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 INTERNET INFRASTRUCTURE COALITION; CPANEL, LLC; IDENTITY DIGITAL INC.; TEXAS.NET, INC.; AND TUCOWS INC. AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE OR, IN THE ALTERNATIVE, DISMISSAL OF THE WRIT AS IMPROVIDENTLY GRANTED

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INTERESTS OF THE AMICI CURIAE[1]

Internet Infrastructure Coalition (i2C) is a trade association representing interests of businesses that construct and operate essential building blocks of the Internet. Its members include cloud providers, data center operators, domain name registrars, domain name registries, and other foundational Internet enterprises. Its mission is to preserve a free and open Internet as an engine for growth and innovation. It works with its members to advocate for sensible policies, establish and reinforce best practices, help create industry standards, and promote awareness of how the Internet works.

cPanel, LLC provides software that, for 26 years, has simplified the process of creating, securing, and administering websites and associated tasks like email and user management. The software scales easily and thus allows small businesses to grow with it while it also serves the needs of large Internet companies. cPanel also has a core market focus of facilitating shared Web hosting, which primarily benefits small business customers.

Identity Digital Inc. offers domain names and related technologies to individuals and organizations for developing a website and online presence, along

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of the brief. No persons other than the Amici, their members, or their counsel made such a monetary contribution.

with protection of those domains against phishing, hacking, and other security threats. It provides the domain name registrations for 96 percent of Fortune 50 companies.

Texas.Net, Inc. is one of the first internet service providers in the United States. It has supported thousands of companies in virtually every industry, including high performance computing, energy, financial services, healthcare, and technology. It currently provides data center outsourcing, and colocation and disaster recovery services.

Tucows Inc. is a collection of businesses that share a belief in the power of the open Internet. Among its businesses is the second largest domain registrar in the world, Tucows Domains, managing tens of millions of domain names and working with tens of thousands of resellers. Through its Ting Fiber division, Tucows builds fiber-optic gigabit-speed Internet infrastructure for homes and businesses across the United States. Tucows also provides new-generation technologies for telecom and Internet service providers through its Wavelo software division.

These Amici have a vital interest in the continued correct application of §230(c)(1) of the Communications Act, 47 U.S.C. §230(c)(1), which for over 25 years has facilitated extraordinary growth of the Internet and, with it, robust economic and social benefits across all sectors.

These Amici are not "Big Tech" or social media companies. They provide the underlying Internet

infrastructure that facilitates, processes, routes, and transports electronic communications among users, platforms, and other end points, not just for social media companies but for the full range of Internet-based services. They and their customers are overwhelmingly small and medium-sized companies. The ultimate beneficiaries of their services are the public at large—a public that depends upon a free and open Internet for a multitude of interactions, from studying and researching online to performing jobs, to shopping, planning travel, to communicating with distant family and friends, to learning the news, to banking and investing, to filing taxes, to airing public grievances, to engaging in political activity. There is virtually no aspect of modern life that the Internet does not touch, and which a free and open Internet does not benefit. The history of the last 25 years, since Congress enacted §230(c)(1), has established the United States as the undisputed leader and champion of the free online marketplaces of both ideas and commerce.

These Amici are not the direct targets of Petitioners, but they are at risk from a ruling with ramifications well beyond the parties and issues in this case. The Petitioners and their allied amici urge a statutory construction that, if adopted, would have wide-ranging implications throughout the Internet industry, disserve the public, and frustrate one of Congress's main purposes when it enacted §230(c)(1). Petitioners and many of their amici ignore the ubiquity of algorithmic processing of large quantities of data and transmissions—something that happens throughout the

Internet and not just at the consumer-facing layer—and they mischaracterize its nature with the misleading phrase "targeted recommendations." Petitioners and their amici do not acknowledge or address the challenges of practical implementation, or the resulting harms to both providers and users of interactive computer services, of the rules they promote. Adoption of their proposed exceptions to the scope of §230(c)(1) would disturb long-settled precedent to create massive new risks of liability for the ordinary deployment and use of essential features of Internet communications, at the level of the foundational infrastructure and intermediaries of the Internet, far beyond the "social media" context from which this case arose. That consequence threatens to chill (if not paralyze) many Internet operations and the many online activities that these Amici and persons from all walks of life have long taken for granted.

SUMMARY OF ARGUMENT

Efforts by the Petitioners and their allied amici to restrict the application of the explicit language of §230(c)(1) have no principled or workable basis, would gut the protection that Congress intended, damage the marketplace of ideas, and threaten the online foundations of the modern economy. The Court should affirm the judgment of the Ninth Circuit or dismiss the writ of certiorari as improvidently granted.

The Petitioners and their allied amici target a specific sub-type of interactive computer service providers, but their construction and application of §230(c)(1) would affect many other types of businesses that fall within the definition of "interactive computer service." Section 230(c)(1) does not focus on so-called "Big Tech" or social media. It protects a wide range of service providers operating throughout the Internet ecosystem, an immense information exchange medium that is now the foundation of the modern economy and how society increasingly communicates for all purposes.

Section 230(c)(1) does not protect just the largest and most prominent, consumer-facing providers of interactive computer services. The statute also protects the least known service providers, which constitute part of the essential technological underpinning of the Internet, as well as the smallest and newest entrants into the industry. And in addition to *providers* of interactive computer services, the statute also expressly and equally protects all *users* of interactive computer services. Any legitimate application of §230(c)(1) must have a standard that applies to small providers as well as large ones and to individual users as well as companies.

Not only these Amici but also virtually all of society and commerce today depend upon the effective and efficient functioning of the Internet. Seemingly mundane functions—like Domain Name Service ("DNS") resolutions that translate domain names (https://www.youtube.com) into their Internet Protocol addresses (142.250.80.110) or other essential traffic

management mechanisms in the Internet infrastructure—are possible only when there are stable, clear, and neutral rules that are not subject to political combat in which Internet regulation is a weapon. Many core features and functions of the Internet infrastructure inevitably rely upon algorithms to meet customer demands, to maximize network efficiency and throughput, and to protect the Internet infrastructure (and, as a consequence, physical infrastructure) from cyberattacks.

Americans have benefitted from the expansion of modes and styles of communication, at every layer, that the Internet has enabled. Section 230(c)(1) has been instrumental in promoting the explosive growth of communication methods available to the public.

Like all powerful multi-purpose tools, the Internet can be used for good or evil. Section 230(c)(1) reflects a decision by Congress that the overall public benefits far outweigh the potential harm from a few evil doers. The statute allows liability of those who misuse the tool, not those who provide it. Under the law, liability for wrongful communications may attach to those who *originate* the communications, not those who retransmit them. Under §230(c)(1), service providers and users alike have assurance that, where they pass along, refer to, or call attention to online communications by other persons, they do not become guarantors of other persons' speech. Liability questions will focus on those who originated the material, and persons who retweet on Twitter, boost on Mastodon, share on Facebook, forward in an email or repost on a discussion

board like Reddit—and all the communication services and technologies throughout the Internet that they use to do so—will not be in the crosshairs of a lawsuit on account of their derivative roles in disseminating information.[2]

Petitioners and their allies seek to distort the statute in several ways. *First*, they focus unduly on what "publishers" typically do and on "social media" or "Big Tech." But the statute by its own terms applies to a much broader set of industries, namely all "interactive computer services," which the law defines as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. §230(f)(2). *Second*, they focus unduly on the law's historic relationship to defamation claims, although the law has no narrow restriction to those claims. In doing so, they distort the historical legal context of the term "publisher" at the time Congress enacted §230(c)(1). *Third*, using the rhetoric of "targeted recommendations," they misdescribe and malign the actual operation of the automated algorithms that are necessary at every level of the Internet to organize, process, route, convey, and transport information and communications. *Fourth*, they wrongly separate "transmission" from the mechanical and logical operations that are inherent in the

[2] Numerous and various popular services allow individuals to promote or emphasize communications originating from others. Courts have consistently applied §230(c)(1) protection to claims that a defendant has emphasized challenged material. *See*, *e.g.*, *Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (per curiam).

transmission function itself. Their proposed refashioning of §230(c)(1) reflects technological ignorance and threatens all kinds of interactive computer services. Prioritization is not just something social media platforms do for postings. It is also a fundamental part of transmission, routing, and processing information at every layer of the Internet. *Fifth*, their proposals would impose impossible burdens on interactive computer services to adjudicate fact-bound disputes over the legality of conduct; they also disrespect the provision of §230(c)(2), 47 U.S.C. §230(c)(2), which protects a service provider's voluntary, good-faith removal or demotion of "offensive" or "otherwise objectionable" material without having to pass judgment on its legal status. *Sixth*, the proposals seek to impose liability for customer abuse that is inconsistent with analogous provisions relating to knowledge and intentional inducement that this Court has created in the context of copyright law.

For 25 years courts have uniformly applied the law without Congress's seeking to steer the courts onto a different course. If circumstances have changed and now call for a policy different from what Congress established in 1996, Congress alone should reconsider it. The Court should either affirm the judgment below or dismiss the writ as improvidently granted.

ARGUMENT

I. Section 230(c)(1) Protects a Wide Variety of Providers and Users of Interactive Computer Services.

A. The Law Concerns a Myriad of Interactive Computer Services, Not Just "Big Tech" or Social Media.

Section 230(c)(1) states that "[n]o 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 definition of "interactive computer service" is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. §230(f)(2).

Although this case concerns a large social media platform, nothing in the law specifically isolates such a service from other beneficiaries of the law's protection. Those beneficiaries include home and business Internet access providers, Internet "backbone" providers,[3] email service providers, customer relationship

[3] "Backbone" in the Internet context refers to the networks and data routes at the heart of Internet transmissions, generally the largest and fastest networks among continents, countries, or regions, upon which other networks, and ultimately their users, depend. They generally provide interconnections by which other networks may communicate with each other to transmit, receive, and exchange data. *See* Bradley Mitchell, *What Internet and Network Backbones Do*, Lifewire (June 6, 2020), https://www.lifewire.com/definition-of-backbone-817777.

management system providers, search engines, domain name registrars, domain name service (DNS) database resolution providers, business networks, and countless more. The Amici here enable communications by providing services and software that run the Internet and process its traffic.

The Internet is "collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio." 15 U.S.C. §6501(6). The infrastructure and the relevant protocols work within several "layers."[4] The TCP/IP model speaks to four layers, each with its own set of "protocols":

1. **"Network access layer"—**how devices actually physically and logically communicate at the lowest common denominator.

2. **"Network layer"—**routing and sending management between disparate networks.

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[4] Two "abstraction models" are often used to understand the various features, functions, and services within Internet infrastructure that support information processing and delivery. *See* Cloudflare, *What is the network layer?*, https://www.cloudflare.com/learning/network-layer/what-is-the-network-layer/ (last visited Jan. 16, 2023) (explanation of "OSI model" and "TCP/IP model.") YouTube is actually an "application" that relies on, but runs *on top of*, all of these layers.

3. **"Transport layer"—**the protocols that allow two connected devices to communicate after each has obtained network access and a path between them.

4. **"Application layer"—**the shared communications protocols and interface methods used by hosts in a communication network. Many wrongly think this is where the social media platforms reside. In fact, the platforms are themselves applications. They rely on, and use, the capabilities supported by application layer protocols but do not operate "within" this layer any more than they do any of the lower layers.

The four Internet layers work collaboratively to transmit information from one end point to another, usually across many different individual networks. "Users," "user equipment" like computers and mobile devices, and applications like YouTube are not "the Internet," just as a car is a means of transportation but is not a highway. They are "on" the Internet. They rely on the Internet, but Amici here *operate* the Internet. Petitioners' flawed proposal may seem attractive for some disfavored vehicles, but if successful would create a crater in the middle of the information highway.

The Court should not adopt a myopic view that focuses only on "Big Tech" or social media. Nor should arguments about the market power of the most prominent companies sway its analysis of §230(c)(1). Small companies, including some of the Amici here and many of the companies that they serve, stand to suffer intolerable burdens from the proposed narrowing of §230(c)(1).

B. The Law Equally Protects Individual Users of Online Services.

Nor does the law protect only providers of interactive computer services: it also protects their users regarding communications those users do not originate. That includes individuals who send email, post to online forums like Reddit or Quora, submit to review sites like Yelp or TripAdvisor, comment on news or opinion sites like washingtonpost.com or nationalreview.com,[5] communicate in videoconference services like Zoom, and engage in other online communications. A user who forwards an email she received from another person gains protection against liability for what the email contains; a user who posts on a social media site a link to an article she had read gains protection under §230(c)(1) against liability for what is in that article. Numerous courts have applied §230(c)(1) to protect users.[6]

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[5] *See* University of Texas at Austin Center for Media Engagement, *Comment Section Survey Across 20 News Sites* (Jan. 12, 2017), https://mediaengagement.org/research/comment-section-survey-across-20-news-sites/.

[6] *See*, *e.g.*, *Batzel v. Smith*, 333 F.3d 1018, 1027, 1030-31 (9th Cir. 2003) (§230(c)(1) protects website operator as a user of interactive computer service), *superseded in part by statute on other grounds as stated in RLI Ins. Co. v. Lagan Eng'g Env't Surveying & Landscape Architecture, D.P.C.*, 834 F. App'x 362 (9th Cir. 2021); *Barrett v. Rosenthal*, 146 P.3d 510, 526-28 (Cal. 2006) (applying §230(c)(1) protection to user who republished messages after warnings by plaintiff); *Donato v. Moldow*, 865 A.2d 711, 718-19 (N.J. Super. Ct. App. Div. 2005) (citing cases); *Banaian v. Bascom*, 281 A.3d 975, 980 (N.H. 2022) (§230(c)(1) bars claims against individuals for retweeting challenged material); *Directory*

Any change in the law's application that focuses on the most prominent providers may have the unintended consequence of sweeping other interactive computer service providers and individual users into its dragnet because of their equivalence in the statute. Potential threats against users—ordinary individuals—for republishing controversial or disputed expressions are intimidating and directly chill speech.

II. These Amici Provide Essential Infrastructure Services to Run the Internet, and They—And the Public—Depend upon a Free and Open Internet.

The Amici joining this brief or their members all provide services or software that connect persons to computer servers over the Internet, qualifying as "interactive computer services." They provide and operate fundamentally important *infrastructure* for the Internet and often escape the notice of the public and politicians because they work within "layers" of the "Internet stack" below the applications like YouTube that offer the most visible consumer-facing services.

Companies like Amici face complaints about their users or about material that passes over their services. Complainants often want to press companies like

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Assistants, Inc. v. Supermedia, LLC, 884 F. Supp. 2d 446, 451-52 (E.D. Va. 2012) (§230(c)(1) protects users who compiled links to allegedly defamatory material and transmitted the links by email to others); *Phan v. Pham*, 182 Cal. App. 4th 323, 325-26, 328 (2010) (§230(c)(1) protects user who forwarded an email with an invitation to read it).

Amici into censoring information that passes over their services or into blacklisting accused customers, analogous to demands that toll road operators inspect trunks of cars or exclude certain drivers on their highways. Section 230(c)(1) has been a powerful protection that helps service providers avoid or rebuff those demands and threats. The law limits litigation that aims to force changes to the fundamental business models and technologies on which the Internet depends.

Section 230(c)(1) has allowed technologies and services like those of Amici to grow and prosper. An uninformed change to how §230(c)(1) applies could have a cascading effect on companies up and down the Internet stack, with new threats of litigation and demands emerging that could cripple technologies, operations, or investments that support a robust, free, and open Internet. That, in turn, can jeopardize the availability, speed, and reliability of the Internet infrastructure on which all Internet communications, and a society and economy relying on those communications, depend. For this reason, these Amici urge the Court to affirm the judgment of the Ninth Circuit or, in the alternative, to dismiss the writ as improvidently granted.

III. For over 25 Years, Consistent Application of §230(c)(1) Has Fostered Extraordinary Growth of Public Engagement and Empowerment Through Communications Technologies and Services.

Since its enactment in 1996, §230(c)(1) has spawned unparalleled growth in the ways that the

public can communicate. The global connectedness of the Internet and its widespread adoption have given individuals instant access to information. The Internet has empowered them to communicate with friends, relations, communities, businesses, governments, and the public at large both locally and in distant parts of the globe. It has also given businesses and other organizations new channels of trade and commerce, spawned new business models, and expanded the economy. Internet services have become the lifeblood of countless aspects of civic life, political expression, and commerce.

Companies have invested heavily in new technologies, services, and business models to foster engagement and the exchange of information by billions of persons online around the globe. Those investments have relied in large part upon the stability of government policies affecting the Internet and especially the protections that §230(c)(1) has afforded them.

While the First Amendment also protects many activities that §230(c)(1) protects, §230(c)(1) has created a speedy off-ramp from litigation burdens. *See Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254-55 (4th Cir. 2009) ("Section 230 immunity . . . is generally accorded effect at the first logical point in the litigation process" and, like qualified immunity, is "an immunity from suit") (italics omitted). Particularly as applied to services with massive user bases and vast amounts of information, the "specter of tort liability" would create an "obvious chilling effect" given the "prolific" nature of speech on the Internet. *Id.* at 254 (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327,

331 (4th Cir. 1997)). In enacting §230(c)(1), Congress recognized that online services could act as choke-points upon public discourse, and it opted to thwart the pressures litigation would bear upon them to restrict speech.

Section 230(c)(1) jurisprudence has been remarkably stable for 25 years. Courts have been virtually unanimous in endorsing the analysis and views of the Fourth Circuit in *Zeran*.[7] Petitioners and their amici target *Zeran* as wrongly decided; under that view, *all* §230(c)(1) court decisions for 25 years must have been wrongly decided, yet Congress has never addressed the supposed error.

Some judges, applying what they considered to be the clear statutory language of §230(c)(1) or uniform precedent, have expressed misgivings about the practical effect of §230(c)(1). Their policy misgivings are appropriate for Congress to consider in weighing possible amendments to §230(c)(1), but only Congress has

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[7] *See*, *e.g.*, *Universal Commc'n Sys. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007); *Jane Doe No. 1 v. Backpage.Com, LLC*, 817 F.3d 12, 18-19 (1st Cir. 2016); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 173-74 (2d Cir. 2016); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003); *Doe v. MySpace, Inc.*, 528 F.3d 413, 419-20 (5th Cir. 2008); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 406-09 (6th Cir. 2014); *Doe v. GTE Corp.*, 347 F.3d 655, 659-60 (7th Cir. 2003); *Johnson v. Arden*, 614 F.3d 785, 790-92 (8th Cir. 2010); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003); *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, 1321-22 (11th Cir. 2006); *Bennett v. Google, LLC*, 882 F.3d 1163, 1166-68 (D.C. Cir. 2018).

authority to re-weigh the policy it established in the 1996 enactment of §230(c)(1).

Some of Petitioners' amici have wrongly suggested that §230(c)(1) has provided online services a free rein and no restraint. To the contrary, courts have regularly applied §230(c)(1) carefully, observing its limitations and ruling that its protection did not extend to claims before them.[8]

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[8] *See*, *e.g.*, *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 139-40 (4th Cir. 2019) (§230(c)(1) does not protect seller against product liability claims); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009) (breach of contract under theory of promissory estoppel regarding removal of challenged material); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1198-1201 (10th Cir. 2009) (§230(c)(1) does not protect website that developed information that it transmitted against FTC unfair practice claim); *FTC v. LeadClick Media*, 838 F.3d at 176-77 (§230(c)(1) does not protect developer of information); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1165-66 (9th Cir. 2008) (en banc) (§230(c)(1) does not protect online service where it has participated in development of challenged communication); *Jane Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851-54 (9th Cir. 2016) (§230(c)(1) does not protect against claim for negligent failure to warn); *Lansing v. Sw. Airlines Co.*, 980 N.E.2d 630 (Ill. App. Ct. 2012) (§230(c)(1) does not protect against claim for failure to supervise employee who engaged in continued online harassment after employer had notice of the misconduct); *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676 (9th Cir. 2019) (§230(c)(1) does not protect against enforcement of ordinance against unlicensed accommodation bookings); *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 313 (2014) (declining to find §230(c)(1) applicable because "plaintiff seeks to hold Yelp liable for its own statements regarding the accuracy of its filter"); *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1094 (9th Cir. 2021) (holding that Snap was not protected where product design allegedly encouraged dangerous behavior); *Bauer v. Armslist, LLC*, 572

IV. Section 230(c)(1) Extends Protection Far Beyond the Defamation Context, and Correct Statutory Analysis Does Not Require Beneficiaries to Resemble Publishers.

Petitioners and their amici focus upon defamation law as the genesis of §230(c)(1)'s protection. But nothing in the statute confines its application or analysis to the defamation context.

The statute prohibits treating a service provider as a publisher or speaker of material that originates with another information content provider. There are numerous claims, beyond defamation, where publication or speech—in other words the substance of any type of communication—can give rise to liability. They include fraud, trade secret misappropriation,[9] and

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F. Supp. 3d 641, 664 (E.D. Wis. 2021) (protection did not apply to claims arising out of the sale of firearms via the Defendant's website), *appeal docketed*, No. 21-3207 (7th Cir. Nov. 29, 2021); *Hy Cite Corp. v. Badbusinessbureau.com, LLC*, 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005) (declining to dismiss claims under §230(c)(1) because the allegedly wrongful content appeared in editorial comments created by Defendants and in titles allegedly provided by Defendants); *Shared.com v. Meta Platforms, Inc.*, No. 22-cv-02366-RS, 2022 WL 4372349, at *3 (N.D. Cal. Sept. 21, 2022) (no protection for certain contract-based claims regarding enforcement of account suspension policies). *See also* Ashley Johnson and Daniel Castro, *The Exceptions to Section 230: How Have the Courts Interpreted Section 230?* (Feb. 2021), https://www2.itif.org/2021-230-report-2.pdf.

[9] *See*, *e.g.*, *Craft Beer Stellar, LLC v. Glassdoor, Inc.*, No. 18-10510-FDS, 2018 WL 5505247, at *3-4 (D. Mass. Oct. 17, 2018).

invasion of privacy and infliction of emotional distress,[10] among others.

Petitioners and their amici wrongly construe the statute as precluding "publisher or speaker" treatment only to persons acting *like* a publisher or speaker, and they dissect various activities of publishers to argue those specific activities are touchstones of protection. But a defendant need not be *like a publisher* for protection; it must simply be an *interactive computer service provider* to qualify for that preclusion. All these Amici engage in activities that are not characteristic of a typical publisher or a speaker. They register domains, provide reverse-proxy security services, operate content delivery networks, operate colocation facilities, provide software to create Web sites, host sites for others, provide online data management, and provide email services. They qualify for §230(c)(1) protection under the clear wording of the statute even though they do not resemble publishers like the Wall Street Journal or Random House or social media at the center of the debate like YouTube, Facebook, or Twitter.

Petitioners and their amici argue that defamation law distinguished publishers and speakers from distributors, arguing that application of the maxim "inclusion of one thing excludes another thing" means that §230(c)(1) provides no protection to "distributors" of information. They argue that, thus, §230(c)(1) leaves

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[10] *See*, *e.g.*, *Poole v. Tumblr, Inc.*, 404 F. Supp. 3d 637, 642 (D. Conn. 2019).

online services vulnerable to treatment as distributors under the common law.

That argument, however, ignores the meaning of "publisher" that prevailed when Congress enacted §230(c)(1). The Fourth Circuit in *Zeran* analyzed the issue correctly: under traditional formulations, distribution was a subset of "publication." *Zeran*, 129 F.3d at 331-32 (citing Restatement (Second) of Torts §577 (Am. L. Inst. 1977) and W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §113 at 799 (5th ed. 1984)). The Ninth Circuit reached the same correct conclusion in *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1104 (9th Cir 2009) (discussing "primary" and "secondary" publishers in reliance on Prosser & Keeton, and identifying distributors as "secondary" publishers). The Florida Supreme Court also reached the same correct conclusion. *Doe v. Am. Online, Inc.*, 783 So.2d 1010, 1015-16 (Fla. 2001) (citing Restatement).

Thus, when Congress enacted §230(c)(1), "publisher" embraced both *primary* and *secondary* publishers, and the law's preclusion of treatment as a "publisher or speaker" referred to treatment as either kind of publisher. Because what Petitioners and their allies call "distributor" was what the law called a "publisher," their resort to "distributor" liability rules is a red herring.

V. So-called "Targeted Recommendations" Are Inherent in Interactive Computer Services and Do Not Invalidate Protection Under §230(c)(1).

Nothing in the language of §230(c)(1) supports the proposed exclusion from protection that Petitioners, their allies, and the Solicitor General urge for so-called "targeted recommendations." They really complain about the automated operation of algorithms—instructions to computer systems—that classify certain kinds of data or traffic based upon previous actions of the service's users and usage patterns that YouTube's systems have detected and that lead the systems to organize data or traffic as a result. Companies throughout the Internet ecosystem, including those providing its technological infrastructure, depend upon algorithms to classify, organize, process, and transmit all sorts of data. Those automated functions do not alter §230(c)(1)'s protection of those companies.

A so-called "targeted recommendation" consists of two things. First, the supposed *recommendation* consists of elevating the ranking of, or prioritizing, some information traffic over others in offering a user further engagement on the service. Second, the supposed *targeting* consists of classifying data or traffic as similar to other data or traffic that users have engaged with. Neither action falls outside the statutory scope of the §230(c)(1) protection; nor should it.

It is not clear what Petitioners and the Solicitor General believe "untargeted" recommendations would

be, or what "unrecommended" offerings would be, other than the random presentation of material from the vast set of information that YouTube maintains, or the provision of material to a user purely upon the user's specific request for that material.[11]

But the law does not condition protection upon purely random or passive operations by a service provider; conversely systematic, automated actions of a computer system should not lose statutory protection. The Solicitor General concedes that, to lose protection under §230(c)(1), "content development must go beyond the mere provision of basic organizational or display tools that Congress viewed as inherent in an interactive online service." Brief of the United States as Amicus Curiae at 23. That statement, which cites no authority, gives no clue as to what "basic" organization means, or from whose perspective an organizing principle is "basic." There are many different ways of organizing information, *all* of which may be considered "basic." Studying traffic patterns, identifying communications with similar usage characteristics, and presenting them in a ranking according to the relevance assumed from usage statistics are ubiquitous practices

[11] Some might argue naively that a purely chronological feed of information would satisfy an "unrecommended" criterion. But bad actors exploit all systems, and one might "flood the zone" with posts to ensure that its posts always appear first. Services rightly apply algorithms to counteract those who abuse them, which under Petitioners' theory could lead to claims by those who argue they are wrongly demoted.

on the Internet, and they are precisely "basic organizational or display tools."

"Access software provider" is one type of "interactive computer service" in §230(f)(2). Section 230(f)(4) defines "access software provider" as a provider of software or enabling tools to pick, choose, subset, organize, or reorganize content (among other things). 47 U.S.C. §230(f)(4). Picking and choosing, subsetting, organizing, and *re*organizing content all suggest a range of *optional* content-related activities as inherent in an interactive computer service.

Thus, so-called "personalization" of transmissions or information through automated functions does not deprive online services of §230(c)(1) protection. The word "interactive" in the statutory phrase "interactive computer service" *suggests* personalization of services. In an analogous context also involving online communications under copyright law, Congress defined an "interactive service" to include "one that enables a member of the public to receive a transmission of a program specially created for the recipient." 17 U.S.C. §114(j)(7). In other words, a personalized service is a subcategory of *interactive* computer service within the scope of §230(c)(1).

Many reasons exist for service providers to categorize and organize their information, to transmit material that a person did not specifically request, and to analyze relationships among data to prioritize the transmission of some data that are available to users. Service providers of all types deliver what users are

most likely to want or to be most interested in. Search engines rank results according to their prediction of what the search user is looking for, based upon vast statistics showing correlations among result displays, rankings, and user actions. Music streaming services create playlists based on similarity to songs a user had previously listened to. Online book sellers recommend to purchasers books that are popular with other persons who had purchased the same books. Social media sites recommend material that is popular with a user's friends. All of these strive to promote the satisfaction and engagement of a service's users.[12]

Algorithmic analysis of usage and traffic patterns, and transmitting information based on algorithms, not only leads to increased user satisfaction but also promotes efficiency and lowers transaction costs for a wide range of online interactions. These automated functions, phrased as "targeting," "recommendations," or "promotion," should not cause any information transmitters or communication software providers, especially those like Amici, to lose §230(c)(1) protection.

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[12] By analogy, bookstores and libraries may group books by subject, by author, by popularity (such as bestseller lists or local demand), or even by "staff picks." To attract customers' attention, they may display selected books on top shelves, on end-caps, or on special tables, or give special discounts. Online "targeted recommendations," while they may focus on more granular criteria, do not materially differ.

VI. Artful Pleading to Distinguish Transmissions of Information from Features Inherent in the Transmissions Cannot Properly Deny Protection of §230(c)(1) to Interactive Computer Services.

Through artful pleading, Petitioners argue a distinction between what they call "targeted recommendations" (personalization of an information feed) and the mere transmission of information to remove §230(c)(1)'s protection. Petitioners and their allies appear to isolate prioritization as a basis for their claim, independent of the transmission of information that they acknowledge that §230(c)(1) protects. They also argue (Brief for Petitioner at 47) that an interactive computer service must transmit material only in response to a specific user request for the material.

Section 230(c)(1) does not support such a tortured distinction. The broad statutory definition of "interactive computer service" in §230(f)(2) does not contain the restriction that Petitioners wish to impose. And as shown above, personalization is inherent in the concept of an "interactive" computer service, whether it be a personalized playlist on a music or video streaming service, clothing suggestions by a retailer, or a news feed from an online newspaper. Moreover, Petitioners cannot plausibly allege harm from so-called *recommendations* that is independent of alleged harm from the *communication* of the challenged information itself. Section 230(c)(1) protects against liability for harm from the communication of the information. Any harm that the Petitioners can plausibly allege would have to

flow from the *combination* of transmitting information and other factors—and §230(c)(1) precludes liability where the communication of information is at the core of the claim.

Under Petitioners' approach and that of some of their allies, §230(c)(1) would protect persons for retransmitting information but not persons who merely refer to information without transmitting it. They suggest (Brief for Petitioner at 33-42) that providing a URL (uniform resource locator, identifying the location of material on the Internet) or notifying users about the existence of a communication would take a service provider (or, by implication, a user, including an individual) outside §230(c)(1)'s scope. That is a perverse interpretation of the law. Virtually all Internet transmissions require the appending of technical information to facilitate transmission, such as packet headers with information about a packet's contents, origin, and destination.[13] The Petitioners' proposed application of §230(c)(1) would make its protection a mirage.

VII. Proposed New Exceptions to §230(c)(1)'s Protection Are Unworkable.

As the Amici stated above, classification of information and prioritization of transmissions are inherent in the management of data and communications,

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[13] *See* Cloudflare, *What is a packet header?*, https://www.cloudflare.com/learning/network-layer/what-is-a-packet/#:~:text=A%20packet%20header%20is%20a,contents%2C%20origin%2C%20and%20destination (last visited Jan. 16, 2023).

and Petitioners and their allies have not articulated a workable alternative. Focusing only on social media, and on prioritization and not removal of material, they imply that YouTube or other social media services should demote or neutralize, rather than promote, certain material or that they should shield some persons, but not others, from certain information. That is a pie-in-the-sky proposal for social media companies; it is even worse for other interactive computer services that operate the infrastructure of the Internet, who might face litigation threats regarding their automated processes for organizing, processing, and transmitting information throughout the Internet.

To begin with, the proposal requires a service provider to learn much more about both the content of information and about a user—beyond what algorithms can detect—to target certain information or users for downgrades of information delivery. Amici are skeptical that Petitioners and their amici believe that more intensive surveillance of users and their access to information would be a welcome development.

The phrase "content moderation," which is popular in discussing social media, obscures the fact that one must know the *context* of any communication and not just its *content* in order to evaluate it. While this has long been clear in defamation cases,[14] the principle applies to all communications. Thus, for example, knowing who created a video and why makes a huge

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[14] *See generally* 1 Rodney A. Smolla, *Law of Defamation* §4:17 (2d ed. 2022).

difference in evaluating it. The videos by bystanders who filmed the 9/11 terror attacks and the mass murderer who filmed his own atrocities in Christchurch, New Zealand, deserve vastly different considerations; the content itself (namely, videos of atrocities) is insufficient for appraisal. Similarly, one must know the intent of a viewer to understand the context: a reporter documenting war crimes who views a video is very different from a partisan who revels in them.

This is not simply a challenge of scale: it is a problem of the competence of a service provider to assess the context of a communication. Where a complainant demands action on a particular communication, the service provider would need both to evaluate the authority of a person to demand it and to adjudicate the complaint without the tools (such as subpoenas and discovery rights) to uncover information relevant to the adjudication.

Interactive computer service providers thus cannot easily (particularly at scale) know what *content* is "unlawful." Governments, the arbiters of what is unlawful, do not maintain an Index of Prohibited Speech. Nor should they.

Without such an Index, and without the competence to adjudicate complaints, online services are left to make extremely rough judgments about circumstances of both the transmission of and the search for information. Consumer-facing online services *do* regularly make such rough judgments, generally to reflect their brand values, typically embodied in terms of

service or community guidelines, and not under legal compunction. Section 230(c)(2) affords them protection for voluntary, good-faith removal of material based upon a determination whether it is "offensive" or "otherwise objectionable" in light of the service or its users. A *legal* appraisal of the substance or context of user behavior is unnecessary.

Forcing adjudications about lawfulness of content or conduct onto any kind of interactive computer services, and imposing potential liability on them for alleged errors in those adjudications, would have an unmistakable effect of forcing services to skew their actions in the most restrictive direction to avoid liability, particularly when millions of automated "judgments" may be at issue. That would be contrary to the explicit purposes of Congress in enacting §230(c)(1).[15] Application of such a rule to providers of "interactive computer services," as defined in §§230(f)(2) and 230(f)(4), would cripple the Internet's infrastructure.

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[15] The copyright safe harbor for online services does not require them to engage in adjudication of copyright claims. It provides a process that encourages some types of service providers to remove material based upon a notification of a claim and to restore material based upon a counter notification. When that happens, the disputants must deal with each other, and the process takes service providers out of the middle. *See* 17 U.S.C. §§512(c)(1)(C), 512(c)(3), 512(g) (describing processes of notification, removal, and restoration).

VIII. Proposed New Exceptions to §230(c)(1)'s Protection Conflict with This Court's Jurisprudence.

Petitioners and their allies propose an "actual knowledge or reason to know" standard relating to "unlawful content" for loss of §230(c)(1) protection. Leaving aside the problem of whether any online service providers, especially Amici, that operate the Internet's infrastructure, have the competence to adjudicate, and therefore have *actual* knowledge of, what is "unlawful content," the *constructive* knowledge approach is contrary to this Court's teaching in the analogous copyright context.[16]

Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), addressed the then-current standard of contributory copyright infringement and its requirement that a defendant have actual knowledge of infringing activity by another in order to be liable. The plaintiff studios argued that Sony was responsible for infringing uses of its Betamax video recorders because it knew persons used its recorders to reproduce movies from television broadcasts. The Court characterized such knowledge as "constructive" and rejected the argument that it could be a basis of liability. *Id*. at 439. The Court held that liability based

[16] The question of knowledge came before the Court as an element of the substantive liability standard for contributory copyright infringement as Amici explain below. Petitioners and their amici propose importing the question into §230(c)(1) analysis, which would muddy the distinction between §230(c)(1)'s protection and underlying causes of action.

on knowledge of potential unlawful uses would not arise "if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses" to avoid liability. *Id.* at 442.

This Court revisited the circumstances of contributory copyright infringement liability in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). There the Court adopted a new standard for contributory infringement: "One infringes contributorily by intentionally inducing or encouraging direct infringement. . . ." *Id.* at 930. Moving away from an actual knowledge standard (and recasting *Sony* as a decision about intent instead of knowledge, *id.* at 933-34), the Court stated:

> The question is under what circumstances the distributor of a product capable of both lawful and unlawful use is liable for acts of copyright infringement by third parties using the product. We hold that one who distributes a device *with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement*, is liable for the resulting acts of infringement by third parties.

Id. at 918 (emphasis added). After *Grokster*, courts have rejected a "should have known" alternative to actual knowledge or explicit wrongful intent. *See*, *e.g.*, *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 307-10 (4th Cir. 2018).

IX. Against a Background of Uniform Judicial Interpretations of §230(c)(1) and Heated Political Debates About It, a New Policy Direction Should Come from Congress, Not This Court.

For over 25 years, courts uniformly applied §230(c)(1) protection to facts like those in this case. What has changed to deserve a departure from that pattern? More persons can communicate with a vast global audience (and malign influences can reach more distant ones), more persons can receive information from more sources, public discourse has become more corrosive, and partisan politics have become more heated. The role of online services has become a political football. Some judges, while acknowledging they are constrained to follow uniform precedent, question the wisdom of the balance that §230(c)(1) struck in promoting development of online services.

The Texas Supreme Court recently addressed the current controversy over §230(c)(1). Referring to Justice Thomas's statement in *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*, ___ U.S. ___, 141 S.Ct. 13 (2020) (statement of Thomas, J.), the court noted that "every existing judicial decision interpreting section 230 takes the contrary position." *In re Facebook, Inc.*, 625 S.W.3d 80, 91-92 (Tex. 2021). That court noted that, where a statutory interpretation is reasonable, "we are hard pressed to cast aside altogether the universal approach of every court to examine the matter over the twenty-five years of section 230's existence." *Id.* at 91.

The Texas Supreme Court also pointed to the fact that Congress had twice *expanded* the scope of §230(c)(1), in 2002 and 2010 (well after the current jurisprudence emerged), suggesting that Congress did not object to the courts' interpretation of §230(c)(1). *Id.* at 92 and n.7.

The observations of the Texas Supreme Court, against the backdrop of strong political ferment, and reinforced by the fact that 18 members of Congress as amici have argued for a change in the application of §230(c)(1), make clear where and how any change to the scope of §230(c)(1) should occur: in Congress. All signs, and all principles of Congress's primacy in creating national policy, point to it as the proper forum for any reconsideration of the law. Congress can study the issues in greater depth, with broader input from stakeholders across society, including information technology experts, and with more focus than courts. And its members are more answerable to the public for the policy choices it makes. This Court should decline to usurp Congress's role in evaluating or reforming this law.

CONCLUSION

For the reasons Amici have explained, the Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit. In the alternative, the

Court should dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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