**No. 21-1333**

**In the Supreme Court of the United States**

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**Reynaldo Gonzalez**, et al. *Petitioners*

*v.*

**Google LLC**, *Respondent*

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On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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# Brief of Amici Curiae National Police Association, Inc. and National Fallen Officer Foundation Supporting Petitioners

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## Interest of Amici Curiae[1]

The National Police Association ("**NPA**") is a nonprofit, Indiana corporation founded to provide educational assistance to supporters of law enforcement and support to individual law enforcement officers and the agencies they serve. NPA defends law enforcement agencies, officers, their supporters, and the public using litigation, communications, activism, and advocacy.[2] For example, NPA filed an amicus brief in, *DeRay Mckesson v. John Doe* (No. 19-730),[3] showing that *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), doesn't bar tort liability for the leader of an alleged riot and road closure for reasonably foreseeable harm to a police officer severely injured by a hurled projectile while responding to that negligent, illegal, dangerous action.

The National Fallen Officer Foundation ("**NFOF**") is a nonprofit, District of Columbia organization designed to assist families of law enforcement officers killed in the line of duty nationwide. The Foundation's

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[1] All parties gave written consent to filing this brief; no counsel for any party authored it in whole or in part; no party counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than amici or their counsel funded it.

[2] *See* nationalpolice.org/; www.facebook.com/NationalPoliceAssoc/; twitter.com/natpoliceassoc; www.youtube.com/c/NationalPoliceAssociation. All hyperlinks herein were active on the date of filing.

[3] *See* www.supremecourt.gov/DocketPDF/19/19-730/127940/20200108141115481_NPA%20Mckesson%20AC%20Br%20Final%20Blue.pdf.

mission is to raise awareness about threats to officer safety, provide law-enforcement advocacy, and provide assistance to police families.[4] NFOF's President and CEO, Sgt. Demetrick "Tre" Pennie, was one of six law-enforcement-officer ("**LEO**") witnesses who testified before the Senate Judiciary Committee on July 26, 2022, on LEO safety. *See Law Enforcement Officer Safety: Protecting Those Who Protect and Serve Before the S. Comm. on Judiciary*, 117th Cong. (2022).[5]

Dr. Pennie was also a plaintiff in *Pennie v. Twitter*, 281 F. Supp. 3d 874 (N.D. Cal. 2017),[6] dismissed based on 47 U.S.C. § 230 protection and failure to establish proximate cause. *Pennie* arose from Micah Johnson's 2016 ambush and massacre that killed five Dallas, Texas police officers and wounded nine other LEOs and two civilians. Plaintiffs alleged that Twitter, Facebook, and Google (YouTube) provided support to the terrorist

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[4] *See* www.nationalfof.org/; www.facebook.com/nationalfof/; twitter.com/nationalfof.

[5] *See*www.judiciary.senate.gov/meetings/law-enforcement-officer-safety-protecting-those-who-protect-and-serve (with links to hearing video and prepared witness testimonies). The testimony of Sgt. Pennie, M.A., Ed.D., begins at 52:13 of the video, with question-and-answer responses beginning at 1:19:30 and 2:30. His written testimony is at www.judiciary.senate.gov/imo/media/doc/Testimony%20-%20Pennie%20-%202022-07-26.pdf (hereinafter "***Pennie Testimony***"). *See also* Demetrick Pennie, *Section 230 of the CDA Must Align with the 21st Century*, Law 360 (July 26, 2017), www.law360.com/articles/947856/section-230-of-the-cda-must-align-with-the-21st-century.

[6] The *Pennie* plaintiffs' motion to voluntarily dismiss their appeal was granted on October 19, 2018.

organization HAMAS (also called "Hamas") and helped it and ideologically aligned "'Black Separatist Hate Groups'" radicalize Johnson "'to conduct terrorist operations.'" 281 F. Supp. 3d at 877-878 (citation omitted).

Amici address (inter alia) the real-world § 230 context of harm to LEOs flowing from terrorist and other radical anti-LEO groups that use social media to amplify their message, recruit, fundraise, organize, intimidate, and inspire attacks. Construing § 230(c)(1) to not immunize social-media recommendations of other content-providers' information will help damp anti-LEO attitudes and violence against LEOs.

## Summary of the Argument

Social media are known means to promote and enable radicalization and violence (Part I), and police are suffering an epidemic of social-media fueled attacks (Part II). Yet this and similar cases were rejected on § 230 grounds and for not establishing an "act of international terrorism" and proximate cause, all needing correction (Part III). Section 230(c)(1) should be construed to not protect social-media recommendations (III.A) and "act of international terrorism" and proximate-cause standards should be clarified and adjusted in light of the harm posed by terrorist and radical groups (III.B-C), all of which will help damp anti-LEO attitudes and attacks.

# Argument

## I.

### Social media are known means to promote and enable radicalization and violence.

It is undisputed that social media are known means by which foreign and domestic terrorists and radicals promote and enable radicalization and violence, e.g., by using such media to organize, spread propaganda beyond borders, amplify their message, raise funds, get recruits, encourage and provoke attacks by members and ideological supporters, provide attack instructions, and achieve intimidation goals.

For example, the Gonzalez Plaintiffs alleged[7] that "Google's services have played a uniquely essential role in the development of ISIS's image, its success in recruiting members from around the world, and its ability to carry out attacks and intimidate its enemies." Joint Excerpts of Record ("**ER**") 87 (3d Am. Compl. ("**TAC**") ¶ 14).[8] *Gonzalez* involved ISIS, YouTube, and terrorist attacks in France. Consolidated cases *Taamneh v. Twitter*, 343 F. Supp. 3d 904 (N.D. Cal. 2018), and *Clayborn v. Twitter*, No. 17-cv-06894, 2018 WL 6839754, *1 (N.D. Cal. Dec. 31, 2018), involved ISIS social-media use and terrorist attacks in Turkey and

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[7] The district court accepted Plaintiffs' allegations as true, Pet. App. 218a, *Gonzalez v. Google*, 335 F. Supp. 3d 1156, 1160 (N.D. Cal. 2018) (on motions to dismiss for failure to state a claim, courts "'accept as true all of the factual allegations contained in the complaint,'" *id.* at 1169 n.1 (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

[8] The ER is contained in ECF Nos. 18-1 and 18-2.

California, respectively. Similarly, *Fields v. Twitter*, 200 F. Supp. 3d 964 (N.D. Cal 2016), involved ISIS and a terrorist attack on U.S. contractors in Jordan for which ISIS claimed credit, *id.* at 966. As done in the similar cases, the *Gonzalez* Plaintiff established at length the use of social-media as a tool of terrorists to enable their goals. *See, e.g.*, ER 104-09 (TAC ¶¶ 94-123) (Al-Zarqawi's successful use of Internet); *id.* at 114-35 (TAC ¶¶ 154-298) ("ISIS's Extensive Use of Google's Services"); *id.* at 140-50 (TAC ¶¶ 332-58) (social-media use by ISIS-related networks in Belgium to recruit for ISIS); *id.* at 151-52 (TAC ¶¶ 365-66) (ISIS used YouTube to encourage supporters to do terrorist attacks in countries fighting ISIS, including France and the U.S.A. ).

Similarly, in *Force v. Facebook*, 934 F.3d 53 (2d Cir. 2019), plaintiffs' allegations included evidence that Hamas also used social media to further its goals—accepted as true in the dismissal-motion context, *id.* at 57—which plaintiffs argued lead to terrorist attacks against five Americans in Israel, *id.* at 57-59.

In *Pennie*, 281 F. Supp. 3d 874, plaintiffs also alleged that Hamas used social media to further its goals, leading to five LEOs being massacred in Dallas and injuries to others, *id.* at 877-79. *Pennie* plaintiffs established Hamas's terrorist activities, its extensive use of social media to recruit, amplify it message, terrorize, and fund terrorism, and how social-media entities allowed other extremist groups to be educated and inspired by Hamas. *Id.* at 877-78.

So though these cases involved § 230-protection, aiding-and-abetting, and probable-cause issues, it was undisputed that social media are known means by

which terrorist and radical groups promote and enable radicalization and violence. This is particularly so where social media recommend other content-providers' information.

## II.

### Police are suffering an epidemic of social-media-fueled hatred and attacks.

Given that social media are known means by which terrorists and radicals promote and enable radicalization and violence—particularly by social media recommending others' content—it would be surprising if that means were *not* turned against police, who are suffering an epidemic of anti-LEO hate and physical attacks. There is evidence of social-media use to foment the current epidemic of anti-LEO hatred and attacks.

The LEO experts called to testify at the recent Senate Judiciary Committee hearing on LEO safety, *supra* at 2 & note 5, established that felonious attacks on police are up over recent years. For example, Dr. Pennie cited FBI statistics in saying that "2021 marked the highest number of law enforcement officers murdered in more than two decades." *Pennie Testimony*, *supra* note 5, at 1. According to the Federal Bureau of Investigation's 2021 statistics: "Seventy-three officers were feloniously killed in 2021, an increase of 27 when compared to the 46 officers who were killed as a result of criminal acts in 2020." FBI National Press Office, *FBI Releases 2021 Statistics on Law Enforcement Officers Killed in the Line of Duty* (May 9, 2022), www.fbi.gov/news/press-releases/press-releases/fbi-releases-2021-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty.

> A CNN article noted recent attacks:
>
> In all, from Monday [Oct. 10, 2022] through Friday [Oct. 14, 2022] last week, 13 police officers were shot—amid a heightened level of violence against law enforcement officers this year. From the beginning of the year through September 30, there were 252 officers shot, including 50 fatally, according to the Fraternal Order of Police, an organization representing US law enforcement officers.

Eric Levenson & Josh Campbell, *Shootings of police officers highlight a rise in violence and distrust*, CNN (Oct. 17, 2022), www.cnn.com/2022/10/17/us/police-violence-ambush-attack/index.html. The article cited a 2016 FBI study of "50 shootings of police officers and [that] found that the assailants' two key motives were a desire to escape arrest (40%) and their hatred of police (28%)." *Id.* The article cited FOP statistics to say that "[t]here have been 63 'ambush-style' attacks so far this year, resulting in 93 officers shot, including 24 fatally." *Id.* (citing FOP, *FOP Monthly Update: Officers Shot and Killed in the Line of Duty* (Oct. 4, 2022), national.fop.net/report-shot-killed-20221004#page=2 .)

Such cited "hatred of police" and "'ambush-style' attacks" are heavily fueled by social-media amplification of anti-LEO messages. As Dr. Pennie put it in his Senate Judiciary Committee testimony, the attacks

> should come as no surprise to anyone, especially considering that "coordinated" efforts were used to undermine our police. As chants to "Defund the Police" got louder, more police officers died and their families were left to pick up the pieces. The rise in "anti-police" sentiment has led to a

rash of attacks on police nationwide.

*Pennie Testimony*, *supra* note 5, at 1.

In addressing "how did we get here?", Dr. Pennie said "[t]he 2014 riots in Ferguson, Missouri gave rise to a new paradigm of violence against police under the pretext of Black Lives Matter." *Id.* "For me," he said, "it was undeniable what Black Lives Matter was doing because they were pulling directly from the Black Nationalist playbook, which overlooked violent crime in the Black community, but magnified incidents involving police." *Id.* at 2. Sgt. Pennie said he was familiar with Black Nationalists' tactics from "[g]rowing up in the 'inner-city' of Houston, Texas," and "[t]he only difference was that Black Lives Matter used social media instead of a bullhorn to amplify their message." *Id.* Both groups "knew how to use the media to manipulate the message and further the cause." *Id.* The riots by BLM and other "'fringe' anarchist groups across the country" in the Summer of 2020 were beyond police agencies' ability to control, especially given limited resources and rules of engagement. *Id.*

The subsequent defund-the-police movement, anti-LEO attitudes, police budget cuts, stress, and the like "led to many police officers resigning, retiring and even withdrawing from police academies." *Id.* Resulting damage includes a spike in violent crime, "overcorrection by district attorneys in their refusal to prosecute criminals," "many police officers becoming reluctant to use force during violent protests out of fear of being prosecuted," and "difficult[y in] recruit[ing] minorities into the policing profession." *Id.* at 3.

Included in Dr. Pennie's fixes for these problems is one involving social media: "As proposed by the Coali-

tion of Safer Web in 2021, the federal Government must develop a social media 'early-warning' system to monitor, flag and share threats against our nation's law enforcement and homeland security interests." *Id.*

Appended to Dr. Pennie's Senate testimony are screenshots demonstrating examples of social-media use by BLM and others to amplify their anti-LEO message, organize, recruit, intimidate, and incite—to the detriment of LEOs.[9] The first is a screenshot of a post on Facebook's Instagram labeled "BLM meme Burning of Minneapolis Headquarters posted on May 29, 2020. *Id.* at 4. It shows a burning six-story building under which are a blue bird symbol (not identical to Twitter's) and the words "BLACK LIVES MATTER." To the right of the image is are the words "Cassandra_oh" and "THE PEOPLE WILL BE HEARD," under which the following hashtags are listed without punctuation:

> #derekchauvin #murderer #fascist #jacobfrey #blacklivesmatter #georgefloyd #minneapolis #nojusticenopeace #noracistpolice #justiceforgeorgefloyd #sayhisname #acab #allcopsarebastards [redacted items] #nokkk #nofascistusa #whitesupremacy.

*Id.* Amicus Pennie adds here that the primary hashtags to promote violence against police were #FUCK12 (fuck the police), #ACAB (All Cops Are Bastards), #BLM, #BlackLivesMatter, #KillPolice, and #Antifa, while #RUST (Remote Uprising Support Teams) was used to distribute tactical and logistical information to radicalized mobs on encrypted apps such as Telegram

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[9] Each image provides the following credit: "*Images provided courtesy of Coalition for Safer Web using GIPEC technology*." *See* www.coalitionsw.org; www.gipec.com.

and WhatsApp to vandalize, loot, and attack police.

The second screenshot appended to Dr. Pennie's Senate testimony is labeled "How BLM Protests for the George Floyd Riots were organized on Facebook—May 29, 2020." The top post, by "Mohammad Chaudhry," says: "A list of BLM protests happening this weekend. Use this info as you see fit. #BLM #BLMProtests #GeorgeFloyd." *Pennie Testimony*, *supra* note 5, at 5.

The third screenshot appended to Dr. Pennie's Senate testimony is labeled "BLM Revolution of 2020—This is how George Floyd Riots were organized the Last Weekend May 2020." It shows a "Pinned Message" at "twitter.com/riotupdate/status . . ." showing a list of target activity sites by region, city, location, and date. *Pennie Testimony*, *supra* note 5, at 6.

The fourth screenshot appended to Dr. Pennie's Senate testimony is labeled "Photos of LA Police Cars on Melrose Ave. posted to Antifa Allstar Telegram Channel on May 30, 2020 using #BLM." The screenshot's site says "Antifa Allstars," and the three police cars shown have been vandalized, with the one in the foreground spray painted with "DIE PIGS." *Pennie Testimony*, *supra* note 5, at 7.

The fifth screenshot appended to Dr. Pennie's Senate testimony is labeled "Police Beheading Image posted to Facebook on July 6, 2016 the day before the Dallas Attacks from Facebook Account Alton Sterling . . . Image shared 5500 times before attack." The screenshot shows posting of the text "#BlackLivesMatter" and an art image of a black-clad-and-masked assailant standing behind a kneeling white police officer—in an oft-seen ISIS beheading pose—that was partially redacted with a black box to hide blood spurting

from the police officer's neck as it is sliced by a large knife. *Pennie Testimony*, *supra* note 5, at 8. The operative *Pennie* Complaint, showed the unredacted image from a Facebook screenshot and an original photograph with an orange-clad victim instead of the police officer "that was clearly the reference for the second image that was used as black separatist hate group propaganda." 1st Am. Compl. ¶ 106 (Figure 20), No. 3:17-cv-00230-JCS, *Pennie*, 281 F. Supp. 3d 874 (Doc. 41; filed June 9, 2017). "This [police-beheading] image was also featured in YouTube videos calling for the killing of officers" "by black separatist hate groups," *id.* at ¶ 107 (Figure 21), with the image partially showing the words "I PLEDGE TO DEFEND MY BLACK COMMUNITY BY ANY MEANS NECESSARY," *id.*

Other evidence of social-media use resulting in harm to LEOs was also provided in *Pennie*, 281 F. Supp. 3d 874, wherein plaintiffs alleged that "'[w]ithout Defendants Twitter, Facebook and Google (YouTube), HAMAS' ability to radicalize and influence individuals to conduct terrorist operations outside the Middle East would not have been possible,'" *id.* at 877 (citation omitted).[10] The *Pennie* plaintiffs organized their allegations along three topics relevant here: (i) "Defendants Allow for Other Extremism Groups to be Educated and Inspired by HAMAS Through Their Websites"; (ii) "Black Separatist Hate Groups Have Been Communicating With HAMAS"; and (iii) "Both Black Separatist Groups and HAMAS Have Called for the Killing of Police." 1st Am. Compl. ¶¶ 103-22, *Pennie*, 281 F. Supp. 3d 874 (No. 3:17-cv-00230-JCS) (Doc. 41; filed June 9, 2017). Social media entities know that

[10] *Pennie* summarized the evidence here. *Id.* at 878-79.

such widely reported activity on their platforms is ongoing—by both declared terrorist groups and other radical groups—but allow it to continue, e.g., by allowing accounts they do remove to spring up again with slightly altered names. *Id.* at ¶¶ 43-89.

In sum, LEOs are targets of terrorist and radical groups and are suffering an epidemic of hatred and attacks fueled by social media. Correcting the flawed analyses discussed next will help damp this epidemic.

## III.

## Flawed analyses regarding § 230, "act of international terrorism," and proximate cause that are used to deny redress should be clarified.

Though it is well known that terrorists and radical groups use social media to promote and enable radicalization and violence—particularly with social media recommendations of other content-providers' information—courts have rejected those seeking redress for resulting harm, and courts have done so based on flawed analyses of (**A**) § 230, (**B**) "act of international terrorism," and (**C**) proximate cause. *See, e.g.*, Pet. App. 921-93a, *Gonzalez v. Google*, 2 F.4th 871, 918 (9th Cir. 2021) (Gould, J., dissenting on these three grounds). These flawed analyses require correction.

### A. § 230 should be construed to not protect recommendations of others' content, which will help damp anti-LEO attitudes and attacks.

As discussed next, (**1**) § 230(c)(1) does not "immunize interactive computer services when they make targeted recommendations of information provided by another information content provider," Cert. Pet. i, which mild-sounding words encompass recommendations posing extreme danger. Construing § 230 to not

provide such protection will help damp anti-LEO attitudes and attacks as (**2**) cases succeed because they aren't dismissed before discovery and (**3**) social media exercise greater care to avoid creating algorithms that "radicalize users into extremist behavior and contribute to deadly terrorist attacks . . . ." Pet. App. 91a, *Gonzalez*, 2 F.4th at 917-18 (Berzon, J. concurring).

**1. § 230 doesn't protect recommendations, and they can pose serious danger.**

Petitioners' Brief establishes why § 230(c)(1) doesn't protect social media when they make targeted recommendations of others' information, which was also shown by Chief Judge Katzmann in *Force*, Pet. App. 139a-169a, 934 F.3d at 76-89 (Katzmann, C.J., concurring in part and dissenting in part), and below by Judges Berzon, Pet. App. 81a-92a, 2 F.4th at 913-18 (Berzon, J., concurring), and Gould, Pet. App. 92a-110a, 2 F.4th at 918-25 (Gould, J., concurring in part and dissenting in part). Amici adopt those arguments establishing that the activity at issue doesn't involve protected "traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information." Cert. Pet. i.[11]

Amici here highlight why activity behind these mild-sounding words in the Issue Presented—"targeted recommendations of information provided by another

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[11] No First Amendment concerns affect the interpretation of § 230(c)(1) under the constitutional-avoidance doctrine, *see, e.g.*, *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring), in light of the analysis in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25-39 (2010) (upholding material-support ban in 18 U.S.C. § 2339B against as-applied, free-speech challenge).

information content provider," *id.*—can pose extreme danger to the public and LEOs. As Chief Judge Katzmann put it, plaintiffs seek to impose liability for "bringing terrorists together":

> As applied to the algorithms, plaintiffs' claims do not seek to punish Facebook for the content others post, for deciding whether to publish third parties' content, or for editing (or failing to edit) others' content before publishing it. In short, they do not rely on treating Facebook as "the publisher" of others' information. Instead, they would hold Facebook liable for its affirmative role in bringing terrorists together.

Pet. App. 142a, *Force*, 934 F.3d at 77. So, for example, if someone searches online about the terrorist group Hamas, "Facebook may 'suggest' that the user become friends with Hamas-related Facebook groups on Facebook or join Hamas-related Facebook groups." Pet. App. 142a, 934 F.3d at 77.

As Judge Berzon put it, "[t]he platforms' algorithms suggest new connections between people and groups and recommend long lists of content, targeted at specific users," so that "they amplify and direct such content, including violent ISIS content." Pet. App. 83a-84a, *Gonzalez*, 2 F.4th at 914. "If viewers start down a path of watching videos that the algorithms link to interest in terrorist content, their immersive universe can easily become one filled with ISIS propaganda and recruitment." Pet. App. 91a, 2 F.4th at 917. The platform's "message—'you may be interested in watching these videos or connecting to these people'—can radicalize users into extremist behavior and contribute to deadly terrorist attacks like these." Pet. App. 91a, 2

F.4th at 917-18. And as Judge Gould put it, social media enabled ISIS:

> Google, through YouTube, and Facebook and Twitter through various platforms and programs, acted affirmatively to amplify and direct ISIS content, repeatedly putting it in the eyes and ears of persons who were susceptible to acting upon it. For example, YouTube's platform did so by serving up an endless stream of violent propaganda content after any user showed an inclination to view such material. At the same time it permitted the platforms to be used to convey recruiting information for ISIS-seeking potential terrorists.

Pet. App. 100a, 2 F.4th at 921.

The "immersive universe" that Judge Berzon mentioned, Pet. App. 91a, 2 F.4th at 917, is explained by Judge Gould as algorithms designed to hook the viewer: "The problem I challenge is not that the social media companies republish harmful propaganda from ISIS; the problem is the algorithm devised by these companies to keep eyes focused on their websites." Pet. App. 96a-97a n.3, 2 F.4th at 920 n.3. He quotes "[h]istorian Anne Applebaum, who has evaluated the stresses on democracies in several countries in light of modern communication technology" regarding addictive, polarizing, emotion-churning social media:

> "[S]ocial media algorithms themselves encourage false perceptions of the world. People click on the news they want to hear; Facebook, YouTube, and Google then show them more of whatever it is that they already favor, whether it is a certain brand of soap or a particular form

> of politics. The algorithms radicalize those who use them too. If you click on perfectly legitimate anti-immigration YouTube sites, for example, these can lead you quickly, in just a few more clicks, to white nationalist sites and then to violent xenophobic sites. Because they have been designed to keep you online, the algorithms also favor emotions, especially anger and fear. And because the sites are addictive, they affect people in ways they don't expect. Anger becomes a habit. Divisiveness becomes normal. Even if social media is not yet the primary news source for all Americans, it already helps shape how politicians and journalists interpret the world and portray it. Polarization has moved from the online world into reality."

Pet. App. 96a-97a n.3, 2 F.4th at 920 n.3. (quoting Anne Applebaum, *Twilight of Democracy—The Seductive Lure of Authoritarianism* (no page cite) (1st ed. 2020)).

Dr. Pennie's Senate Judiciary Committee testimony highlighted domestic radical group's use of social media to stir up hatred and attacks against LEOs. *See supra* Part II.

In *Pennie*, 281 F. Supp. 3d 874, plaintiffs alleged that Micah Johnson (responsible for the 2016 Dallas LEO massacre) "'liked' the Facebook pages of Black Nationalist organizations such as the New Black Panther Party (NBPP), Nation of Islam, and Black Panther Liberation Army, three groups which are listed by SPLC as hate groups . . . ." *Id.* at 878-79 (internal quotation marks and citations omitted). Johnson also "liked" "'the Facebook page of the African American

Defense League, whose leader, Mauricel-Lei Millere, called for murders of police officers across the U.S. following the fatal 2014 shooting of Laquan McDonald.'" *Id.* at 879 (citation omitted).

The *Pennie* "[p]laintiffs also allege[d] that 'without Defendants Twitter, Facebook, and Google (YouTube), HAMAS' ability to radicalize and influence individuals to conduct terrorists operations outside the Middle East would not have been possible'" and that "'[o]n information and belief, Micah Johnson was radicalized, in part, by reviewing postings of HAMAS and other terrorist groups on the internet and Defendants' social media sites,'"*id.* at 877 (citations omitted). The *Pennie* plaintiffs also alleged identification and concrete connections between HAMAS and "black separatist hate groups." *Id.* at 878 (citation omitted). *See also, e.g.*, Michael R. Fischbach, *Black Power and Palestine: Transnational Countries of Color* (2018) (traditional civil rights leaders tended to support Israel while 1960s Black Power movement identified with and supported Palestinians).[12]

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[12] *See also, e.g.*, Kristian Davis Bailey, *Black-Palestinian Solidarity in the Ferguson-Gaza Era*, American Quarterly, reblaw.yale.edu/sites/default/files/black-palestinian_solidarity_in_the_ferguson-gaza_era.pdf; Sam Klug, *'We Know Occupation: The Long History of Black Americans' Solidarity with Palestinians*, Politico (May 30, 2021), www.politico.com/news/magazine/2021/05/30/black-lives-matter-palestine-history-491234; Hansi Lo Wang, *The Complicated History Behind BLM's Solidarity With The Pro-Palestinian Movement*, NPR (June 12, 2021), www.npr.org/2021/06/07/1003872848/the-complicated-history-behind-blms-solidarity-with-the-pro-palestinian-movement.

In sum, the recommendations at issue encourage and enable terrorism and other serious harm—including against LEOs—and § 230(c)(1) doesn't protect such recommendations. As discussed next, two real-world consequences will flow from construing § 230 to not provide such protection, which together will help damp anti-LEO attitudes and attack.

**2. Narrowing § 230(c)(1) protection will allow essential discovery.**

One real-world result of construing § 230(c)(1) to not reach social-media recommendations is that cases seeking redress for harm from such recommendations will go on to discovery concerning well-pleaded allegations. And as a result, some cases will succeed.

Chief Judge Katzmann said the majority's holding that § 230(c)(1) protected algorithm recommendations that brought terrorists together "cut[] off all possibility of relief . . . even if in the future these or future plaintiffs could prove a sufficient connection between those algorithms and their injuries." Pet. App. 158a, *Force*, 934 F.3d at 77. Judge Gould "note[d] that the majority . . . ma[de] its dismissive rulings solely on the pleadings with no discovery to illuminate Plaintiffs' well-pleaded factual contentions." Pet. App. 93a, *Gonzalez*, 2 F.4th at 918. *See also* Pet. App. 122a, 2 F.4th at 931 n.11 (Judge Gould noting that without discovery the *Gonzalez* Plaintiffs should be given the inferences from their operate complaint to which they were entitled and which sufficed to establish proximate cause at the motion-to-dismiss stage, absent which such cases would be impossible for being unable to show exactly *how* radicalization occurred). *See infra* III.B.2 (discussing same).

Notably, these cases are of the sort where social media control the vital information. Social-media algorithms are not public, nor are the changes made to them over time and for what purposes, nor are all social-media terrorist and radical activities. Discovery is the primary means by which plaintiffs suffering harm could learn such information from social media. And without such evidence, establishing proximate cause is difficult or impossible.

For example, the majority below held that Petitioners didn't establish that Google provided "substantial assistance" to ISIS (under 18 U.S.C. § 2333(d)(2)) in part because the operative complaint "contain[ed] no information about the amount of assistance provided by Google [to ISIS]," and "only allege[d] that Google shared *some* advertising revenue with ISIS." Pet. App. 63a-66a, 2 F.4th at 905-06 (emphasis in original). The Ninth Circuit cited *Whitaker v. Tesla Motors*, 985 F.3 1175, 1177 (9th Cir. 2021), for the proposition that "[o]ur case law does not permit plaintiffs to rely on anticipated discovery to satisfy Rules 8 and 12(b)(6); rather, pleadings must assert well-pleaded factual allegations to advance discovery." Pet. App. 66a, 2 F.4th at 906-07. But the quibble was "principally, the absence of any allegation regarding the *amount* of the shared revenue," Pet. App. 66a, 2F.4th at 907 (emphasis added), and the actual amount of assistance provided is the sort of thing that should be established in discovery and then the fact finder should decide whether that established amount is "substantial."

In some situations, one may make an allegation on information and belief:

"'The [*Bell Atl. Corp. v.*] *Twombly*, [550 U.S. 544

> (2007)], plausibility standard . . . does not prevent a plaintiff from pleading facts alleged "upon information and belief" where the facts are peculiarly within the possession and control of the defendant, *see, e.g.*, *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008), or where the belief is based on factual information that makes the inference of culpability plausible, *see* [*Ashcroft v.*] *Iqbal*, [556 U.S. 662, 678 (2009)] ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.")." *Arista Records LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010) (internal citation omitted). Finally, this plausibility standard "'simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal[ity].'" *Id.* (quoting [*Twombly*], 550 U.S. at 556).

*Honeywell International v. Citgo Petroleum Corp.*, 574 F. Supp. 3d 76, 82 (N.D.N.Y. 2021). But § 230(c)(1) forecloses that,[13] as does a too-narrow view of reasonable inferences and proximate cause, *infra* III.B.

In sum, construing § 230(c)(1) to not protect the sort of recommendations at issue will allow plaintiffs the discovery required to prove a sufficient nexus asserted

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[13] The *Pennie* plaintiffs alleged that "'[o]n information and belief, Micah Johnson was radicalized, in part, by reviewing postings of HAMAS and other terrorist groups on the internet and Defendants' social media sites.'" 281 F. Supp. 3d at 877 (citation omitted). But the court dismissed on proximate-cause and § 230(c)(1) grounds. *Id.* at 887-92.

in well-pleaded allegations. Thus, more plaintiffs are likely to succeed in cases seeking redress for the serious harms of such recommendations. And that will damp anti-LEO attitudes and attacks.

**3. Narrowing § 230(c)(1) protection will cause social media to exercise more care.**

Another real-world result flowing from construing § 230(c)(1) to exclude the recommendations at issue will be greater social-media care. If plaintiffs are more likely to get relief for algorithm-recommendation harm, social media will be more careful to prevent their platforms from enabling terrorist and radical groups by such recommendations. Even before any such case succeeds, greater care may be expected given the removal of § 230 protection. That will damp anti-LEO attitudes and attacks.

**B. Act-of-international-terrorism and proximate-cause analyses should be clarified in light of the particular harms posed.**

Narrowing § 230(c)(1) protection alone doesn't fully resolve plaintiffs' problems in this and similar cases because claims have also been rejected on flawed act-of-international-terrorism and proximate-cause analyses. *See, e.g.*, Pet. App. 92a-93a, *Gonzalez*, 2 F.4th at 918 (Gould, J., dissenting on these analyses). Though social media are known means by which terrorists and radicals promote and enable radicalization and violence, and though serious harms result, plaintiffs have had difficulty proving sufficient causation in *particular* cases under the sort of analyses the Ninth Circuit employed below. So those analyses should be clarified, and altered as needed, for situations posing the sort of serious harms at issue here that are posed by terrorist

and radical groups and by the nature of social media that such groups use to further their goals.

Of course, the Question Presented doesn't address these analyses, Cert. Pet. i, but in a case properly before this Court, this Court may go beyond the Question Presented. *See, e.g.*, *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2310, 2313-17 (2022) (Roberts, C.J., concurring in judgment) (majority went beyond question on which certiorari granted). And these analyses were at issue below, with Judge Gould disagreeing with the majority on them:

> I respectfully dissent as to the majority's dismissal of the *Gonzalez* claims on grounds of Section 230 immunity, and of failure to state a claim for direct or secondary liability under the ATA,[14] because of the majority's mistaken conclusion that there was no act of international terrorism, and I also would hold that the complaint adequately alleged that there was proximate cause supporting damages on those claims.

Pet. App. 92a-93a, 2 F.4th at 918. Providing guidance now would promote justice by repairing the harm of flawed analyses without further delay.

**1. "Act of international terrorism" requires clarification.**

Provided an "act of international terrorism"[15] exists,

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[14] "ATA" is the Anti-Terrorism Act, 18 U.S.C. § 2333. "[T]he ATA allows claims for *direct* liability for committing acts of international terror pursuant to § 2333(a), or *secondary* liability pursuant to § 2333(d) for aiding and abetting, or conspiring to commit, acts of international terrorism." Pet. App. 17a, *Gonzalez*, 2 F.4th at 885 (emphasis added).

[15] As set out in *Gonzales*, Pet. App. 16a, 2 F.4th at 885:

the ATA provides *direct* liability for committing such an act, 18 U.S.C. § 2333(a) or *secondary* liability for aiding and abetting, or conspiring to commit, such an act, § 2333(d). Pet. App. 17a, *Gonzalez*, 2 F.4th at 885.

The Gonzalez Plaintiffs asserted direct and secondary liability against Google, essentially because "YouTube provides 'a unique and powerful tool of communication that enables ISIS to achieve [its] goals'" and shares advertising revenue with it. Pet. App. 6a, 2 F.4th at 881 (citation omitted). The Ninth Circuit held that only the revenue-sharing claims weren't barred by § 230, Pet. App. 45a-47a, 2 F.4th at 897-99, and then turned to ATA claims regarding those. It decided the Gonzalez Plaintiffs didn't adequately allege "an act of international terrorism" so it didn't need to reach the proximate-cause issue. Pet. App. 52a, 2 F.4th at 901. Judge Gould dissented to the dismissal of the direct and secondary ATA claims, Pet. App. 92a-93a, 2 F.4th

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"[I]nternational terrorism" is defined in 18 U.S.C. § 2331(1). Acts of international terrorism "involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State." 18 U.S.C. § 2331(1)(A). The acts must "appear to be intended—(i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnaping." *Id.* § 2331(1)(B). Finally, the acts must "occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries. . . ." *Id.* § 2331(1)(C).

at 918, explaining why the Gonzalez Plaintiffs adequately alleged an act of international terrorism, Pet. App. 110a-119a, 2 F.4th at 926-29.

In *Gonzalez*, the Ninth Circuit's "international terrorism" analysis turned on the "appear to be intended" language (*see supra* note 15 (text of § 2331(1)(B)). Pet. App. 50a, 2 F.4th at 899. It noted that an "objective standard" applies, decided that Google's intent objectively appeared to be "its own financial best interest," and held that the operative complaint "fail[ed] to allege that Google's provision of material support appeared to be intended to intimidate or coerce a civilian population, or to influence or affect a government as required by the ATA." Pet. App. 52a, 2 F.4th at 899-01 (citing 18 U.S.C. § 2331(1)(B)). The majority rejected the Gonzalez Plaintiffs' reliance on *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685 (7th Cir. 2008) (en banc) (holding that knowing contributions to Hamas would be "international terrorism" because they would be intended to help Hamas kill people in Israel), distinguishing it on the basis that *Boim* involved gifts to Hamas while the present case involved Google's revenue sharing. Pet. App. 50a-51a, 2 F.4th at 900.

But Judge Gould dissented to this, arguing that by YouTube's approval process for monetizing content with paired ads, which required review of content, coupled with news reports regarding such ads and content, gave Google "constructive knowledge of the fact that it provided financial support to ISIS and incentivized ISIS to continue to post videos on YouTube." Pet. App. 113a, 2 F.4th at 927. Thus, "Google appears to intend the natural and foreseeable consequences of its actions." Pet. App. 113a, 2 F.4th at 927. He said *Boim*'s analysis *did* apply: "Because donating money to Ha-

mas was like 'giving a loaded gun to a child,' it did not matter that the act of giving money is not a violent act itself because, in context, it would be 'dangerous to human life.'" Pet. App. 115a, 2 F.4th at 928 (citation omitted). "*Boim*," he noted, "relied on the foreseeability of the consequences of donations to Hamas to support its sensible holding that the donations would appear to be intended to intimidate or coerce a civilian population." Pet. App. 115a, 2 F.4th at 928(citations omitted). "It was the donor's *knowledge* of Hamas' activities, rather than his approval of it, that gave rise to liability." Pet. App. 116a-17a, 2 F.4th at 928 (emphasis in original). "*Boim*—a decision properly based in Section 2333's text and history—does not attempt to draw a line based on motivation," since such a line is 'irrelevant." Pet. App. 116a, 2 F.4th at 928. And the Gonzalez Plaintiffs alleged that Google had such knowledge. So Judge Gould would have found that the Gonzalez Plaintiffs stated a claim on revenue-sharing claims. Pet. App. 114a-17a, 2 F.4th at 926-28. Judge Gould would also have held that Gonzalez Plaintiffs stated a claim against Google on a non-revenue sharing theory, Pet. App. 117a, 2 F.4th at 929, "[b]ecause amplifying ISIS's message and creating new networks of prospective terrorist recruits foreseeably provides material support to a terrorist organization," Pet. App. 117a, 2 F.4th at 928.

Then Judge Gould provides a clear statement of a key *nature* of terrorism that should control the meaning of "act of international terrorism," i.e., it is, "in part, psychological warfare." Pet. App. 117a, 2 F.4th at 929. He expands on this fact, all of which is compelling, but only some key points can be included here: (i) terror is used to promote a message and cause fear; (ii)

"[b]ecause the communication of ISIS violence and threats is part of the terrorist attack, repeated posting and encouraged viewings of ISIS videos, as effected by Google's algorithms, is also part of the attack"; (iii) "[s]o-called 'neutral' algorithms . . . are then transformed into deadly missiles of destruction by ISIS, even though they were not initially intended to be used that way"; and (iv) "unlike money, which is fungible, YouTube has a virtual monopoly on hosting extremist videos," so "[i]mposing liability on social media platforms for affirmatively amplifying ISIS's message can therefore "cut the terrorists' lifeline." Pet. App. 117a-19a, 2 F.4th at 929 (citations omitted).

The foregoing true nature of terrorism and social media's crucial role in it is what the Ninth Circuit majority (and other courts) seem to ignore. And it is here in particular that this Court can provide guidance in the present case by establishing that this is the true nature of "an act of international terrorism" in relation to social media, which will guide lower courts to accept Judge Gould's view instead of the majority's.

**2. Proximate-cause standards require clarification.**

Judge Gould's detailed analysis demonstrates why plaintiffs' allegations in *Gonzalez* and the consolidated case of *Clayborn v. Twitter*, No. 17-cv-06894, 2018 WL 6839754 (Dec. 31, 2018), adequately alleged proximate cause as to the direct and secondary claims at issue[16] with regard to both revenue sharing and algorithm recommendation claims. Pet. App. 119a-30a, 2 F.4th at

[16] *See supra* note 14 (direct and secondary claim provisions).

929-34.[17]

Many of the cases discussed above have been held to lack such causation. For example, the *Gonzalez* "district court primarily relied on § 230 immunity to conclude that all but the Gonzalez Plaintiffs revenue claims were barred" but held that those "revenue-sharing claims failed because the [operative complaint] did not plausibly allege that Google proximately caused Nohemi's death." Pet. App. 17a, 2 F.4th at 885-86. The Ninth Circuit panel didn't reach the proximate-cause issue in *Gonzalez* because it decided there was no "act of international terrorism." Pet. App. 52a, 2 F.4th at 901.

Judge Gould reached the proximate-cause issue because he would have held that § 230 didn't apply and there was an act of international terrorism. Pet. App. 119a, 2 F.4th at 930. He would have found that the operative *Gonzalez* complaint met the proximate-cause analysis as to both direct liability, Pet. App. 119a-23a, 2 F.4th at 929-31, and secondary liability, Pet. App. 123a-30a,2 F.4th at 931-34. As he noted, the ATA's "'by reason of' phrasing has been understood to impose a requirement of proximate causation." Pet. App. 119a, 2 F.4th at 929-30 (citing *Fields v. Twitter*, 881 F.3d 739, 744 (9th Cir. 2018) ("a plaintiff must show at least some direct relationship between the injuries that he or she has suffered and the defendant's acts")).

Judge Gould found "a sufficient nexus," Pet. App. 120a, 2 F.4th at 930, because "the sum of Plaintiffs'

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[17] The *Gonzalez* majority held that § 230(c)(1) protected Google against algorithm-recommendation claims but not revenue-sharing claims (i.e., based on providing revenue to ISIS). Pet. App. 44a-45a, 2 F.4th at 897-98.

allegations demonstrate that the terrorists responsible for Plaintiffs' injuries used YouTube as an integral component of recruiting, and that such recruiting is necessary to carry out attacks on the scale of those in Paris." Pet. App. 120a, 2 F.4th at 930 (also discussing specific allegations comprising this "sum"). Plaintiffs need not say precisely *how* radicalization occurred because

> [i]t is enough that the complaint alleged that the perpetrators themselves actively used YouTube to recruit others to ISIS, gaining resources with which to plan and implement their attacks; absent the participation of the social media companies for their own profit-centered purposes, terrorist groups like ISIS would not have these resources.

Pet. App. 121a, 2 F.4th at 930-31. Given allegations that the terrorist group used YouTube to recruit and that a shooter was an active social-media user of that platform, it was a permissible inference that "it is probable [he] was radicalized through social media." Pet. App. 122a, 2 F.4th at 931. Viewing the allegations in the light most favorable to plaintiffs, they "plausible alleged a sufficient nexus . . . to satisfy a proximate cause threshold standard." Pet. App. 122a, 2 F.4th at 931. As Judge Gould further noted, the majority's contrary position "would put these and future plaintiffs in an untenable position." Pet. App. 122a, 2 F.4th at 931 n.11. "Without the benefit of discovery, then it is unlikely that any such claims could go forward." Pet. App. 122a, 2 F.4th at 931 n.11. "At the motion to dismiss stage . . . , the Gonzalez Plaintiffs need only plausibly allege 'some direct relation' between the terrorist's actions and the social media companies' conduct. Pet.

App. 122a, 2 F.4th at 931 n.11 (citation omitted). "Given that it is unlikely potential terrorists will announce the avenues by which they were radicalized, such inferences are permissible." Pet. App. 122a, 2 F.4th at 931 n.11.

Judge Gould provided an analogy based on the nature of terrorism to illustrate the direct relation:

> Let's assume that a person on one side of a crowded football stadium fires a high-powered rifle aimed at a crowd on the opposite side of the stadium, filled with people, though all identities are unclear. Would the majority here say that the rifle shot striking an unidentified viewer on the other side of the stadium had no "direct relation" to the shooter and that the shot did not proximately cause a resulting death? I think not. There is direct relation between shooter and victim there sufficient to satisfy *Fields*[, 881 F.3d 739,] and there is similar direct relation here between the challenged conduct of the Defendant social media companies and the victims of ISIS violence in these cases to say that the challenged conduct, if shown to be illegal, was a proximate cause of damages.

Pet. App. 122a-23a, 2 F.4th at 931.

The foregoing analysis shows how proximate cause should work in these types of cases given the true nature of terrorism and social media's crucial role in it. This Court can provide guidance in the present case by establishing that this is how proximate cause should work in this context, which will guide lower courts to accept Judge Gould's view instead of the majority's.

## Conclusion

This Court should hold that § 230(c)(1) does not "immunize interactive computer services when they make targeted recommendations of information provided by another information content provider," Cert. Pet. i. And it should provide guidance regarding the true nature of "an act of international terrorism" and clarify proximate-cause analysis in such cases. Those things will help damp anti-LEO attitudes and attacks.

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