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 *AMICUS CURIAE* OF PROF. ERIC GOLDMAN IN SUPPORT OF RESPONDENT

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January 16, 2023

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Prof. Eric Goldman is a law professor and Associate Dean for Research at Santa Clara University School of Law (he writes on his own behalf, not on behalf of his employer or anyone else). Prof. Goldman has been researching and writing about Internet Law, including Section 230, for thirty years, and he started practicing and teaching Internet Law before Section 230 was enacted. *Wired Magazine* said Prof. Goldman "has for years been journalists' go-to source on all things Section 230," and Prof. Goldman has "an outsize effect on the way Section 230 is treated in public discussion."[2] The magazine also described his blog[3] as "an exhaustive repository of Section 230 information."[4]

Prof. Goldman submits this *amicus* brief to explain the important procedural elements that Section 230 adds to the substantive protections provided by the First Amendment, and how the arguments advanced by the Plaintiffs (the Petitioners in this case) jeopardize those elements in ways that undermine the policies advanced by Section 230.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* funded its preparation or submission.

[2] Gilad Edelman, *Everything You've Heard About Section 230 Is Wrong*, WIRED, May 6, 2021.

[3] Technology & Marketing Law Blog, http://blog.ericgoldman.org.

[4] Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED, Jan. 2, 2017.

SUMMARY OF ARGUMENT

Both the First Amendment and Section 230 advance important policy goals related to free speech, and both doctrines lead to the same substantive pro-speech outcomes in many cases. However, Section 230 goes further than the First Amendment by providing additional substantive protections for speech and by implementing pro-speech procedural mechanisms. These procedural advantages, which are often overlooked in debates about Section 230, include how Section 230: (1) provides publishers with assurances that their decisions are legally protected, regardless of how a Plaintiff frames the claim, (2) establishes a single national standard for compliance, (3) facilitates resolutions on motions to dismiss without expensive and time-consuming discovery, and (4) enables Constitutional avoidance. Without these procedural features, fewer author-users would get the opportunity to publish their content online, and new online publishers would face even higher barriers to entry.

Plaintiffs' proposed distinction between "targeted recommendations" and "traditional editorial functions" would undermine Section 230's procedural benefits.[5] The distinction would newly create a fact question for Section 230 (how was the content moderated?) that would thwart motions to dismiss, thus dramatically increasing defense costs. Second, by discouraging

[5] The Plaintiffs changed their Question Presented between their Petition for Certiorari and their Brief. This *amicus* brief responds to the question the Court accepted for review.

automated content prioritization, the distinction would drive publishers towards more costly solutions that would circumscribe author-users' abilities to publish content of all types (not just speech related to terrorism). The First Amendment may not provide as robust substantive and procedural protections for targeted recommendations as Section 230 currently provides, so the Plaintiffs' efforts to curb Section 230 for targeted recommendations would dramatically change the considerations of online publishers.

Without the Plaintiffs' proposed distinction, this case is a straightforward application of Section 230 that was appropriately dismissed based on the facts alleged in the complaint.

Plaintiffs' proposed distinction would undermine the legislative policy values advanced by Section 230. Congress has the exclusive authority to make those choices.

ARGUMENT

I. Section 230 is a Speech-Enhancing Statute

The First Amendment[6] is justifiably regarded as one of the world's greatest legal protections for free speech. However, it is not the only source of free speech protections in the U.S. Instead, legislatures can, and routinely do, enact laws that supplement or enhance

[6] U.S. CONST., amend. I.

free speech ("speech-enhancing statutes"). Some examples:

- *Defamation retraction statutes* require defamation Plaintiffs to seek a retraction, correction, or apology from media defendants before a Plaintiff is eligible for certain types of damages.
- *Anti-SLAPP laws*[7] create expedited procedures for, and impose heightened pleading burdens on, lawsuits that seek to suppress socially beneficial speech.
- The *Consumer Review Fairness Act*[8] restricts businesses' ability to contractually suppress reviews by their customers.

Some speech-enhancing statutes substantively mirror the First Amendment by codifying the Court's interpretations. However, other speech-enhancing statutes advance speech interests beyond the First Amendment's dictates. By adopting those speech-enhancing statutes, legislatures intentionally and voluntarily prioritize speech interests over other policy considerations. In other words, the First Amendment sets a minimum baseline for speech protections, but legislatures are

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[7] *E.g.*, Uniform Public Expression Protection Act, Uniform Law Comm'n (Oct. 2, 2020), https://higherlogicdownload.s3-external-1.amazonaws.com/UNIFORMLAWS/46a646fa-5ef6-8dd0-7b0a-ce95c59f0d14_file.pdf?AWSAccessKeyId=AKIAVRDO7IEREB57R7MT&Expires=1672698517&Signature=ABHjhW3eU1v776GhTEjhqqKFyoU%3D.

[8] Consumer Review Fairness Act of 2016, Public Law No. 114-258, codified at 15 U.S.C. § 45b.

Constitutionally empowered to protect or facilitate speech above that baseline.

Section 230 is a speech-enhancing statute. By its terms, it seeks "to promote the continued development of the Internet"[9] because the Internet offers "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[10] As such, Section 230 represents a legislative policy choice to preference speech interests over other policy considerations.

II. Section 230 Adds Substantive and Procedural Speech Protections to the First Amendment

Like other speech-enhancing statutes, Section 230 exceeds the First Amendment's baseline speech protections.

Among other attributes, Section 230 provides more substantive protections for speech than the First Amendment requires. For example, Section 230 treats non-commercial speech and commercial speech equivalently, whereas the First Amendment imposes a lower level of Constitutional scrutiny for commercial speech restrictions compared to restrictions on non-commercial speech.

In addition to providing extended substantive speech protections, Section 230 has several pro-speech

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[9] 47 U.S.C. § 230(b)(1).

[10] *Id*. § 230(a)(3).

procedural features that the First Amendment may not require.[11]

First, Section 230 ensures that publishers can rely on its protections for publishing third-party content, regardless of how "creatively" a Plaintiff pleads its case. If an interactive computer service provider publishes third-party content and a Plaintiff cannot claim one of Section 230's statutory exceptions (federal criminal prosecutions, the ECPA and its state law equivalents, intellectual property claims, and FOSTA-related claims), then publishers qualify for Section 230's protections no matter how the Plaintiff pleads the claim. This claim "agnosticism" differs from the First Amendment, where the scrutiny level may vary based on the exact claim being asserted.

Second, Section 230 establishes a single national standard for publishers' compliance purposes. Many state law doctrines, such as defamation, vary across the states in both big and small ways. With limited exceptions,[12] Section 230 makes those state-level variations irrelevant, because an online publisher simply needs to satisfy Section 230's prerequisites. While the First Amendment establishes a baseline of free speech

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[11] For a fuller elaboration of these points, *see* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 34 (2019).

[12] Section 230 excludes state ECPA equivalents, state intellectual property claims (though the Ninth Circuit doesn't recognize that exception), and state FOSTA-related claims.

across the nation, it still permits substantial variation among state laws.

Third, courts can often determine whether a publisher qualifies for Section 230(c)(1) based solely on the facts alleged in the complaint, and those cases can be quickly and cost-effectively resolved on motions to dismiss. In contrast, courts may be reluctant to grant motions to dismiss when defendants invoke First Amendment defenses because many First Amendment doctrines are fact-dependent. Further, if Section 230 and the First Amendment would both eventually require dismissal of a case, the court system and the litigants all benefit from the quick dismissals that Section 230(c)(1) facilitates to save time and costs.

Fourth, Section 230 enables Constitutional avoidance. It provides courts with a way to resolve cases without navigating murky and sometimes-irresolute First Amendment doctrines, and without making decisions that may permanently restrict legislatures' powers. Without Section 230, many cases would turn into Constitutional litigation, with the attendant costs, complexities, and risks to legislative autonomy.

Section 230's procedural features play a crucial role in the statute's overall efficacy. As a result, any Court ruling that disrupts Section 230's procedural features—even unintentionally—is likely to have outsized consequences.

III. Plaintiffs' Requested Outcomes Would Eliminate Section 230's Procedural Benefits

Plaintiffs ask the Court to distinguish between editorial decisions that result from "traditional editorial functions," which would remain eligible for Section 230's protections, and content promotions made using "targeted recommendations," which would not. This proposed distinction is fundamentally incoherent because prioritizing content for audiences (whether done manually or mechanically) has always been a "traditional editorial function." For example, print publishers necessarily decide which stories get featured on the front page and get bigger headlines. Thus, the Question Presented poses a false dichotomy.

In addition, Plaintiffs' proposed dichotomy would undercut Section 230's procedural features in important ways.

First, it would reduce or eliminate the ability of courts to resolve Section 230 defenses on motions to dismiss by introducing a fact question into the defense, i.e., whether the item at issue was the subject of a targeted recommendation or only disseminated via "traditional editorial functions." On motions to dismiss, the defense cannot introduce evidence answering this question. Thus, Plaintiffs could freely bypass Section 230 simply by alleging that the item at issue was the subject of targeted recommendations.

Second, if Section 230 cases reach the discovery phase, publisher-defendants would incur substantial additional costs, even if they ultimately prevail. One

study estimated that defending Section 230 cases without discovery can cost as little as $15,000, while resolving the same case after discovery would cost over $100,000.[13]

Third, the additional defense costs will change how online publishers make their editorial decisions. In general, to give publication access to a large universe of author-users, online publishers achieve economic viability by keeping down their costs with respect to each user-submitted item. Each automated decision has virtually no cost; each post-publication moderation decision typically requires only seconds or minutes of reviewer time.

Because content publication decisions inherently produce winners and losers, the "losers" of each decision have incentives to protest in court. If every content publication decision (which, for large publishers, may be billions of decisions per day) can be challenged in courts, publishers will panic about the costs. This has not been the case to date because successful Section 230 motions to dismiss discourage Plaintiffs from suing and reduce the defense costs when they do. This helps online publishers disregard the costs of potential judicial review when making their editorial decisions.

If Section 230 no longer ensures early and quick dismissals and Plaintiffs can impose substantial costs

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[13] *Section 230: Cost Report*, ENGINE, https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/5c8168cae5e5f04b9a30e84e/1551984843007/Engine_Primer_230cost2019.pdf (visited Jan. 2, 2023).

by asking courts to second-guess the publishers' editorial decisions, online publishers must navigate expensive dilemmas. They could reduce their costs by limiting which author-users gets the privilege to publish their content; thus restricting publication access exclusively to uncontroversial/low-risk authors.

Alternatively, publishers could invest more upfront into each item's deliberation to better prepare their decisions for the anticipated judicial review—for example, by doing more pre-publication human review of content, including more legal review. These costs would overwhelm the value of most individual content items, necessitating that publishers invest only in publishing the highest-value content items.

Either approach would substantially shrink the quantity of user-generated content on the Internet, which would have substantial distributional effects.[14] In particular, fewer voices would be heard online[15]—and those voices would reflect and reinforce majoritarian privileges. Furthermore, because online publishers' content acquisition costs would increase, online information would become harder to find and increasingly

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[14] *See* Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191 (2021).

[15] Thus undercutting one of the Internet's benefits, which is that "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

available only on a pay-to-access basis, which would exacerbate the existing digital divides.

Fourth, these changes to Section 230's procedures would make it difficult or impossible for new publishers to enter the market.[16] For example, if publishers must account for state-by-state variations in liability, their legal compliance costs grow exponentially. Furthermore, if new entrants must build industrial-grade content moderation processes similar to the systems deployed by the incumbents, it raises the upfront entry costs dramatically. There is substantial concern about consolidation and market power among the online publisher-incumbents. Accepting the Plaintiffs' proposals would almost certainly exacerbate marketplace consolidation by discouraging new entrants.

After the Plaintiffs' attempted dichotomy between traditional editorial functions and targeted recommendations is disregarded (as it should be), this case becomes a straightforward dismissal based on Section 230—just as the district court and the Ninth Circuit treated it. YouTube is a provider of an interactive computer service. It published videos uploaded by third

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[16] *See* Michael Masnick, *Don't Shoot the Message Board* (June 2019), https://netchoice.org/wp-content/uploads/2020/04/Dont-Shoot-the-Message-Board-Clean-Copia.pdf (showing how Section 230 helps online publishers raise capital); Eric Goldman, *Want to Kill Facebook and Google? Preserving Section 230 Is Your Best Hope*, BALKINIZATION (June 3, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3398631; *see also* 47 U.S.C. § 230(b)(2) (Section 230 seeks to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

parties. Those videos allegedly contributed to the terrorist attack. These facts squarely and unambiguously fit into Section 230's protections. There are no open factual questions to resolve because Section 230 obviously applies to the facts alleged in the complaint. Obvious Section 230 cases like this should be dismissed early, or courts would "cut the heart out of section 230 by forcing websites to face death by ten thousand duckbites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties."[17]

CONCLUSION

Plaintiffs initially framed their Question Presented so that Plaintiffs could bypass Section 230 by claiming that the defendant recommended the item at issue. This legal standard would allow Plaintiffs to raise questions of fact that would increasingly defeat defendants' motions to dismiss. This interpretation would raise defense costs even if the First Amendment would mandate that the Plaintiffs must lose. It would also significantly distort publishers' editorial decisions and publishing operations, which in turn would hurt ordinary Americans' ability to speak and find information online. Thus, legal distinction between "traditional

[17] *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (adding that "section 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles").

editorial functions" and "targeted recommendations" would radically reconfigure Section 230's contours. It's Congress' prerogative to decide how it wants to shape its speech policy and manage the competing tradeoffs.

The Ninth Circuit's decision in favor of Google properly accommodated Section 230's procedural benefits. For that and other reasons, the Court should rule in favor of the Respondent.

Respectfully submitted,

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January 16, 2023