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 AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. For more than 75 years, AAJ has served as a leading advocate of the right of all Americans to seek legal recourse for wrongful injury.

AAJ has an intense interest in this case and the critical issue of the scope of statutory immunity granted to online service providers. AAJ is concerned that the decision below, if affirmed, will undermine the rights of Americans to obtain legal redress for injury caused by information circulated online.

SUMMARY OF ARGUMENT

1a. The Gonzalez family has pled a valid cause of action under the Anti-Terrorism Act,

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission. Petitioners and Respondent have consented to the filing of this brief.

alleging that Google, LLC aided and abetted ISIS in carrying out the terrorist attack that killed Nohemi Gonzalez. They allege that Google provided material support to ISIS that aided ISIS in conducting acts of international terrorism by allowing ISIS to use YouTube accounts and Google resources to transmit videos and messages throughout the world, recruiting terrorist members, urging violent attacks on Americans and other perceived enemies, planning and executing terrorist attacks, and soliciting funds to carry out future acts of international terrorism. Plaintiffs allege that Google failed to block ISIS videos or take other reasonable steps, even after being notified repeatedly that ISIS was using Google to pursue its international terrorist activities.

The district court and the Ninth Circuit Court of Appeals erred in holding that Google is immune from liability by virtue of a provision of the Communications Decency Act, 47 U.S.C § 230(c)(1), enacted in 1996, which states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The plain meaning of this statute prohibits a court from treating an online provider like Google as a "publisher," liable under common law for disseminating defamatory statements, regardless of whether it knew of their unlawful content. Section 230 provides online providers of third-party information with narrow immunity from such strict "publisher" liability, but does not confer blanket immunity from all accountability for unreasonably continuing to disseminate criminal or egregiously harmful

material with actual knowledge of its criminal or harmful content.

1b. The extraordinarily broad immunity applied by the court below is not based on the statutory text, but on a judicial gloss on the language of Section 230 that strays far beyond the narrow protections for internet companies that Congress had in mind.

Prior to 1995, an "electronic bulletin board" was not treated as a "publisher" under defamation law, but rather as a "distributor," like a bookstore or library, which could be liable for distributing defamatory statements only if it had actual knowledge of their tortious content. However, a New York state court decided that an electronic bulletin board that actively screened the information made available on its site and deleted or altered material it deemed inappropriate, would be treated as a "publisher" and held liable for transmitting defamation regardless of whether it knew of the defamatory nature of the information provided by a third party.

Congress enacted Section 230(c)(1) specifically to overturn that decision. The scope of the Section 230 protection for online providers was modest. It did not expressly make them immune or not liable at all for content on their platforms, nor did it disturb "distributor" liability for knowingly distributing harmful information.

Courts thereafter added a judicial gloss to the statutory language that vastly expanded the scope of Section 230, beginning with the Fourth Circuit decision in *Zeran v. America Online, Inc.* The court there construed "publisher" in the generic sense, as

anyone who publishes a statement. Distributor liability was thus a mere subset of publisher liability, preempted by Section 230. The statute's modest protection was transformed into blanket immunity for online companies from any type of liability for harm caused by statements placed on their site by third parties. Every federal circuit has adopted this broad interpretation of Section 230 immunity, dismissing a wide variety of causes of action arising under both state and federal law.

1c. Textual analysis shows that Section 230 unambiguously confers narrow protection on internet providers, not blanket immunity. First, if Congress had intended to bestow blanket immunity on internet companies, it could easily have done so directly and categorically. Indeed, Congress did exactly that in the immediately following subsection, which grants blanket immunity to online companies for removing objectionable material from its site.

Second, the term "treated as a publisher" must be given its accepted legal meaning in the common law. In a statute affecting common-law causes of action, "treated" obviously refers to treatment by the courts and not a broad generic meaning based on treatment by the world at large.

Finally, construing Section 230(c)(1) as conferring blanket immunity on online providers renders Section 230(c)(2), which expressly makes those providers not liable for editorial decisions regarding removal and content moderation, superfluous.

2a. The blanket immunity applied by the court below and other federal courts also fails to

advance the policy objectives Congress expressly identified. In fact, it undermines those objectives.

Narrow protection from strict "publisher" liability is designed to foster internet development as a forum for free speech by insulating online providers from the expensive duty of scrutinizing masses of third-party material and unavoidable tort liability for unknowingly disseminating harmful content that gets through. Blanket immunity from liability for knowingly continuing to transmit criminal or egregiously harmful material does not further that legislative policy.

The providers of interactive computer services are no longer fledgling and fragile enterprises in need of government subsidy at the expense of the victims of harmful online speech. Moreover, a duty to take reasonable steps after notice and actual knowledge of the unlawful nature of material on their site is not an impossible burden, especially in view of ongoing technological advances in detection and removal.

Equating private claims for compensatory damages for wrongful injury to intrusive government regulation is also unpersuasive. Tort lawsuits provide a financial incentive for companies to alter their behavior in favor of user safety. Tort liability is distinct from government regulation. The presumption against preemption also instructs a court to interpret express statutory preemption provisions narrowly.

2b. Nor does blanket immunity further Congress's stated objective of removing disincentives for online providers to develop and provide

blocking and filtering technologies to empower individuals and families to control the information they receive online. Narrow immunity, which allows those harmed by online speech to hold online providers accountable constitutes precisely the empowerment of individuals and families to press online platforms for the greater protections that Congress envisioned. If online companies are insulated from liability regardless of whether they undertake steps, they will take the path of least cost to themselves and do nothing. In fact, blanket immunity completely negates the effectiveness of the targeted immunity provided in Section 230(c)(2) and sets up the very "disincentives" that Congress sought to remove.

3. This Court should also adopt a narrow interpretation of the scope of Section 230 immunity to avoid conflict with fundamental constitutional rights of the real-world victims of online speech, like the Gonzales family in this case. Even if "publisher" is susceptible to a broad, generic meaning, the canon of constitutional avoidance strongly counsels the narrower interpretation.

The constitutional guarantee of due process embodies the bedrock common-law principle that for every wrongful injury, the courts must afford a legal remedy. Congress intended to provide such a remedy for the victims of international terrorism by establishing a private cause of action against those who aid and abet terrorist organizations by providing material support. The blanket immunity bestowed by courts upon companies like Google deprives injured plaintiffs of the remedy expressly established for them by Congress.

This Court has emphasized that the guarantee of due process protects not only defendants but also plaintiffs seeking to vindicate their statutory causes of action. Indeed, multiple constitutional provisions safeguard Americans' right to access the courts to pursue a valid cause of action and obtain redress for wrongful injury. This Court should adopt the narrow protection of internet firms supported by the text of Section 230 and allow the Gonzalez family their day in court to pursue the cause of action Congress has specifically created.

ARGUMENT

I. THE PLAIN TEXT OF SECTION 230 CONFERS ONLY NARROW IMMUNITY FROM "PUBLISHER" LIABILITY AND DOES NOT GIVE AN INTERACTIVE COMPUTER SERVICE BLANKET IMMUNITY FROM LIABILITY AS A DISTRIBUTOR OF CONTENT THAT IS ILLEGAL OR EGREGIOUSLY HARMFUL.

AAJ addresses this Court with regard to the central issue in this case: The scope of immunity Congress has granted to interactive computer service providers, like Google, under the Section 230 of the Communications Decency Act. AAJ submits that the blanket immunity reflected in the Ninth Circuit decision below, and in other federal court decisions, is not supported by the plain text of the statute. Nor, AAJ contends in Part II, does it further the policies Congress sought to advance.

A. Plaintiffs Pled a Valid Cause of Action Under the Anti-Terrorism Act Based on Defendant's Continued Distribution of Videos and Messages Provided by ISIS with Google's Actual Knowledge that the Content Was Criminal and Egregiously Harmful.

The facts are tragic. Nohemi Gonzalez was a U.S. citizen and California State University senior, studying for a semester in Paris. On November 13, 2013, as she was dining with friends in a Paris bistro, three ISIS gunmen opened fire on the crowd, killing 130 people, including Nohemi. *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1160-61 (N.D. Cal. 2018). The attack was part of a coordinated terrorist offensive in France, planned for months by ISIS, which has made extensive use of You Tube videos and messages to spread its call to attack Americans and others, recruit followers to carry out multiple terrorist attacks, and publicize its crimes. *Id*. at 1161.

Plaintiffs' Third Amended Complaint ("TAC") sets forth in great detail ISIS's extensive use of Google's Platform and Services to conduct its campaign. ISIS posted on YouTube horrific videos, some too graphically violent to be shown on other media, inciting followers around the world to attack and kill Americans and other "infidels" wherever they can be found. *See, e.g.*, TAC ¶¶ 235-239.[2] Google also pro-

[2] For example, ISIS spokesman Abu Muhammad al-Adnani in a message posted to YouTube in September 2014 implored fol-

vided ISIS with free access to its sophisticated Platform and Services, which included capabilities to produce high-quality videos for posting, *id.* ¶¶ 242-44, and access to private "channels" to send videos and messages to their own "subscribers." *Id.* ¶¶ 182-84. ISIS used YouTube to transmit instruction to terrorists carrying out attacks, *id.* ¶ 194-95, and to beg for funds to carry out future attacks. *Id.* ¶ 283.

Nohemi's parents and family brought this action under the Anti-Terrorism Act of 1992, 18 U.S.C. § 2331 *et seq*., which provides a private cause of action for damages for any American national, or their estate or survivors, for harm "by reason of an act of international terrorism." *Id.* at § 2333(a). Congress amended the statute in 2016 by enacting the Justice Against Sponsors of Terrorist Act ("JASTA"), which expanded liability to include "any person who aids and abets, by knowingly providing substantial assistance [to], or who conspires with "a terrorist or terrorist organization that committed the act of terrorism. 18 U.S.C. § 2333(d)(2).

Plaintiffs alleged that—even after Google was notified and given actual knowledge that ISIS was using Google's platform and resources to plan, finance, recruit for, and carry out acts of international terrorism—Google declined to deny ISIS access to its

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lowers: "If you are able to kill an American [or other infidel enemy], then put your trust in Allah and kill him, by any way or means. . . . If you cannot [detonate] a bomb or [fire] a bullet, arrange to meet alone with a French or an American infidel and bash his skull in with a rock, slaughter him with a knife, run him over with your car, throw him off a cliff, strangle him, or inject him with poison." TAC ¶ 366.

services, or did so only incompletely and ineffectively. TAC ¶¶ 505-07. Google's conduct, Plaintiffs asserted, constituted provision of "material support" to ISIS in violation of 18 U.S.C. § 2339A and 18 U.S.C. § 2339B(a)(1), and rendered the company civilly liable for aiding and abetting under 18 U.S.C. § 2333(a) and (d)(2). *See Boim v. Holy Land Found. for Relief and Dev.*, 549 F.3d 685, 694 (7th Cir. 2008) (en banc) (donation of resources to Hamas with knowledge that they would enable the organization to carry out terrorist acts stated valid cause of action under the ATA).

The district court nevertheless granted Defendant's motion to dismiss Plaintiffs' complaint as barred by Section 230, 335 Supp. 3d at 1179, and the Ninth Circuit affirmed. *Gonzalez v. Google LLC*, 2 F.4th 871 (9th Cir. 2021).[3]

Section 230 of the Communications Decency Act provides, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Expressing concern that the Section 230 immunity—as construed by many federal courts—is "sweeping," *Gonzalez*, 2 F.4th. at 897, and "shelters more activity than Congress envisioned it would," *id.* at 913, the Ninth Circuit nevertheless felt bound by

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[3] The court also upheld the dismissal of Plaintiffs' claims based on Google's alleged sharing of advertising revenue with ISIS. *Gonzalez*, 2 F.4th at 913. In this brief, AAJ focuses solely on the scope of Section 230.

the statutory language which "affirmatively immunized interactive computer service providers that publish the speech or content of others." *Id.* at 897. Because the Gonzalez family's claims "seek to impose liability for allowing ISIS to place content on the YouTube platform, the court determined, "they seek to treat Google as a publisher," and are therefore barred by Section 230. *Id.* at 892.

Under that broad construction, even the act of supporting a Foreign Terrorist Organization by providing it a free platform and resources to disseminate its illegal content "falls within the heartland of what it means to be the 'publisher' of information under Section 230(c)(1)." *Gonzalez*, 2 F.4th at 891 (quoting *Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019)).

In short, the lower court determined that when an internet company behaves like a publisher, exercising editorial control over the content on its site, Section 230 bestows blanket immunity even for harm resulting from the company's intentional *failure* to exercise editorial control after it has actual knowledge that the content it is spewing out into the world is criminal and threatens imminent serious harm.

AAJ submits that the lower court's misgivings were entirely warranted and, further, that the court erred in finding that the statutory language supports the extraordinarily broad immunity that federal courts have bestowed on platforms like Google. In fact, it is clear that Congress had a much narrower protection in mind.

B. The Blanket Immunity from Liability for Harm Caused by Third-Party Content Is a Judicial Gloss on Section 230 that Strays Impermissibly Far from the Statute's Language.

1. Congress enacted Section 230(c)(1) to negate a narrow basis for strict liability for online providers of third-party content

Section 230's operational phrase is its prohibition that an online provider shall not "be treated as the publisher or speaker" of information placed on its site by a third party. At common law, a publisher of a defamatory statement is liable to the same extent as the initial speaker, who is strictly liable regardless of whether they knew the defamatory nature of the content. *See* Restatement (Second) of Torts § 578 (1977) ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.").

But a distributor, who does not exercise editorial control over the statements it distributes, such as a newsstand, bookstore, or library, is not treated as a publisher of those statements. Rather, "one who only delivers or transmits defamatory matter . . . is subject to liability if, but only if, he knows or has reason to know of its defamatory character." Restatement (Second) of Torts § 581 (1977). Importantly, a newsstand or bookstore is under no duty to examine the various publications that it offers for sale

"[u]nless there are special circumstances that should warn the dealer that a particular publication is defamatory." *Id*. at cmt. d. However, once a distributor has actual knowledge of the tortious nature of the material or communications within its control, it must stop making the material available to others.[4]

Prior to the enactment of Section 230, online disseminators of information provided by third parties, such as electronic bulletin boards, were widely viewed as "distributors," who should not be liable for defamatory materials distributed through public message or files sections until the operator is actually aware that the defamation is available for distribution." Loftus E. Becker, Jr., *The Liability of Computer Bulletin Board Operators for Defamation Posted by Others*, 22 Conn. L. Rev. 203, 228 (1989). *See, e.g.*, *Cubby v. Compuserve*, *Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).

The details of the common law of defamation are immediately relevant here because at the time Congress was crafting the Communications Decency Act, a New York state trial court held that an electronic bulletin board could be treated, under some circumstances, as a publisher.

Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished), involved a major online service that provided its two million subscribers with

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[4] *See* Restatement (Second) of Torts § 577(2) ("One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited on land or chattels in his possession or under his control is subject to liability for its continued publication.").

access to electronic bulletin boards containing financial information submitted by other users, including statements that allegedly defamed plaintiff. *Id.* at *2. The court acknowledged that "distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue," because a distributor "is considered a passive conduit." *Id.* at *3. The court agreed with *Cubby* that "[c]omputer bulletin boards should generally be regarded in [that] same context." *Id.* at *5. But, unlike Compuserve, PRODIGY had represented itself as "a family oriented computer network" and "exercised editorial control over the content of messages posted on its computer bulletin boards," deleting material it deemed offensive. *Id.* at *3. On that basis, the court concluded that "PRODIGY is a publisher rather than a distributor" and therefore could be held liable for disseminating defamatory information, even it had no actual knowledge. *Id.* at *4.

As the court below acknowledged, Congress's objective in delineating the scope of Section 230 immunity was "modest." *Gonzalez*, 2 F.4th at 887. Congress enacted Section 230(c)(1) specifically to override *Stratton Oakmont*.[5]

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[5] As the Senate Conference Report stated:

> One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.

2. Erroneous judicial construction of the narrow protection Congress enacted has expanded Section 230 into blanket immunity

The "modest" scope of Section 230(c)(1) soon expanded dramatically at the hands of federal courts, beginning with the Fourth Circuit's watershed decision in *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997). Plaintiff in that case contended that AOL should be held liable for the defamatory statements posted by one of its users because AOL had failed to remove the defamatory messages from its bulletin board system within a reasonable time after being made aware that they were defamatory, and it failed to screen for similar defamatory messages thereafter. *Id.* at 328. The Fourth Circuit found the plaintiff's tort claims were preempted by Section 230. Chief Judge Wilkinson, writing for the court, rejected the argument that the statute precludes "publisher" liability, but allows AOL to be held liable as a distributor for knowingly disseminating defamatory statements. In the court's view, "distributor liability . . . is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230." *Id.* at 332.

Every federal circuit has accepted *Zeran*'s rationale for blanket immunity. *See Universal Communication Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007); *Force*, 934 F.3d at 63 (describing *Zeran* as "seminal"); *Green v. Am. Online (AOL)*, 318

S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.). *See also Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003).

F.3d 465, 471 (3d Cir. 2003); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Huon v. Denton*, 841 F.3d 733, 743 (7th Cir. 2016); *Johnson v. Arden*, 614 F.3d 785, 791-92 (8th Cir. 2010); *Batzel*, 333 F.3d at 1027; *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) ("The majority of federal circuits have interpreted [§ 230] to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."); *Bennett v. Google, LLC,* 882 F.3d 1163, 1166 (D.C. Cir. 2018) (describing *Zeran* as "seminal").

On the basis of this judge-made immunity, courts have dismissed lawsuits on a broad array of causes of action, none of which involve otherwise protected speech. *See, e.g.*, *Doe v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016) (sex trafficking of minors); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967-69 (N.D. Ill. 2009) (prostitution); *Chicago Lawyers' Comm. for Civ. Rts. Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669-72 (7th Cir. 2008) (housing discrimination); *Universal Communication Sys., Inc.*, 478 F.3d 413 (securities fraud and cyberstalking); *Force*, 934 F.3d at 64 (terrorism); *Herrick v. Grindr, LLC,* No. 17-CV-932, 2017 WL 744605, at *2-4 (S.D.N.Y. Feb. 24, 2017) (harassment); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1355 (D.C. Cir. 2014) (assault, based on social network message that "called for Muslims to rise up and kill the Jewish people"); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735, 2009 WL 1704355, at *3-4 (S.D.N.Y. June 15,

2009) (illegal gun sales). State courts have adopted the blanket immunity as well. *See, e.g.*, *Daniel v. Armslist*, *LLC*, 926 N.W.2d 710, 715, 726 (Wis. 2019) (website that facilitated sale of firearm to prohibited person who then murdered his wife and two other people and injured four others was immune from liability to the victims under Section 230, despite allegations that website was intentionally designed with the specific purpose of skirting federal firearm laws).

C. The Judicially Created Blanket Immunity Is Not Supported by the Text of Section 230.

1. If Congress intended to grant blanket immunity for interactive computer service providers in Section 230(c)(1), it would have done so in the clear and direct language it used in Section 230(c)(2)

The primary rationale underlying the blanket immunity attributed to Section 230 by *Zeran* and the courts that have followed in its footsteps is that a "publisher" is anyone who takes on "a publisher's role," so that Section 230 bars liability for the "exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Zeran*, 129 F.3d at 330. The *Zeran* court thus rejected the narrow, legal meaning of "publisher," which the common law sharply distinguished from distributor, in favor of the broader, more generic meaning: anyone who transmits a "publication." *Id*. at 332.

If Congress had intended to insulate online providers from both publisher and distributor liability, it could easily have mandated that an interactive computer service shall not "be treated as a publisher or distributor." Congress chose not to do so.

Indeed, if Congress had intended to grant blanket immunity of the scope claimed by the *Zeran* court and by the Ninth Circuit in this case, Congress could have done so directly and categorically. In fact, it did precisely that in the very next subsection of Section 230: "No provider or user of an interactive computer service shall be held liable on account of" restricting access to objectionable material. 47 U.S.C. § 230(c)(2).

Congress clearly knew how to craft statutory language creating blanket immunity for online providers. In crafting Section 230(c)(1), Congress chose not to do so.

2. Congress may be presumed to have used "publisher" in Section 230 in its common-law usage, which leaves "distributor" liability undisturbed

AAJ submits that, in the context of a statute addressing criminal and civil liability, the phrase "treated as a publisher" obviously refers to treatment by the courts, not by the world at large. It is this narrow, legal meaning of "publisher" that the court used in *Stratton Oakmont,* the case which Congress explicitly intended to overturn by enacting Section 230(c)(1).

This narrow construction is confirmed by Congress's use of "publisher or speaker." If, as *Zeran*

reasoned, everyone who issues a "publication" is a "publisher," 129 F.3d at 332, then the phrase "or speaker" becomes mere surplusage.

When courts interpret statutes affecting common law liability, they are guided by the "presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). As this Court has instructed, when "a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (internal citation and quotation marks omitted).

This Court should presume that Congress used the term "publisher" in its narrow, legal sense, and left "distributor" liability intact.

3. Blanket immunity under Section 230(c)(1) makes Section 230(c)(2) superfluous

Finally, the broad construction of Section 230(c)(1) to shield "editorial" functions, such as the decision not to take down content known to be illegal, reads Section 230(c)(2) out of the statute entirely. That subsection protects a provider from liability based on the exercise of its "editorial

functions," including removals and content moderation.[6]

This Court has instructed that, "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Indeed, this canon of construction "is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 386 (2013).

Plainly, the interpretation of Section 230 that is most faithful to the ordinary meaning of the statutory text recognizes that an online provider may not be held strictly liable for harm caused by transmitting information provided by third parties, as a print publisher would be. Nor does an online provider owe a duty to screen the content available on his site for illegal or harmful material. However, when a provider like Google has actual knowledge that content on its site is illegal or egregiously harmful, it may be held liable for harm due to its failure

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[6] "No provider or user of an interactive computer service shall be held liable on account of—

> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.

47 U.S.C. § 230(c)(2).

to take reasonable steps to prevent further dissemination.[7] The text of Section 230, as written by Congress, is no broader than that.

II. BLANKET IMMUNITY UNDER SECTION 230 DOES NOT SERVE CONGRESS'S STATED POLICY OBJECTIVES.

In place of a close and faithful textual analysis of Section 230, courts have asserted that broad immunity for internet companies is needed to serve important public policies that Congress expressly set forth in the statute. That view was first laid out in the first appellate decision to address this question, *Zeran*, and has been adopted by nearly every federal court, though not without misgivings, including by the Ninth Circuit in this case. *See* 129 F.3d at 330-31.

The courts' perception of the importance of these have led them to "read[] extra immunity into statutes where it does not belong," and which Congress could not have intended. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15

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[7] Narrowly construing Section 230 immunity would also remove its protection from online sites that actually solicit, promote, and profit from criminal conduct by third parties. *See* U.S. DEP'T OF JUSTICE, SECTION 230 — NURTURING INNOVATION OR FOSTERING UNACCOUNTABILITY?: KEY TAKEAWAYS AND RECOMMENDATIONS 14-15 (June 2020), https://www.justice.gov/file/1286331/download (recommending a "Bad Samaritan" carve out to remove immunity where online entities purposefully solicit third parties to engage in unlawful activities through their platforms).

(2020) (Thomas, J., statement respecting denial of certiorari).

A. Blanket Immunity from Private Tort Causes of Action Under Section 230 Does Not "Promote the Free Exchange of Information and Ideas over the Internet."

> Congress has declared:
>
> It is the policy of the United States--
>
> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and]
>
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.

47 U.S.C. § 230(b)(1), (2).

The message received by the Fourth Circuit was a congressional mandate that "the new and burgeoning Internet medium" needed shelter from "intrusive government regulation of speech." *Zeran*, 129 F.3d at 330. The court below agreed "Congress designed § 230 'to promote the free exchange of information and ideas over the Internet.'" *Gonzalez*, 2 F.4th at 886 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099-1100 (9th Cir. 2009)).

It should be clear at the outset that internet interactive platforms are no longer the fledgling, fragile endeavors they were when Congress enacted

Section 230.[8] Internet behemoths like Google, Facebook, and Twitter no longer need a government subsidy paid for by real-world victims of internet speech who are deprived of all legal recourse.[9]

Second, promoting continued development of the Internet does not require blanket immunity from civil suits against online companies that knowingly distribute illegal or egregiously harmful content. Obviously, few Americans would welcome a new regulatory bureaucracy to approve of what they could consume online. And no intrusive federal "Department of Computers" has materialized.

However, the *Zeran* court pivoted from fears of Big Brother government to the far different subject of whether private citizens should be able to seek legal redress for wrongful injury: "Congress recognized the threat that tort-based lawsuits pose to freedom of speech," the court stated, because claims like those of the Gonzalez family in this case "represented, for Congress, simply another form of intrusive government regulation of speech." *See* 129 F.3d at 330. Plaintiff's state law tort claims were therefore expressly preempted. *Id.* at 334.

The court cited no support for this "recognition" it attributed to Congress. Rather, this Court

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[8] *See* U.S. DEP'T OF JUSTICE, *supra* note 7, at 11 ("Since the enactment of Section 230 . . . the internet and social media ecosystems have grown exponentially.").

[9] *See id.* at 15-16 (urging adoption of exemption from Section 230 immunity for internet sites that purposefully or knowingly facilitate serious criminal activity, including sex trafficking, illegal drug sales, and terrorism).

has recognized that the prospect of an adverse jury verdict in a tort action is a financial incentive that "merely motivates an optional decision" by a company in favor of greater safety and stands on far different footing than government regulation in this Court's preemption jurisprudence. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005).

Indeed, this Court has instructed that "the term 'regulation' most naturally refers to positive enactments by [legislatures or administrative agencies], not to common-law damages actions. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 519 (1992); *see also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489-90 (1996) (rejecting Medtronic's "extreme position" that preemption of state statutory and administrative regulation of medical devices also encompassed common-law claims for wrongful injury); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988) ("Congress may reasonably determine that incidental regulatory pressure [of tort liability] is acceptable, whereas direct regulatory authority is not").[10] In fact, Congress explicitly intended to create incentives for online companies to provide individuals and families with greater protections against unwanted online content. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (tort liability may provide a financial incentive for companies to alter their behavior in favor of greater safety).

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[10] Moreover, when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates*, 544 U.S. at 449; *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008).

Third, is it no longer sufficient to absolve internet companies of any accountability for the third-party content they make available because of the "staggering" amount of such information that is constantly transmitted online. *See, e.g.*, *Zeran*,129 F.3d at 331. As the court below suggested, this rationale "is likely premised on an antiquated understanding of the extent to which it is possible to screen content posted by third parties." *Gonzalez*, 2 F.4th at 913.

AAJ suggests that maintaining the narrow immunity from "publisher" liability would continue to protect online providers from the burden of screening all the content posted on their sites by third parties. The duty as a "distributor" to take reasonable steps to remove unlawful content that it is made aware of is not an impossible task.

For example, a fake message posted on Twitter recently "announced" that Eli Lilly was about to make its insulin products available for free. Within a few hours of being notified by Lilly, Twitter had taken down the fraudulent Tweet and related fake content. Drew Harwell, *A Fake Tweet Sparked Panic at Eli Lilly and May Have Cost Twitter Millions*, Wash. Post (Nov. 14, 2022). Significantly, both small and large websites already have takedown obligations under the Digital Millennium Copyright Act, 17 U.S.C. § 512(c).

In sum, legislative policy favoring development of the internet is well served by the narrow immunity from strict immunity that Congress wrote into Section 230. Blanket immunity from any accountability for knowingly transmitting illegal and

harmful messages is not needed to further that objective.

B. Blanket Immunity Sets Up a Disincentive for Providers of Interactive Computer Services to Empower Individuals and Families to Protect Themselves Against Unwanted Online Content.

The Fourth Circuit in *Zeran* also based its broad interpretation of Section 230 immunity on the stated intent of Congress "to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 129 F.3d at 331. The court below agreed that Congress designed Section 230 in part "to encourage voluntary monitoring for offensive or obscene material." *Gonzalez*, 2 F.4th at 886; *see also* 47 U.S.C. § 230(b)(3)-(4).[11]

In furtherance of that objective, Section 230(c)(2) explicitly immunizes an online provide

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[11] Congress declared that its purpose in enacting Section 230 was also:

> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
>
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material . . . .

47 U.S.C. 230(b)(3)-(4).

from liability to third parties for deleting or regulating the information posted on its site, as well as for providing parents and families with the technology to block unwanted information themselves. 47 U.S.C. § 230(c)(2). This narrow immunity from strict liability allows victims to hold online providers accountable for knowingly failing to take such action, while incentivizing those providers to take protective measures.

If, however, online providers are immune from liability regardless of whether they make reasonable efforts to take down content they know is illegal or egregiously harmful, they will take the path of least cost to themselves. In fact, blanket immunity completely negates the effectiveness of the targeted immunity provided in Section 230(c)(2) and sets up the very "disincentives" that Congress sought to remove. 47 U.S.C. 230(b)(4).

As Judge Easterbrook has accurately surmised, blanket immunity makes online providers "indifferent to the content of information they host or transmit." *Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003). "As precautions are costly, . . . [they] may be expected to take the do-nothing option and enjoy immunity under § 230(c)(1)." *Id.*

Blanket immunity deprives individuals and families of an important means obtaining greater protections from online providers. This is precisely the opposite of Congress's stated objective.

III. NARROW CONSTRUCTION OF THE SCOPE OF SECTION 230 IMMUNITY COMPORTS WITH AMERICANS' FUNDAMENTAL RIGHT TO ACCESS THE COURTS TO VINDICATE THEIR FEDERAL STATUTORY REMEDY FOR WRONGFUL INJURY.

Even apart from a faithful reading of the statutory text and furtherance of the stated policies of Congress, the narrow construction of Section 230 immunity for internet companies also serves to safeguard fundamental constitutional principles.

To the extent that the text of Section 230(c)(1) is at all ambiguous as to whether it shuts the courthouse door against the Gonzalez family and other real-world victims of illegal online messages, the familiar principle of constitutional avoidance counsels strongly in favor of construing immunity under this section narrowly. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts.").

The Founders were familiar with the bedrock common-law principle: "Every right, when withheld, must have a remedy, and every injury its proper redress" by access to "a legal remedy by suit or action at law." 3 William Blackstone, *Commentaries* *23, *109 (1765). Indeed, the right to personal security from bodily harm is one of the "absolute" rights, the protection of which is "the principal aim of society."

1 William Blackstone, *Commentaries* *120, *125 (1765).

Chief Justice John Marshall, echoing Blackstone, restated this principle in a cornerstone decision for Americans:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

Congress endeavored to do precisely that in creating a private right of action under the Anti-Terrorism Act for any American national, or their estate or survivors, who suffers harm "by reason of an act of international terrorism." 18 U.S.C. § 2333(a). Liability extends to "any person "who aids and abets, *by knowingly providing substantial assistance*" to a terrorist organization that carried out the attack. 18 U.S.C. § 2333(d)(2) (emphasis added).

In this way, Congress intended to "'provide civil litigants with the broadest possible basis . . . to seek relief against [those] that have provided material support, *directly or indirectly*, to foreign organizations or persons that engage in terrorist activities against the United States.'" *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277 (D.C. Cir. 2018) (quoting Justice Against Sponsors of Terrorism Act, Pub. L. No. 114-222, § 2(b), 130 Stat. 852, 853 (2016)).

In this case, Plaintiffs pled a valid cause of action against Google. *See supra* Part I.A. Dismissal by reason of the blanket immunity the lower court read into Section 230 not only lacks basis in the text of the statute and finds no support in the Congress's stated policy objectives, it deprives plaintiffs of the very remedy that Congress expressly created for victims of international terrorism. It cannot be squared with the "traditional notions of fair play and substantial justice" this Court has held to be embodied in the Due Process Clause. *See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024 (2021).

This Court has emphasized that the "Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property *or as plaintiffs attempting to redress grievances*." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (emphasis added). In that case, plaintiff alleged that he was fired from his job because of his disability in violation of the Illinois Fair Employment Practices Act. However, the state court dismissed his action because the state fair employment commission had failed to conduct a required hearing within the prescribed time period. *Id.* at 426-27. This Court, through Justice Blackmun, emphasized that plaintiffs have a property interest in their statutory causes of action. *Id.* at 431-32. The Court concluded that the state court's construction and application of the limitations period because it had the effect of extinguishing plaintiff's statutory cause of action, violated due process. *Id.* at 433.

Americans have long revered the constitutional right to access to their courts as one of "the

most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). It is "part of our 'deep-rooted historic tradition that everyone should have his own day in court,'" *St. Hubert v. United States*, 140 S. Ct. 1727, 1730 (2020) (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). Where, as here, a plaintiff has alleged a valid cause of action for redress of wrongful injury, this Court has found a "separate and distinct right to seek judicial relief "which is a fundamental right grounded in multiple provisions of the Constitution. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

AAJ contends that the plain meaning of the 26 words at the heart of this case grants a narrow immunity from strict liability for harm caused by unknowing dissemination of unlawful statements of another. They do not bestow the blanket immunity constructed by the court below and other federal courts, insulating online providers from accountability for unreasonable dissemination of illegal or egregiously harmful information with notice of its unlawfulness. Nor is such blanket immunity needed to further the policy goals of fostering growth of the internet while encouraging private sector efforts to protect against harmful online content.

To the extent that the words of Section 230(c)(1) are at all susceptible to such a broad interpretation, this Court should construe the statute as affording only a narrow immunity to avoid conflict with the fundamental rights of victims of terrorism

facilitated by internet speech and allow the Gonzalez family access to court to pursue the cause of action Congress has specifically created.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to reverse the decision below.

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