

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 *AMICI CURIAE*
COMMON SENSE MEDIA AND
FRANCES HAUGEN
IN SUPPORT OF PETITIONERS**

JOLINA C. CUARESMA
Counsel of Record
IRENE LY
COMMON SENSE MEDIA
699 8th Street, Suite C150
San Francisco, CA 94103
(415) 863-0600
jcuaresma@commonsense.org
Counsel for Amici Curiae

December 6, 2022

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI CURIAE	1
INTRODUCTION.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT.....	3
I. Section 230 Does Not Grant Blanket Immunity	3
A. Google’s Non Publishing Activities.....	3
B. Section 230 Does Not Grant Immunity for Google’s Non Publishing Activities	5
II. The Vulnerabilities of Adolescent Brains Make Adolescents More Susceptible to the Harms from Google’s Non Publishing Activities	6
A. The Adult Brain and the Adolescent Brain Have Structural Disparities	6
B. The Anatomical Differences Between the Adult & Adolescent Brains Cause Adults and Adolescents to Respond to Stimuli Differently	8
C. Google’s Non Publishing Activities are Particularly Harmful to Adoles- cents	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Force v. Facebook</i> , 934 F. 3d 53 (2d Circ. 2019).....	6
<i>Malwarebytes, Inc. v. Enigma Software Group USA, LLC</i> , 141 S. Ct. 13 (2020).....	5-6
STATUTES	
47 U.S.C. § 230	<i>passim</i>
47 U.S.C. § 230(c)(1).....	2, 3, 5
47 U.S.C. § 230(c)(2).....	5
OTHER AUTHORITIES	
Angela Griffin, <i>Adolescent Neurological Development and Implications for Health and Well-Being</i> , 5 HEALTHCARE 62 (2017).....	8
B.J. Casey et al., <i>The Adolescent Brain</i> , 28 DEVELOPMENTAL REV. 62 (2008).....	7, 9
David R. Roalf et al., 32 NEUROBIOLOGY OF AGING 1634 (2011)	9
Edward E. Smith and John Jonides, <i>Storage and Executive Processes in the Frontal Lobes</i> , 283 SCIENCE 1657 (1999).....	7
Fairplay, <i>Designing for Disorder: Insta- gram’s Pro-eating Disorder Bubble</i> (Apr. 2022), https://fairplayforkids.org/wp-content/uploads/2022/04/designing_for_disorder.pdf	10

TABLE OF AUTHORITIES—Continued

	Page(s)
Google, Privacy Policy, https://policies.google.com/privacy?hl=en-US (last visited Dec. 5, 2022).....	4, 11
JAMES STEYER, WHICH SIDE OF HISTORY? HOW TECHNOLOGY IS RESHAPING DEMOCRACY AND OUR LIVES 96 (James Steyer ed. 2020).....	1-2
Joaquin M. Fuster, <i>The Prefrontal Cortex—An Update: Time is of the Essence</i> , 30 NEURON 319 (2001).....	8
John Naughton, <i>Molly Russell was Trapped by the Cruel Algorithms of Pinterest and Instagram</i> , THE GUARDIAN (Oct. 1, 2022), https://www.theguardian.com/commentisfree/2022/oct/01/molly-russell-was-trapped-by-the-cruel-algorithms-of-pinterest-and-instagram	11
Jomilè Nakutavičiūtė, <i>10 Best YouTube Alternatives and Competitors</i> , NordVPN (Oct. 29, 2021), https://nordvpn.com/blog/youtube-alternatives/	3
Mariam Arain et al., <i>Maturation of the Adolescent Brain</i> , 9 NEUROPSYCHIATRIC DISEASE TREATMENT 449 (2013).....	8, 9
R. Douglas Fields, <i>Changes in the Brain’s White Matter</i> , 330 SCIENCE 768 (2010)....	9
Ralph Adolphs, <i>The Biology of Fear</i> , 23 CURRENT BIOLOGY 79 (2013).....	7

TABLE OF AUTHORITIES—Continued

	Page(s)
Third Amended Complaint, <i>Gonzalez v. Google LLC</i> , No. 4:16-cv-03282-DMR (N.D. Cal. Nov. 6, 2017).....	11-12
Velayudhan Rajmohan and Eladath Mohandas, <i>The Limbic System</i> , 49 INDIAN J. OF PSYCHIATRY 132 (2007)	7
YouTube, Terms of Service, https://www.youtube.com/static?template=terms (last visited Dec. 6, 2022).....	4

INTEREST OF AMICI CURIAE¹

Amici are Common Sense Media, the leading national nonprofit organization committed to helping children and families navigate the evolving digital world, and Frances Haugen, an advocate for accountability and transparency in social media. *Amici's* concern stem from courts' broad interpretations of the plain text of section 230 of the Communications Decency Act (CDA) that have resulted in sweeping immunity for internet companies' editorial activities, regardless of whether the conduct rendered a firm "a publisher." Now, Google asks the Court to extend the interpretation further, well beyond what the text of section 230 can bear: immunity from liability for *any* activities regardless of whether the conduct relates to publishing duties. Such an outcome would make it harder for parents to protect kids and teens online.

INTRODUCTION

"Although the United States has protected kids by establishing strict rules and standards on everything from dirty air and unsafe foods to dangerous toys and violence on television, the internet has almost no rules at all, thanks to Section 230."² Specifically, court rulings have improperly interpreted the plain text of section 230 of the Communications Decency Act (CDA), turning the provision into a "get-out-of-jail-free

¹ In accordance with Rule 37, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amicus or its counsel, has made a monetary contribution to the preparation or submission of this brief, and all parties have filed a blanket letter of consent.

² JAMES STEYER, WHICH SIDE OF HISTORY? HOW TECHNOLOGY IS RESHAPING DEMOCRACY AND OUR LIVES 96 (James Steyer ed., 2020).

card” and “a bulletproof shield for social media platforms.”³

Amici urges the Court to reject Google’s argument that it is immune from liability under the Anti-Terrorism Act by claiming that section 230 constitutes a broad a safe harbor for internet companies against liability for users’ posts not covered under the First Amendment. Google argues that section 230(c)(1), which provides that internet companies cannot “be treated as the publisher” of users’ posts, 47 U.S.C. § 230(c)(1), protects the tech firm when it displays users’ content to other potentially interested users on the platform. The issue, however, is not about users’ content, but about users’ personal information and what Google does with it.

Aside from stretching the plain language of section 230, Google overlooks the provision’s obvious intent. Congress enacted the CDA to shield children from access to offensive material on the internet. Yet, Google’s activities—creating profiles from the billions of collected data points about users and amplifying harmful content by regularly recommending targeted videos and ads based on user profiles—is simply not covered by the plain text of section 230. The provision covers users’ posts, not the use of users’ posts. Congress could not have envisioned that section 230 would extend to Google’s activities that steer vulnerable adolescents toward harmful content.

SUMMARY OF ARGUMENT

This brief focuses on two points not highlighted in the parties’ submissions: the activities of Google, through YouTube, that involve the collection and

³ *Ibid* at 95.

utilization of users' personal information; and the effect the activities have on the adolescent brain. Part I describes the tech firm's activities, and explains why adopting Google's position would improperly grant the firm blanket immunity. Part II describes the structural disparities between the adult and adolescent brains, and explains how Google's activities create a receptive and captive audience by knowingly and persistently recommending and steering adolescents to ISIS videos promoting terrorism and other harmful content.

ARGUMENT

I. Section 230 Does Not Grant Blanket Immunity.

Google argues that it cannot be held liable for its display of third-party content to potentially interested users because section 230(c)(1) protects publishers and publishing is essentially "curating and displaying content of interest to users." Brief in Opposition at 10. Google, through YouTube, is not just a publisher, however. Google also monitors and tracks users' online activities across websites and computer devices to make predictions about the content users want to view.⁴

A. Google's Non Publishing Activities

Google collects users' demographic data (age, gender, location) and maintains a running account of other personal information. Each time a user logs on, Google makes a recording of:

⁴ There are a number of Google competitors that do not engage in these activities. See Jomilė Nakutavičiūtė, *10 Best YouTube Alternatives and Competitors*, NordVPN (Oct. 29, 2021), <https://nordvpn.com/blog/youtube-alternatives/>.

- the terms the individual typed into in the search tool;
- the videos the individual watched and how often;
- the videos the individual “liked;”
- the videos where the individual posted a comment;
- the ads the individual “skipped” or clicked on for more information;
- any other users the individual shared videos or communicated with, the videos that were shared, and the content of the communications;
- the items the individual purchased or returned; and
- the individual’s activities on third-party websites and apps and web browsing history under certain conditions.⁵

Since 2005, Google has collected billions of data points on users for purposes stated in the tech firm’s privacy policy:

We use your data for analytics. . . . We analyze data about your visits. . . . We use automated systems that analyze your content to provide you . . . customized search results,

⁵ See Google, Privacy Policy, <https://policies.google.com/privacy?hl=en-US> (last visited Dec. 5, 2022) (describing what data Google collects from users and how it analyzes that data to provide users customized search results and personalized ads). YouTube’s terms of service statement explains that their privacy policy lays out how they treat users’ personal data, and links to Google’s privacy policy. YouTube, Terms of Service, <https://www.youtube.com/static?template=terms> (last visited Dec. 6, 2022).

personalized ads.... We also use algorithms to recognize patterns in data.⁶

Then, with the use of machine learning algorithms, Google curates each user's online experience by recommending videos and ads that the algorithms predicted would be interesting or relevant based on the user's profile. The more accurate the prediction, the more time a user spends on the platform, which allows Google to collect ever more data to make additional assumptions to update the user's profile to further curate the user's online experience. The feedback loop continues until the user leaves the Google platform.

B. Section 230 does not Grant Immunity for Google's Non Publishing Activities.

There are two instances when immunity from liability exists under section 230 of the CDA: when the internet company (i) permits users to post content not protected by the First Amendment, 47 U.S.C. § 230(c)(1) ("No 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."); and (ii) in good faith, restricts access to material the company "considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected," § 230(c)(2)(A). In other words, "if a company unknowingly leaves up illegal third-party content, it is protected from publisher liability by § 230(c)(1); and if it takes down certain third-party content in good faith, it is protected by § 230(c)(2)(A)." *Malwarebytes, Inc. v. Enigma Software*

⁶ *Id.*

Group USA, LLC, 141 S.Ct. 13, 3–4 (2020) (Statement of Justice Thomas respecting the denial of certiorari).

Under a plain-text reading of section 230, an internet company may claim immunity from liability when the wrongful conduct pertains to publishing or editorial activities. Here, Petitioners’ lawsuit does not seek to hold Google liable for permitting users to post unlawful or tortious content or for failing to remove offensive content pursuant to the tech firm’s content moderation policy. “[I]t strains the English language to say that” Google—in collecting billions of data points about users to make assumptions and create profiles, making predictions about what videos would be interesting based on user profiles, and repeatedly recommending targeted videos—“is acting as ‘the publisher of . . . information provided by another information content provider.’” *Force v. Facebook*, 934 F. 3d 53, 76–77 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (quoting § 230(c)(1)) (citation omitted).

II. The Vulnerabilities of Adolescent Brains Make Adolescents More Susceptible to the Harms from Google’s Non Publishing Activities

Reading section 230 beyond its plain text would expand the law into a question of significant social and economic policy with severe consequences on all of us, particularly adolescents. To understand these consequences, *amici* bring to the Court’s attention important scientific information on brain development.

A. The Adult Brain and the Adolescent Brain Have Structural Disparities.

During adolescence, the transition between childhood and adulthood, the two parts of the brain that regulate behavior, the limbic system (associated with survival)

and the prefrontal cortex (associated with higher-level functions), develop simultaneously, but asynchronously⁷ with the limbic system maturing years before the prefrontal cortex. The brain's frontal lobe is last to fully develop, not maturing until closer to adulthood.⁸

The limbic system, located mainly in the medial temporal lobe and responsible for emotion, memory formation, sexual arousal, and learning, operates subconsciously, continuously processing sensory input from internal and external stimuli to elicit appropriate autonomic and behavioral responses.⁹ Within the limbic system is the amygdala, which controls certain emotional responses (fear, anxiety) that activate immediate and instinctive behavior such as the “fight, flight, or freeze” response to perceived danger.¹⁰

Situated in the front-most area, right behind the forehead, the prefrontal cortex is responsible for executive functioning skills such as planning, problem solving, reasoning, and impulse control.¹¹ The prefrontal cortex has three substructures: the medial frontal, which makes it possible to pay attention and concentrate; the orbitofrontal cortex, which helps prevent reckless behavior or emotional outbursts; and the

⁷ B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 63 (2008).

⁸ *Id.*

⁹ See Velayudhan Rajmohan and Eladath Mohandas, *The Limbic System*, 49 INDIAN J. OF PSYCHIATRY 132–39 (2007) (providing an overview of the components and functions of the limbic system).

¹⁰ Ralph Adolphs, *The Biology of Fear*, 23 CURRENT BIOLOGY 79, 83–85 (2013).

¹¹ Edward E. Smith and John Jonides, *Storage and Executive Processes in the Frontal Lobes*, 283 SCIENCE 1657, 1659–60 (1999).

lateral prefrontal, which processes complex information and evaluating different courses of actions.¹²

The limbic system and the prefrontal cortex, when fully matured, operate in tandem to balance emotion and cognition. Thus, in the adult brain, the prefrontal cortex acts as a counterbalance to the limbic system, making it possible for an adult to consider long term consequences and control impulses.¹³

B. The Anatomical Disparities between the Adult and Adolescent Brains Cause Adults and Adolescents to Respond to Stimuli Differently.

The mismatch in growth rates between the prefrontal cortex and the limbic system is responsible for structural differences between the adult brain and the adolescent brain. Magnetic resonance imaging shows that there are far more cellular connections in a developed prefrontal cortex. For example, the adult brain's frontal lobes have more white matter,¹⁴ or myelin, which is composed of millions of bundles of axons that connect neurons in different brain regions

¹² Joaquin M. Fuster, *The Prefrontal Cortex—An Update: Time is of the Essence*, 30 NEURON 319, 320–21 (2001).

¹³ See Angela Griffin, *Adolescent Neurological Development and Implications for Health and Well-Being*, 5 HEALTHCARE 62, 63 (2017) (describing how the prefrontal cortex is late-evolving and enables individuals to learn how to manage long term planning, monitor what is going on, and adjusting smoothly to surroundings while keeping emotions and behaviors context-appropriate).

¹⁴ Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE TREATMENT 449, 453–54 (2013).

into functional circuits.¹⁵ During adolescence, white matter increases in the corpus callosum, which is the bundle of nerve fibers that connect the left and right hemispheres of the brain, increasing myelination.¹⁶ The growth of white matter allows the two hemispheres to effectively communicate with each other, and enables an individual to use a range of analytical and creative strategies to respond to external stimuli.¹⁷

Studies show that adults process information using the prefrontal cortex whereas adolescents rely on the limbic system.¹⁸ When the prefrontal cortex is active, there is less activity in the amygdala, making it easier for adults to make sound decisions faster than adolescents.¹⁹ Functional brain imaging also shows that responses to external stimuli occur in the limbic system when the prefrontal cortex is not fully developed.²⁰ Without a fully developed prefrontal cortex, adolescents are more likely than adults to be swayed by their emotions and exhibit more impulsive behavior, rather than a logical or measured response.²¹ Until the prefrontal cortex reaches the same level of maturity as the limbic system, the desire for rewards overpowers rational thinking.

¹⁵ R. Douglas Fields, *Changes in the Brain's White Matter*, 330 SCIENCE 768, 768 (2010).

¹⁶ Arain et al., *supra* note 14 at 453–54.

¹⁷ *Id.*

¹⁸ Casey et al., *supra* note 7, at 63.

¹⁹ David R. Roalf et al., *More is Less: Emotion Induced Prefrontal Cortex Activity Habituates in Aging*, 32 NEUROBIOLOGY OF AGING 1634, 1635 (2011).

²⁰ Arain et al., *supra* note 14, at 453.

²¹ *Id.*

C. Google’s Non Publishing Activities are Particularly Harmful to Adolescents

With the mismatch in maturity between the limbic system and the prefrontal cortex in the adolescent brain, Google’s non publishing activities are particularly troubling for adolescents, who are more receptive to harmful content, such as videos encouraging disordered eating, self-harm—or in this case, terrorism activity. Without a completely developed prefrontal cortex to operate in tandem with the limbic system, the adolescent brain lacks the ability to balance emotion and cognition, making adolescents susceptible to harmful content.

When curating an adolescent’s online experience, Google recommends the videos and ads that the algorithms predict would interest the adolescent. The more accurate the prediction, the more time the adolescent spends on the platform, allowing Google to collect ever more data about the adolescent’s interests to improve the accuracy of the algorithms’ predictions to further curate the online experience. The feedback loop displays more of the same content, steering already vulnerable adolescents down a rabbit hole into echo chambers that serve as virtual meeting spaces for any number of groups, including pro-ana (anorexia), pro-mia (bulimia), and pro-self-harm as well as terrorist and other extremist organizations.²²

²² See, e.g., Fairplay, *Designing for Disorder: Instagram’s Pro-eating Disorder Bubble* (Apr. 2022), https://fairplayforkids.org/wp-content/uploads/2022/04/designing_for_disorder.pdf. This report showed that Meta knowingly profited from pushing eating disorder content to children on Instagram with its algorithm since at least 2019. This pro-eating disorder bubble on Instagram consists of nearly 90,000 unique accounts that reach 20 million unique followers, and at least one-third of whom are underage.

The ability to target content and ads to users is not a traditional publishing function. Google’s platform includes features that are particularly insidious. Google, through YouTube, allows users to create “accounts” and “channels,” which make it easier for users to meet virtually.²³

As Petitioners allege, ISIS uses Google to carry out essential communication components of ISIS’s terrorist attacks.²⁴ Google knowingly provides ISIS with use of its algorithms, and other unique computer architecture, computer servers, storage, and communication equipment, to facilitate ISIS’s ability to reach and engage audiences it otherwise could not reach as effectively.²⁵ Advertisers pay Google to place targeted ads on videos, and Google has approved ISIS videos for “monetization” through the tech firm’s placement of ads in those specific videos.²⁶ ISIS uses the platform to indoctrinate and radicalize potential recruits and followers by “providing a constant stream of religious teachings,

Girls have developed eating disorders after being subjected to such content. John Naughton, *Molly Russell was Trapped by the Cruel Algorithms of Pinterest and Instagram*, THE GUARDIAN (Oct. 1, 2022), <https://www.theguardian.com/commentisfree/2022/oct/01/molly-russell-was-trapped-by-the-cruel-algorithms-of-pinterest-and-instagram>. In 2017, 14-year-old Molly Russell killed herself after falling into a dark rabbit hole in the last year of her life. An inquest into her death concluded that she died from “an act of self-harm while suffering from depression and the negative effects of online content.”

²³ Third Amended Compl. ¶ 160.

²⁴ Third Amended Compl. ¶ 195–196.

²⁵ Third Amended Compl. ¶ 551.

²⁶ Third Amended Compl. ¶ 521–533.

mantras, and images showing the ‘truth’ of ISIS’s doctrine . . .,” and providing training to these recruits.²⁷

Google’s activities go beyond providing the traditional services of a publisher. Congress never intended section 230 to be defense for all civil and criminal wrongdoing.

CONCLUSION

For the reasons stated above, *amici* respectfully request the Court to apply the plain-text reading to section 230 of the Communications Decency Act and deny Google’s claim of immunity. The judgment below should therefore be vacated and remanded.

Respectfully submitted,

JOLINA C. CUARESMA

Counsel of Record

IRENE LY

COMMON SENSE MEDIA

699 8th Street, Suite C150

San Francisco, CA 94103

(415) 863-0600

jcuaresma@commonsense.org

Counsel for Amici Curiae

December 6, 2022

²⁷ Third Amended Compl. ¶ 249–250.