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 FOR PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[2] Those companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in multiple facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (nonvoting) members of PLAC.

Since 1983, PLAC has filed more than 1,200 briefs as *amicus curiae* in both state and federal courts, including in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC's members include owners and developers of websites that allow users to post content that the users create. Section 230 embodies Congress's deliberate choice that such websites should not be held liable either for the content posted by users or for their publishing or moderation decisions. See 47 U.S.C.

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

[2] See PLAC, *Corporate Member List*, https://bit.ly/3Gs1rBx (last visited Jan. 16, 2023).

§ 230(c). That policy decision, which has been in place for nearly thirty years—almost as long as the Internet has been in common use—has empowered PLAC's members to innovate, release new technologies, and provide endless resources and solutions for customers' personal and business needs. This ability to freely invest in and create and enhance the technologies that are now part of our everyday lives flows directly from Congress's determination that it is "the policy of the United States * * * to promote the continued development of the Internet * * * and interactive media" through the defense set forth in Section 230. 47 U.S.C. § 230(b)(1).

PLAC therefore has a strong interest in the preservation of that congressional judgment through the proper interpretation of Section 230. The lower courts have consistently and correctly held that Section 230 provides a broad defense to websites for harms alleged to result from the content posted by the third-party users of those websites. In an attempt to circumvent both those rulings and the plain language of the statute, some *amici* argue that Section 230 immunity does not apply to product liability, negligence, or similar common law claims against a website owner—which assert that the website is somehow defective or its owners acted negligently and thereby caused the plaintiff's claimed injury. In fact, Section 230 has no exception for product liability or other tort claims, and plaintiffs may not avoid Section 230's mandate through artful pleading that in substance would do what Section 230 prohibits: hold website owners liable for the harm caused by content created by others.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the scope of the protection against liability provided by 47 U.S.C. § 230—a statute that everyone agrees has fulfilled Congress's goal of "promot[ing] the continued development of the Internet and other interactive computer services" in a manner "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1), (2).

The question presented in the petition is whether the Section 230 defense—which provides in relevant part that an interactive computer service (ICS), a term that encompasses most websites, "shall [not] be treated as the publisher or speaker of any information provided by" a third party, 47 U.S.C. § 230(c)(1)—applies when a website uses an algorithm to determine which of the millions or billions of pieces of third-party content to highlight for users.

Some *amici* have raised a different issue, asserting that claims against websites grounded in product liability, negligence, and other common law principles are categorically excluded from the defense provided by Section 230. See CHILD USA Am. Br. 16-22; Electronic Privacy Information Center (EPIC) Am. Br. 13-18.

There is no occasion for the Court to address the issue here—this case does not involve one of these common law claims. But, the *amici* are wrong. Section 230 applies to these common law claims to the same extent and in the same manner that it applies to other causes of action. And the issue is important, because a significant number of lawsuits against websites assert product liability and other common law claims.

To begin with, Section 230's protections against liability are framed broadly, focusing on the conduct for which the provision bars liability. The statute states that no "interactive computer service"—in other words, no website—"shall be treated as the publisher or speaker of any information provided by" a third party or held liable "on account of * * * any action voluntarily taken in good faith to restrict access to or availability of" objectionable material. 47 U.S.C. § 230(c).

Moreover, far from excluding state-law claims, Section 230 expressly preempts state law by providing that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

Finally, Section 230 includes a provision excluding specified causes of action. That list does not include product liability, negligence, or other common law claims.

Amici's contrary arguments rest on policy or interpretations of Section 230 that are inconsistent with the statute's plain language. There simply is no basis for holding that Section 230 does not apply to these common law claims.

Lower courts consistently have applied Section 230 to these causes of action when the plaintiffs' contentions with respect to one or more elements of the claim requires proof of conduct that is protected by Section 230.

For example, they have recognized that plaintiffs cannot hold ICSs liable for content posted on their platforms by basing their lawsuit on negligence or product liability or failure to warn principles. Those

causes of action require the plaintiff to point to the third-party speech that allegedly caused the plaintiff's harm and the ICS's decision to make that speech available. Section 230 bars those claims because an ICS may not be held liable for either third-party speech on its platform or its decision to publish that speech.

The same analysis applies when plaintiffs seek to hold an ICS liable for its content moderation policies. Even if cast as a product liability claim (that the ICS has a defective product because the website failed to remove harmful content) or negligence (the ICS negligently failed to remove harmful content), those lawsuits are precluded by Section 230 because plaintiffs cannot establish the elements of their claims without pointing to the ICS's protected discretionary decisions about moderating the content on their platforms.

Finally, that analysis holds true when plaintiffs, like those here, seek to hold an ICS liable for the neutral publishing tools used by the ICS to sort, restrict, and otherwise display the content on a website. Basing liability on those tools "treat[s]" the ICS as the "publisher" of the third-party information because they involve actions intrinsic to the publishing function. In fact, Congress defined an ICS to include a provider of "enabling tools" that "filter, screen, allow, or disallow content." 47 U.S.C. § 230(f)(2) & (4).

A claim that a website is a defective product because of the way that its algorithm recommends conduct is, again, seeking to hold an ICS liable for protected conduct, because no plaintiff could establish the elements of that claim without pointing to the publishing decisions expressly protected by Section 230.

ARGUMENT

Section 230 Applies To Product Liability, Negligence, And Similar Claims To The Same Extent That It Applies To Other Causes Of Action.

The petition here presents a general question about the scope of the defense created by Section 230: Whether Section 230 provides immunity to ICSs when they recommend user-created content.

Some *amici* have raised a different issue—asserting that any defense provided by Section 230, regardless of its scope, may be invoked only with respect to particular causes of action, and does not apply at all to claims based on product liability, negligence, and other similar common law principles. See EPIC Am. Br. 13-22; CHILD USA Am. Br. 16-28.

Lawsuits against ICSs based on these causes of action have become commonplace. For example, a plaintiff may assert that an ICS's content moderation system was defectively designed or negligently applied because it did not remove the user-created content that supposedly caused the plaintiffs' injury. Or that the ICS negligently failed to warn the plaintiff about the user-created content alleged to have caused the injury. Or, that the ICS's algorithm for displaying user content was defectively or negligently designed and, by displaying particular user content, allegedly caused the plaintiff's injury.

Indeed, the Judicial Panel on Multidistrict Litigation recently established a new MDL for 28 cases asserting product liability and other common law claims alleging that "defendants' social media platforms are defective because they are designed to maximize user screen time," and that defendants "failed to warn the public" about the alleged resulting harms. Transfer

Order at 2, *In re: Social Media Adolescent Addiction/Personal Injury Prods. Liab. Litig.*, 22-md-3047 (N.D. Cal. Oct. 6, 2022), ECF No. 1.

The actions transferred into the MDL assert claims for design defect; manufacturing defect; failure to warn; negligent design; negligent failure to warn; negligent manufacturing; negligence; negligent misrepresentation; fraud; fraudulent concealment; conspiracy to commit fraud; unjust enrichment; violation of unfair trade practices; breach of express warranty; breach of implied warranty; fitness for a particular purpose; intentional infliction of emotional distress; negligent infliction of emotional distress; negligent failure to recall; and medical monitoring.

This case provides no occasion for this Court to address how Section 230 applies to these causes of action. But if the Court does reference the types of claims for which the Section 230 defense is available, it should make clear that product liability, negligence, and similar claims are not categorically excluded—and that Section 230 applies to them in the same manner that it applies to other causes of action.

As we explain below, a tort claim is barred by Section 230 if the plaintiff relies on conduct protected by Section 230—such as treating the ICS defendant as a "publisher or speaker" of the third-party content or imposing liability for the defendant's moderation decisions—in order to establish any element of that claim.[3]

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[3] There also may be state-law bases for dismissing product liability, negligence, and similar claims against ICSs. For instance, online platforms are typically categorized as services rather than tangible goods, and therefore are not subject to product liability claims. See, *e.g.*, *James* v. *Meow Media, Inc.*, 300 F.3d 683, 700-

A. Section 230 Does Not Exclude Product Liability Or Other Common Law Claims.

Congress drafted Section 230 in broad terms, focusing on the conduct for which the provision bars liability—and expressly identifying the types of legal actions to which the defense does not apply. Because those exclusions do not include product liability and similar common law claims, there is no basis for categorically precluding assertion of the Section 230 defense with respect to those causes of action.[4]

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01 (6th Cir. 2002) (videos games, movies, and websites were not "products" under Kentucky product liability law); *Quinteros* v. *Innogames*, 2022 WL 898560, at *7 (W.D. Wash. Mar. 28, 2022) (online video game is not a "product" for purposes of Washington product liability law); *Wilson* v. *Midway Games, Inc.*, 198 F. Supp. 2d 167, 172-73 (D. Conn. 2002) (video game is not a "product" within meaning of Connecticut Product Liability Act). Additionally, under many states' laws, an ICS does not have a duty to stop harmful third-party conduct on online platforms, which precludes claims for negligence and failure to warn. See, *e.g.*, *Dyroff* v. *Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1101 (9th Cir. 2019) ("No website could function if a duty of care was created when a website facilitates communication, in a content-neutral fashion, of its users' content."); *Beckman* v. *Match.com, LLC*, 743 F. App'x 142, 143 (9th Cir. 2018) (Match.com had no duty to warn under Nevada law because plaintiff had no "special relationship" with the website); *Gavra* v. *Google Inc.*, 2013 WL 3788241, at *3 (N.D. Cal. July 17, 2013) (" Google has assumed no affirmative duty to protect Plaintiffs from extortion * * * ."); *Godwin* v. *Facebook, Inc.*, 160 N.E.3d 372, 380 (Ohio Ct. App. 2020) (Facebook had no duty to stop user of its platform from committing crimes).

[4] The same conclusion applies with respect to statutory claims other than those encompassed within Section 230's express exclusions.

1. Section 230's text and context make clear that the provision applies broadly.

Section 230(c)(1) states, without limitation, 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." *Ibid.* And Section 230(c)(2) provides, again without exception, that "[n]o provider * * * of an interactive computer service shall be held liable on account of * * * *any action* voluntarily taken in good faith to restrict access to or availability of material that the provider * * * considers to be obscene * * * or otherwise objectionable." *Ibid.* (emphasis added).

"[I]t's a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (internal quotation marks omitted). Courts may not create exceptions that do not appear in the statutory text. "[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted).

There is nothing absurd about reading Section 230 exactly as it is written: to preclude any type of claim that would impose liability on a basis prohibited by the statutory text, no matter how the claim is pleaded.

Words in a statute also "must be read and interpreted in their context, not in isolation," *Southwest*

Airlines Co. v. *Saxon*, 142 S. Ct. 1783, 1788 (2022) (internal quotation marks omitted)—and the context surrounding Section 230(c) confirms its plain meaning.

To begin with, the provision expressly preempts state laws inconsistent with Section 230's protections. Section 230(e)(3) provides: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." And even a "State" itself is limited to enforcement actions that are "consistent with this section" and that do not impose inconsistent liability. *Ibid.*

Congress thus made clear that Section 230(c) applies to state-law claims, such as product liability and other common law causes of action.

That conclusion is confirmed by the absence of such claims from Section 230's list of excluded causes of action. The statute excludes:

- Specified federal statutory provisions relating to obscenity and sexual exploitation of children, and "any * * * Federal criminal statute";
- "any law pertaining to intellectual property";
- "the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law"; and
- Specified federal and state laws relating to sex trafficking.

47 U.S.C. § 230(e)(1)-(2) & (4)-(5).

Congress's enactment of these exclusions confirms the broad applicability of Section 230(c): by including these exceptions Congress made clear that it intended

the Section 230 defense to apply broadly to all possible claims other than those expressly excluded. In addition, Congress's failure to include common law torts on its list of excluded actions confirms that it intended Section 230(c) to apply to such claims. See *Dodd* v. *United States*, 545 U.S. 353, 357 (2005) (the Court will "presume that [the] legislature says in a statute what it means and means in a statute what it says" (internal quotation marks omitted)).

Excluding product liability and other common law claims would also be wholly inconsistent with Congress's statutory findings and policy statement, which it enacted as part of Section 230.

Congress determined that "interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens"; that they "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity"; and that Americans were "[i]ncreasingly * * * relying on interactive media for a variety of political, educational, cultural, and entertainment services." 47 U.S.C. § 230(a)(1), (3), (5).

And Congress recognized that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." 47 U.S.C. § 230(a)(4) (emphasis added).

Based on these findings, Congress declared that "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive

free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(1)-(2) (emphasis added).

That policy goal could not be achieved if plaintiffs could circumvent the protections set forth in Section 230(c) simply by styling their claims as product liability or negligence actions. The threat of tort liability—including punitive damages—for user content would act as a significant deterrent to the creation of a free market for interactive computer services, imposing the very regulation that Congress sought to preclude. See *Riegel* v. *Medtronics, Inc.*, 552 U.S. 312, 324 (2008) (state regulation includes requirements imposed by the state's "common-law duties").

Congress's declared purposes therefore lead to the same conclusion as Section 230's operative text: Section 230(c) applies broadly to all claims not expressly excluded in Section 230(e). Because product liability and other common law actions are not excluded—and Section 230(e)(3) expressly preempts inconsistent state laws—Section 230(c) plainly applies to these claims.

2. *Amici*'s contrary arguments are precluded by Section 230's plain language.

The *amici* asserting that product liability and similar common law claims should be categorically excluded from Section 230's protections do not address the broad statutory text, or Congress's express exclusion of other claims. They instead rest their arguments on policy grounds, or on their unjustifiably narrow views of the scope of Section 230(c), which they contend would exclude all product liability claims.

Amici are wrong on all counts.

Arguments based on policy cannot override the words of a statute; "the text of a law controls over purported legislative intentions unmoored from any statutory text." *Oklahoma* v. *Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). But *amici* are wrong about Congress's policy as well.

For example, *Amicus* CHILD USA asserts that Congress "sought to tackle only one" "issue": "the ease with which children could access sexually explicit materials" online, and excluding product liability claims supposedly is consistent with that goal. CHILD USA Am. Br. 4 (asserting that a broad construction of Section 230 "impedes Congress's goal to protect children from harmful online material").

It is true that one of the goals specified by Congress was to encourage "the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." 47 U.S.C. § 230(b)(4). But—as discussed above (at 11-12)—Congress also sought to promote "the continued development of the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market" for such services "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1) & (2).

Congress reconciled these twin goals by limiting lawsuits against websites for third-party content and for the websites' content moderation decisions, 47 U.S.C. § 230(c), and at the same time empowering parents to be able to restrict access to that material in their own homes, see *id*. § 230(a)(2) (recognizing that

interactive computer services "offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops").[5]

Even Congress's reference to "trafficking in obscenity, stalking and harassment by means of computer" focused solely on federal criminal penalties—referring to "ensur[ing] vigorous enforcement of Federal criminal laws to deter and punish" such conduct. 47 U.S.C. § 230(b)(5). That tracks the statutory text's wholesale exemption of federal criminal prosecutions. *Id*. § 230(e)(1). Congress thus made clear its intent to adopt only narrow, targeted exemptions from Section 230's protections.[6]

CHILD USA also suggests that this Court should narrow Section 230's reach because some of the websites protected by Section 230 today are owned by

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[5] CHILD USA's interpretation of the legislative history also has been refuted by one of the Members of Congress closely involved in drafting Section 230, who has explained that Section 230's twin purposes were "protecting speech and privacy on the internet from government regulation, and incentivizing blocking and filtering technologies that individuals could use to become their own censors in their own households." See Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, UNIV. RICH. J.L. & TECH. ¶ 24 (2020), https://bit.ly/3ixNVnU (last visited Jan. 16, 2023).

[6] When Congress in 1998 added new prohibitions relating to access of such materials by minors (see Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 *et seq*. (adding 47 U.S.C. § 231)), it at the same time amended Section 230 to exempt actions under the new provision. That is further evidence that Congress itself interpreted Section 230 broadly, to cover all actions not expressly excluded—even actions expressly targeting wrongful conduct relating to children.

large companies and, more generally, because websites have become more intricate in the several decades since Congress adopted that provision. Am. Br. 17. But those changes do not authorize this Court to alter Section 230's meaning. "[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands." *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) (quoting *INS* v. *Chadha,* 462 U.S. 919, 951 (1983)). Changes in the law are up to Congress—which has actively monitored Section 230 and amended the law multiple times. Google Br. 30.

Finally, CHILD USA contends that ICSs are subject to liability as "manufacturers of products" and that such liability does not involve "content-derived harm," and therefore does not implicate Section 230. Am. Br. 19. In its view, "manufacturer" liability is based on a plaintiff's "ability to access the social media platform" that has failed to implement appropriate "safety features," and "not from the contents" of third-party posts. *Id*. at 18.

But the harm suffered by the plaintiff in the case discussed by CHILD USA was caused by the plaintiff's interaction with the third-party content—there was no harm, and therefore no tort claim, before that interaction occurred. The availability of the user-supplied content on the website therefore was necessary to prove an essential element of the plaintiff's claim (harm caused by the defendant), which is the reason Section 230 applied. See *Doe* v. *MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (explaining that the plaintiff's claim based on "failure to implement measures that would have prevented" communication

between the third-party and the plaintiff was "merely another way of claiming that MySpace was liable for publishing the communications" between the third-party and the plaintiff). See also pages 17-24, *infra* (discussing application of Section 230 to product liability and negligence claims).

Amicus EPIC's argument relies on its different—but also unjustifiably narrow—interpretation of the scope of the Section 230 defense. It asserts that Section 230 only protects an ICS from the claims that the same plaintiff could bring against the third party who created and posted the content that is the basis for the plaintiff's claim—essentially limiting the provision to defamation claims. EPIC Am. Br. 4-5, 7 (Section 230 means "that the interactive computer service should not be put in the same shoes as an information content provider").

Google (Br. 46-47) explains the multiple flaws in this argument. Put simply, if Congress wanted to create such a limited defense, it could simply have said that in the statute. Instead, Congress provided that no ICS may be "treated as the publisher or speaker" of harmful content posted by a third party. 47 U.S.C. § 230(c)(1). "Treated" is a broad term that captures any attempt by a plaintiff to impose liability based on the third party's content. Indeed, if plaintiffs could escape Section 230's restrictions simply by recasting their claim as some other tort that they could not bring against the original content creator, then Congress's expressly stated goals for Section 230 would be easily circumvented.

In sum, product liability and similar common law claims are not categorically excluded from Section 230's protections. The provision applies to those

claims in the same manner and to the same extent that it applies to other causes of action.

B. A Product Liability Or Other Tort Claim Is Barred By Section 230 If The Plaintiff Seeks To Satisfy An Element Of The Claim With Conduct Protected By Section 230.

Section 230 applies to product liability and other common law claims in the same manner that it applies to other causes of action. The claim is precluded if the plaintiff's contention with respect to any element of the tort claim either (a) "treat[s]" an ICS "as the publisher or speaker of any information provided by" a third party; or (b) imposes liability "on account of * * * any action voluntarily taken in good faith to restrict access to or availability of" objectionable material. 47 U.S.C. § 230(c).

Product liability claims often will infringe on these protections. We discuss below some of the frequently-repeated situations in which courts have correctly held that Section 230 precludes liability.

That does not mean that every product liability or other tort claim against a website is precluded by Section 230. For example, in *Jane Doe No. 1* v. *Backpage.com, LLC*, a website knowingly accepted anonymous advertising payments from sex traffickers who were using the website as part of their criminal activity. See 817 F.3d 12, 17 (1st Cir. 2016). Section 230 should not provide a defense for that conduct. See Google Br. 41-42.

And in *Doe* v. *Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), a plaintiff brought suit against a website's owners for negligent failure to warn, alleging that the owners knowingly remained silent about two

men who were using information on the website to locate and assault women. *Id*. at 848. Section 230 did not bar the plaintiff's claim because not a single element of that claim relied on third-party content on the website—in fact, the assailants in question had never even posted on the website. *Id*. at 848-49.

Even with respect to claims to which Section 230 applies, the plaintiff still "may sue the third-party user[s] who generated the content" that harmed them. *MySpace*, 528 F.3d at 419. As Judge Wilkinson put it, "Congress made a policy choice * * * not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran* v. *America Online, Inc.,* 129 F.3d 327, 330-31 (4th Cir. 1997).[7]

1. Claims based on the plaintiff's ability to view the third-party content on the defendant's website.

Plaintiffs have brought lawsuits against ICSs styled as various torts that rely, at bottom, on the availability on the defendant's website of the third-party content that caused harm to the plaintiff. These claims generally contend that a service should not have permitted the posting of the third-party speech in question and that the plaintiff's injury resulted from that third-party speech.

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[7] This brief addresses claims asserting that the allegedly defective or negligently designed product is the ICS's website or the service provided through such a website; we do not address claims in which the allegedly defective product is a physical good that was purchased through a website. See *Erie Ins. Co.* v. *Amazon.com, Inc.*, 925 F.3d 135, 139-140 (4th Cir. 2019); see also U.S. Am. Br, 16 (referring to such claims).

Whether framed in terms of product liability (*i.e.*, a properly designed website would not have allowed that content to be posted), failure to warn (the website should have warned users about the harmful content), negligence (the website had a duty to prevent the harmful content), or some other tort theory, all such claims are barred by Section 230 because they all necessarily rest on the contention that the plaintiff's harm was caused by the availability of third-party speech on the defendant's website and that the defendant was responsible for the harm caused by that speech.

For instance, consider a claim asserting that a website acted negligently because it allowed harmful conduct to be posted to the platform. The plaintiff would have to establish that the ICS had a duty to the plaintiff, that the ICS breached that duty, and that the breach caused the plaintiff's injury. See generally *Restatement (Second) of Torts* § 281 (2022). The plaintiff necessarily would point to third-party speech and to the ICS's decisions whether to publish that speech to satisfy each element of the claim. In other words, the plaintiff would have to show that the ICS had a duty to prevent harmful content from being uploaded to its website, that the ICS failed to prevent harmful content from appearing on the site, and that the harmful content then harmed the plaintiff. Because those contentions would "treat[]" the website as the "publisher or speaker" of the third-party information, Section 230 is a complete bar to that claim.

Similarly, Section 230 would bar a failure-to-warn claim asserting that a plaintiff was harmed by speech posted by third parties on an Internet platform. Such claims require breach of a duty to warn, *Restatement (Second) of Torts* § 402A, and imposition of such a duty

would "treat[]" the website as the "publisher or speaker," 42 U.S.C. § 230(c)(1). Moreover, the plaintiff's proof of causation would be the availability on the website of the third-party content that caused the plaintiff's harm, which similarly "treat[s]" the website as the "publisher or speaker." *Id.*

The United States agrees that these claims "'treat[]' [the website] as a 'publisher or speaker' by holding the platform liable for allowing (or failing to remove) unlawful content provided by" a third party. U.S. Am. Br. 25-26 (quoting 47 U.S.C. § 230(c)(1)).

2. Claims based on the ICS's content moderation practices.

Subjecting a website to liability for third-party content based on alleged defects in the website's content moderation policies also is prohibited by Section 230, no matter how the claim is styled. That is because the choice not to remove content is a publishing decision, and therefore falls squarely within Section 230's requirement that no ICS "shall be treated as the publisher" of third-party content on its platform. 47 U.S.C. § 230(c)(1). Further, because Section 230(c)(2) protects ICSs from being held liable for their decisions to "restrict access to or availability of" objectionable content, it also protects them from the failure to remove content under the argument that, by removing some objectionable content, the ICS has the obligation to remove all such content. 47 U.S.C. § 230(c)(2).

Indeed, even those who believe that Section 230 has a limited scope agree that ICSs cannot be held liable for failing to remove content. See, e.g., *Force* v. *Facebook, Inc.*, 934 F.3d 53, 85 (2d Cir. 2019) (Katzmann, C.J., concurring) ("Of course, the failure to remove terrorist content, while an important policy

concern, is immunized under § 230 as currently written."); U.S. Am. Br. 20, 25-26.

For example, consider a claim that an ICS failed to remove photos of a plaintiff that the plaintiff's ex-boyfriend had posted to the ICS's platform. See *Barnes* v. *Yahoo!, Inc.*, 570 F.3d 1096, 1099-1100 (9th Cir. 2009). Such a claim could be framed in product liability—that the ICS's website design was defective because the content was not removed. Or it could be styled as a claim for the negligent provision of services—under which the plaintiff would have to show that the ICS undertook a service and then performed that service negligently, to the plaintiff's detriment.

Either way, the claim would rest on the contention that the plaintiff negligently failed to remove the third-party content. It therefore would be seeking to hold the ICS liable for its content moderation policy and the choices it made as a publisher. See *Barnes*, 570 F.3d at 1102.

Certainly a plaintiff cannot "escape section 230(c) by labeling as a 'negligent undertaking' an action that is quintessentially that of a publisher." *Barnes*, 570 F.3d at 1103. See also *Gavra* v. *Google Inc.*, 2013 WL 3788241, at *1-2 (N.D. Cal. July 17, 2013) (plaintiffs could not sue YouTube for failing to remove videos accusing an attorney of "adultery, fraud, and drug abuse" because plaintiffs were asserting a "duty of care requiring [Google] to remove videos from its website" and that "duty [would] exist[] only if the court treats Google as a publisher of the content on its websites," which Section 230 prohibits).

Some plaintiffs have sought to bring tort claims under the theory that an ICS could have chosen to implement different content moderation tools. But these

claims, too, are barred by Section 230, because plaintiffs would be seeking to hold the ICS liable for its content moderation decisions—what third-party content it chose to publish and what content it chose to exclude. *In re Facebook, Inc.*, 625 S.W.3d 80, 93 (Tex. 2021) ("Regardless of whether Plaintiffs' claims are couched as failure to warn, negligence, or some other tort of omission, any liability would be premised on second-guessing of Facebook's decisions relating to the monitoring, screening, and deletion of [third-party] content from its network." (internal quotation marks omitted)).

3. Claims based on neutral publishing tools.

Some plaintiffs have argued that the tools that ICSs use to sort, restrict, and otherwise display content can themselves support product liability and other common law claims, and that claims based on those publishing tools are exempt from Section 230's reach because they are based on the website's design and not on third-party content. Those contentions resemble petitioners' claim here.

Google explains that such claims are precluded by Section 230 because such claims "treat[]" the ISC as "the publisher" of the third-party content and, moreover, Section 230(f)(2) & (4) expressly define "interactive computer service" to include these functions. Google Br. 5-9, 22-28, 33-52. Indeed, without these tools, websites would not be functional—they would be an unrelenting and discordant stream of unrelated posts, and would make as much as sense as print media that published content in the order in which it was received.

Thus, product liability, negligence, and other tort claims that seek to hold ICSs liable for these neutral sorting tools are attempting to impose liability for the very publishing decisions that Section 230 protects.

For example, consider a claim—like petitioners' here—asserting that a website's algorithm presented third-party content, and that the plaintiff was harmed as a result of viewing the third-party content. A product liability claim would have to demonstrate that the algorithm was defectively designed and a negligence claim would have to show that it was negligently designed. In both situations, the website would be "treated as the publisher" of the information—because determining how and which third-party content to present is an archetypal publishing function. Accord, *Dryoff* v. *Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097-98 (9th Cir. 2019) (recognizing that algorithms and other sorting tools are "content-neutral website functions" that "facilitate the communication and content of others" but are not "content in and of themselves"); *Kimzey* v. *Yelp! Inc.*, 836 F.3d 1263, 1269-71 (9th Cir. 2016) (explaining that Yelp's five-star rating system, which "reduces [inputs from third parties] into a single, aggregate metric" is a "neutral tool" that "did not amount to content development or creation" (internal quotation marks omitted)).

Newspapers decide which content will appear on the front page—and on the front pages of individual sections and on every other page. Television and radio networks decide which content will appear and when

in their schedules. Websites using algorithms to determine which content appears are indistinguishable from those decisions.[8]

Section 230 recognizes that reality by, among other things, including the "display," "organiz[ation]," and "reorganize[ation]" of content in the definition of "access software provider" and defining "interactive computer service[s]" protected by Section 230 to include access software providers. 47 U.S.C. § 230(f)(2) & (4). That further confirms that Congress intended Section 230(c)'s protections to encompass those activities.

CONCLUSION

The judgment of the court of appeals should be affirmed.

[8] Indeed, the New York Times website uses an algorithm to determine which content will be presented to website users (see New York Times, *Personalization*, https://bit.ly/3kt7FcU (last visited Jan. 17, 2023))—demonstrating that selecting which items from a large volume of content will be presented to a reader is a quintessentially publishing function.

Respectfully submitted.

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