19 N.C.J.L. & Tech. 125, 136 (2017) ("Even if a particular attribute is not present in the data, combinations of other attributes can act as a proxy. Algorithmic parameters are never neutral. They are always imbued with values.").

When one draws data from a society with a bedrock history of systemic inequity, the data will reflect that history. The data fed into an algorithm making decisions about what content to display or what opportunities to extend—such as one's neighborhood, job and credit history, education, personal associations, wealth, and

health—are themselves inextricably intertwined with generations of discrimination and segregation in housing, employment, education, banking, insurance, and criminal justice. *See* Rashida Richardson, *Racial Segregation and the Data-Driven Society: How Our Failure to Reckon with Root Causes Perpetuates Separate and Unequal Realities*, 36 Berkeley Tech. L.J. 101 (2021); Ruha Benjamin, *Race After Technology* (2019); Safiya Noble, *Algorithms of Oppression* (2018). The effects of segregation and redlining continue to resonate today:

> Many measures of resource distribution and public well-being now track the same geographic pattern [as residential segregation]: investment in construction; urban blight; real estate sales; household loans; small business lending; public school quality; access to transportation; access to banking; access to fresh food; life expectancy; asthma rates; lead paint exposure rates; diabetes rates; heart disease rates; and the list goes on.

Leaders of a Beautiful Struggle v. Baltimore Police Dep't, 2 F.4th 330, 349 (4th Cir. 2021) (en banc) (Gregory, C.J., concurring).

In a society scaffolded on the consequences of institutionalized oppression, automated decision-making systems built with societal data often reproduce discrimination—at scale. *See* White House Off. of Sci. & Tech. Pol'y, *Blueprint for an AI Bill of Rights* 24 ("Data that fails to account for existing systemic biases in American society can result in a range of consequences.").[6] "Just as neighborhoods can serve as a proxy for racial or ethnic identity, there are new

[6] https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

worries that big data technologies could be used to 'digitally redline' unwanted groups, either as customers, employees, tenants, or recipients of credit." White House, *Big Data: Seizing Opportunities, Preserving Values* 53 (May 2014).[7]

Algorithms find hidden correlations in datasets and use those correlations to create efficiencies. *See* Karen Hao, *What is machine learning?*, MIT Tech. Rev. (Nov. 17, 2018).[8] When a poorly-designed algorithm executes its mission of finding hidden correlations—to look at what happened before to decide what should happen next—it will often mistake the *consequences* of discrimination and inequality for an individual's merit and reproduce more discrimination. For example, an algorithm may interpret a mosaic of datapoints as reflecting an individual's personal preferences, when it actually reflects a lack of choice due to socioeconomic limitations. There is nothing neutral about a recommendation algorithm that takes different data about different people in different contexts and provides those people with different outcomes—as its human designers instructed it to do. When an algorithm is employed to make these decisions at the scale of the internet, with trillions of datapoints to draw upon and millions of users to evaluate, the potential harm from discrimination is devastating.

We caution this Court against adopting an oversimplistic neutral tools standard that would immunize internet companies that employ procedurally indiscriminate algorithms even when those algorithms cause or

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[7] https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

[8] https://www.technologyreview.com/2018/11/17/103781/what-is-machine-learning-we-drew-you-another-flowchart/.

exacerbate redlining and other discriminatory harms. Equality "is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). "[I]t is no answer" to one who is denied equal treatment "that, on the average, persons like him are served." *Henderson v. United States*, 339 U.S. 816, 825 (1950) (holding railcar segregation unlawful). A publisher materially contributes when it designs its system to "specifically encourag[e]" the "harnessing [of information's] untapped potential" to produce an unlawful act, *Accusearch*, 570 F.3d at 1198-99, even if the system runs passively in any given instance.

Amici do not suggest that all content recommendation algorithms should lose Section 230 protection. Rather, asking whether a procedure is a "neutral tool" is the wrong question. Instead, the Court should hew closely to the text of the statute and hold that publishers are not immune when they are at least in part "responsible for what makes the displayed content allegedly unlawful." *Jones*, 755 F.3d at 410.

IV. Section 230 must not impair protections against discrimination and harassment online.

Extending Section 230 immunity beyond the natural reading of the text could have grave consequences for the enforcement of civil rights laws, including the Voting Rights Act ("VRA"), 52 U.S.C. §§ 10301 *et seq*., Ku Klux Klan Act ("KKK Act"), 42 U.S.C. §§ 1985, 1986, Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*., Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691 *et seq*., Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*., and state anti-discrimination laws. People of color and other historically underserved groups experience significant and severe discrimination and harassment through online

systems, including voter suppression and discrimination in housing, credit, and employment. Many of these harms proliferate at least in part because Section 230 makes it difficult to hold platforms accountable. Conduct that is unlawful offline should not be immunized from liability simply because the conduct occurs online, if the defendant is not acting as a publisher or has materially contributed to its illegality.

A. Section 230 should not obstruct statutes prohibiting discrimination in economic opportunities.

Civil rights laws such as FHA, ECOA, and Title VII protect online users from discrimination in housing, credit, and employment, respectively. 42 U.S.C. §§ 3604-05; 15 U.S.C. § 1691; 42 U.S.C. § 2000e-2.

Because of the far-reaching and persistent effects of segregation and redlining, it is no surprise that discrimination occurs widely in the data-driven economy. Bias has been found in algorithms used to make decisions for myriad economic opportunities, such as:

- **Mortgage approvals**. Mortgage approval algorithms have denied applications from equivalent homebuyers of color substantially more than white homebuyers. *See* Shawn Donnan et al., *Wells Fargo Rejected Half Its Black Applicants in Mortgage Refinancing Boom*, Bloomberg (Mar. 11, 2022);[9] Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup & Associated Press (Aug. 25, 2021).[10]

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[9] https://www.bloomberg.com/graphics/2022-wells-fargo-black-home-loan-refinancing.

[10] https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.

- **Mortgage rates**. Lenders have charged Black and Latinx borrowers higher rates than similarly situated white borrowers. *See* Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nat'l Bureau Econ. Res. Working Paper No. 25943, 2019);[11] Laura Counts, *Minority homebuyers face widespread statistical lending discrimination, study finds*, Univ. of Calif. Berkeley Haas Sch. of Bus. (Nov. 13, 2018).[12]

- **Tenant screening**. Background check algorithms used by landlords frequently produce flawed reports and disproportionately deny lease applications from tenants of color. *See* Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, The Markup & N.Y. Times (May 28, 2020).[13]

- **Employment**. Algorithms used to automate the hiring process can produce discriminatory outcomes. *See* Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn, 1 (Dec. 2018);[14] Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (Oct. 10, 2018).[15]

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[11] https://www.nber.org/papers/w25943.

[12] http://newsroom.haas.berkeley.edu/minority-homebuyers-facewidespread-statistical-lending-discrimination-study-finds/.

[13] https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters.

[14] https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf.

[15] https://www.reuters.com/article/us-amazon-com-jobs-automation-insightidUSKCN1MK08G.

B. Section 230 must not shield voter suppression.

Bad actors who knowingly aid and abet online voter suppression should not receive Section 230 immunity. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Intimidation and disinformation occurring through the internet can disenfranchise voters at a scale not possible through traditional offline communications. *See NCBCP I*, 498 F. Supp. 3d at 464. Laws like the VRA and the KKK Act play valuable roles in curtailing these harms. Section 11(b) of the VRA and Section 2 of the KKK Act prohibit using force, intimidation, or threats to interfere with voting rights. 52 U.S.C. § 10307(b); 42 U.S.C. § 1985(3). The KKK Act also establishes vicarious liability for any person who knows of a 42 U.S.C. § 1985 violation, has the ability to aid in preventing it, and neglects to do so. 42 U.S.C. § 1986.

These risks are not hypothetical. In *Nat'l Coal. on Black Civic Participation*, a district court considered claims arising from the use of robocalls as a voter suppression mechanism. *NCBCP I*, 498 F. Supp. 3d at 463. The calls at issue included intimidating and misleading information designed to deter Black voters. *Id.* at 467. The court granted a temporary restraining order, finding that the defendants who plotted and sent the robocalls engaged in voter intimidation in violation of the VRA and KKK Act. *Id.* at 489. As an intervenor, the State of New York added a new defendant: the robocall service provider. *NCBCP II*, 2021 WL 4254802, at *1. The robocall provider moved to dismiss the case in part by invoking Section 230. *Id.* at *4. The court disagreed and denied the motion to dismiss, holding that the service provider was not

entitled to immunity when it allegedly helped the defendants target Black neighborhoods. *Id.* at *10. In its ruling on the temporary restraining order, the court explained the substantial harms at issue:

> Defendants carry out electoral terror using telephones, computers, and modern technology adapted to serve the same deleterious ends [as the KKK]. Because of the vastly greater population they can reach instantly with false and dreadful information, contemporary means of voter intimidation may be more detrimental to free elections than the approaches taken for that purpose in past eras, and hence call for swift and effective judicial relief.

NCBCP I, 498 F. Supp. 3d at 464.

Online companies that actively engage in or materially contribute to voter suppression should not be afforded Section 230 immunity. Section 230 must not serve as a barrier to the preservation of fundamental voting rights.

C. Section 230 must not shield violations of public accommodation laws.

White supremacist and other hateful threats, harassment, and intimidation on social media are a reality for people of color, women, LGBTQ people, religious minorities, immigrants, people with disabilities, and other historically underserved communities. When someone is threatened or harassed online because of their race, sex, or other protected traits, that is more than just an attempt to silence their voice. It is interference with their equal right to patronize that online business, just as if they had been chased out of a store or restaurant.

Over 40% of Americans have experienced online harassment and 25% have experienced physical threats, stalking, sexual harassment, or sustained harassment online. *See* Emily Vogels, *The State of Online Harassment*, Pew Rsch. Ctr. (Jan. 13, 2021).[16] 54% of Black adults and 47% of Hispanic adults who were harassed online say it was because of their race or ethnicity. *Id*. 16% of women report being sexually harassed online, and 13% report being stalked. *Id*. 33% of adult women under 35 report online sexual harassment. *Id*. Approximately 70% of gay, lesbian, and bisexual adults have encountered online harassment, and *half* have been targeted for severe abuse. *Id*. 17% of Asian-Americans have experienced sexual harassment, stalking, physical threats, and other severe online harassment, up 50% year-over-year. *See* Anti-Defamation League, *Asian-Americans Experience Rise in Severe Online Hate and Harassment, ADL Survey Finds* (Mar. 3, 2021).[17] When someone experiences public harassment campaigns, the surrounding community is intimidated as well. 27% of adults report self-censoring after witnessing online harassment and 13% quit a platform altogether. *See* Maeve Duggan, *Online Harassment 2017*, Pew Rsch. Ctr. (July 11, 2017).[18]

Public accommodations laws protect people against discrimination in businesses that serve the general public. Many states' public accommodation statutes include provisions that prohibit businesses from advertising or otherwise making statements that exclude

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[16] https://www.pewresearch.org/internet/2021/01/13/the-state-of-online-harassment.

[17] https://www.adl.org/news/press-releases/asian-americans-experience-rise-in-severe-online-hate-and-harassment-adl-survey.

[18] https://www.pewresearch.org/internet/2017/07/11/online-harassment-2017/.

protected classes. *See, e.g.*, W. Va. Code § 5-11-9(6)(B); Colo. Rev. Stat. § 24-34-601(2)(a); N.Y. Exec. Law § 296.2(a). Public accommodation laws also typically prohibit third parties from using threats, intimidation, or force to interfere with a patron's equal enjoyment of public accommodations. *See, e.g.*, 42 U.S.C. § 2000a-2; D.C. Code § 2-1402.61; *Dumpson v. Ade*, No. CV 18-1011, 2019 WL 3767171 (D.D.C. Aug. 9, 2019). More than 20 jurisdictions apply or are likely to apply their public accommodation laws beyond brick-and-mortar businesses. *See* David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce,* Lawyers' Comm. for Civil Rights Under Law, at 4 (2020).[19]

In *Dumpson*, a website violated the District of Columbia's Human Rights Act when its proprietor incited his followers to engage in online harassment of the first Black female student government president of American University. 2019 WL 3767171, at *5. The website published links to the woman's social media accounts and statements directing its readers to target her–which they did. *Id*. at *1-2. The court held that "a causal nexus exists between the" ensuing harassment and interference with plaintiff's enjoyment of a place of public accommodations. *Id*. at *5.

Section 230 should not immunize online platforms that materially contribute to harassment or threats that interfere with an online user's equal enjoyment of places of public accommodation—including online businesses.

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[19] https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf.

V. Reasonable Section 230 protections reduce censorship of people of color and other historically underserved communities.

While online hate is a serious problem, amici are gravely concerned that undercutting Section 230 would increase censorship, particularly of people of color. Section 230 was enacted to promote the development of a free and open internet. People of color and other historically underserved communities benefit civically and economically from the internet that Section 230 created. "The Internet and other interactive computer services 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). Section 230 enables these communities to connect, share their ideas and voices, and grow businesses in digital spaces.

A. Section 230 promotes civic engagement and activism.

"If it weren't for my video, the world wouldn't have known the truth," said Darnella Frazier, the young Black woman who recorded the murder of George Floyd. Joe Hernandez, *Read This Powerful Statement From Darnella Frazier, Who Filmed George Floyd's Murder*, NPR (May 26, 2021).[20] Ms. Frazier's ability to share that video online, and its ability to go viral and catapult a national racial justice movement, likely would not have been possible without Section 230.

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[20] https://www.npr.org/2021/05/26/1000475344/read-this-powerful-statement-from-darnella-frazier-who-filmed-george-floyds-murd.

Modern civil rights movements benefit from reduced gatekeeping on social media. Bystanders can upload videos and activists can speak directly to followers without being dependent on the decisions of the nightly news. The Movement for Black Lives began through a series of Facebook posts following the killing of Trayvon Martin in 2013, and then grew through coordinated demonstrations. *See* Jenna Wortham*, How a New Wave of Black Activists Changed the Conversation,* N.Y. Times (Aug. 28, 2020).[21] Using the hashtag #BlackLivesMatter on social media, the movement connected Black people and others online—regardless of where they were in the world—to bring attention to police brutality. The movement revealed "a candid narrative about the lived reality of Black Americans—one that rarely appeared in the mainstream media, which tended to play into a pathology of Blackness rather than interrogate the material causes of racial oppression and inequality." *Id.*; *see also* Michael Doyle & William Douglas, *Social media help take Ferguson protests national*, McClatchy DC (Nov. 26, 2014) (Twitter saw 580,000 posts in two days during nationwide protests).[22]

Platforms can have millions of new posts daily. Without Section 230, or with substantially curtailed immunity, social media companies would have to engage in blunt and heavy-handed censorship to minimize the risk of liability from unlawful posts. *See Roommates*, 521 F.3d at 1163 (Congress sought to allow platforms "to perform some editing on user-generated content without thereby becoming liable for all defamatory or

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[21] https://www.nytimes.com/2020/08/25/magazine/black-visions-collective.html.

[22] https://www.mcclatchydc.com/news/crime/article24776848.html.

otherwise unlawful messages that they didn't edit or delete").

Communities of color and other diverse groups historically have faced greater speech restrictions whenever censorship is an option, particularly when they seek to assert their rights. *See, e.g.*, *Shuttlesworth v. City of Birmingham, Ala.,* 394 U.S. 147 (1969) (reversing conviction of civil rights activist for demonstrating without a permit); *Gillman ex rel. Gillman v. Sch. Bd. for Holmes Cnty., Fla.,* 567 F. Supp. 2d 1359 (N.D. Fla. 2008) (school censorship of gay rights slogans and symbols violated First Amendment); Terence McArdle, *'Night of terror': The suffragists who were beaten and tortured for seeking the vote*, Wash. Post (Nov. 10, 2017) (women suffragists in 1917 arrested and tortured for picketing White House).[23]

Historically underserved populations are already disproportionately silenced online and undercutting Section 230 would make it worse. "Current content moderation AI is not as sophisticated as some of the platforms would like us to believe, especially when moderating the content of BIPOC people." Bertram Lee, *Where the Rubber Meets the Road: Section 230 and Civil Rights*, Pub. Knowledge (Aug. 12, 2020).[24] The content moderation systems of many platforms lack the ability to recognize cultural nuances not rooted in a white, male, straight context, resulting in disproportionate silencing of users of color and other underserved groups. For example, social media users

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[23] https://www.washingtonpost.com/news/retropolis/wp/2017/11/10/night-of-terror-the-suffragists-who-were-beaten-and-tortured-for-seeking-the-vote/.

[24] https://publicknowledge.org/where-the-rubber-meets-the-road-section-230-and-civil-rights/.

who are Black or transgender are more likely to have their accounts disciplined when they discuss race or gender issues, respectively, even if they are not violating platform rules. *See* Oliver L. Haimson et al., *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 Proc. Ass'n for Computing Mach. on Hum.-Comput. Interaction 466 (2021); *see also* Jessica Guynn, *Facebook while black: Users call it getting 'Zucked,' say talking about racism is censored as hate speech*, USA Today (Apr. 24, 2019) (users who tried to call out or discuss their experiences with discrimination were likely to be incorrectly flagged for violating hate speech rules);[25] Elizabeth Dwoskin et al., *Facebook's race-blind practices around hate speech came at the expense of Black users, new documents show*, Wash. Post (Nov. 21, 2021).[26]

If Section 230's coverage is overly restricted, increased use of censorship tools and processes would disproportionately silence people of color and other underserved communities even more, undermining their ability to organize and advocate through the internet.

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[25] https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/.

[26] https://www.washingtonpost.com/technology/2021/11/21/facebook-algorithm-biased-race/.

B. Undermining Section 230 would disproportionately harm diverse creators and entrepreneurs.

Section 230 also empowers influencers and entrepreneurs of color to create lucrative businesses and reach audiences without relying on traditional media or commercial gatekeepers. While creators of color have historically been shut out of mainstream media, social media has given them and other underrepresented voices new opportunities to break through and influence popular culture. *See* Taylor Lorenz, *The New Influencer Capital of America*, N.Y. Times (Dec. 11, 2020) (describing the growing influence of Black creators in Atlanta).[27] For example, Black gay rapper Lil Nas X launched a meteoric career without a record label when his song "Old Town Road" went viral on TikTok. *See* N.Y. Times, *How Lil Nas X Took 'Old Town Road' From TikTok Meme to No.1 / Diary of a Song*, YouTube (May 9, 2019).[28] Black Twitter has been described as "the most dynamic subset not only of Twitter but of the wider social internet" and "[c]apable of creating, shaping, and remixing popular culture at light speed." Jason Parham, *A People's History of Black Twitter, Part I*, WIRED (Jul. 15, 2021).[29] LGBTQ influencers use video streaming platforms to reach dispersed and underrepresented audiences. *See* Taylor Lorenz, *The trans Twitch star delivering news to a legion of LGBTQ teens*, Wash. Post (Jun. 26,

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[27] https://www.nytimes.com/2020/12/11/style/atlanta-black-tiktok-creators.html.

[28] https://youtu.be/ptKqFafZgCk.

[29] https://www.wired.com/story/black-twitter-oral-history-part-i-coming-together/.

2022).[30] This entire ecosystem depends on Section 230 immunizing platforms for user-generated content in statutorily-authorized circumstances.

Online commerce, with protection from Section 230, can reduce barriers for potential entrepreneurs of color. "While Black Americans are more likely to start businesses than any other ethnic group, they are up against tougher challenges from the get-go," including reduced access to financial and social capital. Jocina Becker & Jihye Gyde, *The Black Unicorn: Changing the Game for Inclusivity in Retail*, McKinsey & Co. (Nov. 17, 2021).[31] Third-party marketplace websites have facilitated connection with global markets, democratized access to systems required for business start-ups, and streamlined logistics. "Potential entrepreneurs now have more widely available broadband, greater digital fluency, and a more mature e-commerce marketplace that simplifies website creation, marketing, and online sales," making it "easier to translate an artisanal hobby or creative passion project into an online venture." Jeremy Hartman & Joseph Parilla, *Microbusinesses Flourished During the Pandemic. Now We Must Tap Into Their Full Potential*, Brookings (Jan. 4, 2022).[32] Through use of these tools, Black owners now account for 26% of all new online microbusinesses, while women currently own 57%. *See id.*; *but see* Take Creative Control, *Women Lead the Way in Online Crafts, But with Big Racial Gaps* (2022)

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[30] https://www.washingtonpost.com/technology/2022/06/26/keffals-trans-twitch-streaming-news/.

[31] https://www.mckinsey.com/industries/retail/our-insights/the-black-unicorn-changing-the-game-for-inclusivity-in-retail.

[32] https://www.brookings.edu/blog/the-avenue/2022/01/04/microbusinesses-flourished-during-the-pandemic-now-we-must-tap-into-their-full-potential/.

(people of color experience discrimination while participating in online marketplaces).[33] Platforms that streamline entrepreneurship rely on Section 230 to immunize them from third-party content.

CONCLUSION

We urge the Court to promote a free and equitable internet through a balanced interpretation of Section 230. The Court should interpret Section 230 to immunize a defendant only if (1) the claim seeks to treat the defendant as a publisher of another's improper content; and (2) the defendant did not materially contribute to the impropriety.

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December 7, 2022

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[33] https://takecreativecontrol.org/wp-content/uploads/2022/08/MicroReport_Crafts-V3.pdf.