No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, ET AL., PETITIONERS

v.

GOOGLE LLC

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE SUGGESTING REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The State of Texas has an interest in the proper interpretation of Section 230 of the Communications Decency Act. Like other States, Texas asks this Court to correct the lower courts' misapplication of Section 230 in a way that prevents injured citizens from obtaining relief for wrongs committed through the Internet. *See* Br. of Tennessee. Those lower-court decisions generally serve to protect bad actors from the consequences of their actions—not to promote the free exchange of ideas on the Internet.

But Texas also has a more specific interest: Internet platforms are relying on Section 230 in other litigation that is likely to come before the Court to defeat a Texas law that protects free speech on the Internet. That litigation presents important questions, and the Court's decision in this case may affect it.

SUMMARY OF ARGUMENT

I. Section 230 directs courts not to treat the provider of an interactive computer service as "the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). That rule of construction is irrelevant here, where petitioners allege that Google's *own* recommendations aided and abetted the acts of terror perpetrated by ISIS. Neither those recommendations nor the algorithms that produced them were provided by "another" party. Google

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than the State of Texas contributed monetarily to its preparation or submission. Counsel of record for all parties received notice of amicus's intention to file this brief. The State of Texas takes no position on whether petitioners will prevail on the merits of their claims.

went beyond passively hosting content. It actively promoted certain videos over others. Section 230 does not shield it from liability for doing so.

Section 230's statutory history confirms that it is inapplicable here. Congress enacted Section 230 as part of a broader statutory scheme to limit children's access to Internet pornography. Section 230 does that by allowing Internet platforms to remove pornography (and similar content) without risk of being called to account for the content they *fail* to remove. In that way, Section 230 reflects a deliberate choice by Congress to treat Internet platforms like telephone companies, which have long had a warrant to remove certain content without becoming liable for everything else that occurs on their platforms. But Section 230's historical context does not suggest that Congress intended the statute to provide a blanket immunity for any claim tangentially related to third-party content.

II. Overbroad judicial interpretations of Section 230 have harmed States and their citizens in two ways. *First*, a court infringes state sovereignty whenever it incorrectly holds that Section 230 prevents a State from enforcing its laws. *Second*, a court harms a State's citizens whenever it misapplies Section 230 and improperly prevents those citizens from obtaining redress for wrongs committed online. This Court should stem the tide of those harms by faithfully interpreting Section 230.

III. Social-media giants and their advocates often prognosticate that any restriction on Section 230's reach would result in the end of the digital world as we know it. Those concerns are hyperbolic. A lack of Section 230 protection by no means guarantees liability. Plaintiffs, including petitioners, must still prove their claims. Allowing petitioners' claims here to proceed would not make

Google liable for the content of every video it recommends. Rather, Google faces potential liability only if petitioners can demonstrate that recommendations *themselves* amount to "aiding and abetting" terrorism. And even if correctly interpreting Section 230 requires companies like Google to adjust their business models, that does not foretell disaster. Indeed, given rampant online evils like human trafficking and child pornography, such an adjustment may well prove salutary. But if Internet platforms believe the social value of their businesses justifies an immunity broader than that conferred by Section 230's text, that is a trade-off that Congress, rather than the courts, should make.

ARGUMENT

I. Section 230 Does Not Shield Google from Liability for the Recommendations It Provides.

Section 230 prevents a court from treating a provider of "an interactive computer service" (an Internet platform) as the publisher or speaker of information provided by "another information content provider" (an unaffiliated content producer). 47 U.S.C. § 230(c)(1). And it protects a provider that makes a good-faith effort to restrict access to pornography and other content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" from liability for content that it does not restrict. *Id.* § 230(c)(2)(A). But it does not confer broad immunity on a provider merely because a claim involves third-party content.

Here, petitioners do not allege that Google is directly liable for what the *terrorists* did, but for what *Google* did. According to petitioners, Google actively aided and abetted terrorism by recommending ISIS videos to YouTube users. J.A. 169–70, 173. Because petitioners' claims do not seek to hold Google liable for information provided

by another information content provider, Section 230(c)(1) provides Google no protection.

The precedent on which Google relies is conspicuously flawed. It rests principally on a single circuit decision from Section 230's infancy that deviated from that statute's text in a policy-driven and misguided effort to protect then-nascent Internet service providers. That precedent also ignores Section 230's historical context, which shows that Section 230 was enacted to allow website operators to remove pornography without risking strict liability for content they do not censor—not to provide operators with a shield so expansive that it approaches the protections of sovereign immunity. Judicial decisions expanding Section 230's protections beyond its text have instead improperly immunized online businesses from liability for facilitating such heinous acts as child sex trafficking and international terrorism, as well as invidiously discriminating among who may use their services.

As a matter of first impression, this Court should recognize the scope of the statute's plain language, backed up by the context that framed its enactment. That is the only way to honor the delicate balance that Congress struck between fostering the Internet's growth and ensuring that growth does not jeopardize the most vulnerable and impressionable Americans.

A. Section 230's text provides no protection for Google's recommendations.

Entitled "Protection for private blocking and screening of offensive material," Section 230 limits the liability of providers of an interactive computer service in targeted ways. Its centerpiece is subsection (c), "Protection for 'Good Samaritan' blocking and screening of offensive material." Subsection (c)(1) states 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." "[I]nformation content provider" is defined by subsection (f)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." Google argues that Section 230(c)(1) bars petitioners' claims. *E.g.*, Br. in Opp. 20. It does not.

Petitioners allege that Google repeatedly and knowingly recommended ISIS videos to YouTube users. J.A. 169, 173. According to petitioners, those recommendations were made because the ISIS videos were selected by automated algorithms created by Google. J.A. 173. Petitioners seek damages under a federal law that creates liability "as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed" an act of international terrorism. 18 U.S.C. § 2333(d)(2); *see* J.A. 176–78. Petitioners thus seek to hold Google liable for taking affirmative acts—aiding and abetting terrorists—by recommending terrorist videos based on algorithms that Google created. Because those recommendations are not "information provided by another information content provider," Section 230(c)(1) offers Google no protection.

A recent decision of the Supreme Court of Texas, *In re Facebook, Inc.*, 625 S.W.3d 80 (Tex. 2021) (orig. proceeding), is instructive. In that case, human-trafficking survivors brought claims for "negligence, negligent undertaking, gross negligence, and products liability based on Facebook's alleged failure to warn of, or take adequate measures to prevent, sex trafficking on its internet platforms." *Id.* at 83. The plaintiffs also brought claims

"under a Texas statute creating a civil cause of action against those who intentionally or knowingly benefit from participation in a sex-trafficking venture." *Id.* The court (largely relying on federal circuit authority that it recognized as dubious) held that Section 230 barred the plaintiffs' common-law claims. *Id.* at 93–96. But the court also held that the plaintiffs' statutory claims could proceed. *Id.* at 96–101. The court reasoned that the statutory claims did not "treat Facebook as [someone] who bears responsibility for the words or actions of third-party content providers," but instead treated Facebook "like any other party who bears responsibility for its *own* wrongful acts." *Id.* at 98. And the court found it "highly unlikely that Congress . . . sought to immunize those companies from *all* liability for the way they run their platforms, even liability for their own knowing or intentional acts as opposed to those of their users." *Id.*

Like the statutory claims in *Facebook*, but unlike the claims at issue in many cases in which courts have held that Section 230 barred relief, petitioners' claims do not seek to hold Google liable for "information provided by another information content provider." 47 U.S.C. § 230(c)(1). That is, petitioners' claims do not seek to hold Google liable merely for harm caused by third-party information. *Cf., e.g.*, *Bennett v. Google, LLC*, 882 F.3d 1163, 1164 (D.C. Cir. 2018) (plaintiff's claim was based on an allegedly defamatory message posted by a third party); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997) (same). Instead, the harm alleged by petitioners is death resulting from an act of international terrorism. J.A. 155, 178, 181. Federal law creates primary liability for the attack. 18 U.S.C. § 2333(a). And it creates secondary liability for aiding and abetting it. *Id.* § 2333(d)(2).

Petitioners' claims, therefore, are two steps removed from any third-party posts. They seek to hold Google secondarily liable for a terrorist act. And their theory is that Google aided and abetted the terrorists by actively and voluntarily recommending ISIS videos. Those recommendations were provided by Google, not by ISIS or any other information content provider. Petitioners thus allege that Google's own acts—the recommendations it provided—make it secondarily liable for physical actions that the terrorists took, not for posting information online. Whether that theory entitles petitioners to relief remains to be seen. But regardless of whether petitioners can link the video recommendations and the murder on the merits, Section 230 plays no role here.

Of course, Google's liability under petitioners' theory does, in a limited respect, depend on third-party content. If ISIS videos did not exist on its platform, Google could not face potential aiding-and-abetting liability for recommending those videos. But Section 230 does not preempt petitioners' claims merely because third-party content is somehow involved. "[Section 230(c)(1)] does not insulate a company from liability for all conduct that happens to be transmitted through the internet. Instead, protection under § 230(c)(1) extends only to bar certain claims, in specific circumstances, against particular types of parties." *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 129 (4th Cir. 2022); *see Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (noting that Section 230 "does not provide a general immunity against all claims derived from third-party content").

The court of appeals rejected petitioners' argument that "Google does more than merely republish content created by third parties." Pet. App. 31a. It did so by applying a "material contribution" test, according to which

a website operator "creat[es] or develop[s]" third-party content when it alters the content in a way that materially contributes "*to its alleged unlawfulness*." Pet. App. 32a (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008) (en banc)). But this Court need not address the propriety of the material-contribution test for determining whether the alteration of third-party content makes a defendant an information content provider under Section 230(f)(3), because Google's recommendations were solely its own acts. It is those recommendations, not Google's hosting or alteration of ISIS's videos, that are at issue here.

The court of appeals also erred in concluding that Google's conduct here is not outside of Section 230's scope because Google's "algorithms do not treat ISIS-created content differently than any other third-party created content." Pet. App. 37a. That is a *merits* determination. And that reasoning is flawed because a recommendation, by its very nature, treats some content differently from other content. There are a vast number of videos on YouTube. Google's algorithms sort through them and select a handful of videos to recommend to a given user at a given time. That is the *opposite* of treating all content the same. And Section 230(c)(1) does not shield Google's decision to go beyond merely hosting content and to instead promote certain videos over others.

B. Section 230's history confirms that it does not shield Internet platforms from the consequences of their own conduct.

The statutory history of Section 230 confirms the congressional intent to encourage Internet platforms to remove pornography and similar content, not to grant

platforms government-like immunity for their own conduct. Supplementing legislation that criminalized the sharing of pornography, Section 230 gave Internet companies telephone-like liability protections, which allowed them to voluntarily remove pornography even as they carried countless other forms of content. This was necessary because an early-Internet judicial decision concluded that online platforms that remove *any* content become liable for *all* of it. Cases decided shortly after Section 230's enactment, however, badly distorted this statutory framework, requiring this Court's intervention.

1. Section 230 was enacted as part of the Telecommunications Act of 1996, the "major components of [which] have nothing to do with the Internet." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). The exception was "Title V—known as the 'Communications Decency Act of 1996.'" *Id.* at 858. That Act, in turn, provided two independent but overlapping legislative solutions for how to limit children's access to Internet pornography.

First, Senator Jim Exon's proposal, ultimately enacted as Section 502 of the Telecommunications Act, 47 U.S.C. § 223(a), (d), took a heavy-handed approach to what was then considered a severe problem of pornography on the Internet. Time Magazine "pour[ed] fuel" on this incendiary issue when it incorrectly reported that over 80% of images available on early Internet platforms were pornographic. 141 Cong. Rec. S9019 (daily ed. June 26, 1995) (statement of Rep. Grassley) (reprinted version of the story). That story was introduced in Congress. *Id.* And "[t]he study became the source of endless articles and editorials." Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 54 (1996). In order "to

protect minors from 'indecent' and 'patently offensive' communications on the Internet," *Reno*, 521 U.S. at 849, Senator Exon's legislation imposed criminal penalties on persons who send such images to minors or who "knowingly permit[] any telecommunications facility under his control to be used" for such activity "with the intent that it be used for such" activity, *id.* at 859–60; *see* Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, § 502.

Second, some representatives likewise recognized the need to protect children from pornography but favored a lighter legislative touch. They proposed what became Section 509 of the Telecommunications Act, and later Section 230, "as a substitute for the Exon" approach. *Reno*, 521 U.S. at 858 n.24. Instead of being coercive, Section 230 more gently encouraged Internet platforms to be "Good Samaritans" by voluntarily removing pornography. 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox, one of the bill's sponsors). To do that, it provided legal *protection* to Internet platforms that opted to remove such content. That protection was important in the light of a state-court decision from New York that threatened to expose Internet platforms that remove content to tremendous legal liability for what they did *not* remove. *Id.*

2. The New York case—*Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. 1995)—misapplied "specific background legal principles" about how Internet platforms should be liable for their users' speech. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting denial of certiorari). Specifically, the court applied *newspaper*-type liability to an Internet platform's decisions about what to transmit, even though

Internet platforms generally bear no resemblance to newspapers. The bill that became Section 230 represented Congress's rejection of that misapplication, providing critical context for how Section 230 operates.

Tort law has long applied different liability standards to speech intermediaries. The classic example is defamation: newspapers and other comparable publishers are generally deemed to be the speakers of any third-party content they carry and are held liable to the same extent as the underlying authors. *See, e.g.*, *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 60–61 (2d Cir. 1980) (explaining that such publishers are "subject to liability just as if [they] had published [the libelous content] originally"). A newspaper, therefore, cannot defend against a defamation action on the ground that some unaffiliated party was the author of the defamation it printed.

Other entities are liable for third-party content they carry only in limited contexts. A telegraph company, for example, could be held liable only in the "rare case[]" in which it "happened to know that the message" it transmitted "was [tortious] or that the sender was acting, not in the protection of any legitimate interest, but in bad faith and for the purpose of traducing another." *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 543 (1st Cir. 1940). Telephone companies, meanwhile, are generally regarded as completely immune from liability for the third-party content they carry. *See* Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 146 n.26 (2021) (collecting authorities).[2]

[2] There is some authority for the proposition that telephone companies may be held liable for the "*knowing* transmission" of tortious third-party content. Candeub, *supra*, at 146 n.26. But, because telephone companies (unlike telegraph companies) seldom have the

The *Stratton Oakmont* court botched the application of these established liability frameworks to the new Internet medium.[3] In that case, "[a]n early Internet company was sued for failing to take down defamatory content posted by an unidentified commenter on a message board." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). The *Stratton Oakmont* court accepted that Internet platforms generally were "conduit[s]" not legally responsible for their users' speech. 1995 WL 323710, at *3. But it concluded that liability was appropriate there because "the company . . . held itself out as a family-friendly service provider that moderated and took down offensive content." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J.). In the court's view, the practice of taking down *some* content made the Internet platform liable, just like a newspaper, for all the content it allowed to remain available. *Stratton Oakmont*, 1995 WL 323710, at *3, *4.

"Congressmen on both sides of the debate"—Senator Exon's side, and those who favored the light-touch approach—"found *Stratton* objectionable." Cannon, *supra*, at 62. That is because the case essentially "create[d] a 'Hobson's choice'" for Internet platforms: they could either "creat[e] 'child safe' areas that expose" their companies to "liability as . . . editor[s], monitor[s], or publisher[s]" of *everything* on their platforms, or they could "do[] nothing," allowing pornography to blight their spaces, "in order to protect [themselves] from liability."

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opportunity to review speech *before* it is transmitted, this category of liability, if it exists at all, is exceedingly narrow.

[3] Indeed, after Section 230 was enacted, New York's high court overruled *Stratton Oakmont* because it concluded—consistent with what was by then the prevailing view—that an Internet platform is more analogous to a "telephone company" than a newspaper. *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999).

Id. As a result, "[e]arly platforms . . . claimed they could not offer porn-free environments because of *Stratton Oakmont*." Candeub, *supra*, at 142.

3. "One of the specific purposes of" what became Section 230 was "to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions." H. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (cleaned up). *Stratton Oakmont*'s Hobson's choice blocked Congress's goal of limiting Internet pornography. Its reasoning also made little practical sense because telephone companies, the closest analogue to Internet companies, had long been allowed to remove certain content without jeopardizing their immunity from liability for other content passing through their wires. *See, e.g*, *Carlin Commc'ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1292 (9th Cir. 1987) (pre-recorded pornographic messages). Likewise for telegraph companies: "If . . . the message is expressed in indecent, obscene or filthy language, then, in our opinion, the telegraph company will be excused from the [obligatory] transmission of any such message." *W. Union Tel. Co. v. Ferguson*, 57 Ind. 495, 498–99 (1877) (stating the common law rule). Section 230 attempted to solve the Hobson's choice problem by largely adopting the same liability framework for the Internet. *See, e.g.*, Candeub, *supra*, at 146.

For many reasons, prevailing sentiment at the time aptly supported the equivalence between telephones and the Internet. For one, Internet service was generally delivered "through a modem that uses a telephone line to connect to the Internet." *See* Mississippi State University Extension, *Types of Internet Connections*, https://tinyurl.com/dialupconnection (noting that a "dial-up"

connection "was the first widely used type of Internet connection").[4]

Additionally, instantaneous communication on Internet platforms most nearly resembled and was regarded as "analogous to a telephone party line, using a computer and keyboard rather than a telephone." *ACLU v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996) (three-judge panel's findings of fact), *aff'd*, 521 U.S. 844 (1997). That is "because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online." *Id.* at 851–52; *see Doe v. GTE Corp.*, 347 F.3d 655, 659 (7th Cir. 2003) (Easterbrook, J.) ("A web host, like a delivery service or phone company, is an intermediary."). And, after all, Section 230 was enacted as part of the "Telecommunications Act" of 1996—an Act that in most relevant part modified federal law that applied to telephones.

Section 230 codified the telephone-style liability scheme for Internet platforms in two ways. *First*, it provided that "[n]o provider or user of an interactive computer service"—*i.e.*, an Internet platform—"shall be treated as the publisher or speaker of any information provided by *another*." 47 U.S.C. § 230(c)(1) (emphasis added). *Second*, it established that this default rule is not displaced if the Internet platform takes action "in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." *Id.* § 230(c)(2). That way, a message board like the one at issue in *Stratton Oakmont* could remove pornography without becoming responsible for other potentially tortious material it did *not* remove.

[4] All websites were last accessed on December 7, 2022.

Importantly, however, Section 230 offered no protection to "information content providers"—meaning persons or entities "responsible, in whole or in part, for the creation or development of information." *Id.* § 230(f)(3).

4. Although Section 230 was originally offered as a "substitute" for Senator Exon's legislation, it was (as already noted) ultimately "enacted as an *additional* section of the Act." *Reno*, 521 U.S. at 858 n.24 (emphasis added). Indeed, it provided that nothing in it should "be construed to impair the enforcement of" Exon's language. 47 U.S.C. § 230(e)(1). "As a result, the [two components] were described as fitting together 'like a hand in a glove.'" Cannon, *supra*, at 68. Exon's component criminalized acts of sharing pornography. 47 U.S.C. § 223(a), (d). And Section 230 protected "Good Samaritan[s]" who take it down. *Id.* § 230(c).

5. Two early court decisions had an outsized impact on the interpretation of the Communications Decency Act and continue to have significant distorting effects on how lower courts apply Section 230.

First, in *Reno*, this Court held that Exon's approach ran afoul of the First Amendment because it "effectively suppresse[d] a large amount of speech that adults ha[d] a constitutional right to receive and to address to one another." 521 U.S. at 874. That took the Exon glove off the Section 230 hand.

Second, in *Zeran v. America Online*, 129 F.3d 327, the Fourth Circuit adopted an atextual test for determining when Section 230's protection applies. Specifically, it concluded that "lawsuits seeking to hold an [Internet platform] liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone *or alter* content—are barred." *Id.* at 330 (emphasis added). This ruling ran

directly afoul of the provision of Section 230 that expressly maintained liability for those "responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). Nevertheless, *Zeran* started a cascade of authority whereby other circuits and state courts adopted the Fourth Circuit's decision, treating it as akin to a decision of *this* Court. *See, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 63 (2d Cir. 2019) (*Zeran* was a "seminal" decision); Candeub, *supra*, at 154–55 ("with perhaps one exception," the lower courts all follow *Zeran*).

Zeran's capacious conception of Section 230 protection has wrongly immunized Internet platforms from liability in a range of situations, including for their *own* conduct. *See Malwarebytes*, 141 S. Ct. at 16 (Thomas, J.). But Section 230 does not, and was not designed to, protect Internet platforms from the consequences of their own actions. An Internet platform, after all, can remove pornography without committing its own unlawful acts. And the telephone companies to which Internet platforms were compared have historically been liable for their *own* acts and omissions—notwithstanding the absence of liability for their *users*' speech. *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Hinchcliffe*, 204 F.2d 381, 382 (10th Cir. 1953) ("where a telephone company negligently fails to furnish proper telephone facilities"); *Cain v. Chesapeake & Potomac Tel. Co.*, 3 App. D.C. 546, 553 (D.C. Cir. 1894) (holding that a telephone company can be held liable for misleading callers about a subscriber's availability); *Emery v. Rochester Tel. Corp.*, 3 N.E.2d 434, 437 (N.Y. 1936) ("unexplained failure to give any service"); *Chesapeake & Potomac Tel. Co. of Va. v. Carless*, 102 S.E. 569, 570 (Va. 1920) (negligently disconnecting subscribers).

* * *

Far from suggesting that the Court should depart from Section 230's plain text, the statute's history confirms that it means what it says: Section 230 provides targeted protections for platforms that want to censor pornography and other harmful content without being exposed to liability for all third-party content that is not removed. But Section 230 does not "create a lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. And just as acts that aid and abet terrorists "are unlawful when [done] face-to-face or by telephone, they don't magically become lawful when [done] electronically online." *Id.*

II. Judicial Expansion of Section 230 Causes Real-World Harm.

The proper interpretation of Section 230 is no mere academic exercise. By going beyond Section 230's text, courts have harmed States and their citizens in two ways.

First, state sovereignty is infringed when courts improperly hold that Section 230 preempts state law. Section 230(e)(3) provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." The stakes for States are therefore high.

For example, Texas recently enacted "a groundbreaking . . . law that addresses the power of dominant social media corporations to shape public discussion of the important issues of the day." *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715, 1716 (2022) (Alito, J., dissenting from grant of application to vacate stay). That law seeks to preserve free speech on the Internet by preventing the biggest social-media platforms from censoring users based on viewpoint. *Id.*

Trade associations representing the platforms sued the Texas Attorney General, arguing primarily that the law violates the First Amendment. *Id.* In the alternative, the trade organizations, whose members include Google and YouTube, *NetChoice, LLC v. Paxton*, 573 F. Supp. 3d 1092, 1103 (W.D. Tex. 2021), *vacated and remanded sub nom. NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022), have also argued that Texas's law "is preempted" by Section 230, *id.* at 1101. If Section 230 is given an overbroad interpretation, Texas may be unable to enforce its carefully structured scheme for protecting free speech in the digital public square. It would be remarkable for Section 230 to preempt a law like Texas's which, after all, dovetails with one of Section 230's own stated values—free speech. 47 U.S.C. § 230(a)(3). And Texas's law in no way frustrates Section 230's safe harbor for the removal of pornography. It does not impose *any* liability on the Internet platforms for content they fail to remove. And it allows them to continue removing pornography in multiple ways. First, removing pornography will generally (and perhaps always) not constitute "viewpoint" discrimination, and so will not fall within the law's proscription. *NetChoice*, 49 F.4th at 445–46. Second, the law gives Internet platforms an explicit permit to remove unlawful content or content they are "specifically authorized to censor by federal law," even if it would constitute "viewpoint" discrimination. *Id.* at 446. In all events, the Court should not interpret Section 230 in a way here that pre-determines the answer to the questions posed in that case.

Second, courts have prevented the citizens of Texas and other States from obtaining redress for their injuries. Courts have strayed so far from the statute's text that they now extend immunity to online platforms even

when the plaintiff is not "trying to hold the defendants liable 'as the publisher or speaker' of third-party content" but only for "the defendant's own misconduct." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.).

For example, in *Jane Doe No. 1 v. Backpage.com, LLC*, victims of sex trafficking alleged "that Backpage, with an eye to maximizing its profits, engaged in a course of conduct designed to facilitate sex traffickers' efforts to advertise their victims on the website." 817 F.3d 12, 16 (1st Cir. 2016). The plaintiffs further alleged that "Backpage's expansion strategy involved the deliberate structuring of its website to facilitate sex trafficking," that "Backpage selectively removed certain postings made in the 'Escorts' section (such as postings made by victim support organizations and law enforcement 'sting' advertisements) and tailored its posting requirements to make sex trafficking easier," and that Backpage removed metadata from uploaded photographs to protect traffickers. *Id.* at 16–17.

As a result of being trafficked through Backpage, one plaintiff was allegedly raped over 1,000 times. *Id.* at 17. Yet the court embraced a "broad construction" of Section 230 and an admittedly "capacious conception of what it means to treat a website operator as the publisher or speaker of information provided by a third party." *Id.* at 19. The court focused on "but-for" causation—that is, there would have been no harm "but for the content of the postings," *id.* at 20—and held that each decision Backpage made, even if intended to facilitate sex trafficking, was undertaken as a "publisher" and therefore entitled to protection under Section 230, *id.* at 20–21.

The attorneys general of 44 States, the District of Columbia, and two Territories have pointed out to Congress

that courts have interpreted Section 230 too broadly and reached "the perverse result" of protecting those who knowingly profit from illegal activity. Letter from Nat'l Ass'n of Att'ys Gen. to Cong. Leaders (May 23, 2019), https://tinyurl.com/naagletter2019. For these reasons, it is critical that the Court faithfully construe Section 230 and avoid the interpretive errors made by many lower courts. *See* Br. of Tennessee.

III. Faithfully Interpreting Section 230 Will Neither Render It a Nullity nor Threaten the Internet.

Google insists that a holding from this Court that Section 230 does not bar petitioners' claims would make Section 230 "a dead letter" and "would threaten the basic organizational decisions of the modern internet." Br. in Opp. 22. Google is wrong.

First, neither petitioners nor the State of Texas suggest that Section 230 offers Google and other online platforms no protections. It certainly does. Section 230 shields Google from claims seeking to hold it liable as though it had spoken or published the myriad videos it hosts, and it allows Google to maintain that shield even when it chooses to censor pornography and similar offensive content. Section 230's protections would still fully honor Congress's decision that Internet platforms *not* be treated like newspapers, for example.

Second, as petitioners recognize, recommending content does not make a platform liable for the recommended content, but only for the recommendation. *See* Pet. Br. 28–29. That distinction is subtle but significant because it could affect—among other things—questions of causation and the extent of liability. Here, recommending ISIS videos potentially exposes Google to aiding-and-abetting liability because *the recommendations themselves* are allegedly unlawful. And petitioners must

show that the *recommendations themselves* caused their alleged harm. By contrast, if the alleged offense—or the act that proximately caused petitioners' harm—were creating and posting terrorist recruiting videos, Google would not be liable. Similarly, Google would not become liable for defamation by recommending a defamatory video. Holding Google liable for the contents of a third-party video would violate Section 230(c)(1)'s prohibition on treating Google "as the publisher or speaker of any information provided by another information content provider." Holding Google liable for its own recommendations does not.

Third, a lack of protection from Section 230 does not mean that Google will be liable for these or any other recommendations. "Paring back the sweeping immunity courts have read into § 230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place." *Malwarebytes*, 141 S. Ct. at 18 (Thomas, J.). Plaintiffs must still prove their cases. *See id.* Here, for example, it may be that recommending ISIS videos does not constitute aiding and abetting the terrorists "by knowingly providing substantial assistance." 18 U.S.C. § 2333(d)(2). A lack of Section 230 protection just means that a court can consider that question. Honoring Congress's enacted language will result in a new status quo that gives platforms and consumers alike ample protections from liability and abuse.

More fundamentally, Google assumes that "the basic organizational decisions of the modern internet"—which were enabled only by an overbroad interpretation of Section 230—are desirable. Br. in Opp. 22. But it is highly debatable that "the 'Internet as we know it' is . . . what we want it to be, particularly when it comes to sex

trafficking, pornography, child sex-abuse images, and exploitation." Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL'Y 553, 554 (2018). "It is clear that, whatever § 230 did for the legitimate digital economy, it also did for the illicit digital economy." *Id.* And Section 230's overbroad interpretation has left victims of this illicit behavior unable to obtain adequate redress. If that trade-off is worthwhile, it is one for Congress to make—not for Google to obtain through textually unjustifiable interpretations of Section 230.

CONCLUSION

The Court should reverse the court of appeals' judgment and remand the case for further proceedings.

Respectfully submitted.

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