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 FREE PRESS ACTION AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

Free Press Action is a nonpartisan, non-profit, nationwide media and technology advocacy organization. It believes that positive social change, racial justice, and meaningful engagement in public life require equitable access to open channels of communication, diverse and independent ownership of media platforms, and journalism that holds leaders accountable. For nearly two decades, it has engaged in litigation, congressional advocacy, and administrative agency proceedings to advance these goals, including cases, legislative hearings, and administrative proceedings concerning the interpretation and application of Section 230.

SUMMARY OF ARGUMENT

I. Section 230 represents Congress's attempt to balance two important competing interests. On the one hand, Congress wanted to encourage providers of interactive computer services (ICSs) to protect their users from harmful and unlawful conduct. On the other hand, Congress did not want to create an incentive for ICS providers to over-moderate their platforms out of a fear of being responsible for everything their users posted.

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[1] No counsel for any party authored this brief in whole or in part. Amicus curiae received a contribution from the North Fund to fund in part the brief's preparation and submission; no other person or entity, other than amicus curiae, its members, or its counsel contributed money to fund the brief's preparation or submission. All parties have lodged letters of blanket consent to the filing of amicus briefs.

The balance Congress struck is codified in Section 230(c). Subsection (c)(2)(A) provides blanket immunity for an ICS provider's decision to remove or restrict access to objectionable content. The text of Subsection (c)(1), in turn, provides a more limited protection from liability for leaving user-generated content up. In particular, it declares 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).

There is no dispute that Google qualifies as a "provider . . . of an interactive computer service." So the question in this case is whether petitioners seek to treat Google as the "publisher" of "information provided by another information content provider" when they seek compensation for injuries Google allegedly caused by hosting and recommending videos promoting terrorism.

Petitioners claim that Google is entitled to no protection under Section 230 because they seek to hold it responsible not for the third-party content it hosts, but for its algorithmic recommendation of that content to its users. Google, on the other hand, argues that because decisions about what content to disseminate or withdraw are editorial choices of the sort publishers often make, Section 230 provides it complete immunity.

Neither side is fully correct, and adopting either position would do damage to the careful calibration of rights and incentives Congress achieved in Section 230.

II. Petitioners argue that they merely seek to hold Google liable for its own recommendation, not for any "information provided by another." Pet. Br. 38-39. That, in amicus's view, is wrong. The harm alleged here arises not solely, or even principally, from the recommendation, but from the content of the third-party videos recommended. That is sufficient to trigger Section 230's prohibition against treating Google as the publisher of that content.

III. At the same time, however, Google is wrong in arguing that Section 230 provides it blanket immunity for its decision to host and recommend videos promoting terrorism or other unlawful content. The plain text of Section 230(c)(1) provides no immunity to anyone. Instead, it simply prohibits treating an ICS as the "publisher" or "speaker" of user content.

As Justice Thomas has explained, that language refers to common law categories that establish the duty of care in defamation cases. *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting the denial of certiorari). Under that tradition, authors, speakers, and publishing houses were liable for knowing or negligent dissemination of defamatory statements. However, mere distributors of such works – such as bookstores, newsstands, and libraries – had no obligation to review the materials they sold for defamatory content. Instead, they were liable only when they distributed materials *knowing* they were tortious or unlawful. *Ibid*. That requirement provides significant protection to distributors, but not complete immunity.

An influential early decision correctly concluded that Internet platforms should be treated as distributors of third-party content, rather than as publishers, and hence could be liable only for knowingly hosting defamatory materials. *See Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). However, a later decision held that once an ICS provider engaged in any content moderation at all, it became a publisher and was subject to the duty to review all of the third-party content it hosted upon pain of civil liability for negligently allowing defamatory statements on its platform. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Congress enacted Section 230 in response to that decision. H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.).

Understood against this backdrop, Section 230 precludes classifying Google as a publisher of its users' content, and thereby obligating it to take due care to prevent its users from posting unlawful content, but it does not preclude classifying Google as a distributor and obligating it to remove content it knows to be unlawful.

In this case, petitioners' claims under the Anti-Terrorism Act appear not to depend on classifying Google as the publisher of the ISIS videos at issue. If merely distributing such content qualifies as providing material support to terrorists (a question on which amicus takes no position here), and if petitioners are able to prove that Google knowingly distributed that unlawful content, Section 230 provides Google no defense.

ARGUMENT

I. Section 230 Seeks To Balance Protecting The Public From Harmful Internet Content And Promoting Online Expression.

The Internet has the potential to be an engine for innovation, interpersonal connection, and substantial social good. But it can also be a powerful tool for inflicting harm, by targeting and amplifying harassment, spreading disinformation, perpetrating frauds, and promoting attacks on people and democratic institutions.

Section 230 of the Communications Act represents Congress's attempt to strike a balance, promoting the best, and helping the public to protect itself against the worst, of what the Internet has to offer. That careful balancing of competing interests should inform the Court's interpretation of the provision.

1. Congress has long recognized the enormous potential of the Internet for promoting expression and empowering individuals and communities. In Section 230's statutory findings, Congress noted that the then-recent flourishing of Internet services and sites "represent an extraordinary advance in the availability of educational and informational resources to our citizens." 47 U.S.C. § 230(a)(1). By dramatically lowering the cost of distributing information, the Internet holds the promise of increasing access to knowledge even more broadly and rapidly than earlier print and electronic media did alone. The Internet also is a powerful democratizing platform for all to make their voices heard, one that is much less dependent on the gatekeepers of traditional publishing and media. The Internet thus offers "a

forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3).

However, Congress also recognized that the Internet can be a potent tool for injury and oppression as well. From early on, the Internet had been used to disseminate abusive materials and commit criminal acts. The free-flowing discourse facilitated by new technologies brought with it not only enormous potential for civilized dialogue, but also for harassment, defamation, discrimination, and disinformation. And as commercial use of the Internet grew, old forms of harmful business conduct, like fraud and false advertising, found a new and powerful platform.

The uncontrolled proliferation of harmful content on the Internet also threatens to diminish the medium's ability to carry through on its promised benefits. Were providers or individual Internet users unable to screen out damaging material, people would be reluctant to take advantage of the vast numbers of useful services otherwise available on the Internet. Homework-help websites, religious fora, repositories of scholarly work – there is no online resource that could not be ruined by an uncontrolled influx of offensive material.

The allegations in this case illustrate the reality and severity of those dangers. Google is alleged to have knowingly hosted and recommended videos openly supporting ISIS, leading to the death of an innocent person at the hands of terrorists whose capabilities were materially advanced by the recruitment and propaganda videos promoted by Google's recommendation algorithm. *See* Pet. App. 6a.

2. In enacting Section 230, Congress sought to balance the competing interests in promoting Internet expression and protecting the public from harmful content.

Congress disavowed any direct government role in controlling speech on Internet platforms, leaving content regulation to providers and users. 47 U.S.C. § 230(b)(2). To that end, Congress enacted measures to "encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet." *Id*. § 230(b)(3); *see also id*. § 230(d).

Congress further sought to empower and encourage providers – the statute uses the term "interactive computer service" (ICS) providers – to moderate their platforms and remove harmful or unlawful content. Section 230(c)(2) therefore immunized ICS providers when they "voluntarily [and] in good faith . . . restrict access to or availability of" objectionable content. 47 U.S.C. § 230(c)(2)(A); *see also, e.g.*, 141 Cong. Rec. 22,045 (1995) (comments of Rep. Cox) (underscoring that Section 230 was intended to protect ICSs that screen objectionable material).

But Congress recognized that merely immunizing an ICS provider's decision to *take down* content, without providing any protection for a decision to leave other content *up*, could create perverse incentives that could chill legitimate expression. Without some protection against being held liable for everything its users posted, a provider could face pressure to over-moderate and/or under-publish content. Accordingly, Congress included the provision at issue in this case, declaring that an ICS provider shall not be "treated as

the publisher or speaker" of information "provided by another." 47 U.S.C. § 230(c)(1).

How that provision is interpreted has had, and will have, a dramatic effect on the balance Section 230 seeks to provide. If given too narrow a scope, Section 230 as a whole will skew platforms' incentive toward suppressing speech and removing content, as ICS providers recognize that they are entitled to absolute immunity for their decisions to remove content and only limited protection for leaving it up. If Section 230(c)(1) is given too broad a reach, however, then providers will have insufficient incentives to remove truly harmful, and often illegal, content even after they become aware of it.

As discussed next, the best reading of Section 230(c) strikes the most appropriate balance – providers are afforded broad immunity for their decisions to remove objectionable content and are subject to liability for the third-party content they leave up only if the plaintiff can show that the defendant had knowledge of the unlawful nature of the content, yet continued to distribute it.[2]

II. Section 230 Applies To Google's Recommendation Of YouTube Videos Produced And Uploaded By Third Parties.

Petitioners argue that Section 230 does not apply because they seek to hold Google liable not for "information provided by another, 47 U.S.C. § 230(c)(1), but for its own recommendations. Pet. 27. Amicus agrees that Section 230 does not immunize

[2] By "unlawful content," amicus means content that violates a criminal or civil law, is tortious, or is otherwise actionable.

defendants for information or conduct that is entirely their own. Indeed, that limitation is essential to the balance Section 230 strikes. But amicus does not believe that in the context of this case, Google is being sued solely for its own conduct or information.

Nothing in Section 230 immunizes an ICS provider for distributing information or other content it has developed on its own, or for its own conduct in producing information jointly with others. *See* 47 U.S.C. § 230(c)(1) (addressing liability only with respect to "information provided by *another* information content provider") (emphasis added); *id.* § 230(f)(3) (defining "information content provider" as any entity "that is responsible, in whole *or in part*, for the creation or development of information provided through the Internet") (emphasis added). Accordingly, there should be no question that Section 230 would not apply if Google itself produced the videos at issue in this case.

Courts have likewise rightly recognized that Section 230 does not apply when an ICS provider participates in the development of the information it distributes, as when a roommate-matching website solicited racial preferences from users which it then published, in violation of fair housing laws. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1165 (9th Cir. 2008) (en banc). Section 230 is intended to protect an ICS provider from publisher liability when it functions as a conduit for the information created by others, not when it acts as a co-creator or co-conspirator.

Likewise, Section 230 does not apply when a plaintiff seeks to hold an ICS provider liable for conduct that does not involve conveying information

created by others. For example, the Ninth Circuit correctly denied a Section 230 defense in *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). The defendant in that case ran a social networking site that allowed aspiring models to post profiles and contact information. The plaintiff alleged that "two rapists used the website to lure her to a fake audition, where they drugged her, raped her, and recorded her for a pornographic video" and that the website owners "knew about the rapists but did not warn her or the website's other users." *Id*. at 848; *see also id*. at 849 (explaining that site operators knew that the perpetrators had been criminally charged with using the site to victimize other women). Section 230 was inapplicable because the plaintiff was not seeking to hold the defendant liable for publishing third-party content – the perpetrators had not posted anything on the website, but rather used the site to identify and contact victims. *Id*. at 851. Instead, the plaintiff's theory of liability was that the defendant had violated a duty "to warn her about information it obtained from an outside source about how third parties targeted and lured victims through" the website. *Ibid*.

Here, petitioners seek to analogize Google's algorithmic recommendation of others' content to cases involving a defendant's own speech or conduct. But the analogy is ultimately unpersuasive. Amicus agrees that it makes no difference whether Google's recommendations are generated by a human Google employee or by a computer running an algorithm developed by Google engineers. But however generated, the recommendation by itself is not an independent, or the most meaningful, source of petitioners' alleged injury. Instead, the injury arises

because of the harmful content of the videos Google recommended. And holding an ICS provider responsible for the harm caused by others' content is what Section 230(c)(1) is intended to address.

In amicus's view, the link between the recommendation and the speech of others here is sufficiently direct and intertwined that the reasonable limitations in Section 230(c)(1) on treating Google as a publisher appropriately apply. But, as discussed next, that does not mean Google is scot-free, for the statute does not preclude holding Google liable for distributing content it knows to be unlawful, whether it recommends that content or not.

III. Section 230 Does Not Preclude Holding Google Liable As The Distributor Of Content It Knows To Be Unlawful.

Congress enacted Section 230 in response to decisions attempting to apply longstanding defamation principles to the Internet context. H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.). As Justice Thomas has explained, those principles distinguish between the legal duties of "speakers" (like Stephen King), "publishers" (like Simon & Schuster) and "distributors" (like Barnes and Noble). *See Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting the denial of certiorari).

While defamation law traditionally held speakers and publishers liable for merely negligent dissemination of defamatory material, it excused distributors from liability unless they knew or had reason to know of the defamatory character of the materials they were distributing. 141 S. Ct. at 14. In

declaring that an ICS provider shall not be treated as the "publisher or speaker" of third-party content, Congress determined that ICSs are more like distributors than publishers or speakers, and therefore should not be held liable for the content they hosted absent knowledge of its unlawful content. It was not providing ICS providers blanket immunity for any and all conduct that could be characterized as a traditional "publishing" function nor excusing them from knowingly distributing unlawful materials.

A. Section 230 Was Enacted Against The Backdrop Of Authorities Drawing A Distinction Between The Duties Of "Publishers" and "Distributors."

1. At common law, the tort of defamation required a publication of the defamatory statement. *See* Restatement (Second) of Torts § 558. But the law did not impose the same standards of care and liability upon every person who might be involved in that publication. *Malwarebytes*, 141 S. Ct. at 14. The author and publishing house were subject to liability if they knowingly, recklessly, or negligently published a defamatory statement. Restatement (Second) of Torts § 580B.[3] But "one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character." *Id*. § 581(1); *see also id*. § 578 ("*Except as to those who only deliver or transmit defamation published by a third*

[3] In light of First Amendment concerns, actual knowledge was required when the defamed person was a public official. Restatement (Second) of Torts § 580A; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it.") (emphasis added). This group included bookstores, newsstands, libraries and other conduits of materials published by others. *Id*. § 581 cmt. d-f.

Accordingly, speakers and publishers were subject to a negligence standard of care, while distributors were required only to avoid disseminating defamatory material with knowledge.

This distinction between what were sometimes called "primary" or "original" publishers (*e.g.*, publishing houses) on the one hand,[4] and distributors (*e.g.*, bookstores and newsstands) on the other, was premised on the different kinds of knowledge and control the two kinds of entities typically have. As the Restatement explained, the "composer or original publisher of a defamatory statement, such as the author, printer or publishing house, usually knows or can find out whether a statement in a work produced by him is defamatory or capable of a defamatory import." Restatement (Second) of Torts § 581(1) cmt. c. Accordingly, the law places on speakers and primary publishers an obligation to exercise due care that the materials they produce and distribute do not defame. *Ibid*.

On the other hand, it is impracticable for a newsstand, bookseller, or library to review every work it carries. Accordingly, such a distributor is "under no duty to examine the various publications that he offers

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[4] *See Malwarebytes*, 141 S. Ct. at 15 (citing W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Law of Torts* 799, 803 (5th ed. 1984)).

for sale to ascertain whether they contain any defamatory items." Restatement (Second) of Torts § 581 cmt. d; *see also id*. cmt. e. As a result, the law imposed on distributors a more modest, but still important, duty to avoid knowingly distributing defamatory materials. *Id*. § 581; *see also, e.g.*, *Osmond v. EWAP, Inc.*, 153 Cal. App. 3d 842, 852 (1984).

2. The advent of the Internet gave rise to difficult questions about how to apply these traditional classifications to an ICS.

An early influential decision was *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991). *See, e.g.*, Jeff Kosseff, *A User's Guide to Section 230, and a Legislator's Guide to Amending It (Or Not)*, 37 Berkeley Tech. L.J. (forthcoming) (manuscript at 8-9)[5] (*User's Guide*) (recounting history leading to enactment of Section 230). In that case, CompuServe maintained what was in essence "an electronic, for profit library" carrying "a vast number of publications." 776 F. Supp. at 140. One of those publications allegedly defamed a competing media company and its developer. The alleged victims sued CompuServe for its role in conveying the defamation, giving rise to the question of whether CompuServe was subject to the heightened standard of care of a traditional publisher or to the lesser standard of a distributor. The court held the distributor standard best fit the nature of CompuServe's role on the Internet. It explained that CompuServe "ha[d] no more editorial control" over the publications uploaded to it "than does a public library, book store, or newsstand," and it would not be "feasible for

[5] Available on SSRN: https://ssrn.com/abstract=3905347.

CompuServe to examine every publication it carries for potentially defamatory statements." *Ibid.* Recognizing that holding CompuServe liable as a publisher "would impose an undue burden on the free flow of information," the court held that it could be liable only as a distributor. *Id.* at 140-41. And because CompuServe lacked actual or constructive knowledge of the alleged defamation, it could not be held liable for the defamatory speech of others whose publications it merely hosted. *Id.* at 141.

A few years later, a different court concluded that an ICS provider went beyond the role of a mere distributor, and incurred the obligations of a publisher, when it exercised a degree of editorial control over the content it hosted. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), Prodigy had undertaken to moderate its "bulletin boards" to screen out posts that were, for example, "in bad taste" or "insulting." *Id*. at *2. The court held that Prodigy's choice to engage in content moderation took the case outside *Cubby*'s ambit: "Prodigy is clearly making decisions as to content . . ., and such decisions constitute editorial control," *id.* at *4, making it a "publisher" that could be held liable for defamation with respect to the posts it did *not* delete, *see id.* at *5, even without actual or constructive knowledge, *id.* at *3.

ICS providers and others reacted to the *Stratton Oakmont* decision with alarm. *See User's Guide*, *supra* at 10. Many feared that the decision would encourage providers to either abandon any attempt at content moderation altogether – for fear that even modest attempts to protect users from harmful conduct would

trigger the heightened risk of liability that followed classification as a publisher – or overreact in the other direction by removing any content that could even arguably be viewed as defamatory, chilling online speech. *See ibid*.

Congress responded to these concerns by enacting Section 230. *See* H.R. Rep. No. 104-458, at 194. In proposing the text that was to become Section 230, Representative Christopher Cox discussed and contrasted *Cubby* and *Stratton Oakmont*, 141 Cong. Rec. 22,044-45 (1995), concluding, "We want to encourage people like Prodigy, like CompuServe . . . to do everything possible for us, the customer, to help us control, at the portals of our computer, at the front door of our house, what comes in and what our children see." *Id.* at 22,045. But as *Stratton Oakmont* demonstrated, treating ICS providers as publishers instead of distributors whenever they engaged in content moderation created a "backward" incentive. *Ibid.*

B. Section 230 Prohibits Imposing The Classification And Legal Duties Of A "Publisher" On Internet Platforms, But Does Not Preclude Subjecting Them To The Lesser Duties Of Distributors.

Particularly when read against this historical background, Section 230 is best understood as prohibiting classification of an ICS provider as the "publisher" of third-party content, but not precluding liability premised on the ICS acting as a distributor, so long as the plaintiff can show the provider acted

with knowledge of the unlawful nature of the content it was distributing.

1. By its terms, Section 230(c)(1) does not provide blanket immunity to anyone, in stark contrast to the immediately following paragraph, which provides immunity in traditional, express terms. *See* 47 U.S.C. § 230(c)(2) ("No provider . . . shall be held liable on account of . . . ."); *Malwarebytes*, 141 S. Ct. at 16 (noting that when "Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

What (c)(1) prohibits is a particular *classification* – *i.e.*, treating an ICS as the "publisher" or "speaker" of others' information. In so doing, Section 230(c)(1) prohibits imposing on an ICS provider special legal duties that apply only to the speaker or publisher of information. *See* 141 S. Ct. at 15 (noting "the text of § 230(c)(1) grants immunity only from 'publisher' or 'speaker' liability").

For example, Section 230 would not preclude suit against Google for being the *source* of information (say, a user's search history) that a third party then disclosed in a YouTube video. Holding Google liable for leaking confidential user information would not require treating Google as the "publisher" or "speaker" of that third-party video. Nor would any legal duties it breached arise from being the publisher of those videos, as opposed to, say, from the terms of its user agreement or a privacy law.

Likewise, Section 230 does not preclude suits alleging that an ICS provider violated duties it incurs

as a *distributor* of third-party content. If Congress had intended to overrule both *Stratton Oakmont* and *Cubby*, in order to provide ICSs complete immunity for their role in distributing unlawful content, it could have said so expressly, using the same straightforward terminology it used in subsection (c)(2) to immunize restrictions on access to objectionable content. *See Malwarebytes*, 141 S. Ct. at 16-17. It could have said, for example, that "No provider or user of an interactive computer service shall be held liable on account of any information provided by another information content provider."

Indeed, on Google's interpretation, it is hard to see why Congress bothered enacting subsection (c)(2)(A) at all. If Section 230(c)(1) provides sweeping immunity for "traditional editorial functions (such as deciding whether to display or withdraw information)," BIO 20 (cleaned up), Section 230(c)(2)(A) would have been unnecessary to protect an ICS provider's decision to "restrict access to or availability of material." Congress enacted both provisions because it intended to provide different protection for the decisions to take down and leave up content, the former being completely immunized and the latter protected only against the imposition of heightened "publisher" or "speaker" liability, using terms of art from cases that expressly distinguished "publisher" from "distributor" liability. *See Malwarebytes*, 141 S. Ct. at 15.

Accordingly, Section 230's application does not depend on whether a provider is being sued for engaging in allegedly "traditional editorial functions" such as "deciding whether to display or withdraw" third-party content. BIO 20 (citation omitted). Instead of turning on a categorization of the

defendant's *conduct*, Section 230 turns on the nature of the *duty* the plaintiff seeks to enforce against the ICS provider – is it a duty imposed on any distributor of content or only on publishers or speakers?

This understanding of the provision accords not only with the text and background of the statute, but with Congress's purposes. Congress rejected *Stratton Oakmont*'s all-or-nothing approach that required providers to abandon any content moderation to avoid publisher liability. But Congress did so to give providers an incentive to protect their users. *See supra* 7-8. Google's view dramatically undermines that incentive, offering an ICS provider no reason to remove unlawful content even after it has become aware of it. Indeed, on Google's view, an ICS provider may even knowingly recommend or promote illegal content to its users, assured that it is completely immune from civil liability for the harm its decision will inflict on victims who, as a practical matter, often have no recourse against the originators of the content.

At the same time, allowing liability for knowingly distributing unlawful content does not create undue pressure to engage in expansive and expensive screening of content or to suppress legitimate speech. An ICS provider continues to bear no duty to prescreen user content and cannot be held liable for negligent content moderation. It is only when a provider becomes aware of the unlawful nature of hosted content that it incurs any potential obligation to take remedial action.

In practice, this should ordinarily require a plaintiff to show that the ICS was provided direct notice of the content (for example, in the form of a

complaint) and a reasonable basis to believe that the content was unlawful, yet allowed the content to remain online.[6]

Requiring an ICS provider to investigate such a complaint and take appropriate action would not impose an undue burden. After all, one would expect that a responsible provider would take those steps even without the prospect of potential civil liability, including because Section 230 does not protect it from federal criminal liability for knowingly hosting unlawful content. *See* 47 U.S.C. § 230(e)(1). Moreover, as discussed, distributors of analog content

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[6] In the defamation context, a distributor is liable if it knows or "has reason to know" of the defamatory nature of the materials it is distributing. Restatement (Second) of Torts § 581(1). The Court need not decide in this case whether Section 230 requires anything short of actual knowledge, given that petitioners allege Google acted with actual knowledge in this case. *See* Pet. 10; *see also* 18 U.S.C. § 2333(d)(2) (providing for aiding and abetting liability for those who "knowingly provid[e] substantial assistance" to an act of international terrorism).

But if the Court does address the question, it should make clear that even if something short of actual knowledge might suffice, it should be the rare case in which a court should find that an ICS had reason to know the content of a user's post absent someone identifying a specific post and providing the ICS reasonable notice why the content is unlawful. *See* Restatement (Second) of Torts § 12(1) ("reason to know" requires that the defendant have "information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists"); *id.* § 12(2) (contrasting with "should know" standard). Courts must guard against the risk that a "reason to know" standard could be used to effectively impose on ICS providers a publisher's duty to proactively monitor and investigate the content they distribute, in conflict with a core purpose of Section 230(c)(1).

have long been subject to the same requirement under traditional defamation law, including large distributors like Amazon that carry millions of titles.[7]

At the same time, many online platforms already have systems in place to process complaints about hosted content in order to comply with the take-down provisions of the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860 (1998). That statute similarly shields a platform from liability for hosting unlawful material (*i.e.*, content that violates another's' copyright) unless it has "actual knowledge that the material . . . is infringing" or fails to expeditiously remove infringing material "upon notification of claimed infringement." 17 U.S.C. § 512(c)(1)(A)(i), (c)(1)(C); *see also* 47 U.S.C. § 230(e)(2) (providing that nothing in Section 230 "shall be construed to limit or expand any law pertaining to intellectual property").

2. Google's contrary claim that it is free from any responsibility for the content it distributes cannot be reconciled with the statute's text, history, or purposes.

Some courts have denied that Congress recognized a distinction between "publishers" and "distributors." In its influential decision in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), for example, the Fourth Circuit noted that "publication" is an element of every defamation claim, and that the term broadly encompasses any form of communication, from speech to publication by a publishing house, to distribution by a newsstand or a

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[7] *See* Patrick Lo, *Amazon.com: The New and Unparallel Bookbuying Experience*, 3 Int'l J. Tech, Knowledge & Soc'y 67, 67-68 (2007).

bookstore. *Id.* at 332-33. The court reasoned that in declaring that an ICS provider cannot be treated as the "publisher" of third-party information, Congress was referring to this broad meaning of "publication" and therefore forbade treating an ICS as either the publisher or distributor of its user's content. *Ibid.*

The Fourth Circuit too easily assumed that the statutory word "publisher" encompasses anyone who could be said to "publish" the work at common law. *Cf. New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539-40 (2019) (rejecting similar attempt to define "employment contract" by reference to common law definition of "employee"). The equation disregards that although publication is required in every defamation case, liability for that publication turns on whether the defendant is a speaker, publisher, or merely a distributor of the statement. *See supra* 12-13. Because Section 230 addresses standards for liability, it is most naturally understood as referring to these more refined distinctions upon which liability ultimately depends.

The Fourth Circuit's contrary assumption that Congress intended its reference to "publishers" to encompass anyone involved in the "publication" of a defamatory statement is belied by Congress's separate prohibition against treating an ICS provider as a "speaker" of that information. Since speaking is a standard form of "publication" in defamation law, Restatement (Second) of Torts § 577 cmt. a, there would have been no need to refer to speakers separately if Congress had intended "publisher" to encompass anyone engaged in "publication" of the statement at common law.

Treating ICS providers as distributors, but not speakers or publishers, also sensibly describes how the Internet actually works and what is reasonable to expect of those who provide platforms for others' content. As *Cubby* rightly explained, many ICS providers operate far more like a bookstore or a library than a primary publisher, providing a method for distributing content written, edited, and inspected by others, not the ICS itself. The court's error in *Stratton Oakmont* was in thinking that because an ICS attempted some modest level of content moderation, it was reasonable to expect it to engage in intensive inspection and review of *all* the content it hosted in a manner akin to a publishing house.

But there is no evidence that Congress believed there was something special about distributing content over the Internet that required relieving ICS providers of the far more modest obligations of content distributors. To be sure, there may be real differences between traditional booksellers and online video-hosting platforms, or between copyright complaints and other objections to user content. But there is nothing in the text or history of Section 230 indicating that those differences led Congress to provide ICSs carte blanche to knowingly distribute unlawful content that inflicts real, substantial harm on the public. Indeed, Congress's decision in the DMCA to generally shield platforms from responsibility for hosting infringing materials posted by others unless the platform has knowledge of the infringement strongly suggests that Congress does not share the view that it is unreasonable or infeasible to require providers to remove unlawful content once they are put on notice of its unlawful character.

C. As Applied To This Case, Section 230 Does Not Preclude Holding Google Liable For Knowing Violations Of The Anti-Terrorism Act.

Properly construed, Section 230 thus applies to petitioners' attempts to hold Google liable for recommending and distributing videos produced by ISIS and its sympathizers, but does not necessarily immunize Google for violations of the Anti-Terrorism Act. Liability under that statute appears not to depend on Google being the "speaker" or "publisher" of the ISIS video it hosted. The Act provides a cause of action to any "national of the United States injured in his or her person, property, or business by reason of an act of international terrorism" against anyone who "aids and abets, by knowingly providing substantial assistance . . . such an act of international terrorism." 18 U.S.C. § 2333(a), (d)(2). To the extent hosting ISIS videos counts as providing "substantial assistance" – a question on which amicus takes no position – liability would turn on Google's distribution of that content, not on it acting as a publisher or speaker within the meaning of Section 230. Furthermore, because the Act permits liability only for "knowingly" providing substantial assistance, such a theory of liability would fit with Congress's decision to allow distributor liability for knowing dissemination of unlawful materials.

CONCLUSION

For the foregoing reasons, the Court should hold that Section 230(c)(1) applies to an ICS provider's recommendations regarding information provided by others but does not relieve the provider of liability for knowingly distributing unlawful content.

Respectfully submitted,

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