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 TECHFREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT**

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## INTEREST OF *AMICUS CURIAE*[*]

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

Throughout its existence, TechFreedom has staunchly defended free speech on the Internet. Accordingly, TechFreedom's experts have long been at the forefront of the fight to protect Section 230, the bulwark of online free expression. Through its articles, reports, congressional testimony, legal briefs, regulatory comments, and more, TechFreedom seeks to explain why Section 230 is so important, and why eliminating or narrowing it would be a catastrophic mistake. See, e.g., Corbin K. Barthold, *Section 230 Heads to the Supreme Court*, Reason (Nov. 4, 2022), https://bit.ly/3QoUtC1; Berin Szóka & Ari Cohn, *The Wall Street Journal Misreads Section 230 and the First Amendment*, Lawfare (Feb. 3, 2021), https://bit.ly/3GltTVK; *Platform Responsibility & Section 230: Filtering Practices of Social Media Platforms*, Hearing Before the House Comm. on the Judiciary (Apr. 26, 2018) (testimony of Berin Szóka), https://bit.ly/3Wdbqkd; Brief of TechFreedom as *Amicus* ISO Petitioner, *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, No. 19-1284 (U.S., June 12, 2020); Comments of TechFreedom, *In re Petition for Rulemaking to Clarify Provisions of Section 230 of*

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[*] No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

*the Communications Act of 1934*, FCC Dkt. RM-11862 (Sept. 2, 2020), https://bit.ly/31XVlpe.

TechFreedom has influenced the debate over this vital law before, see, e.g., *Domen v. Vimeo, Inc.*, 6 F.4th 245, 253 (2d Cir. 2021) (citing Berin Szóka & Ashkhen Kazaryan, *Section 230: An Introduction for Antitrust & Consumer Protection Practitioners*, The Global Antitrust Institute Report on the Digital Economy (2020)), and we aspire to influence it here. We hope that, upon reaching the end this brief, the reader will better understand why Section 230 is "one of the greatest protections of free online speech in the world." Jeff Kosseff, *The Twenty-Six Words That Created the Internet* ("*Twenty-Six Words*"), 4 (Cornell Univ. Press 2019).

## STATUTORY BACKGROUND

In the summer of 1995, a New York trial court issued a ruling against Prodigy, one of the early online service providers. The company, concluded *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct., May 24, 1995), could be held liable for allegedly defamatory statements posted on one of its bulletin boards. What made this decision "surpassingly stupid," as former Rep. Chris Cox would later describe it, was that it exposed Prodigy to liability simply because the firm had engaged in what we now call content moderation. TechFreedom, *Armchair Discussion with Former Congressman Christopher Cox*, YouTube (Aug. 10, 2017), https://bit.ly/3FtJG5D.

A few years before, another early online service provider, CompuServe, had defeated a similar lawsuit. Unlike Prodigy, CompuServe did not engage in content moderation. It neither knew nor sought to know what was said in its forums. *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), therefore found that CompuServe was simply a distributor—a passive conduit—of others' material. Prodigy, by contrast, monitored its service in an effort to spot and remove content that ran against "the culture of the millions of American families" that it "aspire[d] to serve." *Prodigy*, 1995 WL 323710 at *2. This, according to *Stratton Oakmont*, made it a publisher of the content it hosted. (Don't get too attached to the "distributor" label. As we'll see, it merely describes a subset of publishers, and is not itself a "freestanding" legal concept. Resp. Br. 48.)

A distributor (really, a secondary publisher), such as a bookstore or library, faces liability for others' speech only if it knew or should have known of the speech's illegality. A (primary) publisher, such as a book producer or a newspaper, faces stricter liability for the speech it disseminates. But cf. Resp. Br. 48-49 (noting that this more stringent standard has eroded). By making a "choice" to "gain the benefits of editorial control," *Stratton Oakmont* declared, Prodigy had transformed itself from a distributor into a publisher, thereby exposing itself to "greater liability than CompuServe and other computer networks that make no such choice." 1995 WL 323710 at *5.

Cox and then-Rep. Ron Wyden wanted (among other things) to protect services in Prodigy's position from publisher liability. In other words, they wanted

to eliminate the "moderator's dilemma"—a legal regime under which an online forum that moderates *some* content becomes legally responsible for *all* the content it hosts. To that end, they introduced the bill that would become the law that we now know as Section 230. Compare Chris Cox, *Testimony of Former U.S. Rep. Chris Cox Before the Senate Subcomm. on Comm'ns, Tech., Innovation, and the Internet*, at 3 (July 28, 2020), https://bit.ly/3FwFf8X (explaining that Section 230 eliminated the moderator's dilemma) and U.S. Brief 15 (acknowledging the same) with Cruz Brief 7-9 (construing Section 230 in a way that would revive the moderator's dilemma) and Hawley Brief 4-8 (same).

Section 230's pivotal provision 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." 47 U.S.C. § 230(c)(1). The law defines an "interactive computer service" as something that enables "multiple users" to use "a computer server." *Id*. § 230(f)(2). Such a service, when it hosts third-party content as contemplated by Section 230(c)(1), operates as a *platform*: "a means or opportunity to communicate ideas or information to a group of people." *Merriam-Webster.com Dictionary* (Jan. 13, 2023), https://bit.ly/31FRgnU. In sum, with limited exceptions, Section 230(c)(1) protects any "provider or user" of a platform—from large websites and apps to individual blogs and social media accounts—from liability for disseminating speech created by others.

Originally called the Internet Freedom and Family Empowerment Act, Cox and Wyden's bill was hitched,

in the commotion of the legislative process, to a very different Senate bill, the Communications Decency Act, which sought in essence to ban pornography from the Internet. Compare Kosseff, *Twenty-Six Words*, *supra*, at 57-74 (explaining the distinct origins of the two bills) with Cruz Brief 9-10 (erroneously treating Section 230 and the original CDA's anti-porn provisions as a single coherent scheme) and Hawley Brief 11 (same). Both bills were then passed as part of the Telecommunications Act of 1996. A year later the Supreme Court struck down the Senate's anti-porn regulation as a violation of the First Amendment. *Reno v. ACLU*, 521 U.S. 844 (1997). Cox and Wyden's deregulatory effort passed through this divorce unscathed. It even kept the name of its unconstitutional former spouse: to this day it is misleadingly known as Section 230 of the Communications Decency Act.

A few months after the Supreme Court invalidated the "true" CDA, Judge Wilkinson issued the first major decision on Section 230. Under Section 230(c)(1), he wrote in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), "lawsuits seeking to hold [an online] service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content—are barred," *id.* at 330.

The plaintiff, Kenneth Zeran, argued that Section 230(c)(1) protects websites only from publisher liability, not "distributor" liability. As both the district court, through Judge Ellis, and the Fourth Circuit, led by Judge Wilkinson, explained, however, Zeran misunderstood "the true nature of so-called

distributor liability and its relationship to publisher liability." *Zeran v. Am. Online*, 985 F. Supp. 1124, 1133 (E.D. Va. 1997). "Distributor liability, or more precisely, liability for knowingly or negligently distributing defamatory material, is merely a species or type of liability for publishing defamatory material." *Id.* In other words, "distributor liability" is just a *more lenient* standard of liability for a *certain kind* of publisher. It follows that, in using the term "publisher," Section 230(c)(1) protects websites from *both* (primary) publisher *and* "distributor" (secondary publisher) liability. *Id.*; 129 F.3d at 332. See also Resp. Br. 48-52.

Both the district court and the Fourth Circuit invoked (among other things) the *Restatement (Second) of Torts* and Judge Easterbrook's opinion in *Tacket v. General Motors Corp.*, 836 F.2d 1042 (7th Cir. 1987). The *Restatement* declares: "One who intentionally and unreasonably fails to remove defamatory matter that he knows to be exhibited" on his property "is subject to liability for its continued publication." § 577(2). Judge Easterbrook elaborated: "Adoption of another's publication is an old basis of liability …. Failing to remove a libel from your building, after notice and an opportunity to do so, is a form of adoption." *Tacket*, 836 F.2d at 1046. In short, to distribute another's material, when you know or should know what that material says, is *to be* a publisher of it.

Judge Wilkinson explained why this makes sense as a matter of logic. Section 230, he pointed out, simply *can't* protect publishing unless it *also* protects distributing. The greater protection must include the

lesser. To see why, suppose that someone objects to a piece of content hosted by a platform. The platform then knows about the content and, knowing about it, must decide what to do with it. It is put to the "choice" of "editorial control." *Stratton Oakmont*, 1995 WL 323710 at *3. In working out whether to leave the content up, downrank it, label it, or remove it, the platform approaches the content as a publisher does, and in so doing enjoys the protection of Section 230(c)(1). 129 F.3d at 332-33.

Not surprisingly, given its respected author, its careful research, and its persuasive reasoning, the Fourth Circuit's *Zeran* decision proved enormously influential. Following its lead, courts have held that Section 230(c)(1) protects platforms (i.e., "interactive computer service[s]") from liability for chatroom remarks, social media posts, forwarded emails, dating profiles, product and employer reviews, business location listings, and more. Thanks to Section 230, the Internet's most popular destinations—Google, Facebook, YouTube, Reddit, Wikipedia—are filled with user-generated content. It is only a small exaggeration to say that Section 230 contains the twenty-six words that created the Internet. See Kosseff, *Twenty-Six Words*, *supra*.

## SUMMARY OF ARGUMENT

"'The basic principles of freedom of speech and the press,'" Justice Scalia once wrote for this Court, "'do not vary' when a new and different medium of communication appears." *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952)).

Section 230 was enacted to honor this principle, not to undermine it.

With Section 230 in place, the Internet has flourished. Companies can offer search engines, social media, customer review aggregators, dating apps, and comment sections—and non-profits and private citizens can offer crowd-sourced encyclopedias and community forums—without getting pummeled with lawsuits for other people's misconduct. Everybody wins. By (usually) pinning culpability for illegal content squarely on the person who created it, Section 230 enables Internet services to grow and thrive by offering user-generated content. By filling the Internet with different speech environments, the services' innovation enables a wide array of people to find places online where they feel comfortable speaking. Section 230 is a boon for free speech, for the Internet, and for free speech on the Internet.

Section 230 is not a "Big Tech" regulation. Yet some prominent critics of so-called "Big Tech censorship," overcome with scorn for the tech industry, cf. Cruz Brief 1, 3, 5, 18, 19 (repeatedly vilifying "Big Tech companies"), want to turn it into one. These critics have sought to deprive "Big Tech" of Section 230 protection by any means necessary. Even when their approach would cause immense collateral damage—limiting Section 230, or even the First Amendment, for *everyone on the Internet*—they press on.

A popular belief among these critics is that, in one way or another, Section 230 distinguishes between "platforms" and "publishers." In Section I, we explain why this notion is wrong. The crude original version of

the idea holds that a "platform" must be "neutral" (as measured … somehow) to enjoy Section 230 protection. This theory—platform-versus-publisher fallacy 1.0—is a nonstarter: it's no more than a wishful attempt to rewrite the statute. A revised version of the idea—recently accepted by the Fifth Circuit—posits that Section 230 transforms each entity it protects *from* a "publisher" *into* a "platform" that can be compelled by the government to speak. In addition to asking the text of Section 230 to do far more than it can bear, this theory—platform-versus-publisher fallacy 2.0—claims, quite absurdly, that Section 230 short-circuits the First Amendment. Touch Section 230, this theory claims, and you lose your right to edit your website (or even your social media account) as you see fit, free of government interference.

In recent years, Section 230 has become a scapegoat. The law's many detractors insist that the Internet would be better off without it (or with it greatly weakened). These naysayers are strangely self-assured about this. Their confidence is especially puzzling when one considers that some of them detest Section 230 for enabling speech (namely, hate speech and misinformation) while others loathe it for enabling "censorship" (that is, content moderation). The fact that so many believe so strongly that curtailing Section 230 will serve utterly disparate ends should give any serious person pause.

In Section II, we contend that putting new limits on Section 230 would not satisfy the law's opponents. We begin with a few words on why the text of Section 230 doesn't support any such limits. We then show how narrowing Section 230 would result in *more*,

not less, content moderation (or, if one insists, "Big Tech censorship"). It's not complicated: more liability exposure means more caution in displaying (or recommending) content. Finally, we explain why narrowing Section 230 would simultaneously create (1) more online spaces for misinformation and hate speech and (2) fewer online spaces for marginalized voices.

## ARGUMENT

### I. SECTION 230 AND THE FIRST AMENDMENT WORK IN HARMONY.

Section 230 does not distinguish between a "platform" and a "publisher." A platform, as it disseminates third-party content, is a publisher. A publisher, if and when it disseminates third-party content, is a platform. Section 230(c)(1) protects a platform—i.e., any provider or user of an "interactive computer service"—as it publishes third-party content. It's that simple. Attempts to read a "platform-versus-publisher" distinction into Section 230 are contrived, misguided, pernicious (especially to broader First Amendment rights), and wrong.

#### A. Platform-Versus-Publisher Fallacy 1.0.

In its original form, the platform-versus-publisher fallacy asserts that a website may invoke Section 230 only if it disseminates third-party content in a "neutral" fashion. Sen. Ted Cruz once claimed, for instance, that acting as "a neutral public forum" is

"the predicate" for "Section 230 immunity." See Catherine Padhi, *Ted Cruz vs. Section 230: Misrepresenting the Communications Decency Act*, Lawfare (Apr. 20, 2018), https://bit.ly/2vxKDYE. Cruz asserted that when a website "pick[s] and choose[s]" what content to allow, it transforms itself from a "platform" to a "publisher" unprotected by Section 230. Ted Cruz, *Facebook Has Been Censoring or Suppressing Conservative Speech for Years*, Fox News (Apr. 11, 2018), https://fxn.ws/3GwQRcm.

This crude version of the fallacy bears no connection whatever to Section 230's text, which contains no mention of a platform/publisher distinction, and which offers not the slightest guidance on what would make a platform "neutral." Indeed, the original platform-versus-publisher fallacy is *at war* with the text of Section 230, which "explicitly grants immunity to all intermediaries, both the 'neutral' and the proudly biased." David Greene, *Publisher or Platform? It Doesn't Matter*, Electronic Frontier Foundation (Dec. 8, 2020), https://bit.ly/3GPqDDo. See also *Fostering a Healthier Internet to Protect Consumers*, Hearing Before the House Energy & Com. Comm. (Oct. 16, 2019) (statement of Rep. Cathy McMorris Rodgers), https://bit.ly/3H3lms5 (in enacting Section 230, "Congress never intended to provide immunity only to websites who are 'neutral'").

Hobbled as it is by this fatal defect—promoting, as it does, a version of Section 230 that does not exist—platform-versus-publisher fallacy 1.0 has gained no traction in the courts. Even Sen. Cruz appears to have abandoned it. Compare Cruz Brief 7-9 (moving on to

the publisher-versus-distributor fallacy) with Sec. I, *supra* (explaining why that argument, too, fails).

### B. Platform-Versus-Publisher Fallacy 2.0.

As this Court knows, see *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022); *NetChoice, LLC v. Paxton*, No. 22-555 (U.S.) (set for the Jan. 20, 2023, conference); *NetChoice, LLC v. Moody*, No. 22-393 (U.S.) (same); *Moody v. NetChoice, LLC*, No. 22-277 (U.S.) (same), Florida and Texas have attempted to enact social media speech codes. While defending its new law, HB20, in court, Texas gave the platform-versus-publisher fallacy a facelift.

In this new version, websites are not offered a (spurious) choice between "platform" status or "publisher" status. Instead (the argument runs) Section 230 flat out strips a host of third-party content of its First Amendment right to editorial discretion. In this spin on the fallacy—which the Fifth Circuit adopted—Section 230 "reflects Congress's factual determination that Platforms are not 'publishers,'" and that they "are not 'speaking' when they host other people's speech." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 448, 467 (5th Cir. 2022); see also *Paxton*, 142 S. Ct. at 1717 n.2 (Alito, J., joined by Thomas and Gorsuch, JJ., dissenting from grant of application to vacate stay).

Platform-versus-publisher fallacy 2.0 at least points to something in Section 230's text—but it misunderstands what it points at. Section 230(c)(1) states that platforms shall not "be treated as the

publisher or speaker" of the third-party content they disseminate. Texas and the Fifth Circuit conflate not *treating* a platform as a publisher, for purposes of *liability*, with a platform's not *being* a publisher, for purposes of the *First Amendment*.

As Judge Southwick grasped, in his dissent from the Fifth Circuit's decision, platforms that disseminate third-party content *both* exercise "editorial discretion" *and* enjoy protection "from traditional publisher liability." *Paxton*, 49 F.4th at 506. Although Judge Southwick opined that "this *may* be exactly how Section 230 is supposed to work," *id.* (emphasis added), he was being too modest: it's *clearly* how it's supposed to work. In enacting Section 230, Congress sought to bolster intermediaries' First Amendment rights, not brush them aside (something, of course, that no statute could do in any event). See, e.g., *Google Inc. v. Hood*, 822 F.3d 212, 220 (5th Cir. 2016) ("First Amendment values … drive" Section 230); *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003) (Section 230 "sought to further First Amendment … interests on the Internet"); 141 Cong. Rec. H. 8471 (Aug. 4, 1995) (statement of Rep. Zoe Lofgren) (Section 230 "preserve[s] the First Amendment … on the Net").

The fact that a website is *not liable* for speaking, when it disseminates others' content, does not mean that it is *not speaking*. Websites "are within their First Amendment rights to moderate their online platforms however they like, and they're additionally shielded by Section 230 for many types of liability for their users' speech. It's not one or the other: It's both." Elliot Harmon, *No, Section 230 Does Not Require Platforms*

*to Be "Neutral"*, Electronic Frontier Foundation (April 12, 2018), https://bit.ly/2DJ1zO4.

"An entity that exercises 'editorial discretion,'" the Fifth Circuit claimed, "accepts reputational and legal responsibility for the content it edits." *Paxton*, 49 F.4th at 464. Therefore, the Fifth Circuit reasoned, Congress can indeed strip an entity of its First Amendment right to editorial discretion, so long as Congress also creates a legal regime under which that entity bears no legal or reputational responsibility for its editorial decisions.

Packaged within this argument is a quixotic and undefended belief that if Congress *strengthens* your ability *to speak* (by removing potential legal or reputational consequences), it may *weaken* your right to *free speech* (by telling you what to say). The Fifth Circuit's unstated assumption is, in effect, that Congress can silence a disfavored entity, or turn it into a state puppet, by handing it a poison chalice.

The argument's stated premise—no responsibility, no rights—fares no better. Consider the Speech and Debate Clause, which provides legislators legal immunity for what they say on the House or Senate floor. CONST. ART. I, § 6, cl. 1. No one would claim that, because he enjoyed constitutionally backed legal immunity for his words, Charles Sumner was not "speaking" when he denounced "the harlot, Slavery," in the Senate. (Preston Brooks sure thought he was.) Similarly, the notion that speaking must come with some kind of a reputational risk "simply isn't a prerequisite to First Amendment protection." *NetChoice, LLC v. Moody*, 34 F.4th 1196, 1218 (11th

Cir. 2022) (discussing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974), and *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994)).

And platforms' editorial decisions *do* affect their reputations. The very people who decry "Big Tech censorship" prove the point. Thanks largely to certain high-profile content moderation decisions (e.g., ejecting Donald Trump from their services), large social media platforms have a poor reputation among certain users. If the topic of "Big Tech" were not so politically charged, the connection between platforms' editorial decisions and their reputations would be too obvious to require elaboration. See, e.g., Suzanne Vranica, et al., *Elon Musk's Campaign to Win Back Twitter Advertisers Isn't Going Well*, Wall St. J. (Dec. 22, 2022), https://on.wsj.com/3IASicw (discussing companies' unwillingness to purchase Twitter ads that get displayed next to hate speech); Peter Kafka, *Why Disney Didn't Buy Twitter*, Vox (Sept. 7, 2022), https://bit.ly/3VYI74w (discussing Disney's decision to back out of buying Twitter, after CEO Bob Iger realized that the "nastiness" on the platform would damage Disney's image as a "manufactur[er of] fun"); Kosseff, *Twenty-Six Words*, *supra*, at 241 (discussing Twitter's awareness that hosting ISIS content would "risk ruining the company's *reputation with customers*") (emphasis added).

There is, quite simply, no tradeoff between Section 230 protection and First Amendment protection. And thank goodness: such a tradeoff would have dreadful implications. Think back to the Fifth Circuit's contention that, under Section 230, "Platforms are not 'publishers.'" *Paxton*, 49 F.4th at

467. By that logic, *no one* who enjoys Section 230 protection is a "publisher." To claim that Section 230 strips platforms of their First Amendment rights, in other words, is to claim that it strips everyone on the Internet of their First Amendment rights. If Section 230 protects what you (a user of an interactive computer service) retweet—as it does, see *Banaian v. Bascom*, No. 2020-0496 (N.H., May 11, 2022)—you can, in the Fifth Circuit's view, be forced to let the government *tell you what to retweet*.

* * *

At its root, the platform-versus-publisher fallacy is an intensely revisionist exercise. It surveys the Internet as it exists today, spots some large social media platforms, assumes that those platforms are akin to public utilities, and then tries to reverse-engineer Section 230 into a utility regulation for those platforms (and, somehow, them alone). This is bad history as well as bad law. Section 230 governs the whole Internet. It was enacted precisely so that a *diverse* range of platforms, large and small—any "provider or user of an interactive computer service," § 230(c)(1)—could flourish there. It ensures that Yelp can host customer reviews, Wikipedia can host crowd-sourced encyclopedia entries, news sites can host comment sections, and an average citizen's carpentry website can host a carpentry forum.

Under the correct reading of the law, all these entities are protected by *both* Section 230 *and* the First Amendment. Congress sought to protect speech on the Internet, and it succeeded. According to the platform-versus-publisher *arrivistes*, these entities

are *not* necessarily protected by *either* Section 230 *or* the First Amendment. Congress laid a trap. Exercise your First Amendment rights (by failing to be "neutral," in the eyes of the state), and you could find yourself unprotected by Section 230. Still worse, exercise your Section 230 rights, and you could find yourself unprotected by the First Amendment.

Either outcome would be (to borrow a word from the Fifth Circuit) a "staggering" twist. *Paxton*, 49 F.4th at 445. It should come as a great relief, therefore, that neither version of the platform-versus-publisher fallacy bears any resemblance to how either Section 230 or the First Amendment actually works. "The story of Section 230 is the story of American free speech in the Internet age," Kosseff, *Twenty-Six Words*, *supra*, at 8, not the story of the greatest "Gotcha!" in the history of American law.

## II. WHATEVER THE COMPLAINT, SECTION 230 IS NOT THE PROBLEM.

Several briefs on the other side attempt to depict the broad (and correct) understanding of Section 230 as a "policy" choice that courts have grafted onto the law. See, e.g., Pet. Brief 47-52; U.S. Brief 11-12; Cruz Brief 13-14, 16; Hawley Brief 9-10, 12-13. But this ignores the fact that the *text* of Section 230(c)(1) *is* broad. An immunity from being treated as "the publisher" of third-party content is a broad immunity indeed—as has been understood from the beginning.

When, writing for the district court in *Zeran*, Judge Ellis concluded that Section 230(c)(1) is a broad protection, he did so entirely in a section entitled

"Conflict with the Language of the CDA." 985 F. Supp. 1132-33. Only *then* did he proceed to *confirm* the point in a section entitled "Conflict with the Purposes and Objectives of the CDA." *Id.* at 1134. As many other courts would later confirm, Judge Ellis got it right. See, e.g., *Chicago Lawyers' Comm. v. Craigslist*, 519 F.3d 666, 671 (7th Cir. 2008) (Easterbrook, J.) ("Section 230(c)(1) is general."); *Murphy v. Twitter, Inc.*, 60 Cal. App. 5th 12, 33 (Cal. Ct. App. 2021) ("[T]he terms of section 230(c)(1) are broad and direct[.]"); *Donato v. Moldow*, 374 N.J. Super. 475, 497 (N.J. App. Div. 2005) (Section 230(c)(1) contains a "broad general immunity" and "has received" no more than a "textual construction").

That the petitioners, the United States, and their *amici* might be *unhappy* with Section 230(c)(1)'s breadth is no reason to give the law a cramped reading. Even if one were to conclude that a "gap" exists between Section 230's "broad statutory language" and "the specific wrongs" Section 230 was meant to address, that "gap" would be "for Congress, rather than the courts, to bridge." *Barrett v. Rosenthal*, 40 Cal.4th 33, 63 (Cal. 2006) (Moreno, J., concurring).

The respondent's brief discusses the correct understanding of Section 230(c)(1)'s text at greater length. See Resp. Brief 46-52. We make an additional point: *Even if* there were colorable text-based arguments for narrowing Section 230, that does not mean that doing so would be *a good idea*. Indeed, neither of the main factions pushing to restrict Section 230 would be happy with the result.

### A. Gutting Section 230 Would Disappoint Those Who Decry "Big Tech Censorship."

"The Section 230 critics who believe that platforms already block too much user content would be particularly disappointed" by a ruling that guts Section 230. Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (or Not)*, 37 Berkeley Tech. L.J. (forthcoming), https://bit.ly/3Fu1zkT. Without Section 230, after all, "risk-averse platforms would block more content than they otherwise would with the full Section 230 protections in place." *Id.*

Some in the faction that decries "Big Tech censorship" contend that this case is about "just" recommendations—the idea being that one could (1) rule for the petitioners without (2) causing platforms to remove a lot more content. See, e.g., Brendan Carr (@BrendanCarrFCC), Twitter (Oct. 3, 2022), 4:51 PM, https://bit.ly/3G2n24E (arguing that this case is *only* about "whether 230 shields Google from liability for affirmatively recommending ISIS videos to users"). That's a dubious claim—as other commentators from that same faction are happy to demonstrate. See Hawley Brief 17 (arguing that Google should face liability whenever it "continu[es] to operate its recommendation algorithms" while aware that *any* unlawful content exists on its platform). But in any event, even a ruling that "just" caused platforms to be more cautious about *recommending* content would blow up in this faction's face. A ruling that mutilated Section 230 for recommendations would be almost

indistinguishable, in the eyes of the "Big Tech censorship" faction, from a decision that destroyed Section 230 altogether.

Imagine, for example, a ruling that Section 230 offers only "distributor" protection for recommenddations. Cf. Cruz Brief 7-9; Hawley Brief 4-8. In such a world, "a provider would be at risk of liability each time it received notice," via a complaint, that a recommendation contains a potentially unlawful message. *Barrett*, 40 Cal.4th at 45. Each complaint would "requir[e] an investigation of the circumstances, a legal judgment about the [unlawful] character of the information, and an editorial decision on whether to continue the [recommendation]." *Id*. Although "this might be feasible for the traditional print publisher," the "sheer number of postings … would create an impossible burden in the Internet context." *Id*. Platforms would therefore be likely to stop recommending a piece of content whenever someone lodged a complaint against it.

But what good is content that never gets recommended? It's *recommendations* that the people on the wrong end of the so-called "censorship" covet. They want the *reach* that allows them to be heard over the great crowd of voices on the Internet. See Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 Geo. Wash. L. Rev. 697, 701 (2010). Indeed, many of the same people who want to gut Section 230 also complain of "shadow banning," by which they mean a platform's allowing a user to post but blocking the posts from getting recommended to others. Yet a ruling that withheld Section 230 protection from

recommendations would effectively make shadow banning (so understood) unavoidable and common.

In short, relegating recommendations to "distributor" liability status "would allow any person or company who is unhappy with user content to bully a service provider" into all but hiding that content from other users, "lest the provider face significant legal exposure." Kosseff, *Twenty-Six Words*, *supra*, at 94. And the situation would be still worse if platforms were assumed to have constructive knowledge of the content they recommend. The platforms would stop recommending—or even letting users recommend, as by retweeting—large swathes of content from the get-go.

It is hard to overstate how risk-averse platforms lacking Section 230 protection would have reason to be. They'd face far more than just defamation suits (or terrorism suits like this one). In the past quarter century or so, for instance, enterprising local governments have developed a taste for novel and aggressive theories of public-nuisance liability. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741 (2003). Some of these theories have gained traction in court. See, e.g., *People v. Conagra Grocery Prods. Co.*, 17 Cal. App. 5th 51 (Cal. Ct. App. 2017) (imposing hundreds of millions of dollars in public-nuisance liability on companies that legally sold lead paint more than half a century ago). Absent Section 230 protection, such theories could easily be applied to platforms that disseminate third-party content.

Let's take an example. The *New York Times* recently warned "that a growing number of Americans are anticipating, or even welcoming, the possibility of sustained political violence." Ken Bensinger & Sheera Frenkel, *Talk of 'Civil War,' Ignited by Mar-a-Lago Search, Is Flaring Online*, N.Y. Times (Oct. 5, 2022), https://nyti.ms/3GuHslD. "Experts say the steady patter of bellicose talk"—including on social media—"has helped normalize," on the political right, the notion that violence is, and even should be, coming. *Id.* Whenever such violence breaks out, platforms will face blame for having hosted some of the "patter" that helped "normalize" violence in the minds of those who committed it. Remove Section 230, and the platforms that host such "patter" become vulnerable to public-nuisance liability. Platforms in such a bind are likely to crack down on even mildly heated rightwing political rhetoric.

### B. Gutting Section 230 Would Disappoint Those Who Want to Curb Hate Speech and Protect Marginalized Voices.

If those who worry about "Big Tech censorship" lose from narrowing Section 230, you might think that those who worry about the spread of extremism and disinformation, and about protecting marginalized voices, must win. But it's not so simple.

Recall the moderator's dilemma: Before Section 230, a platform could limit its liability either by doing virtually no content moderation or by doing lots of it. Eliminating Section 230 would bring the dilemma back to life. In response, platforms would probably

move in two very different directions. For those concerned about hate speech and vulnerable communities, this split would likely produce the worst of both worlds.

Some small, fringe platforms would likely reach for "distributor" status. These platforms would attempt to bury their heads in the sand, striving to know as little as possible about what takes place on their sites (including by making it as hard as possible to notify them about objectionable or unlawful content). On these services, hate speech and disinformation would flourish like never before.

The mainstream platforms, meanwhile, would grudgingly accept "publisher" status, with all the extra responsibility that that entails. These platforms would remove (or stop recommending) content the moment anyone asserted that it was defamatory or otherwise illegal. Kosseff, *Twenty-Six Words*, *supra*, at 94. In practice, that would spur these services to expel (or downrank) those who dare to accuse the powerful of discrimination, corruption, or incompetence. See Billy Easley, *Revising the Law That Lets Platforms Moderate Content Will Silence Marginalized Voices*, Slate (Oct. 29, 2020), https://bit.ly/3k60LKR.

Before the Internet, as protected by Section 230, "only the powerful had access to the newspaper ink and broadcast airwaves, allowing them to tell their stories." Kosseff, *Twenty-Six Words*, *supra*, at 225. An average citizen could raise awareness about a defective product, a corrupt politician, or a toxic workplace "only if [a] reporter considered the story worthy of an on-air report." *Id*. Curtail Section 230,

and we regress toward that more closed, more silent, more stifled world. "Without Section 230, the traditional media"—whose "power structures" are often "stacked against the disenfranchised"—"would have even more power over speech." *Id*. at 223.

## CONCLUSION

The judgment should be affirmed.

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Respectfully submitted,

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