No. 21-1333

In the Supreme Court of the United States

REYNOLDO GONZALES, *ET AL.*, PETITIONERS,
v.
GOOGLE LLC, RESPONDENT.

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

BRIEF FOR THE CENTER FOR GROWTH AND OPPORTUNITY, AMERICANS FOR PROSPERITY FOUNDATION, BEACON CENTER OF TENNESSEE, FREEDOM FOUNDATION OF MINNESOTA, ILLINOIS POLICY, INDEPENDENCE INSTITUTE, JAMES MADISON INSTITUTE, LIBERTAS INSTITUTE, MOUNTAIN STATES POLICY CENTER, OKLAHOMA COUNCIL OF PUBLIC AFFAIRS, PELICAN INSTITUTE FOR PUBLIC POLICY, AND RIO GRANDE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Does 47 U.S.C. § 230(c)(l) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider?

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are The Center for Growth and Opportunity, Americans for Prosperity Foundation, Beacon Center of Tennessee, Freedom Foundation of Minnesota, Illinois Policy, Independence Institute, James Madison Institute, Libertas Institute, Mountain States Policy Center, Oklahoma Council of Public Affairs, Pelican Institute for Public Policy, and Rio Grande Foundation. These are educational and research organizations committed to the rule of law, market economics, individual rights, and limited government. They write and train the public on topics including economic growth, innovation, free speech, and intermediary liability. In the states where they operate, these organizations serve as some of the few, and at times the only, organized advocates of free-market policies and regulatory restraint. But this case is not merely important to these organizations as a matter of policy. It is important to *their own* ability to reach their audiences on internet platforms.

SUMMARY OF ARGUMENT

Petitioners and their *amici* labor under two basic misconceptions about Section 230. The first misconception is textual, the second factual. Once these misconceptions are corrected, it is plain that Section 230 protects YouTube's recommendations.

I. The *textual* misconception is that Section 230 does not address recommendations like those made

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *amici* or their counsel made a monetary contribution to this brief. Each of the parties has consented to the filing of this *amicus* brief.

by YouTube's "automated recommendation system[]." Pet. Br. 17. It does.

A. Automated recommendation systems are what Section 230 calls "enabling tools," which are used by "access software providers" to "choose," "display," and "forward" "content." § 230(f)(4). In using such tools, access software providers do not "publish[]" their own content, but that of "another." § 230(c)(1). For this reason, such providers are defined as "interactive computer service[s]" (§ 230(f)(2)) that are not liable as "publisher[s]" (§ 230(c)(1)). Petitioners never *mention* § 230(f)(4), not even once. But it resolves this case.

It is no answer to say that YouTube cannot avoid liability by relying on a definition. Definitions exist to clarify operative language. And as the government notes, "[i]t would make little sense for Congress to specifically include entities that provide 'enabling tools' that 'filter,' 'organize,' and 'reorganize' content as among those to which Section 230(c)(1) applies, only to categorically withdraw that protection" elsewhere. Br. 23. That would make Section 230(c)(1) "a dead letter." *Ibid.* Just so. It cannot be that the very functions that *qualify* platforms for protection under Section 230 also *disqualify* them from its protections. Resp. Br. 40. Later, the government retreats from its own logic—saying that enabling tools might make access software providers publishers of *their own* content after all. Br. 24–28. But the definition of "enabling tools" allows no such retreat. If it did, Section 230(c)(1) would be a "dead letter." *Id.* at 23.

B. If Section 230's text left any doubt, it would be resolved by the law's purpose statements. This Court often relies on such statements to clarify statutory language. Indeed, Justice Thomas has urged the

Court to rely on the purpose statements in Section 230 itself. Three statements are relevant here.

First, "[i]t is the policy of the United States * * * to promote the continued development of the Internet[.]" § 230(b)(1). Nothing has fostered the growth of the internet like automated recommendation systems, which help users find what they want in oceans of information. As petitioners note, internet platforms "are constantly adjusting their recommendation systems to improve their effectiveness"; and "[t]hese recommendation systems have been highly effective at increasing usage[.]" Pet. Br. 17. Indeed they have. Over 60 percent of people globally have social-media accounts—some five billion people, each a unique content creator. Section 230 has fostered this growth by protecting automated recommendation systems from liability. It should not be reinterpreted.

Second, it is federal policy "to preserve the vibrant and competitive free market that presently exists for the Internet * * * unfettered by Federal or State regulation[.]" § 230(b)(2). Petitioners' suit contradicts this purpose, seeking to expose YouTube to federal liability. And if petitioners succeed, state tort suits will follow as night follows day. If this case has exposed any ambiguity in Section 230, then, it should be resolved against new forms of liability.

Third, it is federal policy "to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools[.]" § 230(b)(3). Fostering "user control" is exactly what petitioners say YouTube's automated recommendation system does. It "recommends content to users based upon * * * what is known about the viewer." J.A. 169. And again, with-

out such powerful systems, users would be hopelessly lost. Finding content would be an exercise in trying to boil the ocean. User control today *requires* automated recommendation systems. It would diminish user control to subject those systems to liability.

In short, it is a misconception that Section 230 does not cleanly resolve this case. It does. And that reading is confirmed by the law's purpose statements.

II. The *factual* misconception is that Section 230 lets platforms squelch conservative and heterodox speech with impunity. Doubtless platforms have squelched speech at times, and some have not obviously paid a price—yet. But the overall data and history of the internet reveal a more complex picture.

A. Consider the internet's leading voices today. The largest social-media platform in the world is Facebook, with almost three billion users. It is dominated by speakers on the right. To take one example, here were the top ten links on Facebook one day last month (right-of-center speakers shown in bold):

1. Ben Shapiro
2. Dan Bongino
3. Occupy Democrats
4. Fox News
5. Dan Bongino
6. Danielle D'Souza Gill
7. Donald Trump For President
8. NJ.com
9. Dan Bongino
10. Univision Famosos

These results are typical. So often does Ben Shapiro lead the rankings, for example, that National Public Radio declared that "Ben Shapiro rules Facebook."

Meanwhile, over on Spotify, the top podcast is hosted by Covid-vaccine skeptic and frequent critic of the left Joe Rogan, whose show collects *190 million* downloads a month, numbers Fox News star Tucker Carlson (with some three million nightly viewers) would envy. Other examples abound—from psychologist and free-speech advocate Jordan Peterson (half a billion views on YouTube), to conservative talk-show host Dave Rubin (same), to centrist journalist Bari Weiss (almost a million followers on Twitter).

B. If past is prologue, moreover, platforms themselves will be far from immune to competition. No company has ever dominated Big Tech for long. IBM was dethroned by Microsoft. Hewlett-Packard was beaten by Apple. AOL was bested by Yahoo, which was knocked off by Google. And the creative destruction continues. Twitter is famously under new ownership. Facebook's stock has plummeted. And social-media upstarts Parler, Gab, and Rumble are growing. Reports of the death of competition under Section 230 are greatly exaggerated.

C. Exposing all platforms to liability would mainly hurt startups, which later may challenge today's leaders. It would also discourage turnover at the top of those platforms. Who doubts that Elon Musk, already skittish about the cost of buying Twitter, would have passed if Twitter were liable for the recommendations of its algorithms? Or for comparison, look to Europe, which *lacks* Section 230 protections. Not one European platform leads the world. All the leading platforms are based in the United States—for now.

As a matter of statutory text and sound policy, then, YouTube's recommendations are and should be protected. The Court should affirm.

ARGUMENT

I. This case is readily resolved under the plain text of Section 230.

Section 230 may pose its interpretive challenges, but not in this case. The plain text of the statute answers the question presented, and that answer is confirmed by the statute's purpose statements.

A. Section 230 distinguishes between "enabling tools" that "choose," "organize," and "display" or "forward" "content"—which describes YouTube's automated recommendation system—and "content" itself.

The Court took this case to decide whether Section 230 protects "interactive computer services when they make targeted recommendations of information provided by another information content provider." Pet. i. The answer is yes.

1. To start, it is important to understand what petitioners mean when they refer to "targeted recommendations." Pet. i. According to the operative complaint, YouTube "recommends content to users based upon the content and what is known about the viewer." J.A. 169. And "[t]hose recommendations are implemented through automated algorithms, which select the specific material to be recommended to a particular user based on information about that user that is known to [YouTube]." Pet. 3; see also *id*. at 9, 30 (same). In other words, "YouTube * * * ha[s] created [a] complex automated recommendation system[]—often called [a] recommendation algorithm[]—using artificial intelligence to determine what material to recommend to each user. [YouTube] collect[s]

detailed information about users * * * [and] then use[s] that information to try to determine what that user would like to view." Pet. Br. 17.

2. Under Section 230, YouTube's "automated recommendation system[]" (Pet. Br. 17) does not expose YouTube (or Google) to liability. Rather, the law distinguishes between providers of *information content* and providers of *access to* that content. Under the plain text of the statute, YouTube's recommendation system provides access to content, but does not itself create or develop content. YouTube is therefore not subject to liability. Here is why.

a. Under Section 230, "[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). An "interactive computer service" is defined to include "any * * * access software provider[.]" § 230(f)(2). In turn, an "access software provider" is defined as "a provider of software (including client or server software), or enabling tools that do any one or more of the following:"

> (A) filter, screen, allow, or disallow content;
>
> (B) pick, choose, analyze, or digest content; or
>
> (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

§ 230(f)(4).

Notice the repeated use of the word "content." In defining "access software provider," Congress conspicuously distinguished between a provider of "software * * * or enabling tools" that provide "access" to

"content"—in myriad ways—and the "content" itself. § 230(f)(4); *cf.* § 230(f)(2) (defining entities that provide mere "*access to* * * * a computer server" and "*access to* the Internet") (emphasis added).

In contrasting access to content and content itself, Section 230 *also* distinguishes an "access software provider" from an "information content provider." An "information content provider" is "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." § 230(f)(3).

It follows that the "software" or "enabling tools" that provide "access" to "content" are not themselves providing "information content." Otherwise, every access software provider would be an information content provider, and the definition of access software provider would be a dead letter.

Indeed, as the government notes, "Section 230(c)(1)" *itself* "would be a dead letter." Br. 23. *All* access software providers would be "treated as * * * publisher[s]" (§ 230(c)(1)), and *all* would be subject to liability. After all, a "publisher" is "one that makes public." *Force* v. *Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019) (citing *Webster's Third New Int'l Dictionary* 1837 (1981)). And "actively bringing [a speaker's] message to interested parties * * * falls within the heartland of what it means to be the 'publisher' of information." *Force*, 934 F.3d at 65 (citation omitted). That is just what access software providers do—*with material from information content providers*. But if providing access-enabling tools by *itself* turned access software providers *into* information content providers, access software providers would become "pub-

lisher[s]" *of their own* content. § 230(c)(1). They would thus forfeit the protection of Section 230(c)(1), which shields platforms when publishing the content of "*another*." That cannot be what Congress intended in distinguishing access software providers from information content providers.

b. The statute's definitions, in other words, are key to understanding its liability provisions. Section 230 must protect "interactive computer services when they make targeted recommendations of information provided by another information content provider" (Pet. i) *because*, in making those recommendations, they are acting as access software providers, *not* as information content providers or "publisher[s]" of their own content. § 230(c)(1).

Specifically, interactive computer services are providing "enabling tools" that "pick," "choose," "organize," "reorganize," "subset," and "display" or "forward" content of others (§ 230(f)(4)) "based upon * * * what is known about the viewer" (J.A. 169) (operative complaint). By "display[ing]" or "forward[ing]"—or as petitioners say, "recommending"—content, these "enabling tools" are providing "access" to content of "another." § 230(c)(1). Thus, they are protected as the "publisher" of the content of "another." *Ibid.*

Of course, none of this excludes access software providers from also enjoying First Amendment protection. Whether done by an algorithm or a human, choosing, organizing, and forwarding content are constitutionally protected exercises of "editorial judgment." *Mia. Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241, 255 (1974). But this is not a First Amendment case. It is a Section 230 case. And under Section

230, access software providers are protected when they publish the content of "another." § 230(c)(1).

Petitioners' error is in assuming that under Section 230, recommending content equals "publish[ing]" one's *own* content. § 230(c)(1). But petitioners reach this conclusion only by ignoring Section 230's definitions—indeed, never *mentioning* the definition of access software provider. § 230(f)(4). But statutory terms "'must be read and interpreted in their context, not in isolation." *Sw. Airlines Co.* v. *Saxon*, 142 S. Ct. 1783, 1788 (2022) (citations and internal quotation marks omitted). That is, the Court will interpret a statute "as a symmetrical and coherent regulatory scheme," and "fit, if possible, all parts into a[] harmonious whole." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Taking that harmonious approach here requires consulting Section 230's definitions, which describe "display[ing]" and "forward[ing]" content that a platform has "cho[sen]" as a way of providing "access" to content. § 230(f)(4). Take "forward[ing]," for example. "Forward[ing]" is a synonym of "recommending." The primary definition of "forward," when used as a verb, is "to help onward: PROMOTE" (as in "forwarded his friend's career"). *Merriam-Webster's Collegiate Dictionary* 460 (10th ed. 1994). And Section 230 distinguishes "forward[ing]" from "transmit[ting]" and "display[ing]." § 230(f)(4)(C). Thus, an access software provider may "forward"—that is, promote—content that it has "cho[sen]" *and* enjoy the protection of Section 230 because, in so doing, it has used "tools" that Congress prescribed for "enabling" *access to* content, rather than for "publish[ing]" its *own* content. § 230(c)(1).

Or put the matter the other way around. What, one might ask, *is* an "enabling tool" for "choos[ing]" and "display[ing]" or "forward[ing]" content if *not* an automated recommendation system like YouTube's? Petitioners have no answer.

Nor does the government, which, like petitioners, assumes that displaying or forwarding content equals saying, "you should watch this." Br. 27. That is, it amounts to "publish[ing]" the platform's *own* content. § 230(c)(1). But again, Congress thought otherwise—defining displaying or forwarding content as an enabling tool for providing access to content created by *others*—namely, information content providers.

c. The government agrees, however, that Section 230's definitional provisions are critical to understanding its liability provisions. As the government notes (at 23), "[i]t would make little sense for Congress to specifically include entities that provide 'enabling tools' that 'filter,' 'organize,' and 'reorganize' content as among those to which Section 230(c)(1) applies, only to categorically withdraw that protection through the definition of 'information content provider.'" Exactly—only the very same argument applies to Section 230(c)(1)'s use of the word "publisher." That is, it would make little sense for Congress to protect "interactive computer services" in Section 230(c)(1) through the definition of "enabling tools" but withdraw that very same protection by using the word "publisher."

Either way, it cannot be that the functions that *qualify* platforms for protection also *disqualify* them from that same protection. Resp. Br. 40. Congress does not "take away with one hand what [it] has given * * * with the other." *Atl. Marine Constr. Co.* v.

United States Dist. Court, 571 U.S. 49, 57 (2013). Rather, reading the statute as a "harmonious whole" (*Brown & Williamson*, 529 U.S. at 133), YouTube's automated recommendation system falls in the heart of what Congress protected in Section 230.

B. Holding that YouTube's automated recommendation system is protected as an "enabling tool" fits with the law's express purpose statements.

If there were any doubt about how to interpret Section 230 in this case, that doubt would be resolved by the law's express purpose statements.

1. This Court relies on express statutory purpose statements to clarify the proper interpretation of operative text.

This Court often relies on congressionally enacted "legislative findings and purposes that motivate" a given statute. *Toyota Motor Mfg., Ky.* v. *Williams*, 534 U.S. 184, 197 (2002). For example, in a unanimous decision, the Court interpreted the Foreign Sovereign Immunities Act in part by looking to the "primary purposes" expressly stated in the Act. *Samantar* v. *Yousuf*, 560 U.S. 305, 319–320 (2010). Similarly, in another case, the Court held that "[a]ny doubt" about a statute's meaning was "dispelled by the record and by formal legislative findings." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 564 (2011).

Indeed, Justice Thomas has urged this Court to rely on the policy statements in Section 230 itself. *Nat'l Cable & Telecoms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 359–360 (2002) (Thomas, concurring in part and dissenting in part). The question in *National Cable* was whether the FCC had authority to regulate

certain rates under the 1996 amendments to the Communications Act. Writing separately, Justice Thomas would have found that the Act reserved that rate-governing authority to the FCC in part because that would encourage the spread of the internet—which is one thing that Congress said it wanted. *Ibid.* Where did Congress say that? In Section 230. "Congress declared that 'it is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services[.]'" *Ibid.* (quoting 47 U.S.C. § 230(b)(1)); see also *Reynolds* v. *United States*, 565 U.S. 432, 448 n.* (2012) (legislative history is especially "superfluous" when "the text of the Act itself makes clear" in an express purpose statement what Congress "sought to establish") (Scalia, concurring).

In short, as Justice Story explained, a purpose statement is "a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute." 1 Joseph Story, Commentaries on the Constitution of the United States § 459, at 326 (2d ed. 1858) (quoted in Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012)). So purpose statements should be consulted because they "can shed light on the meaning of [a statute's] operative provisions." Reading Law 218.

2. Section 230's express purpose statements favor distinguishing YouTube's automated recommendation system from content.

a. Section 230's purpose statements reinforce the plain-text reading of the statute. Under Section 230, "[i]t is the policy of the United States—"

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
>
> (2) 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; [and]
>
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services[.]

47 U.S.C. § 230(b)(1)–(3) ("Policy"). Each of these purposes, or "polic[ies]," as Section 230 calls them, would be undermined by interpreting "enabling tools" of an "access software provider" *not* to cover YouTube's "automated recommendation system[]." Pet. Br. 17. And conversely, each of these purposes would be furthered by interpreting "enabling tools" to cover YouTube's system.

"[P]romote the continued development of the Internet." YouTube's automated recommendation system, and other systems like it, are some of the internet's chief engines of innovation. As petitioners note in their merits brief (at 17), recommendation

systems are not merely used by YouTube; "Facebook, Twitter and other Internet companies have created complex automated recommendation systems." These systems "collect detailed information about users—their interactions with the platform, the content of the information that the user has chosen to view, and other information—then use that information to try to determine what that user would like to view. In 2016 YouTube's Vice President of Engineering explained that the company utilized 80 billion pieces of information about its users in making recommendations[.]" *Ibid.* "These Internet companies are constantly adjusting their recommendation systems to improve their effectiveness in inducing viewers to spend more time on the site"; and "*[t]hese recommendation systems have been highly effective at increasing usage*[.]" *Ibid.* (emphasis added). And as the internet grows, these powerful tools become even more vital to help users find what they want in a near-infinite soup of information.

What these ever-improving recommendation systems have done, in other words, is "promote the continued development of the Internet." § 230(b)(1). To borrow from Section 230's factual findings, these systems have led to "an extraordinary advance in the availability of educational and informational resources[.]" § 230(a)(1). And they have enabled the internet to continue to "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity[.]" § 230(a)(3).

Of course, the leading speakers vary by platform. Twitter and Facebook, for example, have historically catered to different audiences. *Infra* at 24–27. But

across platforms, it is safe to say that there has never been a marketplace of ideas as diverse as the marketplace available on today's internet. And that internet runs, in significant part, on "automated recommendation system[s]." Pet. Br. 17.

If the Court is to interpret Section 230 to "promote the continued development of the Internet" (§ 230(b)(1)), it should be careful about suddenly treating these tools of innovation—automated recommendation systems—as subject to liability. And it should be especially slow to do so when the text of Section 230 itself so readily captures automated recommendation systems in the definition of "access software provider" (§ 230(f)(4)) rather than "information content provider" (§ 230(f)(3)).

"[P]reserve the free market * * * for the Internet * * * unfettered by Federal or State regulation." The Court should be doubly slow to open automated recommendation systems to liability because another of Congress's purposes in Section 230 was "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[.]" 47 U.S.C. § 230(b)(2). Petitioners seek to expose interactive computer services to regulation in the form of federal liability. J.A. 176–184 (listing claims for relief under federal law). That contradicts Congress's purpose. So if there were any doubt as to whether YouTube's recommendation system were an enabling tool protected from liability, it should be resolved in favor of that protection.

It is no answer to say that a liability shield is a form of regulation. Perhaps a shield technically *could* be used as sword, but it would make a poor

weapon. In any event, Section 230 treats a shield as a shield—by protecting internet service providers from liability as "publisher[s]" and, in other circumstances, from "[c]ivil liability" generally. § 230(c)(1), (2). So when Congress said that its purpose was 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" (*id.* § 230(b)(2)), it obviously was not calling for more liability; it was calling for less.

The Court should thus reject pleas for a narrow interpretation of Section 230's liability shield. Instead, as petitioners urge, the law "should be neither broadly nor narrowly construed." Pet. Br. 47 (heading case removed). That is, it should be construed *fairly*, in a way that tracks the law's stated purpose. That means interpreting Section 230's shield to cover YouTube's automated recommendation system.

But suppose Congress had said that one of its purposes was to treat a shield as a sword. That odd purpose *still* could not force an interpretation of Section 230 so crabbed that it would transform an access software provider into an information content provider *itself*. A purpose statement "will not limit a more general disposition that the operative text contains"; after all, "legislative remedies often go beyond the specific ill that prompted the statute." Reading Law 219. Here, the operative text of Section 230 defines an "interactive computer service" to include a provider of "enabling tools" that do *exactly* what YouTube's automated recommendation system does. And it treats "enabling tools" as distinct from "content" subject to liability. So, whatever Congress's stated pur-

pose in Section 230, the law would protect YouTube's recommendation system from liability.

But again, Congress's stated purpose here *was* to limit liability. The way to do that in this case is to treat enabling tools, like YouTube's automated recommendation system, as distinct from content.

"[E]ncourage the development of technologies which maximize user control." It would be difficult to find a phrase that better captures YouTube's automated recommendation system than a technology that "maximize[s] user control." 47 U.S.C. § 230(b)(3). Again, without such a system, users would be lost in the internet's ever-expanding universe of information. Thus, petitioners themselves insist that YouTube's system is driven by user inputs:

- the system "recommends content to users *based upon * * * what is known about the viewer*";
- "[t]hose recommendations are implemented through automated algorithms, which select the specific material to be recommended to a particular user *based on information about that user* that is known to the interactive computer service";
- the system "*collect[s] detailed information about users*—their interactions with the platform, the content of the information that the user has chosen to view, and other information—*then use[s] that information to try to determine what that user would like to view*"; and
- "YouTube's Vice President of Engineering explained that *the company utilized 80 bil-*

> *lion pieces of information about its users in making recommendations*."

J.A. 169, Pet. 3, Pet. Br. 17 (all emphases added).

b. Given these allegations, petitioners load the dice against YouTube in their original question presented—asking whether Section 230 protects "interactive computer services when they make targeted recommendations" (Pet. i), as if the services target users based on what *the services* want. Petitioners allege the opposite. The services target users based on "what th[e] user[s] would like." Pet. Br. 17. That is why the services collect information about users—so that, as the operative complaint puts it, they can "recommend[] content to users based upon * * * what is known about the viewer." J.A. 169.

Nor can it be said that usually the algorithm also reflects what the platform wants—again, that assertion contradicts the complaint. *Cf.* J.A. 169. But even if YouTube's recommendations reflected its preferences, YouTube would still be protected. After all, Section 230 goes out of its way to give an "access software provider" a say in what it provides access to. Without forfeiting its role as a mere provider of access, an access software provider may:

> (A) *filter, screen, allow, or disallow* content;
>
> (B) *pick, choose*, analyze, or digest content; or
>
> (C) transmit, receive, display, *forward*, cache, search, *subset*, *organize, reorganize*, or translate content.

§ 230(f)(4) (emphasis added). Again, petitioner entirely ignores this language.

Yet this language is bolstered by the rest of Section 230(c)(2), which protects interactive computer services from liability for "restrict[ing] access" to content that they would otherwise display. Likewise, Section 230(c)(1) protects such services—via the definition of "access software provider"—from liability for restricting access to content that *they* would otherwise display. In both cases, restricting access to content would have the inevitable effect of favoring *other*, *non*restricted content. Yet Congress still shielded those content restrictions from liability.

But again, the Court need not reach this issue of YouTube favoring content based on what *it* wanted. The complaint never alleges that YouTube did so.

c. So what statutory obligations *does* an interactive computer service have to directly foster user control? Only one: to tell users about their options for buying "parental control protections":

> **Obligations of interactive computer service.** *A provider of interactive computer service shall*, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, *notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors.* Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

§ 230(d) (emphases added). Section 230, in other words, requires interactive computer services to *encourage* user control, but not to *mandate* it. *Ibid.* Petitioner overlooks this provision too.

In sum, Section 230 seeks to foster user control. The way to do that here is to treat YouTube's automated recommendation system as a "tool" that "enable[s]" access to content, but not as content itself.

II. Reading Section 230 as its plain text requires will best foster speech and expand the marketplace of ideas.

Nor is there any *need* to overhaul Section 230, which, as currently interpreted, has fostered speech and expanded the marketplace of ideas. Critics of Section 230 often focus on certain high-profile examples of platforms suppressing speech. And we do not discount those. But the hard data reveal a more favorable picture. To this day, some of the most prominent voices on the internet come from conservative and heterodox speakers. And the leading platforms in Big Tech are always changing. Exposing platforms to liability would primarily hurt upstarts, which tomorrow may challenge today's leaders. Viewed through the proper wide-angle lens, Section 230 is a success story. It should not be reinterpreted.

A. Under the law's current interpretation, the marketplace of ideas has grown and heterodox speech has flourished.

1. Since Section 230 was enacted, internet platforms have added billions of users, each a unique content creator.

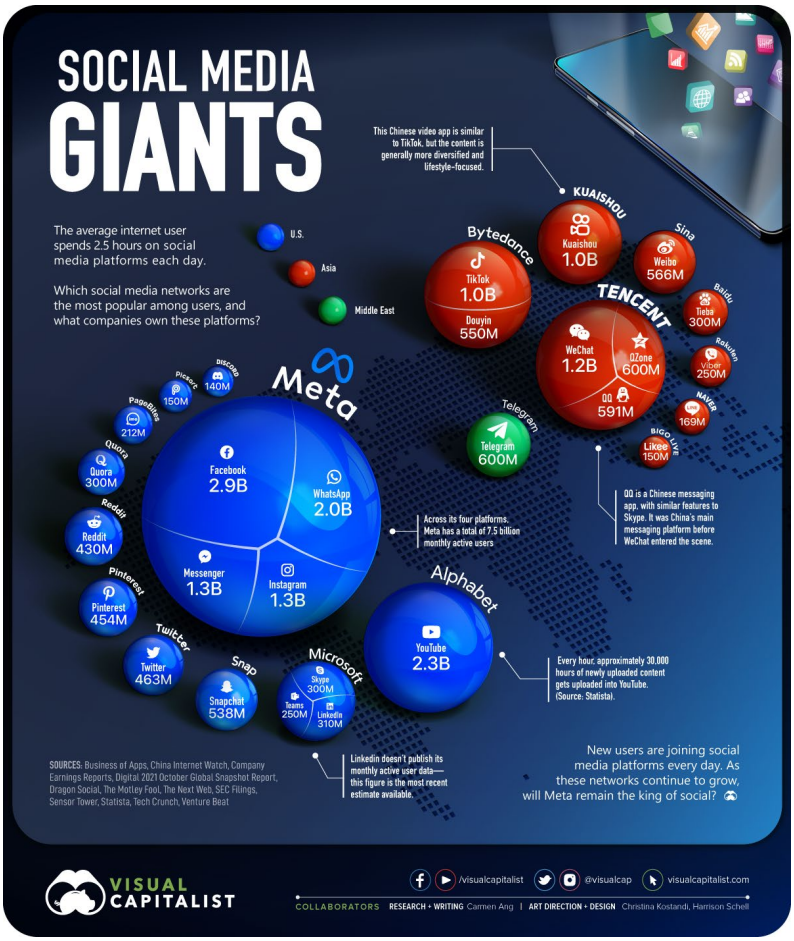
Since Section 230 was enacted, the number of internet users has grown exponentially. Of course,

each of these users is a unique content creator—or, in the words of Section 230 a "publisher." § 230(c)(1).

The sheer number of users—which is to say publishers—is hard to believe. Today, "approximately 61% of the world's population have a social media account. In 2022, the number of social media accounts is expected to surpass five billion[.]" David Curry, Social App Report (2023), BusinessofApps (Dec. 14, 2022), http://bit.ly/3XyV7PS. Twitter has some 450 million monthly active users. Mansoor Iqbal, Twitter Revenue and Usage Statistics (2022), BusinessofApps (Jan. 9, 2023), http://bit.ly/3wfnreo. In the third quarter of 2022, YouTube served over 2.65 billion active users. Mansoor Iqbal, YouTube Revenue and Usage Statistics (2022), BusinessofApps (Jan. 9, 2023), http://bit.ly/3QOmraq. Testifying to Congress, Google's CEO noted that in 2017 Google served over three *trillion* searches, 15% of which—some 450 billion—were novel. *Google Data Collection*, C-SPAN (Dec. 11, 2018), https://bit.ly/3Dht6Vh.

The real behemoth, though, is Facebook. "In 2021, Facebook made $117 billion in revenue, more than every other social media platform combined. Instagram alone made more than LinkedIn, Snapchat, Pinterest and Twitter combined." Curry, *supra*. Facebook's growth has been astonishing. In its first year (2004), Facebook reached over a million monthly active users. Kurt Wagner and Rani Molla, *Facebook's First 15 Years Were Defined by User Growth*, Vox (Feb. 5, 2019), http://bit.ly/3GTnvp7. In 2008, Facebook hit 100 million users. *Ibid*. By October 2012, Facebook reached over a billion users. *Ibid*. As of October 2022, Facebook users numbered 2.96 billion. Meta, Meta Earnings Presentation Q3 2022 at

14 (Oct. 26, 2022), https://bit.ly/3XImzuv. Here is a graphic showing how Facebook and its parent, Meta, compare in number of users to the other top players in social media:



Carmen Ang, *Ranked: The World's Most Popular Social Networks, and Who Owns Them*, Visual Capitalist (Dec. 6, 2021), https://bit.ly/3XApgOv.

2. Many of the leading voices on the internet are conservative or heterodox.

Consistently, leading voices on social media are conservative. Take gargantuan Facebook, for example. On any given day, the odds are good that many of the top links posted on Facebook will be from someone on the right. The day petitioners filed their blue brief (November 30), for example, the #1 link posted on Facebook was from Fox News. @FacebooksTop10, Twitter (Nov. 30, 2022, 11:00 AM), https://bit.ly/3WmQUgN. The next-leading news link—coming in at #5—was by conservative Dan Bongino. *Ibid*. A week later, the #1 link was from Catholic Fundamentalism. @FacebooksTop10, Twitter (Dec. 7, 2022, 11:00 AM), https://bit.ly/3XBp9Cp. Other top-ten links that day were from Ben Shapiro (#4), Donald Trump 2020 Voters (#6), Fox News (#7), and the conservative satire site Babylon Bee (#10). *Ibid*. The next day featured the top ten shown in our Summary of Argument (*supra* at 4), which is riddled with conservatives. @FacebooksTop10, Twitter (Dec. 8, 2022, 11:00 AM), https://bit.ly/3XfUNFD.

a. Ben Shapiro bears special mention. So popular is Shapiro on Facebook that National Public Radio declared that "Ben Shapiro rules Facebook." Miles Parks, *Outrage as a Business Model: How Ben Shapiro is Using Facebook to Build a Business Empire,* National Public Radio (July 19, 2021), http://bit.ly/3CY1bJP. "An NPR analysis of social media data found that over the past year, stories published by the site Shapiro founded, The Daily Wire, received more likes, shares and comments on Facebook than any other news publisher by a wide margin." *Ibid*. "In May [2021], The Daily Wire generated

more Facebook engagement on its articles than The New York Times, The Washington Post, NBC News and CNN combined." *Ibid.* "The conservative podcast host * * * drives an engagement machine unparalleled by anything else on the world's biggest social networking site." *Ibid.*

Facebook is not alone in hosting conservatives. Apple just announced that Shapiro's podcast ranked in the top ten in 2022. Apple, *Apple reveals the most popular podcasts of 2022* (Dec. 5, 2022), https://apple.co/3WbQMAQ. Spotify announced that for the third straight year, its leading podcast was The Joe Rogan Experience. Heather Hamilton, *Joe Rogan earns top spot on Spotify's 2022 podcast chart*, Washington Examiner (Dec. 29, 2022). Rogan drew attention recently for his views on Covid vaccines and for hosting guests who took heterodox views on the vaccines. Josh Dickey, *Joe Rogan Is Talking About Vaccines Again*, The Wrap (Apr. 13, 2022), https://bit.ly/3XE3nxK. His podcast is "effectively a series of wandering conversations, often over whiskey and weed, on topics including but not limited to: comedy, cage-fighting, psychedelics, and the political excesses of the left." Matt Flegenheimer, *Joe Rogan Is Too Big to Cancel*, N.Y. Times (July 1, 2021).

The size of Rogan's audience is staggering. "In 2019, Mr. Rogan said his podcast was downloaded about 190 million times in a month. Some single episodes have reached tens of millions." *Ibid.* By contrast, "[t]he most popular host in cable news, Tucker Carlson of Fox News, might expect about three million live viewers per night." *Ibid.* So big has Rogan become that the New York Times declared him "too big to cancel." *Ibid.*

b. Shapiro and Rogan are not alone. Clinical psychologist, author, and free-speech advocate Jordan Peterson made his name by posting lectures on YouTube, where his channel now has six million subscribers. Jordan B Peterson (@JordanBPeterson), YouTube, https://bit.ly/3XjDSC7. As noted, Tucker Carlson's nightly viewers number only half that. Peterson's YouTube videos have been watched almost half a billion times. *Ibid.* Conservative talk-show host Dave Rubin's videos have been viewed over 580 million times. Dave Rubin (@RubinReport), *About*, YouTube, https://bit.ly/3ZIitnN. The heterodox journal Quillette is visited almost a million times per month. Daniel Engber, *Free Thought for the Closed-Minded*, Slate (Jan. 8, 2019), https://bit.ly/2FkLIY7.

Journalist Bari Weiss likewise is enjoying a swelling following online, just three years after fleeing the New York Times, because, in her view, the Times was too inhospitable to centrists. Bari Weiss, *Resignation Letter*, https://bit.ly/3IVd0nJ. According to Weiss, she had been hired "with the goal of bringing in * * * first-time writers, centrists, conservatives and others who would not naturally think of The Times as their home. The reason for this effort was clear: The paper's failure to anticipate the outcome of the 2016 election meant that it didn't have a firm grasp of the country it covers." *Ibid.* But instead of following the truth, the paper became a progressive "performance space" where truth was "molded to fit the needs of a predetermined narrative." *Ibid.*

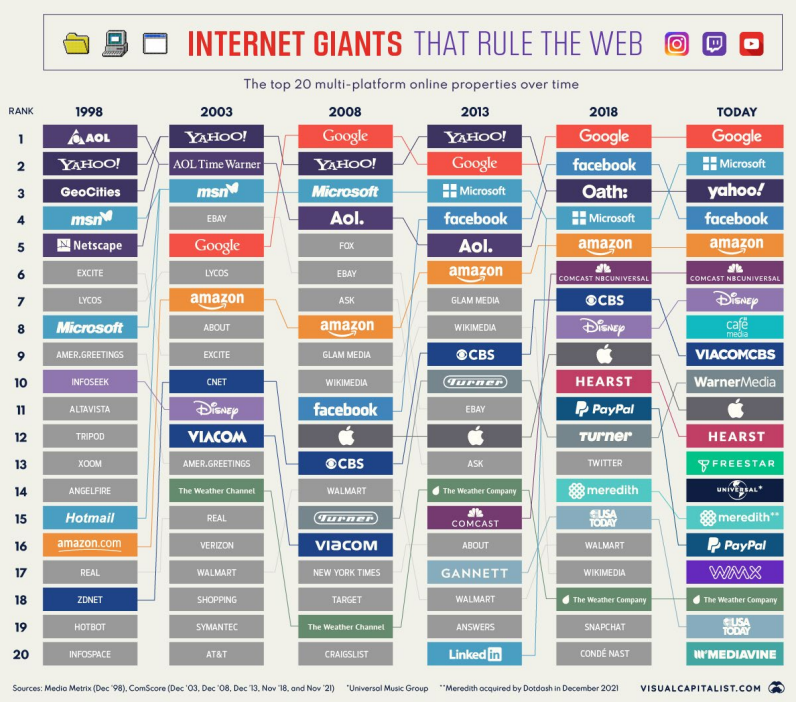
So Weiss left and founded her own podcast and online journal, which were so successful that a few weeks ago Weiss launched a media company called The Free Press. *About The Free Press*, The Free

Press, https://bit.ly/3wetFec. The company already has ten employees, and the journal has 25,000 subscribers. Sara Fischer, *Exclusive: Bari Weiss reveals business plan for buzzy new media startup*, Axios (Dec. 13, 2022), https://bit.ly/3WmV7B7. Weiss herself has almost one million Twitter followers. *Ibid.*

B. Assuming that Section 230 must be constricted to stop censorship by "Big Tech" ignores that no one has ever ruled Big Tech for long.

None of this is to deny that platforms have behaved poorly—perhaps especially Twitter, whose excesses new owner Elon Musk is exposing in releases that some are calling the Twitter Files. *E.g.*, Ryan Mills, *Twitter Files: Platform Suppressed Valid Information from Medical Experts about Covid-19*, National Review (Dec. 26, 2022), https://bit.ly/3ISV64Y. Nor is it to deny that some *amici* believe that investigations may be needed, especially if the evidence shows that platforms caved to government pressure or colluded with government officials. But the solution is *not* to expose all sites—big and small—to liability for their recommendation systems. The primary solution is the market.

From the days when Microsoft overtook IBM and Apple surpassed Hewlett-Packard, no one has ever lasted atop Big Tech. Likewise, the history of the internet under Section 230 has been one scene after another of what economist Joseph Schumpeter called "creative destruction." *Capitalism, Socialism and Democracy* 84 (3d ed. 1950). AOL, Netscape, Yahoo—all enjoyed their day in the sun but were elbowed aside by competitors offering more popular products:



Nick Routley, *The 20 Internet Giants That Rule the Web*, Visual Capitalist (Jan. 19, 2022), https://bit.ly/2CQeaP0.

Sometimes the results of these power changes please the left; other times they please the right. For example, many critics of Twitter have become fans, thanks to its new ownership. Erin Griffith, *For Many, Elon Musk's Buying Twitter Is a Moment of Celebration*, N.Y. Times (Oct. 28, 2022). Meanwhile, Facebook haters doubtless felt schadenfreude as they watched its market capitalization plummet this past year. See Aimee Picchi, *Meta's value has plunged by $700 billion. Wall Street calls it a "train wreck."*, CBS (Oct. 28, 2022), https://cbsn.ws/3ZFhULA.

The key is not to focus on who is up or down at the moment. Instead, it is to note that over the long run

the winners are consumers, who "gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co.* v. *Cigarettes Cheaper!*, 462 F.3d 690, 696 (7th Cir. 2006) (Easterbrook, J.). If a social-media platform is offering a subpar product, the history of the internet shows that the market will tend to produce something better.

C. By exposing upstarts to liability that only established firms can bear, constricting Section 230 would chill heterodox speech and shrink the marketplace of ideas.

Constricting Section 230's liability protections is also likely to backfire. Section 230 does not protect only large platforms; it protects *all* platforms. Upstart social-media sites like Gab, Parler, and Rumble enjoy the same protections as Facebook and Twitter. If Section 230 no longer protects automated recommendation systems, upstarts will likely suffer most.

1. For one thing, it is easier for large corporations to afford the legions of moderators, coders, compliance specialists, and attorneys that would be needed in a world without Section 230. Smaller players face a much tougher time. It has been estimated that in litigation costs alone, Section 230 saves online intermediaries up to $3,000 at the pre-complaint stage, up to $80,000 at the motion-to-dismiss stage, up to $150,000 at the summary-judgment stage, and up to—and perhaps even more than—$500,000 through the discovery stage. Engine, *Primer: Value of Section 230* (Jan. 31, 2019), https://bit.ly/2GUx4VA. These litigation costs are often needless, because, as noted, the First Amendment protects platforms' handling of third-party content. *Supra* at 9–10. In that sense,

Section 230 is a tort-reform law. It shields platforms from facing litigation in the first place.

Removing Section 230's litigation-cost shield would devastate many startups. For example, when a family-owned candle shop creates a website and allows customers to comment on their favorite candles, and the shop organizes the comments, that is protected by Section 230. When a local rock band sets up an online forum for its fans to discuss the band's music or upcoming shows, and ranks the posts, that is protected by Section 230. Even relatively small sites use algorithms to help users and drive traffic. "Virtually no modern website would function if users had to sort through content themselves." Resp. Br. 11. All would thus be harmed if Section 230 were constricted to exclude automated recommendation systems.

Of course, Section 230 also protects new social networks, which also use automated recommendation systems. For example, Gab, a network founded in 2016 to "defend, protect and preserve free speech online for all people," benefits from Section 230's protections and explicitly disclaims any liability for user-generated content. Jazmin Goodwin, *Gab: Everything you need to know about the fast-growing, controversial social network*, CNN (Jan. 17, 2021), https://cnn.it/3XD25Df; Gab, *Website Terms of Service*, https://bit.ly/3ZKaaYw. The same is true of Parler, a social-media platform founded in 2018 that describes itself as "the solution to problems that have surfaced * * * due to changes in Big Tech policy influenced by various special-interest groups." Allana Akhtar & Britney Nguyen, *Everything you need to know about Parler, the right-wing social media platform Kanye West is planning to buy*, Business Insider

(Oct. 20, 2022), https://bit.ly/3kp8cgg; Parler, About, https://bit.ly/3iNqxTO; Parler, User Agreement, https://bit.ly/3WlZAnI. So too with Rumble, a competitor of YouTube that now boasts 78 million monthly users. Tom Parker, *Rumble sets new record of 78 million monthly active users*, Reclaim the Net, https://bit.ly/3ZIHXRR.

Indeed, a research study prepared for Google in 2015 found that liability protections like those in Section 230 increase the success rate and profitability of startup internet firms. Oxera, *The economic impact of safe harbours on Internet intermediary start-ups* (Feb. 2015), https://bit.ly/3Jco8gj. By contrast, weakening Section 230 would force startup intermediaries "to face death by ten thousand duck-bites[.]" *Fair Housing Council of San Fernando Valley* v. *Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

2. The value of Section 230 to startups is not mere speculation. Since the law passed in 1996, a natural experiment has been running in which American firms enjoy liability protection from third-party content, while European firms are exposed to more legal risk. Michael Masnick, *Don't Shoot the Message Board: How intermediary liability harms online investment & innovation*, Copia (Jun. 25, 2019), https://bit.ly/3w8dY8v. What has happened? Not one European platform leads the world. All the largest platforms are based in the United States. *Supra* at 23 (graphic). True, some sizeable platforms are based in China, but those platforms are government controlled and thus government protected. See Shen Lu, *As China Tightens Controls on Social Media, Some Users Seek Refuge Under the Radar*, The Wall Street Journal (Aug. 4, 2022).

European startups are at a disadvantage from the get-go. According to one study, "under the framework set forth by [Section] 230, a [U.S.-based] company is 5 times as likely to secure investment over $10 million and nearly 10 times as likely to receive investments over $100 million, as compared to internet companies in the EU, under the more limited E-Commerce Directive." Masnick, *supra*, at 8. As a result, removing Section 230's liability protections could cost the United States an estimated "425,000 jobs, and decrease GDP by $44 billion annually." Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, RealClearPolicy (Sept. 26, 2018), https://bit.ly/3CVMlTT.

Even setting aside the plain text of Section 230, then, its protections for automated recommendation systems should be preserved as a matter of sound policy. Such protections nurture today's startups, benefit our economy, and help generate jobs.

CONCLUSION

The judgment should be affirmed.

Respectfully submitted.

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