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 THE KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The Knight First Amendment Institute at Columbia University ("Knight Institute" or "Institute") is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government.

Amicus has a particular interest in this case because the Court's interpretation of Section 230 of the Communications Decency Act of 1996—and, in particular, the Court's determination of whether or when Section 230's liability shield protects algorithmic recommendations—will have far-reaching implications for free speech online.

SUMMARY OF ARGUMENT

Millions of Americans turn to the internet multiple times every day—or practically continuously—to learn the news, communicate with others, hear from political leaders, advocate for political change, listen to music, watch movies, participate in (virtual) meetings, consult dynamic

[1] Both parties consent to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

maps, and search for information. These activities—all of which involve the exercise of First Amendment rights—are made possible, or at least made easier and more rewarding, by recommendation algorithms.

Search engines rely on recommendation algorithms to direct users to results likely to be most useful to them. Social media platforms use recommendation algorithms to determine which posts any given user is most likely to find engaging (or interesting, or useful), and which other users that particular user might want to interact with. It is important to recognize that recommendation algorithms can sometimes have pernicious effects—for example, amplifying content that is sensational, extreme, false, or polarizing. Nonetheless, without recommendation algorithms, many of the "vast democratic forums of the Internet," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. Am. C.L. Union*, 521 U.S. 844, 868 (1997)), would be useless jumbles of information, like libraries of randomly shelved books, but on an almost unimaginable scale.

This case presents the question of whether recommendation algorithms are covered by the immunity that Congress extended to platforms through Section 230 of the Communications Decency Act. The best way to interpret the statute is to read it to mean that platforms are immunized for their use of recommendation algorithms unless they materially contribute—in a manner that goes beyond mere amplification of speech—to the alleged illegality. This reading is faithful to the statute's

text. It has the effect of immunizing platforms for decisions that are inextricable from publication, but not for design, engineering, or other decisions that cause harm.

It should be acknowledged that adopting this framework would immunize some conduct that causes real harms, because some harmful conduct is the result of mere amplification and is therefore inseparable from publication. But categorically excluding recommendation algorithms from the scope of Section 230's coverage would have devastating consequences for free speech, as explained below. And legislatures can address or mitigate the harms associated with amplification through other mechanisms, including by requiring platforms to be more transparent,[2] establishing legal protections for journalists and researchers who study the platforms,[3] limiting what information

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[2] *See* Laura Edelson, Jason Chuang, Erika Franklin Fowler, Michael M. Franz & Travis Ridout, *A Standard for Universal Digital Ad Transparency*, Knight First Amend. Inst. at Columbia Univ. (Dec. 9, 2021), https://perma.cc/9QWA-X7FB; Ramya Krishnan, *How the Supreme Court Could Encourage Platform Transparency*, Knight First Amend. Inst. at Columbia Univ. (Jan. 9, 2023), https://perma.cc/2FKY-RN2H.

[3] *See* Alex Abdo, Ramya Krishnan, Stephanie Krent, Evan Welber Falcón & Andrew Keane Woods, *A Safe Harbor for Platform Research*, Knight First Amend. Inst. at Columbia Univ. (Jan. 19, 2022), https://perma.cc/WP5A-EVH9; Bennett Cyphers & Cory Doctorow, *The New ACCESS Act is a Good Start. Here's How to Make Sure it Delivers.*, Elec. Frontier Found. (June 21, 2021), https://perma.cc/R2VA-BPDC.

platforms can collect and how they can use it,[4] and mandating interoperability and data portability.[5]

Under the framework proposed here, Petitioners' claims must be dismissed. While Petitioners use the language of targeting and selectivity, the gravamen of their claim is that YouTube amplified particular content. Given the structure of the statute, mere amplification, which is inseparable from publishing, cannot render an information service provider "responsible, in whole or in part, for the creation or development" of the information at issue. 47 U.S.C. § 230(f)(3). Respondent is shielded by Section 230 here because amplification, without more, does not amount to a "material contribution" to the alleged illegality.

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[4] *See* Jameel Jaffer & Ramya Krishnan, *Clearview AI's First Amendment Theory Threatens Privacy—And Free Speech, Too*, Slate (Nov. 17, 2020), https://perma.cc/ZZ98-M9LB; *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, Fed. Trade Comm'n (Aug. 11, 2022), https://perma.cc/TYS7-NUYV.

[5] *See* Daphne Keller, *Amplification and its Discontents*, Knight First Amend. Inst. at Columbia Univ. (June 8, 2021), https://perma.cc/LAH2-7K6D.

ARGUMENT

I. Recommendation algorithms are crucial to free speech online.

A. Without recommendation algorithms, it would be virtually impossible to search the internet.

Without a way for users to find what they are looking for, the internet would be a useless jumble of information, akin to a library of randomly shelved books, but on an immense scale. Google, the dominant search engine globally, processes more than 8.5 billion searches per day, or more than 3.1 trillion searches per year.[6] Most major websites—including the sites of news organizations, schools, museums, theatres, courts, and bookstores—have search engines built into them. Virtually everyone who uses the internet uses search engines, and most of us use search engines multiple times every day.

By relying on recommendation algorithms, search engines help users find what they are looking for. When a user enters a query into Google, Google must determine which web pages, among the hundreds of billions on the internet, are most likely to be responsive.[7] Google's algorithms allow it to

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[6] Maryam Mohsin, *10 Google Search Statistics You Need to Know in 2022*, Oberlo (Jan. 2, 2022), https://perma.cc/U48F-NGXZ.

[7] *How Google Search organizes information*, Google, https://perma.cc/Z65W-W8CG ("When you Search, Google looks through hundreds of billions of webpages and other content stored in our Search index to find helpful

"provide[] a list of links to websites, ordered in what Google deems to be of descending relevance to the user's search terms." *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123, 125 (2d Cir. 2009); *see also Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144, 150–51 (4th Cir. 2012) ("When an Internet user enters a word or phrase—the keyword or keywords—into Google's search engine, Google returns a results list of links to websites that the search engine has determined to be relevant based on a proprietary algorithm.").

There are important differences in the way that search engines are designed. For example, some search engines, like Google, provide search results that are targeted based in part on information about the user, such as the user's demographics, location, search history, and interests. *See, e.g.*, *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1134 (9th Cir. 2022) ("Google uses proprietary algorithms" that "take into account, among other things, . . . the user's past behavior and browser settings, to identify and rank relevant webpages."). Other search engines, like DuckDuckGo, do not target search results in the same manner, instead relying almost exclusively on a user's search terms to make recommendations.[8] For good reason, Congress is considering legislation that would limit

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information—more information than all of the libraries of the world.").

[8] *How Anonymous is DuckDuckGo?*, Spread Privacy (last visited Jan. 18, 2023), https://perma.cc/WX32-4TKY.

what information search engines can collect about their users, and how they can use that information.[9]

For present purposes, the important point is that search engines could not operate without recommendation algorithms. This would be true even if Congress passed privacy legislation, as it should. Every search engine "uses algorithms . . . to determine what shows up first in the list of results, what shows up second, and so on," because "[o]therwise, for every search you'd just get a completely random set of results, which wouldn't be very useful to you."[10]

B. Without recommendation algorithms, social media platforms would lose much of their value as forums for speech.

This Court has recognized that social media platforms have become among the most important places "for the exchange of views," enabling users "to engage in a wide array of protected First Amendment activity on topics 'as diverse as human thought.'" *Packingham*, 137 S. Ct. at 1735–36 (quoting *Reno*, 521 U.S. at 852). For most

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[9] *E.g.*, American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8152/text.

[10] *Is DuckDuckGo an "unfiltered" search engine?*, DuckDuckGo, https://perma.cc/7MYW-ARFJ.

Americans, these platforms are now part of everyday life.[11]

Recommendation algorithms are as important to the functioning of social media platforms as they are to the functioning of search engines. They make it possible for social media platforms to provide users with content that will interest them, and to determine which other users those users might be interested in interacting with. As with search engines, there are important distinctions in the way that different social media platforms are designed. Some platforms rely on "reverse-chronological recommendation algorithms," which sort content by time and "display[] the most recent items in reverse-chronological order."[12] Most of the most popular social media sites today use "deep learning recommendation algorithms," which use machine learning to amplify "content users will find compelling."[13]

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[11] For example, based on a recent survey, a large majority of American adults use YouTube and Facebook, and a smaller but significant number use Instagram, LinkedIn, Snapchat, Twitter, and TikTok. Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, Pew Rsch. Ctr. (Apr. 7, 2021), https://perma.cc/6UN3-N7RP. According to another recent survey, nearly all teens use YouTube, and a substantial majority use TikTok, Instagram, and Snapchat. Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, Pew Rsch. Ctr. (Aug. 10, 2022), https://perma.cc/RDR7-HH8W.

[12] Chris Meserole, *How do recommender systems work on digital platforms?*, Brookings (Sept. 21, 2022), https://perma.cc/C4TK-SQ9E.

[13] *Id.*

Twitter used a reverse-chronological recommendation algorithm for its first ten years, from 2006 to 2016, and still gives users the option to see content in reverse-chronological order.[14] In 2011, Facebook pioneered the use of a deep learning recommendation algorithm to generate its News Feed feature, "an infinite stream of updates personalized to you based on your interests."[15] Other platforms, like YouTube, followed suit, and now "more than 70 percent of the time people spend watching videos on [YouTube] is . . . driven by YouTube's [deep learning] algorithmic recommendations."[16]

As with the recommendation algorithms that underlie search engines, the recommendation algorithms that underlie some social media feeds rely on information collected or inferred about the user—for example, their age, interests, browsing behavior, and the like. New privacy legislation might limit what information social media platforms can collect about their users, and how they can use that information. Even if Congress enacts new privacy legislation, however, recommendation algorithms of one form or another will remain important to the usability and value of most social media platforms.

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[14] Anna Chung, *News Feeds, Old Content: A Brief History of Algorithmically Curated Feeds on Facebook and Twitter*, Medium (Apr. 19, 2019), https://perma.cc/7DCC-6MJF.

[15] Casey Newton, *How YouTube perfected the feed*, The Verge (Aug. 30, 2017), https://perma.cc/5UZW-TSMY.

[16] *Id.*

II. Categorically withdrawing immunity for algorithmic recommendations would have far-reaching implications for free speech online.

Categorically excluding algorithmic recommendations from the scope of Section 230's protection—which is what Petitioners have asked the Court to do—would require search engines and social media platforms to radically change how they operate in order to avoid the risk of liability. These changes would have profoundly negative consequences for free speech online.[17]

As it has been interpreted by the lower courts, Section 230 provides important protections to search engines and social media platforms for their algorithmic recommendations. The protection is substantive, in that it shields them from a broad array of claims arising out of their publication of third-party content. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019). It is also procedural, in that it ensures that these claims are dismissed "at the early stages of litigation," protecting internet intermediaries "from having to fight costly and protracted legal battles" in the first place. *Jackson v. Airbnb Inc.*, CV 22-3084 DSF, 2022 WL 16753197, at *1 (C.D. Cal. Nov. 4, 2022) (quoting *Fair Hous.*

[17] Earlier in this litigation, Petitioners focused specifically on "targeted" recommendations, but they failed to offer any workable way of distinguishing targeted recommendations from non-targeted ones. Targeting is generally (and perhaps always) a matter of degree, as the Second Circuit observed in *Force v. Facebook, Inc.*, 934 F.3d 53, 66–67 (2d Cir. 2019).

Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc)).

These protections are important to search engines and social media platforms because, as discussed above, recommendation algorithms are essential to their operation, and to the value they provide to their users. Every search result reflects an algorithmic recommendation, as does nearly every post displayed to users of major social media platforms. Because recommendation algorithms are so essential to the operation of search engines and social media platforms, categorically excluding them from Section 230's protection would have far-reaching consequences. In particular, it would require platforms to take down content or disable algorithmic recommendations in order to avoid the possibility of liability.

The threat of liability would be real. On Petitioners' theory of Section 230, any public official accused, but not convicted, of engaging in malfeasance could sue Google for listing news stories about those accusations in response to a user's query. A Hollywood director alleged to have abused his position of authority to sexually assault an aspiring actor could sue the platforms for recommending stories about those allegations. Scientists criticized for their research conclusions could sue the platforms for circulating that criticism. Even if the suits were not successful, the expense of defending against them would be significant.

In response to the risk of liability, the companies would have little choice but to disable

recommendation algorithms that make their sites work for their users, or to take down large swaths of constitutionally protected speech.[18] It is important to understand here that the platforms themselves have little stake in whether any particular category of speech stays up. In response to even a small risk of liability, the platforms are likely to remove not only speech that is likely to lead to civil liability, but also speech that *might* lead to civil liability, as well as speech that might give rise to litigation, even if the litigation is likely to be unsuccessful. Rather than risk any of these results, platforms will simply take third-party speech down. Perhaps the speech that platforms take down will include the kind of speech that Petitioners complain of in this case. But it will certainly include a great deal of other speech as well, including speech that is indisputably important to public discourse. Overrepresented in the removed speech would probably be the speech of political minorities, speech that is politically controversial or that relates to politically controversial topics, and speech that is critical of the powerful.

The possibility that intermediary liability will lead to suppression of speech is one the Court has highlighted in other contexts. For example, in *Smith*

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[18] *See* Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, Knight First Amend. Inst. at Columbia Univ. (Apr. 6, 2018), https://perma.cc/C9RM-8KT6 (noting that "search engines . . . offer algorithmic ranking as their entire value proposition"); *id.* (noting that "[w]hether [a social media platform] sorts content chronologically, alphabetically, by size, or some other metric, it unavoidably imposes a hierarchy of some sort").

v. California, the Court struck down a Los Angeles ordinance that imposed strict criminal liability on a bookstore that sold obscene books, reasoning that, "[i]f the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed." 361 U.S. 147, 153 (1959).

Smith was only the first in a line of cases that recognized the dangers that imposing intermediary liability posed to free speech. The plurality opinion in *Manual Enterprises, Inc. v. Day* held that magazine publishers could not be held liable for advertisements that offered nudist photographs without proof the publisher *knew* at least some of the material was obscene. 370 U.S. 478, 492 (1962). There, the plurality recognized that because "publishers cannot practicably be expected to investigate each of their advertisers," and because "the economic consequences" of a single violation "might entail heavy financial sacrifice," it was likely that publishers would simply "refrain from accepting advertisements from those whose own materials could conceivably be deemed objectionable by the Post Office Department," thereby depriving the public of materials "which might otherwise be entitled to constitutional protection." *Id.* at 493.

As the Court recognized in *Bantam Books, Inc. v. Sullivan*, the threat of liability can chill intermediaries into removing important speech even if no enforcement action is ever brought. 372 U.S. 58 (1963). In that case, a Rhode Island commission violated the First Amendment by *threatening* booksellers with liability if they sold or displayed

any books to minors that the commission had deemed "objectionable." *Id.* at 61, 63–64. Though the commission had not seized or banned any books, the commission's "informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation"—suppressed protected speech nonetheless, because they made distributors unwilling to distribute many books. *Id.* at 67.

If the Court were to exclude recommendation algorithms from Section 230's coverage, the incentive for social media platforms and search engines to avoid liability by suppressing broad swaths of content would be especially strong. Again, platforms have little to lose by taking down content that might lead to civil liability. And with millions, even billions, of pieces of content uploaded every day,[19] individualized review is not feasible. Platforms would respond to the risk of intermediary liability by taking down large amounts of content, including content that is important to public discourse.[20]

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[19] *See* Resp. Br. at 1 ("Each day users worldwide generate over 500 million tweets, 294 billion emails, 4 million giga-bytes of Facebook data, and 720,000 hours of new YouTube content.").

[20] Keller, *supra* note 18 ("When platforms face liability for user content, they have strong incentives to err on the side of caution and take it down, particularly for controversial or unpopular material.").

III. The use of recommendation algorithms is protected by Section 230 unless they materially contribute to the illegality, which is not the case here.

Section 230(c)(1) is best read to mean that platforms are immunized for their recommendation algorithms except where they materially contribute—in a manner that goes beyond mere amplification of speech—to the alleged illegality. This reading, which many lower courts have already adopted, is faithful to the statute's text and purpose. It has the effect of insulating internet platforms from liability for publishing others' content, while also providing an avenue for holding platforms liable when they are meaningfully responsible for the alleged harms. Under this reading of the statute, Petitioners' claims must be dismissed.

At bottom, Petitioners' claims seek to treat YouTube as the publisher of terrorism-related speech. Petitioners argue that YouTube stepped beyond Section 230's protection by amplifying that speech, but mere amplification is inextricable from publication, and so it cannot—as a statutory or common-sense matter—convert the platform from a publisher of speech into a developer of that speech. To see that Petitioners' complaint is fundamentally about mere amplification, it is helpful to recognize that the harm they complain about would be mitigated if Respondents amplified the speech less, and augmented if they amplified it more. This distinguishes the complaint at issue here from superficially similar ones that allege, e.g., that a

platform violated an anti-discrimination law by directing content to some groups and not others.

While the Court should dismiss Petitioners' claims, it should take care not to suggest that the statute would immunize platforms that contribute to illegality in ways that go beyond mere amplification of content. As explained below, the interpretation *amicus* endorses here would not immunize a platform for taking a variety of other actions to alter, solicit, or wrongfully display user-generated content.

A. The "material contribution" test is faithful to the text of Section 230.

Section 230(c)(1) provides 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." 47 U.S.C § 230(c)(1). On its face, it applies only when a platform is being treated as a publisher, and only when the published information has been provided by a third party.

The first of these limitations restricts immunity to claims that seek to hold a platform liable "as the publisher or speaker" of information. 47 U.S.C. § 230(c)(1). If a claim does not treat a platform as a publisher or speaker, then Section 230(c)(1) simply does not apply, and the claim may proceed. In this case, for example, the Ninth Circuit properly determined that Petitioners' revenue-sharing claims did not rest on the ISIS-related content at issue because YouTube could avoid liability without

modifying its publication of that content. *Gonzalez v. Google LLC*, 2 F.4th 871, 898 (9th Cir. 2021) (citing *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019)).

If a claim *does* treat a platform as a publisher or speaker of information, then the applicability of Section 230(c)(1) turns on the statute's second limitation, which asks whether the information at issue was "provided by another information content provider." 47 U.S.C. § 230(c)(1). The statute goes on to define an "information content provider" as anyone "responsible, in whole or in part, for the creation or development" of the information at issue. *Id.* § 230(f)(3).

Sometimes, it is easy to determine whether a platform is "responsible, in whole or in part, for the creation or development" of the content it publishes. For example, in *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093–94 (9th Cir. 2021), the plaintiffs argued that the social media platform Snapchat, which allows users to take photos and videos with a smartphone camera and share them with each other, could be held liable for its allegedly negligent design of a "Speed Filter" that encouraged users to drive at excessive speeds. The Speed Filter allowed users to "superimpose a 'filter' over the photos or videos that they capture through Snapchat" and "record their real-life speed." *Id.* at 1088 (internal quotation marks omitted). The plaintiffs' children used the Speed Filter to record the excessive speed at which they were traveling just before the fatal crash that gave rise to the lawsuit. *Id.*

The Ninth Circuit had little trouble concluding that, even assuming the plaintiffs' negligent design claim treated Snapchat as a publisher, the claim "simply does not rest on third-party content," i.e., "the content that Snapchat's users create with the Speed Filter." *Id.* at 1093. Instead, it "rests on nothing more than Snap's 'own acts'" in inducing Snapchat users to drive at excessive speeds. *Id.* at 1094 (quoting *Roommates*, 521 F.3d at 1165).

Other times, however, it is less obvious whether a platform is responsible, at least "in part," for the creation or development of information. To address that question in harder cases, most of the circuit courts have applied some version of the material contribution test, which asks whether the platform "materially contributed" to the alleged illegality. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (en banc). If the platform materially contributed, then the claim can proceed because it would hold the platform liable "for the creation or development" of that information; if the platform did not materially contribute, then the platform is immune as the mere publisher of information "provided by another information content provider." 47 U.S.C. § 230(c)(1), (f)(3).

The Ninth Circuit, which first articulated the material contribution test, based it on its interpretation of the term "development" in Section 230(f)(3). That term, the court observed, "refer[s] not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness." *Roommates*, 521 F.3d at 1167–68. As the Ninth

Circuit observed in this case, "making a material contribution does not mean merely taking action that is necessary to the display of the allegedly illegal content, but rather, being responsible for what makes the displayed content allegedly unlawful." *Gonzalez*, 2 F.4th at 892 (internal quotation marks and citations omitted).[21]

Although the *amicus* brief submitted by the United States does not address the material contribution test, it provides a thorough analysis of the statutory term "development"—one that firmly supports the material contribution test. Taking dictionary definitions, contextual considerations, and adjacent subsections into account, the brief concludes that "'development' does not include actions a website takes to better display preexisting third-party content or make it more usable." U.S. Amicus Br. at 22. Instead, "development" means

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[21] The Second, Fourth, Sixth, and Tenth Circuits have expressly adopted the material contribution test. *Force*, 934 F.3d at 68; *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 128 (4th Cir. 2022); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 413 (6th Cir. 2014); *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009). The First, Seventh, Eighth, and D.C. Circuits conduct a similar line-drawing analysis without using the term "material contribution"—for example, asking whether the defendant "did [any]thing to contribute to the posts' unlawfulness beyond displaying them." *Monsarrat v. Newman*, 28 F.4th 314, 319 (1st Cir. 2022); *see also Huon v. Denton*, 841 F.3d 733, 742–43 (7th Cir. 2016); *E. Coast Test Prep LLC v. Allnurses.com, Inc.*, 971 F.3d 747, 752 (8th Cir. 2020); *Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1269–71 (D.C. Cir. 2019). The Third, Fifth, and Eleventh Circuits have not yet interpreted the term "information content provider."

that "when an online service provider substantially adds or otherwise contributes to a third party's information—such that the resulting content can fairly be deemed the joint product of the provider and that party—both may be viewed as 'information content providers' with respect to that content, and both may be held accountable even on claims that would treat the platform as the 'publisher or speaker' of that content." *Id.* at 24. The Knight Institute adopts this portion of the United States's brief.[22]

B. The "material contribution" test allows platforms to be held liable for their own contributions to illegality.

The material contribution test draws a statutorily grounded and sensible line between claims that challenge a platform's own contribution to the unlawfulness of content and claims that challenge only a platform's publication of content. While the test is necessarily fact-bound, certain trends have begun to emerge in the lower courts' application of the test.

First and foremost, the two circuits that have addressed the question—the Ninth Circuit and the Second Circuit in *Force*—have properly concluded that a platform's mere amplification or mere recommendation of content created by its users does

[22] As explained below, *see* Part III.B, the Institute disagrees with the United States's application of this test to Petitioners' claims.

not constitute a "material contribution" to the content's unlawfulness. *Gonzalez*, 2 F.4th at 896; *Force,* 934 F.3d at 66. While the amplification of unlawful content can certainly exacerbate the harm caused by that content, these courts have correctly determined that the harm of mere amplification is not distinguishable from the harm of publication. *Gonzalez*, 2 F.4th at 893; *Force,* 934 F.3d at 67. For this reason, amplification no more "develops" or materially contributes to user content than does publication itself, which Section 230 clearly protects. As the Second Circuit put it, "[i]t would turn Section 230(c)(1) upside down to hold that Congress intended that when publishers of third-party content become especially adept at performing the functions of publishers, they are no longer immunized from civil liability." *Force*, 934 F.3d at 67.

In its *amicus* brief, the United States argues that Section 230 does not immunize recommendations of content because they convey the platform's own message that the user "will be interested in" the recommended content. *See* U.S. Amicus Br. at 27. The problem with the United States's argument is that *all* publications of content implicitly convey this message. Even reverse-chronological recommendations convey the message that the user will be interested in particular content now *because it is new*. Interpreting the statute to nonetheless permit suit against a platform for merely amplifying content would undo the bulk of the protection that Congress enacted the statute to provide. Every link near the top of a list of search results, and every post

near the top of a social media feed could supply the foundation for a claim of unlawful amplification.

Accordingly, the circuit courts that have addressed the question have properly applied the material contribution test to immunize mere recommendation or amplification of content.

The circuit courts have, however, applied the material contribution test in a way that leaves room for other kinds of claims against the platforms.

For instance, courts have held that Section 230(c)(1) does not immunize platforms from claims alleging that they altered content in a way that introduced illegality. Platforms alter user-generated content in myriad ways. Some alterations make user-generated content more available or present it in new formats. Other alterations change the user-generated content in a way that introduces unlawfulness. The lower courts have drawn a line between the two, applying the material contribution test to immunize the former but not the latter.

In *Kimzey v. Yelp!, Inc.*, for example, the Ninth Circuit concluded that Yelp—a website that hosts business reviews—could not be held liable for generating a "star rating" based on a user's allegedly defamatory review of the plaintiff's business. 836 F.3d 1263, 1265–66 (9th Cir. 2016). Although Yelp's star-rating system "reduce[d]" user reviews "into a single, aggregate metric," the court held that the rating system did "'absolutely nothing to enhance the defamatory sting of the message' beyond the

words offered by the user." *Id.* at 1270 (quoting *Roommates*, 521 F.3d at 1172).

Similarly, in *Marshall's Locksmith Service Inc. v. Google, LLC*, the D.C. Circuit held that Google did not become an information content provider when it converted fraudulent address information it collected from websites created by "scam locksmiths" into "pinpoints" on its digital maps. 925 F.3d 1263, 1265–66 (D.C. Cir. 2019). Although the court did not mention the material contribution test by name, it conducted the same line-drawing analysis, finding that although Google had "augmented and altered" the information, the alterations merely "represented" user-generated information "in a different format"—a function that is common to all information published online. *Id.* at 1269–70. The court held as much even though Google's presentation of the address information made it significantly more accessible to users looking for locksmiths. *Id.* at 1265.[23]

In contrast, in *Henderson v. Source for Public Data,* the Fourth Circuit held that a credit-reporting website materially contributed to the alleged unlawfulness of the content at issue by generating misleading summaries of criminal records that suggested that the plaintiffs had committed crimes.

[23] The *Marshall's* court also stated that Google could not be an "information content provider" because it used only "neutral tools" to convert the address information into pinpoints. *Id.* at 1271. But even tools that perform the same automated function regardless of content can make a material contribution to harm.

53 F.4th 110, 128 (4th Cir. 2022). Because the defendant went "beyond formatting or procedural alterations and change[d] the substance of the content altered" in a way that made it unlawful, the Fourth Circuit denied immunity. *Id.* at 129.

The circuit courts have also held that Section 230(c)(1) does not immunize platforms against claims alleging that they solicited or encouraged the unlawful content at issue, such as by requiring or specifically prompting users to input unlawful content. *See*, *e.g.*, *FTC v. Accusearch Inc.*, 570 F.3d 1187, 1199 (10th Cir. 2009). Because any forum can be abused, courts have held that a platform's solicitation or encouragement must go beyond simply providing users with the tools or opportunity to create problematic content. *Chi. Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008), *as amended* (May 2, 2008); *Roommates*, 521 F.3d at 1174 n.38. Likewise, courts have held that a platform does not materially contribute when it solicits *lawful* content but receives *unlawful* content instead. *See*, *e.g.*, *Accusearch*, 570 F.3d at 1200–01 (interpreting *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 983–86 (10th Cir. 2000)).

But when platforms induce users to post unlawful content, or when the publication of unlawful content is their raison d'être, courts have held that platforms cross the line between merely publishing content and developing it. In *Roommates*, for example, the defendant website formulated drop-down menus that required users to express discriminatory housing preferences. *Roommates*,

521 F.3d at 1172–74. The Ninth Circuit denied immunity for the drop-down menus, emphasizing that "[t]he CDA does not grant immunity for inducing third parties to express illegal preferences." *Id.* at 1165.

In *Accusearch*, the Tenth Circuit similarly denied immunity where a website allegedly "solicited requests for . . . confidential information and then paid researchers to obtain it." *Accusearch,* 570 F.3d at 1199. Because the platform in *Accusearch* specifically solicited private records whose publication would be unlawful, the court concluded that inducing users to submit unlawful content was the website's "raison d'etre." *Id.* at 1200.

Some courts have also found platforms to make a material contribution when they actively collaborate with users to break the law. In *FTC v. LeadClick Media, LLC*, for example, the Second Circuit denied immunity where employees from an online marketing company counseled users about how to create misleading ads for diet products without getting caught. 838 F.3d 158, 176 (2d Cir. 2016).

Finally, some recently filed cases and administrative actions allege that platforms violated anti-discrimination laws by targeting housing or employment advertisements in a discriminatory manner, even where the advertiser has not expressed a discriminatory preference. *See, e.g.*, Equal Employment Opportunity Commission Complaint, Real Women in Trucking v. Meta Platforms, Inc., (Dec. 1, 2022), https://perma.cc/RGV2-9T8Z (alleging that Meta

shows ads for trucking jobs to a distribution of 90–99% men, even when users request that the ads be shown to everyone). While courts have not yet had the opportunity to address these actions, *amicus* submits that, under the framework described here, Section 230's liability bar would be inapplicable because the claims seek to hold the platforms responsible for their own discriminatory acts, rather than for content provided by users. As noted above, these actions bear some superficial similarity to this one, but there is an important distinction: A platform alleged to have engaged in discriminatory targeting of employment ads could avoid liability by showing the ads to everyone. Doing so would eliminate the harm, making clear that the claim genuinely turns on the platform's discriminatory conduct, rather than the act of amplifying certain speech.

C. Under the "material contribution" test, Petitioners' claims must be dismissed.

In this case, Petitioners allege that YouTube aided and abetted terrorism by recommending ISIS videos to users, thereby "assist[ing] ISIS in spreading its message." Pet. Br. at 10. But Petitioners fail to point to any action by YouTube that materially contributed, in the statutory sense, to the unlawfulness at issue. Instead, the gravamen of their complaint is that YouTube published content it should not have published, or amplified content it should not have amplified. Accordingly, Section 230(c)(1) bars their claim.

Petitioners do not allege that YouTube altered ISIS content in any material way, or that YouTube specifically solicited terrorist content. Instead, they appear to argue that YouTube "created" its own unlawful "information" by implying that users might be interested in ISIS content. *See* Pet. Br. at 44. As explained above, however, the simple act of publication can always be construed to "imply" that users might be interested in the published content. *See* Part III.B. Interpreting "material contribution" so broadly would render Section 230 a nullity.

Petitioners also argue that YouTube can be held liable for targeting ISIS videos to users more likely to be interested in them. Pet. Br. at 9. As discussed above, there are circumstances in which a platform's method of targeting content could constitute a material contribution to unlawfulness. *See* Part III.B (discussing discriminatory targeting). Here, however, Petitioners' complaint is not actually about YouTube's targeting of content. It is about YouTube's publication or amplification of it. This is clear from the fact that the harm Petitioners complain of would be mitigated if YouTube amplified the content less, and augmented if it amplified it more. At bottom, Petitioners' complaint is with acts that are inextricable from publication. It is an effort to treat YouTube as the publisher or speaker of information provided by third parties, and as such is barred by Section 230(c)(1).

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the judgment of the

United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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