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 BIPARTISAN POLICY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

ELIZABETH SEIDLIN-BERNSTEIN
SHAWN F. SUMMERS
BALLARD SPAHR LLP
1735 Market Street
51st Floor
Philadelphia, PA 19103
(215) 665-8500
seidline@ballardspahr.com
summerss@ballardspahr.com

LYNN B. OBERLANDER
Counsel of Record
BALLARD SPAHR LLP
1675 Broadway
19th Floor
New York, NY 10019
(212) 223-0200
oberlanderl@ballardspahr.com

Counsel for Bipartisan Policy Center

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INTEREST OF THE AMICUS CURIAE[1]

The Bipartisan Policy Center ("BPC") is a non-profit organization based in Washington, D.C. that helps policymakers work across party lines to craft bipartisan policies. BPC was founded more than 15 years ago by former Senate Majority Leaders Howard Baker (R-TN), Tom Daschle (D-SD), Bob Dole (R-KS), and George Mitchell (D-ME) to provide a vehicle for bipartisan collaboration. The organization is devoted to connecting policymakers, business and labor leaders, academics, and advocates; providing them with objective information and data; and facilitating policy discussions and negotiations in an effort to achieve bipartisan solutions. Through this approach, BPC has built trust and strong relationships with policymakers across the political spectrum. It works closely with lawmakers from both political parties to address the country's most pressing policy issues, including on issues involving technology. In recent years, BPC launched a Technology Project to conduct evidence-based assessments of issues surrounding technology, help educate policymakers and the public, and bring together various stakeholders to find areas of common ground and make specific policy recommendations, including in connection with content moderation.

BPC submits this *amicus curiae* brief in support of Respondent to express its view that the scope of immunity provided by Section 230 is best left to Congress. Section 230 was enacted as the result of

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the *amicus* has paid for the filing and submission of this brief.

bipartisan collaboration, and Congress has responded on a bipartisan basis to judicial decisions over the scope of Section 230's protection, most notably in the 2017 enactment of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA-SESTA), Pub. L. No. 115-164, 132 Stat. 1253 (2018). In recent years, Congress has debated an array of proposals involving Section 230 and the policy issues surrounding the immunity that it grants to interactive computer service providers. The legislative branch is in the best position to address those policy issues, and it is poised to do so. BPC therefore respectfully asks the Court to allow the policy process to play out in Congress.

SUMMARY OF THE ARGUMENT

In 1996, Congress passed Section 230 by a nearly unanimous vote. That legislation was the product of close cooperation and collaboration by legislators on opposite ends of the political spectrum—Rep. Christopher Cox (R-CA) and Rep. Ron Wyden (D-OR). Together, they sought to ensure the continued development of the Internet and the vibrant free market in goods and ideas that had begun to take hold on it. They did so by crafting legislation that, in part, established a broad immunity for interactive computer service providers: For purposes of most civil suits, those providers would not "be treated as the publisher or speaker of any information provided by another" person. 47 U.S.C. § 230(c)(1), (e). Nor would they be held liable for actions "taken in good faith" to restrict access to material that they considered "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2)(A).

Just as its original sponsors envisioned, the statute has resulted in the development of an Internet in which commerce and communication flourish. The judiciary has consistently recognized that Section 230 allows providers to decide where, how, and to whom content is displayed. Since enacting Section 230, Congress has repeatedly ratified the broad interpretation adopted by the judiciary and has ensured that Section 230's protection is preserved when enacting other statutes.

Over time, society also has witnessed some unforeseen and unfortunate consequences stemming from the Internet's growth. As a result, in recent years, there has been significant debate about the proper scope of immunity afforded by Section 230 and whether providers should be subject to civil liability for some of those consequences. This debate raises important policy questions, which Congress, not the courts, should address.

In light of the history of legislative action since the passage of Section 230 and the constitutional separation of powers, this Court should exercise judicial restraint in the case now before it and preserve the status quo by affirming the prevailing interpretation of Section 230. The Court should allow the legislative branch to assess the political and policy questions surrounding the scope of immunity provided by Section 230. In the past, Congress has not hesitated to act in response to evolving social conditions or to cabin the immunity when judicial decisions have gone beyond the legislature's intent. And, it appears poised to act again: In the 117th Congress, for example, Members introduced nearly two dozen bills that would have amended Section 230 in some capacity. This year,

leaders of both parties have called for reform during the new legislative session.

This Court should not short-circuit the present debate or the legislative process by adopting an interpretation of Section 230 that differs from what has stood for nearly three decades. The judiciary should allow the legislative process to proceed and permit Congress to address this policy-laden issue.

ARGUMENT

I. Section 230 Is The Result Of Bipartisan Legislation.

The bill that eventually became Section 230 was first introduced in Congress on June 30, 1995, as the Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong. (1995). It was written by two House members from opposite sides of the aisle, Rep. Christopher Cox and Rep. Ron Wyden. Rep. Cox was "an unabashed conservative Republican, a member of the GOP leadership, a key player in his party's attempt to uncover campaign-finance fraud by the Clinton administration," while then-Rep. Wyden was "a liberal Democrat, loyal to the White House and a former House member who ha[d] championed such causes as universal health care." Dena Bunis, *GOP's Cox, Democrat United Over Net*, ORANGE CTY. REG. (June 28, 1997).

As Rep. Cox later recounted, these seemingly strange bedfellows met over lunch and "bemoaned the deep partisanship in Congress that mostly prevented Democrats and Republicans from writing legislation together." Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency*

Act, RICH. J.L. & TECH. (Aug. 27, 2020), http://bit.ly/3w8I4ZH. They "decided to look for cutting-edge issues that would present novel and challenging policy questions," for which they would come up with "a practical solution" and "work to educate members on both sides" in order to pass "truly bipartisan legislation." *Id.* Section 230 was the fruit of one such collaboration.

The Cox-Wyden amendment had two primary purposes, both aimed at "promot[ing] the continued development of the Internet." 47 U.S.C. § 230(b)(1). The first purpose was to protect Internet speech from content regulation by the government. *See* 141 CONG. REC. 22,045 (1995) (statement by Rep. Wyden that "the Internet is the shining star of the information age, and Government censors must not be allowed to spoil its promise"); *id.* (statement by Rep. Cox that the amendment would "establish as the policy of the United States that we do not wish to have content regulation by the Federal Government of what is on the Internet"); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

The second purpose was to reverse the decision of a New York court in *Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. Nassau Cty. May 24, 1995), which held that an online service provider's decision to moderate the content of its message boards rendered it a "publisher" of users' defamatory comments on the boards. *See* S. Rep. No. 104-230, at 194 (1996) ("One of the specific purposes of [Section 230] 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."); 141 CONG. REC. 22,045 (1995) (statement by Rep. Cox that *Stratton-Oakmont* decision was "backward" and amendment would "protect computer Good Samaritans" who take "steps to screen indecency and offensive material for their customers"); *id.* at 22,047 (statement by Rep. Bob Goodlatte that *Stratton-Oakmont* decision had established "a tremendous disincentive for online service providers to create family friendly services by detecting and removing objectionable content"); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (Section 230 was meant "to spare interactive computer services" from the "grim choice" imposed by *Stratton-Oakmont* "by allowing them to perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete.").

The legislation received overwhelming bipartisan support, passing by a vote of 420 to 4 in the House of Representatives, and ultimately was enacted as part of the Telecommunications Act of 1996. 141 CONG. REC. 22,054 (1995); Pub. L. No. 104-104, 110 Stat. 56, § 509 (1996); *see also* 141 CONG. REC. 22,044-47 (1995) (floor statements in support of Section 230 by members of both parties).

II. The Courts' Consistent Interpretation Of Section 230 For Nearly Three Decades Is The Foundation Of The Modern Internet.

Section 230(c)(1) states that providers of interactive computer services shall not "be treated as the publisher or speaker of any information provided by another information content provider." Since the passage of the law in 1996, courts have adopted a consistent interpretation of this language to provide immunity to interactive computer service providers from all civil claims (with limited exceptions enumerated in the statute) based on the speech of their users.

As Justice Thomas has noted, from "the first appellate court to consider the statute," courts throughout the country have held that Section 230(c)(1) "confers immunity even when a company distributes content that it *knows* is illegal." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., concurring in the denial of certiorari) (discussing *Zeran*, 129 F.3d at 331). Courts also have agreed that Section 230(c)(1) "protects the 'exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content'"—and have withheld immunity from interactive computer service providers only for "substantial or material edits and additions" to content. *Id.* at 16 (citing *Zeran*, 129 F.3d at 330, 332).[2] Indeed, the decisions rendered by

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[2] *See also, e.g., FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (holding that an interactive computer service provider "will not be held responsible unless it assisted in the development of what made the content unlawful"); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016) ("[A] website may

federal courts have established a broad consensus about the scope of the immunity provided by Section 230, including the protection afforded to interactive computer service providers for selecting what content to present, how to present it, and to whom it should be presented. *See, e.g., Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (holding that Section 230 protects "features and functions, including algorithms, to analyze user posts . . . and recommend[] other user groups"); *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (holding that Section 230 protects Facebook's algorithms that "suggest content," "predict and show the third-party content that is most likely to interest and engage users," make "friend suggestions," and "target ads to its users who are likely most interested in those ads"); *Marshall's Locksmith v. Google, LLC*, 925 F.3d 1263,1269 (D.C. Cir. 2019) (holding that Section 230 immunity protects "[t]he decision to present th[e] third-party data in a particular format" and defendant's "use [of] automated algorithms to convert third-party indicia of location into pictorial form"); *Dirty World Entm't*, 755 F.3d at 403 (recognizing Section 230 protection for sites that actively select and edit content submitted by third parties).

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lose immunity under the CDA by making a material contribution to the creation or development of content."); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 414 (6th Cir. 2014) (recognizing "the 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"); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) ("[A] website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online.").

By expressly shielding interactive computer service providers from liability for the content users publish on their platforms, Section 230 created a set of background principles on which providers and their users have come to rely. And, the courts' uniform interpretation of Section 230 has been foundational to the growth of the modern Internet, including digital commerce, social media, and a wide marketplace of ideas. *See, e.g.*, *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018) (Section 230 "paved the way for a robust new forum for public speech as well as a trillion-dollar industry centered around user-generated content" (internal quotation marks omitted)); Tom Romanoff, *Implications for Changing Section 230*, BIPARTISAN POLICY CENTER (Mar. 29, 2022), http://bit.ly/3kuYUiw ("Whether Section 230's blanket protection was the correct approach to addressing intermediary liability online or not, it does not change the fact that much of the modern internet was built on its back."); Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)*, 37 Berkeley Tech. L.J. no. 2 (2022) at 32-33, (discussing "certainty" that Section 230 has provided to platforms). Without Section 230, the platforms Americans use every day to shop, make restaurant and travel reservations, find housing, read the news, watch movies and television shows, connect with friends and family, and otherwise interact with the world would be unrecognizable—or might not even exist. *See* Resp't Br. at 10-11, 32-33; *see also* Tom Romanoff, *The Future of Content Moderation and Intermediary Liability*, BIPARTISAN POLICY CENTER (Mar. 16, 2022), http://bit.ly/3iS6RxR ("By expressly shielding online service providers from being held liable for the content users publish on their platforms, Section 230 allowed them to grow exponentially during the first two

decades of the 21st century and define the Internet Age.").

In particular, since the Internet's earliest days, services have decided "where on their sites (or other digital property) particular third-party content should reside and to whom it should be shown." *Force*, 934 F.3d at 66. This kind of technology and functionality was envisioned by Section 230's architects, who included in the definition of an "interactive computer service" providers of "software" and "enabling tools" that "filter," "pick," "choose," "search, subset, organize, reorganize, or translate content." 47 U.S.C. § 230(f)(2), (4). As Petitioners themselves recognize, the infrastructure of the modern Internet relies on the use of algorithms to organize and display information provided by others, including to "recommend" material to users. *See, e.g.*, Pet. Br. at 16-17.

Nevertheless, Congress could not have foreseen all the ways in which the technologies underlying the Internet would develop over the past 27 years, how those technologies would be used, or what consequences those technologies might have—both for good and ill. *See* Pet. App. at 44a (recognizing that "the Internet has grown into a sophisticated and powerful global engine the drafters of § 230 could not have foreseen"). For example, the rise of social media has enabled people to connect in new ways all over the world, but it has also facilitated political division and the spread of misinformation. *See* Richard Wike, et al., *Social Media Seen as Mostly Good for Democracy Across Many Nations, But U.S. is a Major Outlier*, PEW RESEARCH CENTER (Dec. 6, 2022), http://bit.ly/3kobQXC.

Some litigants, jurists, lawmakers, and commentators have expressed the view that Section 230 plays a role in the more negative—even, as alleged in this case, tragic—consequences of the modern Internet.[3] This criticism has led to calls for the courts to adopt "a more limited reading of the scope of section 230 immunity." Pet. App. at 82a (Berzon, J., concurring); *see also id.* at 110a n.9 (Gould, J., dissenting in part) (discussing the "rising chorus of judicial voices cautioning against an overbroad reading of the scope of Section 230 immunity"); *In re Facebook, Inc.*, 625 S.W.3d 80, 84 (Tex. 2021) (noting the "burgeoning debate about whether the federal courts have thus far correctly interpreted section 230").

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[3] *See, e.g.*, Susannah Luthi, *A Legal Shield for Social Media is Showing Cracks*, POLITICO (July 14, 2022), https://bit.ly/3ZLKrin (recounting efforts by litigants to get around Section 230 immunity in asserting claims against social media platforms for allegedly causing "teen suicides, eating disorders and mental collapses"); *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., concurring in the denial of certiorari) (arguing that broad immunity under Section 230 "can have serious consequences," including immunizing companies that "knowingly host[] illegal child pornography" or engage in "race discrimination"); Press Release, *Klobuchar, Luján Introduce Legislation to Hold Digital Platforms Accountable for Vaccine and Other Health-Related Misinformation*, SEN. AMY KLOBUCHAR (July 22, 2021), https://bit.ly/3ZF39sh (asserting that Section 230 "distorts legal incentives for platforms to respond to digital misinformation on critical health issues, like Covid-19, and leaves people who suffer harm with little to no recourse"); Olivier Sylvain, *Platform Realism, Informational Inequality, and Section 230 Reform*, 131 Yale L.J.F. 475, 475 (Nov. 16, 2021) (arguing that Section 230 has "helped cultivate bigotry, discrimination, and disinformation about highly consequential social facts").

The negative consequences of the Internet, however, are not the result of "mission creep" in the courts' interpretation of Section 230. *Force*, 934 F.3d at 80 (Katzmann, C.J., dissenting). That interpretation has been remarkably consistent over time. *See* Christopher Cox, *Section 230: A Retrospective*, THE CENTER FOR GROWTH AND OPPORTUNITY (Nov. 10, 2022), http://bit.ly/3GNjl1L (although "outlier cases with outsize notoriety" have "failed to apply the statute as written," most "courts have gotten it right"). Rather, the consequences are the result of changes in the technologies themselves. *See, e.g.*, Kosseff, *supra* p. 9, at 3 (noting that "Section 230 has become a proxy for" a range of complaints about the Internet, "even if Section 230 is not directly related to the particular problem at hand").

III. Any Issues Arising From Changes In Technology Or The Immunity Afforded By Section 230 Should Be Addressed By Congress, Not The Judiciary.

Whatever societal ills may be laid at the feet of Section 230, redressing them is properly a job for Congress, not this Court. Judicial restraint is always appropriate where, as here, the language of the statute, the balancing of interests Congress struck, and the history of judicial interpretation are clear and consistent. But it is particularly appropriate in this instance, where Congress has repeatedly ratified the broad immunity provided by Section 230 and has demonstrated its ability and willingness to amend

Section 230 in response to evolving social conditions and court rulings.[4]

A. Recent Calls For Congressional Action On Section 230 Reflect The Proper Separation of Powers And The Role Of The Legislative Branch.

It is well documented that "[a] healthy debate has begun both in the legal academy and in the policy community about changing the scope of § 230." *Force*, 934 F.3d at 88-89 (Katzmann, C.J., dissenting); *see also* Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 GEO. WASH. L. REV. 347, 382 (2021) ("[V]iews have shifted to the point where Section 230 now finds itself in the crosshairs of legal scholars and both major political parties."); Romanoff, *Implications for Changing Section 230*, *supra* p. 9 (noting that, because of Section 230's centrality to the modern Internet, "policymakers, advocates, and academics have sought to address the question of Section 230 reform from several angles"). Indeed, courts have suggested that "Congress may wish to revisit the CDA to better calibrate the circumstances where such immunization is appropriate or inappropriate in light of congressional purposes." *Force*, 934 F.3d at 78 (Katzmann, C.J., dissenting); *see also In re: Facebook*, 625 S.W.3d at 101 ("The internet looks nothing like it did in 1996, when Congress enacted Section 230. The

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[4] Of course, any legislation enacted by Congress pertaining to the scope of Section 230's immunity will be subject to judicial review to ensure that it comports with the First Amendment and other constitutional provisions. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (striking down, on First Amendment grounds, portions of Communications Decency Act aimed at protecting minors from "indecent" and "patently offensive" Internet communications).

Constitution, however, entrusts to Congress, not the courts, the responsibility to decide whether and how to modernize outdated statutes.").

These calls for legislative action are consistent with the separation of powers prescribed by the Constitution and the exclusive role that Congress plays in legislating policy. *See Hernandez v. Mesa*, 140 S. Ct. 735, 741 (2020) ("The Constitution grants legislative power to Congress; this Court and the lower federal courts, by contrast, have only 'judicial Power.'" (quoting U.S. CONST. art. III, § 1)). In light of that principle, when concerns have been raised about the consequences of federal statutes or problems have arisen in areas properly committed to congressional authority, this Court has declined invitations to resolve them by interpreting the words of Congress to mean something other than what it has enacted. *See, e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity."); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642-43 (2007) (noting that it is not the Court's "prerogative" to alter the balance of interests Congress struck in Title VII; the Court must instead "apply the statute as written").[5] As this Court has cautioned, in interpreting a statute, the judiciary should avoid the "risk [of] amending statutes outside the legislative process reserved for the people's representatives." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1738 (2020); *see also id.* at 1822 (Kavanaugh, J., dissenting) ("Under the Constitution's separation of

[5] Congress subsequently adopted the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), amending Title VII in direct response to this Court's decision in *Ledbetter*.

powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court."); *id.* at 1784 (Alito, J., dissenting) ("The authority of this Court is limited to saying what the law is."); *Sveen v. Melin*, 138 S. Ct. 1815, 1830 (2018) (Gorsuch, J., dissenting) (contrasting legislatures, which "exist to pass new laws of general applicability responsive to majoritarian will," with courts that must "apply existing laws to discrete cases and controversies independently and without consulting shifting political winds").

In the specific context of Section 230, the Courts of Appeals have recognized that any narrowing of Section 230 immunity should come from Congress. Accordingly, the lower courts have repeatedly rejected both direct and collateral attacks on its scope. In the proceedings below, for example, the Ninth Circuit rejected the dissenting judge's call for the creation of a new federal common law cause of action that would skirt Section 230's immunity, reasoning that the courts are "not free to manufacture entirely new causes of action merely because the political branches have not acted." Pet. App. at 44a; *see also id.* ("[W]e are not writing on a blank slate. Congress affirmatively immunized interactive computer service providers that publish the speech or content of others."). The dissent itself "urge[d] that regulation of social media companies would best be handled by the political branches of our government." *Id.* at 94a-95a (Gould, J., dissenting in part). Likewise, Chief Judge Katzmann's dissent in *Force*, 934 F.3d 53—relied on extensively by Petitioners, *see* Pet. Br. at 19, 29-31, 34, and cited repeatedly by the concurring and dissenting opinions below, Pet. App. at 82a (Berzon, J., concurring); *id.* at 98a (Gould, J., dissenting in part and attaching Chief

Judge Katzmann's opinion)—closes by recognizing that "[w]hether, and to what extent, Congress should allow liability" for promoting objectionable content "is a question for legislators, not judges." *Force*, 934 F.3d at 88 (Katzmann, C.J., dissenting); *see also Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 322 (1st Cir. 2017) (in drafting Section 230, "Congress has expressed a policy choice . . . not to deter online harmful speech" (internal quotation marks omitted)); *Obado v. Magedson*, 612 F. App'x 90, 93 (3d Cir. 2015) ("The CDA reflects Congress's decision not to treat providers of interactive computer services like other information providers."); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1129 (N.D. Cal. 2016) ("Congress, not the courts, has the authority to amend the CDA. Plaintiffs' policy arguments do not justify allowing their claims to proceed."); *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998) ("But Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others.").

This Court should follow that same path and refrain from usurping Congress's legislative prerogative, particularly given the lower courts' consistent interpretation of the scope of Section 230's immunity. *See Malwarebytes*, 141 S. Ct. at 13 (Thomas, J., concurring in the denial of certiorari) ("many courts have construed the law broadly to confer sweeping immunity"); *see also, e.g.*, *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (critiquing Court for "disregarding over 50 years of uniform judicial interpretation of Title VII's plain text").

B. Congress Is Aware Of Judicial Rulings About Section 230 And Has Repeatedly Ratified Its Broad Immunity.

History shows that Congress is well aware of court decisions addressing the potential liability of interactive computer service providers. *See, e.g., Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (judiciary "normally assume[s] that, when Congress enacts statutes, it is aware of relevant judicial precedent" (internal quotation marks omitted)). In fact, as discussed above, Congress enacted the broad immunity set forth in Section 230 in direct response to a single decision issued by a trial judge in New York state court. *See supra* at 5-6 (discussing passage of Section 230 in response to *Stratton-Oakmont* decision). And, since its enactment, Congress has amended the Section 230 regime at least twice in response to decisions issued by federal courts. In enacting those changes, legislators left the immunity at issue in this case untouched. *See Edelman v. Lynchburg College*, 535 U.S. 106, 116-17 (2002) (a prevailing judicial construction of a statute is only strengthened when Congress has amended the statute "several times without once casting doubt" on that construction); *see also* Resp't Br. at 30-31 (noting "Congress has amended or incorporated Section 230 twelve times, thereby ratifying the circuits' unanimous interpretation").

First, after this Court struck down parts of the Communications Decency Act on First Amendment grounds, *see Reno*, 521 U.S. at 882, Congress responded by passing the Child Online Protection Act (COPA), Pub. L. No. 105-277, 112 Stat. 2681-736 (1998). *See Ashcroft v. ACLU*, 535 U.S. 564, 569 (2002)

("After our decision in [*Reno*], Congress explored other avenues for restricting minors' access to pornographic material on the Internet. In particular, Congress passed and the President signed into law the Child Online Protection Act . . . ."). In COPA, Congress created a new 47 U.S.C. § 231, which would have required interactive computer services to notify customers about the availability of parental controls. The legislation also amended Section 230 itself to clarify that its immunity did not apply to Section 231.[6]

Then, in 2017, Congress amended the law again in response to a First Circuit ruling that Section 230 immunized an online classified advertising service against claims that it had enabled the sex trafficking of minors. *See Doe v. Backpage.com, LLC*, 817 F.3d 12, 15 (1st Cir. 2016). The First Circuit closed its opinion by noting that the "evils" enabled by Section 230, such as those alleged in the *Backpage* case, must be remedied "through legislation, not through litigation." *Id.* at 29. In response to that decision, Congress again acted swiftly. It amended Section 230 to carve out claims like the ones in *Backpage* and explicitly provide that the statute's immunity has "[n]o effect on sex trafficking law[s]." FOSTA-SESTA, Pub. L. No. 115-164, 132 Stat. 1253 (2018) (adding new subsection (e)(5) to Section 230 excluding sex trafficking claims and criminal charges from Section 230 immunity). FOSTA-SESTA clarified Congress's sense that Section 230 "was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in

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[6] After extensive litigation involving several trips to this Court, COPA was also held unconstitutional and permanently enjoined. *See ACLU v. Mukasey*, 534 F.3d 181, 184-86 (3d Cir. 2008), *cert. denied*, 555 U.S. 1137 (2009).

advertising the sale of unlawful sex acts with sex trafficking victim." *Id.* § 2; *see also* 164 CONG. REC. S1855 (daily ed. Mar. 21, 2018) (Sen. Rob Portman: "The court system said: I am sorry. Under a Federal law that was passed by the Congress—a 21-year-old law—this website is not culpable. It has a shield. It has an immunity. That is why we are here today."); *Does v. Reddit, Inc.*, 51 F.4th 1137, 1144 (9th Cir. 2022) ("Courts were also reluctant to hold websites liable in any civil trafficking suits stemming from user-posts, even if the website participated in the scheme. Congress passed FOSTA in 2018 to address these issues." (citing *Backpage*, 817 F.3d at 23)).

That legislation—like Section 230 itself—reflected bipartisan collaboration and a broad bipartisan consensus. *See, e.g.*, 164 CONG. REC. S1851 (daily ed. Mar. 21, 2018) (Sen. Richard Blumenthal: "This bill is completely bipartisan from beginning to end."); 164 CONG. REC. H7166 (daily ed. July 25, 2018) (Rep. Ann Wagner: "It is because of the massive bipartisan majorities of both the House and the Senate that FOSTA is law today."). It passed 388-25 in the House and 97-2 in the Senate. *See* 164 CONG. REC. S1872 (daily ed. Mar. 21, 2018); 164 CONG. REC. H1318-19 (daily ed. Feb. 27, 2018).

Further, Congress has—repeatedly and over an extended period—incorporated Section 230 into other statutes and been careful to protect Section 230 immunity when it has legislated on a variety of subjects.[7] Notably, when Congress sought to protect

[7] *See, e.g.*, Pub. L. No. 106-386, 114 Stat. 1464, § 3 (2000) (amending statute relating to interstate transport of liquor to provide for injunctive relief in federal court and forbidding issuance of injunction under statute against interactive computer

"the free expression rights of United States authors and publishers" by curtailing the domestic enforcement of judgments imposed in "foreign defamation lawsuits," it not only mandated that such judgments comply with the protections afforded by the First Amendment, but also provided that any foreign judgment against an interactive computer service could be enforced only if it is "consistent with section 230." Pub. L. No. 111-123, 124 Stat. 2380, §§ 2, 3 (2010) (codified at 28 U.S.C. § 4102(c)).

These legislative acts demonstrate that, in the nearly three decades since its enactment, Congress has ratified Section 230 and the immunity it bestows on many occasions. And, when the text of newly enacted legislation might be interpreted to cabin Section 230, Congress has taken pains to explicitly preserve its broad reach.

This history of congressional action—including amending Section 230 to address judicial decisions, while leaving in place the broad immunity for interactive computer service providers—presents a

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service as defined by Section 230(f), codified at 27 U.S.C. § 122b(b)(1)); Pub. L. No. 109-248, 120 Stat. 587, § 502 (2006) (amending criminal statute imposing record-keeping obligations on producers of pornography and providing that deletion of content "in a manner consistent with" Section 230(c) is not considered "selection or alteration of the content of the communication" under statute, codified at 18 U.S.C. § 2257(h)(2)(B)(v)); Pub. L. No. 110-425, 122 Stat. 4830, § 3 (2008) (amending provision of Controlled Substances Act to enact crimes for "dispensing of controlled substances by means of the Internet" and providing that deletion of content "in a manner consistent with" Section 230(c) is not considered "selection or alteration of the content of the communication" under statute, codified at 21 U.S.C. § 841(h)(3)(A)(iii)(II)).

powerful presumption that the lower courts' longstanding interpretation of that immunity is neither incorrect nor misguided. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 537 (2015) ("Congress' decision in 1988 to amend the FHA while still adhering to the operative language of in §§ 804(a) and 805(a) is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals finding disparate-impact liability."); *see also In re Facebook*, 625 S.W.3d at 92 ("[T]hese legislative extensions of CDA immunity, modest as they were, are nonetheless some evidence of Congress's lack of objection to the courts' interpretation of section 230."); *Barrett v. Rosenthal*, 146 P.3d 510, 523 & n.17 (Cal. 2006) (explaining how legislative history of subsequent statute "expressly incorporating section 230(c)" demonstrated ratification by Congress of "the interpretation uniformly given to the statute by intervening court decisions").

C. Congress Is Considering Proposed Reforms To Section 230.

The public record shows that Congress remains acutely aware of the criticisms of Section 230 and calls to reform the scope of its immunity. In the last legislative session, Members of Congress introduced approximately two dozen bills that would amend Section 230 immunity in various ways.[8] *See* Meghan Anand, et al., *All the Ways Congress Wants to Change Section 230*, SLATE.COM (last updated Dec. 19, 2022),

[8] While these particular bills expired with the end of the 117th Congress on January 3, 2023, the controversy over Section 230 has not abated, and there is no reason to expect Congress to abandon the issue in the current 118th Congress.

https://bit.ly/3iOR3fi (collecting bills to amend Section 230 in 117th Congress); *see also* Valerie C. Brannon & Eric N. Holmes, *Section 230: An Overview*, CONGRESSIONAL RESEARCH SERVICE, at 30-36 (Apr. 27, 2021), *available at* https://bit.ly/3GKkbwi (discussing bills to amend Section 230 in 116th Congress). These legislative proposals have come from both Republicans and Democrats, with views spanning the political spectrum. Some reflect a specific political perspective. Others reflect bipartisan collaboration and negotiation.

The proposals offer an array of policy options. Some have sought to cabin Section 230's immunity for specific industries. *See, e.g.*, Accountability for Online Firearms Marketplaces Act of 2021, S. 2725, 117th Cong. (2021) (seeking to eliminate Section 230 immunity for "online firearms marketplaces"). Others have sought to exempt particular types of claims, *see, e.g.*, EARN IT Act of 2022, S. 3538, 117th Cong. (2022) (seeking to limit Section 230 immunity with respect to claims alleging violations of child exploitation laws); SAFE TECH Act, H.R. 3421, 117th Cong. (2021) (seeking to limit Section 230 immunity in cases related to ads or other paid content), or particular types of information, *see, e.g.*, Health Misinformation Act of 2021, S. 2448, 117th Cong. (2021) (seeking to eliminate Section 230 immunity during public health emergencies "if the provider promotes . . . health misinformation through an algorithm"). Still others have called for the immunity to be abolished entirely. *See, e.g.*, 21st Century FREE Speech Act, H.R. 7613, 117th Cong. (2022) (seeking to repeal Section 230); A Bill to Repeal Section 230 of the Communications Act of 1934, S. 2972, 117th Cong. (2021) (same). It is clear that Congress is contemplating the various avenues of

reform that the judiciary has flagged in its decisions addressing Section 230. *See Force*, 934 F.3d at 88-89 (Katzmann, C.J., dissenting) (recognizing that Congress might "clarify" the scope of the immunity, "engage in a broader rethinking of the scope of CDA immunity," or "decide that the current regime best balances the interests involved").

The issues surrounding Section 230 and the policy options proposed to address them have been debated extensively in Congress, both on the floors of the Senate and House of Representatives and in committee hearings.[9] Those debates underscore the significance of the statute in the Internet's development and its present construction. They also

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[9] *See, e.g.*, *Does Section 230's Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the Sen. Comm. on Commerce, Science, & Transportation*, 116th Cong. (Oct. 28, 2020) (http://bit.ly/3CSXSDl); *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds: Hearing Before Subcomm. on Privacy, Technology, & the Law of the Sen. Comm. on Judiciary*, 117th Cong. (April 27, 2021) (http://bit.ly/3XEolwt); *Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity: Hearing Before Subcomm. on Communications & Technology of the House Energy & Commerce Comm.*, 117th Cong. (Dec. 10, 2021) (https://bit.ly/3ZOJpT8); 167 CONG. REC. S846 (daily ed. Feb. 24, 2021) (statement of Sen. Grassley saying "Congress also must take a good, hard look at this famous section 230 we all talk about that has given these platforms great protection—more protection than they probably deserve—and whether, in regard to section 230, there is a need to reform immunity laws on the books."); 167 CONG. REC. S575-76 (daily ed. Feb. 8, 2021) (statement of Sen. Hirono discussing legislation that would "forc[e] internet companies to finally address the serious harms their platforms cause—harms like civil rights and human rights violations, stalking and harassment, and wrongful death" by "creating targeted exceptions to Section 230's broad immunity").

highlight the difficult political and policy questions presented by any change in the status quo.

The political branches are keenly focused on those questions and are poised to act. In January, President Biden called for "bipartisan action from Congress" to "fundamentally reform Section 230." Joe Biden, *Republicans and Democrats, United Against Big Tech Abuses*, WALL ST. J. (Jan. 12, 2023), *available at* https://bit.ly/3IWnB1A; *see also Readout of White House Listening Session on Tech Platform Accountability*, THE WHITE HOUSE (Sept. 8, 2022), http://bit.ly/3ks7dfj (supporting "fundamental reforms to Section 230"). The newly elected Speaker of the House of Representatives also is on record calling for legislative action to fundamentally reform Section 230. *See* Press Release, *Leader McCarthy Statement on Twitter's Continued Efforts to Silence Americans*, REP. KEVIN MCCARTHY (Jan. 3, 2022), http://bit.ly/3GKkh78 ("Big Tech platforms should not be allowed to use the shield of Section 230, which was designed to foster an open internet, to censor first amendment protected free speech. House Republicans will be ready to take action . . . ."); Press Release, *Scrap 230 and Start Over*, REP. KEVIN MCCARTHY (Oct. 15, 2020), http://bit.ly/3GTo55U (advocating that "[i]t is time to scrap Section 230 and start over").

D. The Judiciary Should Not Short-Circuit The Legislative Process Underway In Congress.

The judiciary should allow Congress's deliberative process to play out. It should not short-circuit that process by adopting a statutory interpretation that may differ from the approach

enacted and repeatedly ratified by a majority of Members of Congress and that has been reflected in judicial decisions for more than a generation. The legislative branch is best suited to assess the weight of these concerns and deliberate about potential changes.

The line-drawing necessary to circumscribe the immunity at issue in this case—such as assessing what is deemed a "recommendation" and how Section 230's immunity is impacted by when, how, and to whom a "recommendation" is displayed—are policy choices best left to the legislative branch. Those choices, and the scope of the immunity permitted under the law, are paradigmatically within the realm of Congress. This Court should refrain from upending the status quo.[10] If changes to Section 230's immunity are to be made, they should be made by Congress.

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[10] Alternatively, if the Court rules that Section 230 does not confer immunity on Google in this case, it should do so on the narrowest basis possible to avoid interfering with settled expectations of interactive computer service providers and users and the legislative process that is already underway.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

Lynn B. Oberlander
Counsel of Record
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019
Telephone: (212) 223-0200
oberlanderl@ballardspahr.com

Elizabeth Seidlin-Bernstein
Shawn F. Summers
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: (215) 665-8500
seidline@ballardspahr.com
summerss@ballardspahr.com

Counsel for Bipartisan Policy Center

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