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 FOR SEATTLE SCHOOL DISTRICT NO. 1 AND KENT SCHOOL DISTRICT NO. 415 AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF AMICI CURIAE

Amici curiae are school districts that are facing severe effects on their operations due to the impact of social media on their students.[1]

In the United States, 97 percent of teenagers report using the internet every day.[2] They spend significant time on social media platforms: 35 percent use YouTube, TikTok, Instagram, Snapchat, and/or Facebook "almost constantly."[3] Social media use increases depressive symptoms, disordered eating behavior, anxiety, suicide-related outcomes, and suicide rates among adolescents.[4]

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[1] Petitioners and Respondent have filed with the Clerk of the Court a blanket letter of consent to the filing of amicus briefs in support of any party. In fulfillment of the requirement of Supreme Court Rule 37.6, Amici state that no counsel for either party has authored this brief in whole or in part, and that no person or entity, other than Amici or their counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Emily A. Vogels et al., *Teens, Social Media and Technology 2022*, Pew Rsch. Ctr. (Aug. 10, 2022), https://www.pewresearch.org/internet/2022/08/10/teens-social-media-and-technology-2022/.

[3] *Id.*

[4] Jean M. Twenge & W. Keith Campbell, *Associations between screen time and lower psychological well-being among children and adolescents: Evidence from a population-based study*, 12 Prev. Med. Rep., 271–83 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6214874/; Ariel Shensa et al., *Social Media Use and Depression and Anxiety Symptoms: A Cluster Analysis*, 42(2) Am. J. Health Behav., 116–

According to the United States Surgeon General, one in five children ages 3–17 in the United States now have a "mental, emotional, developmental, or behavioral disorder."[5] This statistic, among others, prompted the Surgeon General to issue an advisory on youth mental health, highlighting this "urgent public health issue" that needs "the nation's immediate awareness and action."[6]

This youth mental-health crisis uniquely harms school districts, some of the main providers of mental

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28 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5904786/; Fazida Karim et al., *Social Media Use and Its Connection to Mental Health: A Systemic Review*, Cureus Volume 12(6) (June 15, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7364393/; Jean M. Twenge et al., *Increases in Depressive Symptoms, Suicide-Related Outcomes, and Suicide Rates Among U.S. Adolescents After 2010 and Links to Increased New Media Screen Time*, 6 Clinical Psych. Sci., 3–17 (2017), https://doi.org/10.1177/2167702617723376; Simon M. Wilksch et al., *The relationship between social media use and disordered eating in young adolescents*, 53 Int'l J. Eating Disorders, 96–106 (2020), https://pubmed.ncbi.nlm.nih.gov/31797420/.

[5] *U.S. Surgeon General Issues Advisory on Youth Mental Health Crisis Further Exposed by COVID-19 Pandemic*, U.S. Dep't Health & Hum. Servs. (Dec. 7, 2021), https://www.hhs.gov/about/news/2021/12/07/us-surgeon-general-issues-advisory-on-youth-mental-health-crisis-further-exposed-by-covid-19-pandemic.html.

[6] *Protecting Youth Mental Health: The U.S. Surgeon General's Advisory* at 5, U.S. Dep't Health & Hum. Servs. (2021), https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf.

health services for school-aged children.[7] In 2020, over 3.1 million children ages 12–17 received mental-health services in an educational setting, more than any other non-specialty setting that provides mental health services.[8] Students in grades 6–2 identify depression, stress, and anxiety as the most prevalent obstacles to learning.[9] Amici's efforts to address these harms could be stymied if 47 U.S.C. section 230 of the Communications Decency Act of 1996 ("CDA") is interpreted incorrectly.

SUMMARY OF ARGUMENT

Traditionally, publishers or speakers (like newspapers) were strictly liable for transmitting illegal content because they exercised editorial control. *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting denial of certiorari). But distributors (like newsstands and libraries) that transmitted far more content than they could be expected to review, were

[7] *National Survey on Drug Use and Health*, SAMHSA (2019 & 1st & 4th Qs. 2020), https://www.samhsa.gov/data/report/2020-nsduh-detailed-tables.

[8] *Id.*

[9] *Insights From the Student Experience, Part I: Emotional & Mental Health* at 2–3, YouthTruth (2022), https://youthtruthsurvey.org/wp-content/uploads/2022/10/YouthTruth_EMH_102622.pdf.

"liable only when they knew (or constructively knew) that content was illegal." *Id.* (citation omitted).

This publisher-distributor distinction provides the background against which section 230 of the CDA was enacted. Under paragraph (c)(1) of the provision, "[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). This paragraph's plain language, bars liability only when a plaintiff seeks to treat providers of an interactive computer service, such as social media companies, as publishers or speakers, and not when a plaintiff seeks to treat them as distributors of content.

Since the enactment of section 230, lower courts have incorrectly applied the statute to bar lawsuits against social media companies not just when those lawsuits seek to treat the companies as publishers, but also when they seek to treat them as distributors. Regardless of the scope of publishers' liability under section 230, this Court should take this opportunity to correct lower courts' conflation of publishers and distributors.

ARGUMENT

I. The law of defamation has consistently distinguished between publisher liability and distributor liability.

Defamation law has long distinguished between publishers and distributors of third-party content. It is a "'black-letter rule that one who republishes a libel is subject to liability just as if he had published it originally . . . .'" *Cianci v. New Times Publ'g Co.*, 639 F.2d 54, 60–61 (2d Cir. 1980) (quoting *Hoover v. Peerless Publ'ns, Inc.*, 461 F. Supp. 1206, 1209 (E.D. Pa. 1978) and citing Restatement (Second) of Torts, § 578 (1977)). In contrast, "'one who only delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.'" *Dworkin v. Hustler Mag., Inc.*, 634 F. Supp. 727, 729 (D. Wyo. 1986) (quoting the Restatement (Second) of Torts, § 581 (1977)).

Courts across the United States have recognized this publisher/distributor distinction. As one court explained:

> [N]o California case impos[es] liability where a distributor merely sold an unchanged libelous periodical. An examination of analogous cases and state and federal First Amendment authority suggest that the paucity of cases is not happenstance. . . . [P]laintiff must prove that the distributors either knew of the libelous content of the article or that facts were known which imposed a duty to investigate.

Lewis v. Time Inc., 83 F.R.D. 455, 463–64 (E.D. Cal. 1979), *aff'd*, 710 F.2d 549 (9th Cir. 1983).[10]

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[10] *See also Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991) ("New York courts have long held that vendors and distributors of defamatory publications are not liable if they neither know nor have reason to know of the defamation") (citation omitted); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984) ("Obviously, the national distributor of hundreds of periodicals has no duty to monitor each issue of every periodical it distributes. Such a rule would be an impermissible burden on the First Amendment. . . . [But w]hen a distributor acts with the requisite scienter in distributing materials defaming or invading the privacy of a private figure it must be subject to liability."); *Cardozo v. True*, 342 So. 2d 1053, 1056 (Fla. 2d Dist. Ct. App. 1977) ("[D]istributors of newspapers and periodicals cannot be even held legally responsible for defamatory material contained therein where the dealer did not know and reasonably could not have known that the publication contained defamatory material.") (citations omitted); *Auvil v. CBS '60 Minutes'*, 800 F. Supp. 928, 931–32 (E.D. Wash. 1992) ("One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he knows or had reason to know of its defamatory character.") (citation omitted); *Balabanoff v. Fossani*, 81 N.Y.S.2d 732, 733 (N.Y. Sup. Ct. 1948) ("It is a good defense to a libel action for a vendor or distributor of a newspaper or other periodical to show that he had no knowledge of the libelous matter and that there were no extraneous facts which should have put him on his guard. Such vendor or distributor is liable, however, if he had knowledge that the newspaper or periodical contained libelous matter.") (citations omitted); *Bowerman v. Detroit Free Press*, 287 Mich. 443, 451–52 (Mich. 1939) (same and noting "in these days of speedy dissemination of news it seems unreasonable to hold that a local distributor of newspapers should be required to check the contents of each issue for libelous matter in order to protect himself against liability for damages"); *Street v. Johnson*, 50 N.W. 395, 395–96 (Wis. 1891) ("The authorities are to the

Leading treatises also reflect the distinction. As explained in the Restatement (Second) of Torts, section 581, *Transmission of Defamation Published by Third Person*, a distributor is liable for third party content only if it "knows or has reason to know of its defamatory character." *Id.* And, in general, a distributor "is under no duty to examine the various publications that he offers for sale to ascertain whether they contain any defamatory items." *Id.* cmt. d.

A distributor faces liability, however, when it has actual knowledge of illegal content in the material it is distributing, or when "there are special circumstances that should warn the dealer that a particular publication is defamatory[.]" *Id.* For example, if a newsdealer continues to carry and sell "a particular paper or magazine that notoriously

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effect that the mere seller of newspapers is not liable for selling and delivering a newspaper containing a libel upon the plaintiff if he can prove upon the trial to the satisfaction of the jury that he did not know that the paper contained a libel; that his ignorance was not due to any negligence on his part; and that he did not know, and had no ground for supposing, that the paper was likely to contain libelous matter.") (citation omitted); *Layton v. Harris*, 3 Del. 406, 407 (Del. Super. Ct. 1842) ("The innocent delivery of a sealed letter by a post-master, or by another at his request, would not be a publication of a libel contained in the letter, without his knowledge. But if he knew anything of it before delivery, or circulated others of the same kind after knowledge of the libel, this would be a publication."); *cf. Smith v. California*, 361 U.S. 147, 152–53 (1959) ("[T]he constitutional guarantees of the freedom of speech and of the press stand in the way of imposing" strict liability on distributors for the contents of the reading materials they carry.).

persists in printing scandalous items, the vendor may do so at the risk that any particular issue may contain defamatory language."[11] *Id.*; *see also* 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 177 (West updated Nov. 2022) ("Everyone who takes a responsible part in the publication of defamatory matter in the media is liable; however, a vendor or distributor of a newspaper or other periodical having no knowledge of a libel appearing in it or of facts that should have put that individual on guard is not liable.") (collecting cases); 50 Am. Jur. 2d *Libel and Slander* § 345 (West updated Nov. 2022) ("One who only delivers or transmits defamatory material published by a third person is subject to liability if, but only if, he or she knows or had reason to know of its defamatory character.") (collecting cases).

Courts have limited distributors' liability for two principal reasons. First, they do not control the content of the publication. Booksellers, news vendors, and libraries, for example, play no role in creating or editing what they distribute. *See Grace v. eBay Inc.*, 16 Cal. Rptr. 3d 192, 198 (Ct. App. 2004), *review granted and opinion superseded*, 99 P.3d 2 (Cal. 2004), *and review dismissed, cause remanded*, 21 Cal. Rptr. 3d 611 (Cal. 2004) (citing Restatement (Second) Torts, § 581, subd. (1), cmts. b, c, d & e, pp. 232–34; Prosser & Keeton, Torts, § 113, pp. 810–11; 2 Harper et al., The Law of Torts (2d ed. 1986) Defamation, § 5.18, pp. 144–45; Smolla, The Law of Defamation, § 4:92, pp. 4–140 to 4–140.1). Second, distributors act—and are *expected* to act—as conduits for a vast amount of media. As a practical matter, it would be

[11] A similar rule applies to bookstores and libraries. *Id.* cmt. e.

impossible for them to shoulder the burden of reviewing that material. *See eBay Inc.*, 16 Cal. Rptr. 3d at 198–99 (citing Restatement (Second) Torts, § 581, subd. (1), cmts. b, c, d & e, pp. 232–34; Prosser & Keeton, Torts (5th ed. 1984), § 113, pp. 810–11; 2 Harper et al., The Law of Torts (2d ed. 1986) Defamation, § 5.18, pp. 144–45; Smolla, The Law of Defamation (2d ed. 1999), § 4:92, pp. 4–140 to 4–140.1).

The traditional functions of a distributor are what social media perform. Social media platforms provide ways for users to create and share text, photos, and videos. *See, e.g.*, JA 17, 58–59, 61–62. As a general matter, and except as otherwise noted by Petitioners, social media companies do not decide what text users write, the composition of the photos they shoot, or the content of their videos. *Id.* Rather, the platforms provide the means for sharing the content their users generate.[12]

By contrast, publishers, such as authors and publishing companies, are subject to strict liability for defamatory content because they have "the ability to control the content of the publication . . . ." *eBay*, 16 Cal. Rptr. 3d at 198 (citing Restatement (Second) Torts, § 581, subd. (1), cmt. c, p. 232; Prosser & Keeton, Torts (5th ed. 1984) § 113, p. 810; Smolla, The Law of Defamation (2d ed. 1999) § 4:87, pp. 4–136.3 to 4–136.4, § 4:92, pp. 4–140 to 4–140.1). They have control over what is written, how it is said, and when

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[12] Social media companies can also serve as publishers when they exercise editorial control over the content on their platforms, as explained in the Brief for Petitioners.

and where their content is published. Because of that control, they are presumed to "know[] or can find out whether a statement in a work produced by [them] is defamatory or capable of a defamatory import." Restatement (Second) of Torts, § 581 cmt. c (1977).

On social media platforms, the users are the publishers of their own content. Users draft the text of their posts, choose what photos to upload, and create or edit the videos they share. Those users are the publishers of their own content because, like an author of a book, they control what they say and how they say it.

II. *Stratton Oakmont* blurred traditional lines and held that an early social media company was liable as a publisher for statements on its message board.

Pre-section 230 defamation cases against internet-messaging boards agreed that these companies were subject to distributor, but not publisher, liability. *See, e.g.*, *Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334, 340 (N.Y. Civ. Ct. 1987) (computerized database service "is one of the modern, technologically interesting, alternative ways the public may obtain up-to-the-minute news" and "is entitled to the same protection as more established means of news distribution"); *CompuServe*, 776 F. Supp. at 140 (a provider of an electronic library of publications "has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so"). In other words, these companies could be

liable if they knew about objectionable content on their platform and did nothing, but they were not strictly liable for posts by users.

Enter *Stratton Oakmont, Inc. v. Prodigy Services Company,* No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). The court confronted whether the owner of an internet messaging board "may be considered a publisher" of a defamatory statement posted by a user. *Id.* The defendant, Prodigy, was the owner of "Money Talk," "the leading and most widely read financial computer bulletin board in the United States, where members can post statements regarding stocks, investments, and other financial matters." *Id.* at *1. A Money Talk member wrote a libelous post about the Stratton Oakmont securities investment banking firm, alleging, among other things, that it was committing criminal fraud. *Id.* In the ensuing lawsuit, the firm argued that Prodigy was a publisher because it "exercised editorial control over the content of messages posted on its computer bulletin boards[.]" *Id.* at *2 (citing "content guidelines," "a software screening program," prescreening "for offensive language," and moderators who could delete content that violated the rules).

The *Stratton Oakmont* court first repeated the familiar rule that a publisher of third-party content "is subject to liability as if he had originally published it." *Id.* at *3 (citation omitted). "In contrast, distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue." *Id.* (citations omitted). But rather

than conclude that Prodigy was only a distributor of content, as cases had done before, the court determined that because Prodigy moderated the message board to remove offensive content, it was exercising editorial control. *Id.* at *4 ("[A]ctively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,'" was exercising "editorial control."). The court recognized "such control is not complete and is enforced both as early as the notes arrive and as late as a complaint is made," but still concluded that Prodigy "is a publisher rather than a distributor." *Id.* This meant Prodigy, and other social media companies that sought to remove offensive content from their sites, would be strictly liable for whatever users posted.

This dramatic expansion of publisher liability threatened the internet itself. If social media companies were strictly liable for whatever users posted, they would be forced to severely reduce and pre-screen every statement made on their platforms, preventing the free exchange of ideas and information between users.[13]

This Court expressed a similar concern in the context of another kind of distributor, bookstores. It observed that if bookstores were strictly liable for the content of books they sold, "[e]very bookseller would

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[13] *See, e.g.*, John L. Hines, Jr. et al., *Anonymity, Immunity & Online Defamation: Managing Corporate Exposures to Reputation Injury*, 4 Sedona Conf. J. 97, 100 (2003) (explaining that such a liability regime would cause companies "to take down or block content on even the slightest suspicion that such content violated the rights of some third party").

be placed under an obligation to make himself aware of the contents of every book in his shop. It would be altogether unreasonable to demand so near an approach to omniscience.'" *Smith*, 361 U.S. at 153–54 (quoting *The King v. Ewart*, 25 N.Z.L.R. 709, 729 (C.A.)). "The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly." *Id.* Thus, the Court held that a state law imposing such liability on booksellers violated the First Amendment. *Id.*

III. To correct *Stratton Oakmont*, section 230 eliminated only publisher liability for social media companies.

A year after *Stratton Oakmont*, Congress passed the CDA "in response to a state-court decision, *Stratton Oakmont*. . . ." *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009); *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) ("Section 230 was prompted by a state court case holding Prodigy responsible for a libelous message posted on one of its financial message boards.") (citing *Stratton Oakmont*, 1995 WL 323710).

Section 230 of the CDA is entitled: *Protection for private blocking and screening of offensive material*. Under the heading: *Protection for "Good Samaritan" blocking and screening of offensive material*, it states: "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." 47 U.S. Code § 230(c)(1).

The plain text of section 230(c)(1) bars only treatment of interactive computer services, like social media companies,[14] "as the publisher or speaker" of information. That is, courts may not, as *Stratton Oakmont* did, apply publisher liability to interactive computer services. As Justice Thomas has recognized, this provision "is definitional" and "ensures that a company . . . can host and transmit third-party content without subjecting itself to the liability that sometimes attaches to the publisher or speaker of unlawful content." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting denial of certiorari).

Lower courts have recognized section 230's textual limits. The Seventh Circuit acknowledged that section 230(c)(1) "limits who may be called the publisher of information that appears online," which "might matter to liability for defamation, obscenity, or copyright infringement." *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). But it noted that when the law at issue "does not depend on who 'publishes' any information or is a 'speaker'. Section 230(c) is irrelevant." *Id.*; *see also Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (noting the

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[14] The parties do not dispute that YouTube is an "interactive computer service." *Gonzalez v. Google LLC*, 2 F.4th 871, 891 (9th Cir. 2021). And courts routinely determine that social media platforms are "interactive computer services." *See, e.g.*, *Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1091 (9th Cir. 2021) (holding that Snapchat qualified as an interactive computer service); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (holding that Facebook qualified as an interactive computer service).

possibility that "§ 230(c)(1) forecloses any liability that depends on deeming the ISP a 'publisher'—defamation law would be a good example of such liability—while permitting the states to regulate ISPs in their capacity as intermediaries"); *Chicago Lawyers' Comm. for Civ. Rts. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) (quoting the same); *Huon v. Denton*, 841 F.3d 733, 741 (7th Cir. 2016) (Section 230 "means that for purposes of defamation and other related theories of liability, a company like Gawker cannot be considered the publisher of information simply because the company hosts an online forum for third-party users to submit comments."). Applying distributor liability to social media companies likewise "does not depend on who 'publishes' any information[,]" so section 230 should not stand in the way. *Stubhub!*, 624 F.3d at 366.

Section 230, in other words, speaks only to the liability of a speaker or publisher. It says nothing about distributor liability. Much less does it purport to remove the liability, traditionally applied, of distributors with knowledge of libelous material on their platforms.

The remainder of section 230 confirms this reading. Congress provided immunity for (1) "any action voluntarily taken 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, whether or not such material is constitutionally protected" or (2) for providing the technical means to restrict access to those materials. 47 U.S.C. § 230(c)(2). Combined, "[t]his limited

protection enables companies to create community guidelines and remove harmful content without worrying about legal reprisal." *Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting denial of certiorari). "In other words, Congress sought to immunize the *removal* of user-generated content, not" information service providers' "*creation* of content," *Roommates.Com*, 521 F.3d at 1163, or *knowingly distributing* unlawful content. As the Seventh Circuit previously asked, "Why should a law designed to eliminate ISPs' liability to the creators of offensive material end up defeating claims by the *victims* of tortious or criminal conduct?" *GTE Corp.*, 347 F.3d at 660 (emphasis added).

To the extent there is any ambiguity in the plain text of the statute, the legislative history of section 230 confirms Congress's intent to relieve internet providers from the heightened publisher-liability standard imposed by *Stratton Oakmont*. It sought to protect companies that removed unlawful or offensive content—not to immunize those who knowingly host illegal content. The Senate Conference Report regarding the CDA explains that:

> One of the specific purposes of this section [230] is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important

> federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.).

The Congressional Record of the House similarly cites *Stratton Oakmont*. 104 Cong. Rec. Vol. 142, No. 13, H1130 at H8469–73 (1996). According to then Congressman Christopher Cox, a New York Court "held that Prodigy . . . could be held liable in a $200 million defamation case[,]" imposing a "higher, stricter liability because [Prodigy] tried to exercise some control over offensive material." *Id.* at H8469–70. Congressman Cox explained that section 230 would "protect computer Good Samaritans, online service providers . . . who take[] steps to screen indecency and offensive material for their customers. It will protect them from taking on liability such as occurred in the Prodigy case in New York." *Id.* at H8470.

The text does exactly that. "[I]f 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*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari). But if a company knows illegal third-party content is on its platform and does not remove it—or worse, actively promotes or recommends it, like a magazine seller putting obscene materials in the most prominent place in its store—nothing in section 230 shields the company from liability.

IV. Despite the plain text, courts of appeals have improperly interpreted section 230 to bar distributor liability for social media companies.

Despite the statutory language, decades of prior caselaw, and the Congressional history, courts below have interpreted section 230 to immunize social media companies from not only treatment as a publisher for restricting access to objectionable content, but also claims that they knowingly distribute and even promote or recommend violent or sexualized content to children.

For example, in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), a third party posted "offensive and tasteless" messages regarding the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, attributing them to the plaintiff and including the plaintiff's home phone number. *Id.* at 329. These false postings led to death threats against the plaintiff and abusive phone calls approximately every two minutes. *Id.* The plaintiff informed the defendant, AOL, of these false messages, but AOL allegedly did not promptly remove the messages or take steps to prevent the third-party from posting additional defamatory content. *Id.*

The plaintiff sought to hold AOL liable as a distributor, not a publisher. Nevertheless, the *Zeran* court concluded that section 230 immunized AOL from suit. *Id.* at 331. The court recognized that "[p]ublishers can be held liable for defamatory statements contained in their works even absent proof that they had specific knowledge of the statement's inclusion" while "distributors are not

liable 'in the absence of proof that they knew or had reason to know of the existence of defamatory matter contained in matter published.'" *Id.* (quoting Page Keeton et al., Prosser and Keeton on the Law of Torts § 113, at 810 (5th ed. 1984)). The court asserted that distributors were considered a type of publisher and were therefore immune under section 230. *Id.* at 332 (asserting that the distinction between distributor liability and publisher liability "signifies only that different standards of liability may be applied *within* the larger publisher category"). The court relied on the contention that "every repetition of a defamatory statement is considered a publication." *Id.* But what it did not understand is that this rule excludes distributors: "*Except as to those who only deliver or transmit defamation published by a third person*, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Restatement (Second) of Torts, § 578 (1977) (emphasis added).

This reading is also contrary to the liability scheme discussed in *Stratton Oakmont*, which explicitly contrasted publisher and distributor liability, ultimately holding that the defendant was "a publisher rather than a distributor." *Stratton Oakmont,* 1995 WL 323710, at *4. As both courts and congressional history have shown, Congress enacted section 230 in response to *Stratton Oakmont*. In doing so, if the statute was meant to remove both publisher liability and distributor liability, it would have said so.

The *Zeran* court also concluded that permitting companies to face traditional distributor liability

would have a chilling effect on the freedom of Internet speech. *Zeran*, 129 F.3d at 333. But section 230 was not intended to lead to an entirely unmoderated internet. The title of the statute and the heading of section 230(c) make it clear that it was designed to provide "[p]rotection for 'Good Samaritan' blocking and screening of offensive material." 47 U.S.C. § 230(c). While "the title of a statute and the heading of a section cannot limit the plain meaning of the text," such text can "shed light on some ambiguous word or phrase." *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528–29 (1947) (citations omitted). Here, to the extent it is ambiguous what treatment as a "publisher or speaker" means, interpreting the statute to bar only strict liability for publishers, rather than also barring knowledge-based distributor liability, is consistent with the heading of the section. Interpreting "publisher" to include "distributor" would immunize those who knowingly fail to remove illegal material, including obscenity, violent content, and other offensive material. As discussed above, the legislative history only confirms Congress meant to shield Good Samaritans who block offensive content, rather than immunize companies that knowingly host illegal content.

Moreover, distributor liability has been carefully applied for many decades to avoid unreasonably holding a distributor liable for content it did not know and had no reason to know was illegal. *See supra* n.10. There is no reason why applying the doctrine to online distributors would unleash a torrent of meritless claims or create an undue chilling effect.

Courts have adapted distributor liability, the "ancient rule," to new technologies in the past. *See Layne v. Trib. Co.*, 108 Fla. 177, 187–88 (Fla. 1933) (discussing development of the "ancient rule" to "present day phases of news dissemination" in the "modern newspaper"); *see also Bowerman v. Detroit Free Press*, 287 Mich. 443, 451–52 (Mich. 1939) (adapting rule for local distributors of newspapers in "these days of speedy dissemination of news"); *see also CompuServe*, 776 F. Supp. at 140) (applying heightened scienter standard because the defendant had no more editorial control over its electronic bulletin boards and library than does a bookstore or newsstand). It was not until *Stratton Oakmont* blurred the distinction between publisher and distributor liability that Congress felt compelled to act.

Clarifying that section 230 did not eliminate the distinction between liability for publishers and distributors would only harmonize the rules applicable online with those that apply in every other medium. And YouTube and others like it are even better equipped to comply with this rule than traditional distributors. While bookstores and libraries could not know the contents of the tens of thousands of books on their physical shelves, YouTube and other social media companies have developed and deployed automated systems that screen the content users post to their platforms. YouTube alone removed more than 415 million videos

in just the first nine months of 2022.[15] An automated system identified 99 percent of those videos, often before anyone even saw them.[16]

The systems YouTube and other social media companies employ for removing content also moot the *Zeran* court's justification for reading section 230 to immunize providers from liability as publishers and distributors. The *Zeran* court found Congress intended to include distributor liability in the shield of section 230 because otherwise the resulting notice-based liability "would deter service providers from regulating the dissemination of offensive material over their own services" by confronting them with "ceaseless choices of suppressing controversial speech or sustaining prohibitive liability." *Zeran*, 129 F.3d at 333. Social media companies already make those decisions millions of times each year.[17] And contrary to the court's assertion that "[a]ny efforts by a service provider to investigate and screen material posted on its service would only lead to notice of potentially defamatory material more frequently and thereby

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[15] Google Transparency Report, *YouTube Community Guidelines enforcement*, Google (Jan.–Sept. 2022), https://transparencyreport.google.com/youtube-policy/removals?hl=en.

[16] *Id.*

[17] *See, e.g.*, *Community Guidelines Enforcement Report*, TikTok (Sept. 28, 2022), https://www.tiktok.com/transparency/en/community-guidelines-enforcement-2022-2/; *Community Standards Enforcement Report*, Meta Transparency Ctr. (3d Q. 2022), https://transparency.fb.com/data/community-standards-enforcement/; *Transparency Report*, Snap Inc. (Apr. 1, 2022), https://snap.com/en-US/privacy/transparency.

create a stronger basis for liability," *id.*, Congress explicitly addressed this issue. Companies are immune, even as distributors, for "any action voluntarily taken 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[.]" 47 U.S.C. § 230(c)(2)(A).

To be clear, defamation law does not obligate YouTube and other online distributors to affirmatively screen user-generated content for illegal material. And they may not be held liable as a publisher merely for hosting third-party content. But if these companies learned that they were hosting illegal content, they could easily remove it along with the troves of other content they remove routinely. And if they failed to do so, the plain text of section 230 does not and should not bar liability.

* * *

Amici agree with Petitioner's answer to the question presented. When social media companies make targeted recommendations of information provided by another information content provider, they are not acting as publishers of that information. But whatever the Court's ultimate holding on that issue, it should make clear that section 230 preserves distributor liability.

CONCLUSION

For the above reasons, this Court should make clear that 47 U.S.C. section 230(c)(1) eliminates only publisher, and not distributor, liability for content provided by others.

Respectfully submitted,

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