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 YELP INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF YELP INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Amicus respectfully submits this brief in support of Respondent Google LLC.[1]

INTEREST OF AMICUS CURIAE

Yelp owns and operates Yelp.com, a popular social networking and search website, mobile website, and related mobile applications for users to share information about their communities. Yelp provides and publishes a forum for members of the public to read and write reviews about local businesses, services, and other entities including restaurants, doctors, auto mechanics, plumbers, churches, and government agencies. One of Yelp's founding principles is that the best source for information about a local community is the community members themselves. Yelp users have contributed nearly 250 million reviews on Yelp. These reviews allow other consumers to find a broad range of helpful information about local companies and other consumer-facing entities.

Section 230(c)(1) has been critical to Yelp's growth. Yelp was founded in 2004, after the Communications Decency Act had been repeatedly held to provide immunity for recommending content created by third parties. *E.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). As a key tool to cultivate useful content for the public, Yelp deploys recommendation software on its platform, applying automatic and

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amicus or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief.

uniform rules to recommend those third-party user reviews it determines to be more reliable and relevant to consumers, and weed out potentially unreliable reviews.

Yelp has gained the trust of millions of users through its recommended reviews, but its efforts have been frequently challenged in courts. As explained in this amicus brief, the broad immunity provided by Section 230(c)(1) is critical to Yelp's ability to continue to use its software to recommend the most reliable and useful reviews to consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners and the Government argue that Google made a choice in designing YouTube's recommendation algorithm, and that choice means that all resulting recommendations are "created by" Google and thus outside of Section 230(c)(1). Not so. Choosing how to organize and communicate information that someone else creates is not itself the creation of new information; it is a necessary part of publishing that third-party information.

Yelp does not often align itself with Google. Yelp is a much smaller company that competes with Google in local search, and Yelp publicly supports ongoing antitrust actions against Google. But in this dispute the potential consequences for consumers and online platforms are significant, and Yelp's recommendation software provides a useful illustration of the inconsistencies and dangers of petitioners' position.

Yelp's recommendation software differs from other platforms in some relevant ways. Yelp's recommendations focus on the quality of the reviews submitted by third parties, not the user who is searching for the reviews. Yelp recommends the same reviews to anyone who types in the same search at the same time, based on the system's assessment of the reliability of the reviews rather than an attempt to anticipate and tailor responses to the user's specific tastes. The software is completely automated; no Yelp employee can override the system's recommendation as to any review to alter the result. The recommendation software applies the same standards to all businesses, so reviews of Yelp's advertisers and non-advertisers are treated exactly the same. And the reviews that are not recommended are generally still viewable, giving users control over how much information they want to see.

Most reviews posted on Yelp are written by consumers who want to share their personal experiences with local businesses, but around 15 to 30 percent of all online reviews across the internet are estimated to be fraudulent. These unreliable reviews pose "a significant threat for online review portals and product search engines" because fraudulent reviews can cause consumers to lose trust in the reliability of the review platforms.[2] The primary goal of Yelp's recommendation software is to identify the most useful, trustworthy reviews for consumers so they can make decisions based on those most trusted reviews, and so consumers want to come back to the platform next time they need to find information about a local business.

But not everyone agrees with every decision Yelp's recommendation software makes. While highlighting the most trustworthy reviews allows honest companies to flourish, the data shows that the process often results in lower ratings for businesses flagged by the Better Business Bureau for potential fraud or excessive consumer complaints, likely because Yelp's software identifies some of the positive "reviews" of those

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[2] Uttara M. Ananthakrishnan et al., *A Tangled Web: Should Online Review Portals Display Fraudulent Reviews?*, Information Systems Research (forthcoming) at 2, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3297363.

companies as not trustworthy.[3] As it turns out, these companies can be eager to sue, and Yelp has spent years defending itself in litigation brought by companies attempting to find creative ways to plead around the immunity provided by Section 230(c)(1).

As discussed in more detail below, courts have routinely recognized that Yelp's automated editorial decisions about where and how to display others' information are immunized under Section 230(c)(1), and that no amount of creative pleading can transform those decisions into information that Yelp itself creates. *Kimzey v. Yelp! Inc.*, 836 F. 3d 1263, 1265-66 (9th Cir. 2016) (output from Yelp's star-rating function—the software that counts the star ratings from recommended reviews and aggregates it into a single rating—is not information that Yelp creates); *Hassell v. Bird*, 5 Cal. 5th 522, 543, n.14 (2018), cert denied, 139 S.Ct. 940 (2019) ("that Yelp had featured at least one of [Defendant's] defamatory reviews as a 'Recommended Review'" does not "somehow serve to deprive Yelp of immunity" as it involves "what are clearly publication decisions by Yelp"); *Braverman v. Yelp, Inc.*, 2013 NY Slip Op 31407(U), 6 (NY Sup. Ct.) (the "alleged act of filtering out positive reviews" of a dental practice "is an exercise of a publisher's traditional editorial function protected by [Section 230]").

These and other hard-fought litigation wins have been foundational to Yelp's growth as an internet platform that consumers can trust to make their purchasing decisions. Narrowing the scope of Section 230

[3] Devesh Raval, *Do Bad Businesses Get Good Reviews? Evidence from Online Review Platforms* (Sept. 21, 2020) at 32-33, 40, *available at* https://deveshraval.github.io/reviews.pdf.

would make it far easier to plead around the statute. That would trigger an onslaught of suits that would bog down internet service providers in endless litigation, exactly what Congress sought to prevent in passing Section 230(c)(1). It would spur bad actors to submit more deceptive reviews. And it misunderstands the text and purposes of Section 230.

Recommending content is a core form of publication under Section 230, and necessary to provide consumers with useful, trustworthy reviews. Without immunity, deceptive reviews would flourish and consumers would be harmed. The Court should affirm.

ARGUMENT

I. Section 230(c)(1) allows review sites like Yelp to recommend reliable reviews to help consumers.

Most people now read online reviews before making purchasing decisions, and many now trust online reviews as much as reviews from friends and family. One recent study found that a staggering 99 percent of U.S. consumers used the internet to find information about local business at least once in 2021, and 77 percent reported that they "always" or "regularly" read online reviews when browsing for a local business.[4]

Imagine a tourist visiting D.C. for the first time and trying to decide where to eat. Typing "steakhouse" into Yelp yields several hundred results, so the

[4] Jamie Pitman, *Local Consumer Review Survey 2022*, BrightLocal (Jan. 26, 2022), https://www.brightlocal.com/research/local-consumer-review-survey.

tourist might scan through the first few recommended results and have The Capital Grille catch their eye. Clicking on that link shows the restaurant's star rating on a scale from 1 to 5 compiled from nearly 1,000 recommended reviews, the full details of those reviews, and allows users to search through the reviews (if, say, they feel like ribeye and just want those comments).[5] At the bottom of every page is a link to see the reviews that are not currently recommended by Yelp's software. This allows users to decide exactly how much information they want and need, while providing up front the information Yelp has assessed to be most reliable and helpful.

A. Yelp's software recommends reliable and relevant reviews.

Yelp's business model depends on providing consumers access to useful, trustworthy information, so the company has a deep interest in displaying reliable reviews for consumers.

Yet as anyone who has ever used the internet knows, not everything online is trustworthy. People submit a wide range of reviews to internet platforms, and studies estimate that 15 to 30 percent of all online reviews across the internet are fraudulent.[6] Indeed, there are entire industries focused on manufacturing deceptive reviews, with companies "creating fake online profiles on consumer review websites and paying freelance writers from as far away as the Philippines, Bangladesh and Eastern Europe for $1 to $10

[5] Available at https://www.yelp.com/biz/the-capital-grille-washington-3.

[6] Ananthakrishnan et al., *supra* note 2, at 2.

per review" to be posted on online review platforms.[7] This makes it critical for Yelp to dedicate itself to mitigating the impact such attempts at deception have on its platform.

1. To aid consumers in finding trustworthy reviews, Yelp first developed its recommendation software back in 2005 to automatically and continuously assess each review and evaluate its reliability. The recommendation software considers many factors, including:

> *Conflicts of interests*. These are reviews likely written by people with undisclosed ties to a business, including competitors, disgruntled employees, friends, or family. These include critical reviews, like those from a restaurant owner who might use a fake name to submit reviews complaining that a competing restaurant is unsanitary.
>
> *Solicited reviews*. These are reviews that the business owner or an employee likely asked for or

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[7] New York Office of the Attorney General, Press Release, *A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than $350,000 In Fines* (Sept. 23, 2013), https://ag.ny.gov/press-release/2013/ag-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews. Some companies are "review bombed" when people who have never set foot in the business submit fake reviews in retaliation for what they perceive as the company's bad actions. For instance, many companies in the last few years have gone viral for their stance on Covid-19 restrictions—both those for and against masks—and have been bombarded with online reviews from people who have never patronized the company but are simply posting a review to retaliate for the company's position.

> even paid someone to write. Reviews that consumers write when asked to do so tend to be biased compared to reviews that consumers are motivated to write on their own.
>
> *Reliability*. Potentially unreliable reviews include those written by less active users, since someone trying to create a fake account to target a specific company will often not have a long history of recommendations.
>
> *Usefulness*. Some reviews might go on a rant about an irrelevant topic or attempt to promote an unrelated product or political theory.

As a New York Attorney General investigation into fraudulent reviews concluded, Yelp's recommendation software was "the most aggressive" of the review platform technologies that target fake reviews on consumer-review websites.[8] Yelp's software currently recommends just over 70 percent of reviews that Yelp users have contributed to Yelp, based on all the criteria above and a host of other considerations.

The reviews that Yelp's software does not recommend are still accessible via a link at the bottom of a business's Yelp page; that link displays the number of reviews that are "not currently recommended" and allows users to click to read the entire review and user rating.[9] Those reviews, however, don't factor into the

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[8] New York Office of the Attorney General, *supra* note 7.

[9] A smaller set of reviews (about 8 percent) are removed from the platform for violating Yelp's Terms of Service, many of those because they did not reflect the writer's first-hand experience.

business's overall Yelp star rating, which is compiled from all the recommended reviews.

Categorizing a significant number of reviews as "not recommended" comes at a cost. As a result of Yelp's recommendation process there is less content that is readily visible on the platform, and it can also discourage users who have their reviews flagged by the recommendation software. But Yelp has made the choice to recommend reviews that the software determines are the most useful and reliable for consumers to provide a platform that consumers can trust for candid reviews of local businesses.

2. Yelp constantly updates its recommendation software. Yelp launched the first version of its recommendation program in 2005, and has consistently worked on improving it ever since then. "Yelp invested tens of millions of dollars and hundreds of thousands of hours in developing and maintaining the [software], which runs on hundreds of computers." *Multiversal Enterprises-Mammoth Properties, LLC v. Yelp Inc.*, 74 Cal. App. 5th 890, 894 (2022). The software is maintained and updated by a team of experienced engineers to protect the integrity of consumer and business owner experiences on Yelp.

A key feature of Yelp's recommendation software is that it repeatedly evaluates all reviews on Yelp's platform, so its recommendations change over time as the system receives new information about a review, a reviewer, or a business. A review that was not recommended one day might later in time become

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Yelp publishes an annual Trust and Safety Report, detailing statistics about its recommendation software and other initiatives to protect consumers, on its website at https://trust.yelp.com/.

recommended as the software receives more information about the user that allows it to determine that the review likely can be trusted. Or a review that was recommended might become not recommended, if for example the software receives information allowing it to identify the reviewer as potentially being affiliated with the reviewed business.

Attempts to evade Yelp's recommendation software grow continually more sophisticated. In recent years, Yelp has confronted a rise of review exchange groups, which attempt to flood sites with fraudulent online reviews, making them less reliable for everyone. Review exchange groups exist on various online platforms and facilitate the buying, selling, or exchange of fake reviews.[10] Other attempts are not-so-sophisticated; a medical emergency care company attempted to recruit people for positive reviews on Yelp by simply messaging people: "I own a company in nyc and would like to get more reviews… would you come checkout our company and write a review? (will pay)."[11] And a spa in New York posted "I need

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[10] Greg Sterling, *Yelp Cracks Down on 'Review Rings' as Google Continues to See Widespread Mapspam*, Search Engine Land (Jan. 10, 2020), https://searchengineland.com/yelp-cracks-down-on-review-rings-as-google-continues-to-see-widespread-mapspam-327432; Sudheer Someshwara, *Yelp Updates Recommendation Software to Better Target and Mitigate Content from Online Review Exchange Groups* (Feb. 25, 2021), https://blog.yelp.com/news/yelp-updates-recommendation-software-to-better-target-and-mitigate-content-from-online-review-exchange-groups/.

[11] New York Office of the Attorney General, Press Release, *A.G. Schneiderman Announces Settlement With Medrite Urgent Care and Carmel for Paying for Positive Reviews Online* (Dec. 2,

someone who is a YELP expert to post positive reviews for a spa that will not be filtered," adding "I will pay $10 per-review."[12]

3. Yelp's recommendation system is completely automated. No employee at Yelp can recommend reviews or manually override the recommendation software's decision as to any review. This approach is deliberate to avoid conflicts of interest. Similarly, businesses that advertise on Yelp don't get any special treatment by the recommendation software. The recommendation software applies the same uniform standards to all businesses. In this way, Yelp preserves its ability to provide the reviews it determines to be the most reliable and useful to consumers.

B. Yelp's recommendation software provides important value to consumers and local businesses.

Without the ability to recommend useful reviews and avoid recommending suspicious reviews, Yelp's platform would be far less helpful. Consumers could not trust the reviews, as unscrupulous businesses would game the system to promote their own business to the detriment of consumers and honest competitors.

2016), https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-medrite-urgent-care-and-carmel-paying. Yelp detected that the medical company had been soliciting reviews, classified those reviews as "not recommended," and posted a consumer alert on the company's page notifying users that the company had been caught trying to buy reviews. *Id.*

[12] New York Office of the Attorney General, *supra* note 7.

1. Access to customer reviews provides consumers transparency and aids their spending decisions. Yelp provides one of the most trusted platforms for reviews, and it has far more breadth and depth than reviews in local papers or word of mouth. One study focused on Seattle restaurants, for instance, found that Yelp users had posted reviews for more than 60,000 restaurants, which is 70 percent of all restaurants in the city.[13] The Seattle Times, by contrast, had reviewed only about 5 percent of those restaurants.[14] The breadth of reviews aids small businesses, allowing companies to make a name for themselves and attract customers with their quality products and services.[15] The free and widespread availability of Yelp's platform allows smaller businesses to compete for consumer dollars against larger businesses, earning increased revenue as their community reputation improves through online reviews.

As noted above, more than 70 percent of Americans now report frequently consulting online reviews before making purchasing decisions,[16] and Congress has recognized the importance of unbiased reviews to that decision-making process. Both houses unanimously voted for the Consumer Review Fairness Act, H.R. 5111, Pub. L. 114-258 (Dec. 14, 2016), to protect

[13] Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harvard Business School, at 3, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1928601.

[14] *Id.*

[15] *Id.*

[16] Pitman, *supra* note 4.

consumers' ability to share their honest opinions of goods and services on platforms like Yelp.

2. Yelp also gives users insight and control over what data they want to see. As noted above, Yelp doesn't permanently remove potentially unreliable reviews that its software does not recommend, instead it simply displays them on a different page for the reviewed business that users can click through to view to obtain more information.

This means that users who are trying to make a quick decision can see the most reliable reviews at a glance, while users who want to have more information can read the non-recommended reviews, and may decide to consider them. Indeed, a study from researchers at Carnegie Mellon and the University of Washington found that people trust review platforms more when they display the reviews that are not recommended by their algorithms, like Yelp does, instead of simply removing such non-recommended reviews altogether.[17] This supports one of the stated goals of Section 230: "to encourage the development of technologies which maximize user control" over information. 47 U.S.C. § 230(b)(3); *see also* § 230(a)(2).

3. Reviews also encourage great service by businesses. A good illustration comes from *Edwards v. District of Columbia*, 755 F.3d 996, 1006-07 (D.C. Cir. 2014), which struck down regulations requiring all paid tour guides in D.C. to pass a 100-question examination before they could tell tourists about the District. The District tried to argue the examination was needed to ensure guides didn't mislead tourists, but

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[17] Ananthakrishnan et al., *supra* note 2, at 22-25.

the court pointed out that "consumer review websites[] like Yelp" accomplished this goal far more efficiently than government regulations. *Id.*

As the *Edwards* court explained, "[o]ne need only peruse" websites with consumer reviews to see "the expressed outrage and contempt that would likely befall" a tour company that was "less than scrupulous" about providing a quality tour. *Id.* "Put simply, bad reviews are bad for business." *Id.* at 1007. Citing Adam Smith's *The Wealth of Nations*, the opinion noted that it should come as no surprise that vigorous competition means companies can take "the coal of self-interest" and turn it into "a gem-like consumer experience." *Id.* As the court concluded, a market where consumers have access to candid reviews is far more efficient than government regulations.[18]

4. Displaying but separating out less reliable reviews, as Yelp does, also "increases the cost to commit fraud by creating a system of reputation."[19] The study from the Carnegie Mellon and University of Washington researchers found that 80 percent of consumers surveyed trusted "a review platform more if it displays fraudulent review information because businesses are less likely to write fraud reviews on these platforms."[20] That is, flagging but still displaying potentially fraudulent reviews "can be an effective tool for review portals to curb fraudulent behavior of

[18] This is particularly true for independent businesses, who have less name recognition and are more impacted by reviews than chain restaurants. Luca, *supra* note 13, at 2.

[19] Ananthakrishnan et al., *supra* note 2, at 23.

[20] *Id.* at 4.

dishonest businesses" because consumers quite naturally "associate fraud with poor quality."[21] This process "can be a good way to introduce a penalty for getting caught and deter businesses from writing fraudulent reviews in the first place."[22]

5. Yelp's recommendation system imposes a significant cost to companies that attempt to game the system by submitting positive reviews of their own company. Not only do they have to expend substantial time and effort submitting these reviews (which as noted often involves paying fake-review writers), there is also the reputational cost noted above that comes to a company from being linked to fraudulent reviews.[23]

If Yelp could not analyze and recommend reviews without facing liability, those costs of submitting fraudulent reviews would disappear. If Yelp had to display every submitted review, without the editorial freedom Section 230(c)(1) provides to algorithmically recommend some over others for consumers, business owners could submit hundreds of positive reviews for their own business with little effort or risk of a penalty. And some doubtless would, because reviews impact consumer decisions. A well-regarded study found that a one-star increase in Yelp rating—for instance, a business that increases its combined review

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[21] *Id*. at 15.

[22] *Id*.

[23] *Id*.

score from 3 stars to 4 stars—lead to a 5 to 9 percent increase in revenue for that company.[24]

Empirical evidence bears out the importance of assessing and identifying unreliable reviews. In 2020, Devesh Raval, the Deputy Director for Consumer Protection of the Federal Trade Commission, published a study examining the impact of fake reviews.[25] The results were particularly interesting for the companies he classified as "low quality businesses"—those with an "F" grade from the Better Business Bureau or a high number of complaints filed against them.[26] Those low quality businesses had a higher percentage of positive reviews that been "not recommended" by Yelp's software than higher quality businesses, and the low quality businesses received a lower overall score on Yelp than they did on platforms without rigorous recommendation software.[27] That is, the study concluded that businesses flagged as problematic by the Better Business Bureau were more likely to have unreliable reviews saying positive things about their business, and those positive reviews would artificially increase the company's rankings if not for the algorithmic processes of Yelp's recommendation software.[28] As the study noted, "fake reviews steer consumers to low quality businesses to their detriment."[29]

[24] Luca, *supra* note 13, at 2.

[25] Raval, *supra* note 3.

[26] *Id*. at 4.

[27] *Id*. at 32-33, 40.

[28] *Id*. at 40-41.

[29] *Id*. at 5, 41.

6. Companies rarely complain to Yelp when they receive positive reviews, but they do when they receive criticism or when positive reviews are not recommended. If Section 230(c)(1) allowed broad claims for the act of recommending certain reviews, it would provide a significant incentive to platforms to avoid choosing to recommend some user-generated content as more reliable than other content, since that could expose the company to suit and extensive legal fees. *See Levitt v. Yelp! Inc.*, No. C-10-1321 EMC, 2011 WL 5079526, at *8 (N.D. Cal. Oct. 26, 2011), *aff'd*, 765 F.3d 1123 (9th Cir. 2014) (forcing Yelp to "defend its editorial decisions . . . on a case by case basis . . . could lead Yelp to resist filtering out false/unreliable reviews (as someone could claim an improper motive for its decision)").

A good illustration of the harm that would follow when Section 230(c)(1) is not applied is *Multiversal*, 74 Cal. App. 5th at 894. In *Multiversal* a business owner complained that Yelp had not recommended various positive reviews of his restaurant, even though it recommended several critical reviews. *Id.* at 895.[30] His company sued Yelp for false advertising and unfair competition, and he "demanded that Yelp override the operation of its recommendation software and display reviews he deemed to be 'real and legitimate.'" *Id.* Yelp eventually prevailed on the merits after trial, demonstrating that its

[30] Discovery revealed that representatives of the business had manufactured many of the positive reviews that Yelp's algorithm had flagged as suspicious; for instance, one of the business's managers submitted six different positive reviews of his restaurant within a few hours, five using assumed names. *Id.* at 896.

recommendation software indeed sought to recommend the most trustworthy reviews to consumers, *id*. at 897, 907, but this was only after having to fight the case in court for ten years.

In another case, a lawyer complained that one of her prior clients had posted a defamatory review of her law firm on Yelp. *Hassell*, 5 Cal. 5th at 542. She did not name Yelp as a defendant—likely because of Section 230—but then tried to enforce an injunction against Yelp to make it remove the reviews from its platform. *Id*. at 545. One of the lawyer's arguments was that Yelp was an "aider and abettor" of others' allegedly defamatory speech because it displayed a critical review that the lawyer disliked on the recommended page and positive reviews that she liked on the non-recommended page. *Id*. at 543, n.14. Yelp had to spend nearly five years litigating and go all the way to the California Supreme Court to obtain a ruling that Section 230 immunized its decision to continue hosting the review.

In both those cases the plaintiffs sought to evade the immunity conferred by Section 230(c)(1) through artful pleading, and in each the courts eventually rejected their claims but only after years of expensive litigation. If this Court were to side with plaintiffs and narrow the scope of Section 230(c)(1) it would almost certainly cause an onslaught of similar suits that could tie up companies in endless litigation.

7. Recommendation software aids in government efforts to protect consumers.

At the most basic level, government agencies sometimes use reviews directly to inform or guide government action. The Center for Disease Control has noted that foodborne illness outbreaks can be identified through analyzing Yelp reviews, such as reviews indicating someone got sick shortly after eating at a specific restaurant.[31] Similarly, a study comparing hospital reviews from Yelp and the government's hospital database found that Yelp reviews identified many areas of concern to patients not identified by the database.[32] As the study concluded, Yelp's reviews show "new areas of importance to patients and caregivers that may have important implications for policy makers seeking to measure patient experience of hospital quality and hospitals attempting to improve patient satisfaction."[33]

More broadly, a wide range of government agencies have identified the problem of fraudulent reviews as one of significant concern to consumers, and taken steps that complement Yelp's software to combat these reviews. Several states have undertaken

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[31] Centers for Disease Control and Prevention, *Using Online Restaurant Reviews to Find Local Foodborne Outbreaks* (Apr. 12, 2019), https://www.cdc.gov/foodcore/successes/nyc-yelp.html (noting state agencies have potentially prevented further outbreaks using Yelp reviews); *see also* Elaine O. Nsoesie et al., *Online Reports of Foodborne Illness Capture Foods Implicated in Official Foodborne Outbreak Reports* (Aug. 11, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4167574/ (concluding "online illness reports could complement traditional surveillance systems by providing near real-time information on foodborne illnesses, implicated foods and locations").

[32] Benjamin L. Ranard et al., *What Can Yelp Teach Us About Measuring Hospital Quality?* (Apr. 1, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4845957/.

[33] *Id.*

extended sting operations to combat fake reviews.[34] The Federal Trade Commission recently announced a rulemaking process to combat fraudulent reviews and businesses who pay for positive reviews.[35] In so doing, one commissioner noted that identifying certain reviews as "less reliable" helps consumers.[36] And even some international government entities have forced other websites to "develop better protections against fraudulent reviews."[37] These laws and government investigations reflect an understanding that unreliable reviews harm consumers.

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[34] *E.g.*, Elaine S. Povich, *States Take Key Role in Fighting Fake Online Reviews*, Pew Charitable Trusts (Dec. 2, 2022), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/11/17/states-take-key-role-in-fighting-fake-online-reviews; New York Office of the Attorney General, *supra* note 7.

[35] Federal Trade Commission, *FTC to Explore Rulemaking to Combat Fake Reviews and Other Deceptive Endorsements* (Oct. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/ftc-explore-rulemaking-combat-fake-reviews-other-deceptive-endorsements.

[36] Statement of Commissioner Rebecca Kelly Slaughter Regarding Advance Notice of Proposed Rulemaking for Trade Regulation Rule Concerning Reviews and Endorsements (Oct. 20, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/commissioner-slaughter-remarks-regarding-fake-reviews-endorsements-anpr_0.pdf.

[37] Ananthakrishnan et al., *supra* note 2, at 6.

II. Recommendations are not new information created by the publisher, but rather an integral part of the publication process.

Petitioners claim that recommendations are outside the scope of Section 230(c)(1), at least when the suit is ostensibly over anything besides the underlying content. That is, plaintiffs' position seems to be that while they might not be allowed to sue Yelp for the content of a review, they could sue Yelp for recommending, or not recommending, that same review. *E.g.*, Petr. Br. 28.

1. That argument misunderstands the text of Section 230(c)(1). The critical question here is whether in recommending certain content a company acts as the "publisher" of "information provided by another information content provider," or instead creates its own new information. Petitioners and their amici urge the Court to consider each part of the statutory text in isolation, but there is no warrant for that artificial reading of the statute. Recommending and presenting information provided by a third party is the essence of "publishing" that information, and so is protected activity under Section 230.

Petitioners argue that "publisher" in this context should not be read to apply to anyone performing the functions of a traditional publisher, but limited to "actually communicat[ing] the writing or statement" to another person in the sense used in defamation cases. Petr. Br. 20; *see also* Petr. Br. 20-29; U.S. Amicus Br. 9. But as Respondent shows, Resp. Br. 23-26, even under the artificially narrow definition that petitioners urge, the decision to promote specific speech to a specific audience qualifies as publication.

Communicating anything requires choices. A newspaper editor printing a story must decide whether to put it on the first page above the fold or bury it at the end, whether to highlight it with big bold text or make the type plain and small. Those are all choices reflecting how much the publisher seeks to promote the statement, which in turn affects how likely a reader is to see it, but it would make little sense to say the choice of font or location was "new information" created by the publisher distinct from the act of publishing the statement.

Similarly, if someone orally repeats a statement they must decide when to say it, how loudly to say it, how insistently to say it, whether to say it by itself or in context, and to whom to say it. Those are all choices made by the speaker, but they are all part of "publishing" the statement. If the speaker has immunity from publishing the statement, he has immunity from making the statement in a loud voice, or saying it to someone he knows is interested.

The Government argues that Google made a "choice" in how to design its recommendation algorithm, e.g., U.S. Amicus Br. 9, 19, 28-29, and that choice means the recommendation is Google's own "information." But making a choice on how to present and communicate information is not itself "creating" new information.

Yelp again offers a helpful illustration, because the inputs for its recommendations come from the third-party reviews themselves, not from any predictions about the specific person searching for the review. *Kimzey*, 836 F.3d at 1270. If a hospital has a thousand reviews, there is no feasible way for Yelp or any other internet service provider to show all the reviews at once, nor is there any objectively "correct" or "normal" way to display them. (Alphabetically by last name of author? Chronologically? By length of review? By rating?) There are no defaults built into the internet. A platform *must* make choices to publish any results for users; it is literally impossible to publish information online without making a choice about how and where to display it.

Yelp has chosen to use its recommendation software to prioritize display of the reviews it deems most likely to be reliable and useful. The choice of which third-party contributed content to recommend or not is just as much a part of "publishing" as a newspaper's choice to put something as a bold headline on the first page or bury a story on page three—the salient difference is that the sheer volume of reviews contributed to Yelp necessitates the use of automated software to perform a recommendation task that no humans could do at scale.

The same is true for YouTube, even though YouTube uses other sources of information to arrive at its recommendations, including information about the users who will be viewing the content. Choosing your audience is part of publishing. If a newspaper decides to send a third-party supplement on tractors to only those who live in rural regions, that choice does not create new "information" or "content" apart from the third-party tractor supplement itself. If someone has immunity for publishing a particular defamatory statement, that immunity isn't limited to only situations when he repeated the statement to someone he picked completely randomly—the immunity would cover him even if he repeated that statement to a person he believed would likely be interested in the topic.

Indeed, Petitioners and their amici seem to concede the essence of this point when they agree that a standard search engine does not provide "content 'created by another'" when it returns the results to a query. Petr. Br. 39; U.S. Amicus Br. 13, 22-23, 29; Free Speech for People Amicus Br. 13-14. Displaying the results of a search engine requires choice. A search engine does not create its own content if it chooses to return the most popular and heavily linked pages first, or chooses to move links to older and rarely-viewed pages last, so that the user must click through numerous other results to reach them.

Nor does a search engine create content if it chooses to use contextual clues about the user to anticipate what information will be most useful; if the user searches for "orioles" after previously searching for "red sox game time," the search engine does not create its own new content if it suggests a page with baseball scores rather than one about birdwatching. Nor does it create its own content by suggesting the official MLB website before a page someone made claiming to be about the Orioles but really trying to sell tupperware. In both cases the website is simply presenting the user with the information most likely to be relevant and useful.

There is no principled way to distinguish the search engine example from a company like YouTube or Yelp that seeks to recommend the most helpful and relevant content to their users. When the results presented to the user comes from information created by third parties, an online provider does not "create" new information by recommending certain results above others, but simply acts as a publisher for that third-party information.

CONCLUSION

For all the reasons set out above and in Respondent's brief on the merits, the Court should affirm the decision below and find that Section 230 immunizes Respondent's recommendations.

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