No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, et al.,

Petitioners,

v.

GOOGLE LLC,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SCHOLARS OF CIVIL RIGHTS AND SOCIAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF THE *AMICI CURIAE*[1]

Though far from perfect, the internet has been one of the great equalizing forces in human history. Online platforms have displaced the gatekeepers of traditional media—placing a megaphone in front of marginalized and underserved voices. Speaking on their own terms and with ownership of their intellectual property, marginalized communities have spoken online with unprecedented reach, transforming culture and society and empowering the most vulnerable.

For that, we can thank Section 230. Enacted in the internet's dawning days, the law was conceived as a bulwark against censorship of all stripes, whether by the government or private interests with deep enough pockets to intimidate speech they disapproved into silence. Naturally, efforts to silence speech bear down most heavily on those at the margins—whose ideas, art, and very identities are received as threats by those in the mainstream. Congress recognized that the internet's promise as a roiling, vibrant community of expression would only be realized if the platforms hosting user-generated content felt secure in hosting controversial speech that might face legal challenge. Section 230 has done just that. At the same time, it empowered platforms to accept their obligation as hosts to make the internet hospitable for all its users by moderating content—a function of special importance to those whose marginalized identities are

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

more likely to elicit harassment, threats, and discrimination.

Amici are scholars of civil rights and social justice.[2] They focus on what the internet has meant for its most marginalized users, and thus what this litigation will mean for those communities, from their capability to educate and inform, to their opportunities to share nontraditional ideas and expression. As this Court for the first time interprets the words that created the modern internet, *amici* recognize that this is not a moment to remain neutral, but instead to express their deep interest in preserving the internet as a space where people outside of dominant culture may speak and actually be heard, may connect and organize, and ultimately may shape a more equitable world.

This case is about the future of the internet, and whether the statute at its foundation will remain a strong buttress for free expression online. Only construing the statute as broadly as it was written will do the job. More, the technology at issue here—algorithms that organize, moderate, and recommend the deluge of content uploaded online—is what makes the internet such a powerful engine for expression and social change. For speakers who lack resources and cultural cachet, and users who lack access to elite libraries and repositories, being able to connect with an eager and untapped audience and modern griots is every bit as important as being able to speak in the first place. It is essential to the voices who struggle most to be heard that platforms remain free to use neutral tools to amplify and recommend their expression.

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[2] A complete list of *amici* appears in an appendix to this brief.

SUMMARY OF ARGUMENT

The Court should affirm the judgment below, preserving the vibrant landscape of free expression that Congress created through Section 230 and protecting the special gains that the law has delivered to marginalized and underserved communities.

I. Section 230 was enacted to cultivate the unfettered expression of ideas and art on the internet. It has accomplished exactly that. By protecting internet platforms from liability for the user-generated content they host, the law has allowed speech to flourish. Marginalized and underserved communities are among those who have benefited immensely from these new opportunities to reach audiences. Long shut out of traditional media, these voices have found unprecedented opportunities to speak online, free from collateral censorship by platforms wary of litigation risk, as well as the "heckler's veto" against expression outside the mainstream. Marginalized communities have used this powerful megaphone to effect lasting change, from the Black Lives Matter movement to the #MeToo campaign to the fight for LGBTQ+ rights.

The technology at issue in this litigation is central to that achievement. From the cacophony of third-party content posted online, platforms organize coherent streams of information, reaching ideal audiences. They do so with algorithms that "recommend" content, as well as moderate it. Of course, platforms have organized and curated information for as long as they have existed, and traditional distributors of information like bookstores have always done the same. Never has that transformed third-party content into their own. To remove from Section 230's protection this essential aspect of how internet platforms host user-generated content would blunt the sharpest tool

available to marginalized internet users to carve out their niche and cut through the noise.

II. Courts interpreting Section 230 have embraced a "neutral tools" standard that upholds the law's objective to foster a free and open internet while empowering platforms to moderate the content they host. This standard flows directly from the statute, recognizing the principle of neutrality embedded in its text and giving effect to its directive to promote content moderation without undermining free expression. Time and again, the standard has held platforms accountable for wrongdoing without encroaching on Section 230's protective shield. Undercutting it would do no more to police internet platforms, but it would force them to choose between moderating content more severely, *or else not at all*. Either way, people at the margins—already disproportionately targets of censorship and online harassment—will lose the most from fatally weakening Section 230.

ARGUMENT

I. SECTION 230 AMPLIFIES UNDERSERVED AND MARGINALIZED VOICES.

Section 230 created the internet as we know it. Enacted to promote free expression online, the law cultivated the conditions for free speech to flourish by shielding platforms hosting user-generated speech from liability for that content. Few have benefited more than marginalized and underserved speakers, long the subjects of gatekeeping and censorship. The law provides these voices with a megaphone and—through recommendation engines—connects them with eager, receptive, and new audiences. Undermining that technology by removing it from Section 230's protections would shake the foundations of the

internet, with nobody bearing more of the shock than its most marginalized speakers and users.

A. Section 230 was enacted, in part, to preserve the internet as a forum where underserved and marginalized voices can thrive.

Still in its nascent days, the internet was already at a crossroads when Section 230 became law. The law emerged from the debate over a well-meaning but misguided effort to protect children online: the Communications Decency Act of 1996. Many members of Congress, including Section 230's authors, feared that the proposed law would stifle free speech.[3] Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, JOLT (Aug. 27, 2020) https://perma.cc/SVS5-FWZK. They put forward an amendment—originally a standalone "rebuke" of the CDA—to empower platforms to remove harmful content and families to set boundaries, recognizing that government censorship would suffocate free expression. *Ibid*.

Equally important context for the law's enactment were two cases—*Cubby, Inc.* v. *CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991) and *Stratton Oakmont, Inc.* v. *Prodigy Servs. Co.*, 1995 WL 3233710 (N.Y. Sup. Ct. May 24, 1995)—which, combined, established a rule that internet platforms making any effort to moderate content would be liable as publishers for whatever content remained. This rule created a "perverse incentive for platforms to abandon any attempt to maintain civility on their sites" and would be a "body blow to the internet itself" by giving user-

[3] These concerns proved prescient. The Court quickly invalidated almost the entire law other than Section 230. *Reno* v. *ACLU*, 521 U.S. 844 (1997).

generated content no quarter online. Cox, *Origins and Original Intent, supra*.

Staring down the albatross of government censorship from one direction and the evisceration of third-party content from the other, Section 230 became a bulwark for free expression online, especially of ideas and speakers most susceptible to censorship or legal opprobrium. See, *e.g.*, Thach, et al., *(In)visible moderation: A digital ethnography of marginalized users and content moderation on Twitch and Reddit*, New Media & Society (July 18, 2022), https://perma.cc/2E74-5S8Q (documenting how "moderation practices across different platforms disproportionately target marginalized groups" including "queer people and women of color" and "individuals with mental illness").

This ambition is enshrined in the statute's enacted findings and statements of policy, which explain the stakes: "The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C § 230(a)(3), and thus "[i]t is the policy of the United States— * * * 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*. at § 230(b)(2). See also *Zeran* v. *America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

B. Section 230 has been integral to the success of marginalized voices in influencing politics and culture online.

1. Section 230 ensures that internet platforms need not assess all the content they host for its litigation risk. *Zeran,* 129 F.3d at 331 (describing the "obvious chilling effect" of imposing "tort liability in an area of such prolific speech" as the internet). Such a regime would disproportionately suppress marginalized voices in favor of dominant, established voices less likely to offend or cross lines patrolled by majority sensibilities. For instance, the "immunity provided by § 230 protects against the 'heckler's veto' that would chill free speech." *Jones* v. *Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). This protection is particularly significant for "[v]ulnerable speech," the first to fall when content restrictions tighten since "marginalized communities * * * [are] particularly vulnerable to" "collateral censorship." Note, *Section 230 as First Amendment Rule*, 131 Harv. L. Rev. 2027, 2041, 2047 (2018).

These concerns are nothing new. They animated this Court's recognition in *New York Times* v. *Sullivan* that imposing liability would have caused future intermediaries of speech criticizing public figures to "steer far wider of the unlawful zone" than legally necessary, "dampen[ing] the vigor and limit[ing] the variety of public debate." 376 U.S. 254, 279 (1964). Such "collateral censorship" follows from "rules imposing civil and criminal liability" on "reasonably nervous conduit[s]" of third-party speech who are "induced to silence protected speech in the name of prudent business decision making." Michael Meyerson, *Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media*, 71 Notre Dame L. Rev. 79, 116 (1995). And collateral censorship hits

marginalized voices hardest. Julie Adler, *The Public's Burden in a Digital Age: Pressures on Intermediaries and the Privatization of Internet Censorship*, 20 J. L. Pol. 231, 237-251 (2011). Indeed, the defamation lawsuit at issue in *Sullivan* itself "was part of a broader strategy by some white Southerners to blunt criticism from the Northern press of their often-violent reaction to the demands of blacks for equal rights." John B. Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides "Breathing Space" for Communications in the Public Interest*, 64 DePaul L. Rev. 1, 2 (2014). The case thus "was crucially important" to the "emerging civil rights movement of the late 1950s and early 1960s." *Ibid*. Section 230, by embodying *Sullivan*'s protection against collateral censorship, likewise preserves an environment where speech by marginalized voices can flourish.

2. Under Section 230, the internet thus became a megaphone amplifying marginalized and underserved voices long shut out of traditional media. As other *amici* have demonstrated, these speakers have used the internet to exert unprecedented influence in politics and culture. See Lawyers' Committee Am. Br. 26-27, 30-31. That would not have happened without Section 230's preservation of free expression, and it all is at stake if Section 230 is weakened.

Section 230 has also fueled economic empowerment, as "the information age has sparked a renewed growth in entrepreneurship as technology helps to eliminate many of the non-financial barriers to business formation and expansion." Valarie Rawlston Wilson, *Intellectual property as an essential 21st century business asset*, in Intellectual Property, Entrepreneurship, and Social Justice: From Swords to Ploughshares, Lateef Mtima, ed. 65 (2015). In the internet

age, entrepreneurs of color have started businesses at twice the national rate. *Id*. at 66. Further, historically marginalized communities have exerted unprecedented control over their intellectual property—a key aspect of business success and longevity. *Id*. at 70. And these trends have only accelerated. Since the "onset of the pandemic, online microbusiness ownership [has grown] fastest among groups hit hardest by the economic fallout"—including Black entrepreneurs, women, and people without a college degree. Jeremy Hartman & Joseph Parilla, *Microbusinesses flourished during the pandemic. Now we must tap into their full potential.* Brookings (Jan. 4, 2022), https://perma.cc/5KWB-QBD3.

More, thanks to Section 230, the "internet's user-generated content platforms and other technologies * * * enabl[e] creators to bypass [the] gatekeepers" of traditional media. Institute for Intellectual Property and Social Justice, Diversity and Inclusiveness in the Online Creator Economy 2 (2022), https://perma.cc/VVZ2-K7SZ. Because "[p]articipation in the creator economy by women and people of color relies on online ecosystems that give creative people open, low-cost access to potential supporters and followers," the "creator economy has more diverse and inclusive participation than traditional creative industries." *Id.* at 2-3. In 2020, 3.4 million people of color participated in the American online creator economy, earning $6.8 billion. *Id*. at 2.

Finally, the law has fostered a wide array of social justice movements, organized and promoted online. By disrupting the dominance of traditional media sources, online subcultures like Black Twitter have allowed marginalized communities to raise "issues of concern to themselves and their communities—issues they say either are not covered by mainstream media,

or are not covered with the appropriate cultural context." Deen Freelon et al., *How Black Twitter and other social media communities interact with mainstream news*, Knight Foundation 53 (2018), https://perma.cc/KZU9-H3NA. Without Section 230, platforms would have been far less willing, over the past 25 years, to play host to ideas that, by speaking truth to power, ruffle the feathers of those perched at the top and invite retaliation and suppression.

Section 230 directly enabled one of the core tactics of the Black Lives Matter movement: raising awareness of police violence by sharing videos depicting it, including the murder of George Floyd, which sparked the largest social movement in American history. Thanks to the law, platforms did not fear that hosting such content would lead to civil liability. Michael Socolow, *The Other George Floyd Story: How Media Freedom Led To Conviction In His Killer's Trial*, techdirt (April 23, 2021), https://perma.cc/RRB6-WL79. Further, without Section 230, platforms may hesitate to allow activists to organize protests, influenced by narratives that focus on personal or property damage and the resulting liability. See, *e.g.*, *McKesson* v. *Doe*, 141 S. Ct. 48, 49 (2020) (per curiam) (vacating, without reaching the merits, a Fifth Circuit decision holding a protest organizer liable for personal injury damages arising from the protest). Without Section 230, a decade-long movement for racial justice that was built on social media may never have been built at all.[4]

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[4] For more on how social media, and thus Section 230, has been central to the Black Lives Matter movement and the broader movement to undo structural and interpersonal anti-Black racism in American society, see, *e.g.*, Minjie Li, *Visual Social Media and Black Activism: Exploring How Using Instagram Influences Black Activism Orientation and Racial Identity Ideology Among*

Likewise, without Section 230, "the #MeToo movement probably would not have spread so rapidly." Jeff Kosseff, The Twenty-Six Words that Created the Internet 226 (2019). Absent the law's protections, internet platforms would have been far more cautious about hosting potentially defamatory content alleging that (often powerful and litigious) men had committed sexual misconduct. The statute has proven an important bulwark of free speech in the movement's wake, limiting liability for providers and users of interactive computer services who give a greater voice to allegations that once could only have spread through whisper networks. See, *e.g., Comyack* v. *Giannella*, 2020 WL 2027398, at *37-39 (N.J. Super. L. Apr. 21, 2020) (holding that Section 230 protected internet users who shared #MeToo allegations). The #MeToo movement started a global conversation about the violence women experience at work, owing its salience to the faces and names attached to those stories. Without Section 230, such a conversation could never have happened as it did.[5]

Black Americans, 99 Journalism & Mass Commc'n Q. 718 (2022); Jeongwon Yang, *Speaking Up on Black Lives Matter: A Comparative Study of Consumer Reactions toward Brand and Influencer-Generated Corporate Social Responsibility Messages*, 5 J. Advertising 565 (2021); American University Center for Media & Social Impact, *Beyond the Hashtags* (2016) https://perma.cc/VY4G-6BHG; Raven Maragh-Lloyd, *From Permit Patty to Karen: Black Online Humor as Play and Resistance*, 13 Am. J. Play 253 (2021).

[5] For more on how social media, and thus Section 230, has been central to the #MeToo movement and the broader movement to combat sexual violence and sexism, see, *e.g.*, Shana L. Maier, *Rape Victim Advocates' Perceptions of the #MeToo Movement: Opportunities, Challenges, and Sustainability*, 38 J. Interpersonal Violence 336 (2023); Chris Linder, et al., *From Margins to Mainstream: Social Media as a Tool for Campus Sexual Violence Activism*, 9 J. Diversity Higher Educ. 231 (2016); Rachel Cohen, et

Section 230 has also long provided a safe haven for LGBTQ+ people, who have relied upon the internet since its inception to form community, increase their visibility, and assert their civil rights. See Michael Water, *Warnings From the Queer History of Modern Internet Regulation*, Wired (Feb. 28, 2021) https://perma.cc/H7XX-9M3X. For just as long, LGBTQ+ people and groups have been the subject of legal and social regulation online. In fact, the Communications Decency Act of 1996 was originally challenged by several LGBTQ+ organizations whose efforts to promote safe sex during the AIDS crisis were at risk of being criminalized. See *Reno,* 521 U.S. at 862 n.27. And many major advances in LGBTQ+ rights have come during the internet age, from the right to same sex relations, *Lawrence* v. *Texas*, 539 U.S. 558 (2003), to the right to same sex marriage, *Obergefell* v. *Hodges*, 576 U.S. 644 (2015), to the right to be free from employment discrimination, *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731 (2020).

It is no coincidence that this revolution unfolded since the internet's inception. From the anonymous chatrooms of the early internet to the livestreams that dominate today—the internet cultivated space for millions to understand and express their identities, find and support others like them, and insist upon their humanity and dignity. See Bill Easley, *Revising the Law That Lets Platforms Moderate Content Will Silence Marginalized Voices*, Slate (Oct. 29, 2020) https://perma.cc/3CEM-9EDZ. All along the way, Section 230 helped that expression flourish, protecting platforms who hosted speech that was once considered

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al., #BoPo on Instagram: An experimental investigation of the effects of viewing body positive content on young women's mood and body image, 21 New Media & Soc'y 1546 (2019).

by many to be offensive or even unlawful, but now is a vibrant and essential part of our social fabric. Today, as laws proliferate that further marginalize trans youth and criminalize supportive adults, Section 230 is as vital as ever. Anne Branigin and N. Kirkpatrick, *Anti-trans laws are on the rise. Here's a look at where — and what kind.*, Washington Post (October 14, 2022), https://perma.cc/RZ7G-BNPL.[6]

C. The technology at stake in this litigation plays an indispensable role in amplifying marginalized voices.

The petitioner and government (see U.S. Br. 26-32) seek to carve out from Section 230's protection a bedrock feature of many platforms: the ability to organize and recommend user-generated content to audiences based on their interests. These functionalities are the lifeblood of the modern internet and are especially important for helping marginalized speakers reach new audiences and build community.

Recommendation engines are a core aspect of what we expect whenever we go online. Platforms are constantly deluged with user-generated content—10,000 posts on Facebook, Instagram, and Twitter, and over 500 minutes of video uploaded on YouTube,

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[6] For more on how social media, and thus Section 230, has been central to the LGBTQ+ rights movement and the expression of queer identities, see, *e.g.*, Rachel M. Schmitz, et al., *The cyber power of marginalized identities: Intersectional strategies of online LGBTQ+ Latinx activism*, 22 Fem. Med. Stud. 271 (2022); Iolanda Tartajada, *Lost in Transition? Digital Trans Activism on YouTube*, 24 Info., Commc'n & Soc'y 1091 (2020); Khushboo Sharma & Arun Dev Pareek, *Tactics of Survival: Social Media, Alternative Discourses, and the Rise of Trans Narratives*, 13 Rupkatha J. Interdisc. Stud. Human. 1 (2021); Olu Jenzen, *Trans youth and social media: moving between counterpublics and the wider web*, 24 Gender, Place & Culture 1626-641 (2017).

every second. *The Scale of Creative Work Uploaded to the Internet Per Second*, Spextralplex (June 27, 2019) https://perma.cc/HUK2-NHBU. The service that platforms provide by hosting that content would be worthless without imposing order on the chaos to get content onto the screens of people interested in consuming it. See Chris Meserole, *How do recommender systems work on digital platforms?*, Brookings (September 21, 2022) https://perma.cc/Z7R8-R6XC. So, platforms take inputs from users—their search queries, their browsing history, and so on—and plug them into algorithms to predict what content users will find interesting. *Ibid*. See also Michael Schrage, *The recommender revolution*, MIT Technology Review (April 27, 2022) https://perma.cc/ACF3-CG86 (comparing recommendation algorithms to the "steam engines [that] energized the Industrial Age").

This activity makes the internet work—from entertainment to e-commerce—but it does not transform user-provided content into content prepared by the platform. *Force* v. *Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019) (holding that there is "no basis * * * for concluding" that Section 230 provides less protection to a platform "when it uses tools such as algorithms that are designed to match that information with a consumer's interests"). Indeed, algorithmic recommendations are nothing but highly sophisticated iterations of traditional protected activity. Consider a paradigmatic information "distributor"—a bookstore—traditionally immune from liability in the mode of how Section 230 sought to treat interactive computer services. Pet. Br. at 3. Walking into a bookstore would be an exercise in futility if its shelves were not organized to tell book browsers where to look. But, of course, bookstores do organize their shelves—for instance, by genre. A store might use one fact about a customer—

that she likes Stephen King novels—to nudge her to pick up a Tananarive Due novel by placing the authors side by side. Recommendation algorithms work the same way, only deploying more information about the user to organize much more content.

Marginalized and underserved voices benefit from the internet's power not simply to give people a platform to speak but to cultivate audiences who will find the speaker's message compelling. Gone are the days of relegating marginalized speakers to graveyard TV and radio slots. The internet allows everyone to speak in primetime, and to primetime audiences. Recommendations delivered by neutral algorithms are the engines for artists, entrepreneurs, and organizers outside the mainstream to create culture, build brands, and mobilize movements. See generally Judith Möller, et al. *Do not blame it on the algorithm: an empirical assessment of multiple recommender systems and their impact on content diversity*, 21 Information, Communication & Society 959 (2018) (finding that recommendation algorithms produce diverse information ecosystems, helping users break out of "information bubbles").

Removing this crucial functionality from Section 230's protection will make the internet less useful for everyone, most of all marginalized users. If platforms are liable for the third-party content they recommend, they will only be willing to recommend "safe" content. That is, voices from mainstream and dominant culture deemed uncontroversial, as well as paid content vetted by platforms and indemnified for liability. See Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 Notre Dame L. Rev. Reflection 33, 42 (2019) (remarking that "Section 230 helps keep more 'at risk' legitimate content online"). More, platforms will cow to pressure from powerful groups

threatening lawsuits to silence disfavored content. YouTube would be a far poorer platform if its legal department, rather than a viewer's own preferences, determined the next video in that viewer's queue. And it would be a platform where content creators from underserved and marginalized groups would be crowded out.

II. THE "NEUTRAL TOOLS" STANDARD STRIKES THE PROPER BALANCE BETWEEN FOSTERING FREE SPEECH, PROMOTING CONTENT MODERATION, AND HOLDING PLATFORMS ACCOUNTABLE.

The circuit courts have embraced the Ninth Circuit's "neutral tools" standard to assess whether a platform has materially contributed to an underlying harm and should be legally liable. See, *e.g., Fair Hous. Council of San Fernando Valley* v. *Roommates.Com, LLC,* 521 F.3d 1157, 1169 (9th Cir. 2008); *FTC* v. *Accusearch Inc.*, 570 F.3d 1187, 1201 (10th Cir. 2009); *Jones* v. *Dirty World Ent. Recordings LLC*, 755 F.3d 398, 416 (6th Cir. 2014); *Force* v. *Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019). Accord *Marshall's Locksmith Serv. Inc.* v. *Google, LLC*, 925 F.3d 1263, 1270 (D.C. Cir. 2019) (articulating a "neutral means" standard).

Complaints that this standard is "atextual" and thus illegitimate (*e.g.*, Lawyers' Committee Am. Br. 14) miss the mark. The standard is necessary to effect the balance that Congress constructed, allowing free speech to flourish while empowering platforms to moderate content to create more hospitable spaces. More, the standard follows from the principle of neutrality embedded in the statute's text. And, in practice, it has proven apt for sorting out when platforms cause harm versus merely being its conduit.

Ultimately, undermining this standard would work great harm to the internet, and especially to the marginalized users whose speech it protects most fervently.

A. Weakening Section 230 would weaken the incentives and tools for platforms to moderate content.

1. Section 230 reflects Congress's judgment that empowering platforms to moderate content is preferable to an online free-for-all. Weakening the law means weakening the platforms' ability to perform this task—opening the door to more harassment and discrimination of marginalized users.

The law resolved the "moderator's dilemma" created by treating platforms as publishers, which had incentivized platforms to refrain from all content moderation, lest they be held responsible for harmful content that slipped through the cracks. Reese Bastian, *Content Moderation Issues Online: Section 230 Is Not to Blame*, 8 Texas A&M J. of Property L. 43, 50 (2022). Thus, "[a] major function of the law is to encourage platforms to take down lawful but offensive speech," and undermining the law risks inhibiting platforms from undertaking that obligation. Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, Knight First Amendment Institute (April 6, 2018), https://perma.cc/3TM6-AW6Z.

In enacting Section 230, Congress recognized that perfection cannot be the standard. Considering the sheer amount of content uploaded online every second—and the tremendous amount of content platforms remove already—they will never be able keep their websites 100% free of spam, harassment, hate

speech, and other abusive content.[7] Nonetheless, they should not be punished for trying to make the internet a safer, more hospitable place for all users.

More, undermining Section 230 could directly inhibit platforms' moderation efforts, as Section 230 presently shields platforms from being sued by disgruntled users on the wrong side of their moderating decisions. See, *e.g.*, *Domen* v. *Vimeo, Inc.*, 6 F.4th 245 (2d Cir. 2021) (Section 230 precluded a claim that Vimeo had violated state public accommodations law by permanently suspending an account for advocating "gay conversion therapy"); *Murphy* v. *Twitter, Inc.*, 60 Cal. App. 5th 12, 19 (2021) (Section 230 barred a breach of contract claim by a Twitter user whose account was suspended for repeatedly misgendering a transgender user); *Twitter, Inc.* v. *Super. Ct. ex rel Taylor*, Case No. A154973 (Cal. Ct. App. Aug. 17, 2018) (Section 230 barred an unfair trade practices claim by a white supremacist Twitter user whose account was permanently suspended for hate speech).

Obviously, making it riskier for platforms to moderate content would harm marginalized internet users, who are already disproportionately the targets of hate speech and harassment. Emily A. Vogels, *The State of Online Harassment*, Pew Research Center (Jan. 13, 2021), perma.cc/4CZN-5TGU (finding that women, people of color, and LGTBQ+ internet users report significantly more online harassment on

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[7] The numbers are staggering: In just the third quarter of 2022, Facebook removed 1.5 billion fake accounts and took action on 1.4 billion spam posts. See Meta, *Facebook Community Standards Enforcement Report: Fake Accounts* (Nov. 2022), https://perma.cc/JY8Z-Q4YV. It acted upon millions more posts for harassment (6.6 million), terrorism (28.9 million), hate speech (10.6 million), and incitement (14.4 million). *Ibid*.

account of identity traits). Inhibiting content moderation would make the internet less safe for these individuals, chilling their expression and depriving the digital community of their contributions.

2. The "neutral tools" standard is directly implicated by platforms' efforts to fulfill their obligation to make the internet a safe and hospitable environment for all users, most of all marginalized people. Internet companies rely on automated algorithms, machine learning, and artificial intelligence to flag, remove, or "deboost" abusive content. See Robert Gorwa, et. al., *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance,* 7 Big Data & Soc'y 1, 3 (2020). These tools are intertwined with the recommendation technology that petitioners and the government seek to remove from Section 230's protection.

The government takes issue with a platform "[e]ncouraging a user to watch a selected video" by queuing it in a sidebar. U.S. Br. at 27. But encouraging a user to view certain content by putting it in front of them is functionally no different from discouraging a user from viewing certain content by hiding it. In both cases, the platform uses neutral technology to assemble an appropriate universe of content. By the same token, asserting that a platform is "responsible" for the content it recommends if its algorithm is somehow flawed, see Lawyers' Committee Am. Br. 19, would open it up to liability for its moderation failures. In both cases, the platform is equally "responsible" for the content it displays, whether by

recommending something it should not have, or by failing to remove something it should have.[8]

If platforms may be liable for recommending content using a neutral algorithm, it follows that they could be liable for moderating content by the same means. But such a result is directly foreclosed by the text and context of Section 230. The law was enacted with the express goal of promoting content moderation. See 47 U.S.C. § 230(b)(4) ("It is the policy of the United States— * * * to remove disincentives for the development and utilization of blocking and filtering technologies"). And it establishes a principle of neutrality: interactive computer services are not liable for giving shape to the mass of user-generated content they receive, so long as the "information [was] provided by another information content provider," *id*. § 230(c)(1), meaning the platform is not "responsible, in whole or in part, for the creation or development" of the information. *Id*. § 230(f)(3). Allowing liability to flow from the operation of neutral tools for curating third party content—for content moderation or otherwise—directly contravenes the statute.

B. Section 230 has succeeded at holding platforms accountable.

Construing Section 230 as broadly as it is written would not "have grave consequences for the

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[8] The Lawyers' Committee for Civil Rights Under Law thoughtfully discusses the problem of racially biased algorithms. See Br. 14-19. No doubt, these are important policy concerns that *amici* strongly encourage all platforms to consider very seriously. But Section 230 cannot resolve them. Holding that Section 230 does not apply if a platform errs in its efforts to curate content would eviscerate the protections that Congress enacted to promote content moderation, however imperfect. Increasing the risk that attends to content moderation only discourages platforms' responsible efforts to make the internet safer and more inclusive.

enforcement of civil rights laws." Lawyers' Committee Am. Br. 19. Section 230 does not give platforms a license to discriminate. To the contrary, courts applying the neutral tools standard have successfully sorted out when platforms are liable for materially contributing to harmful conduct.

Take housing discrimination. In *Roommates.Com*, 521 F.3d 1157, the platform invoked Section 230 after prompting users to express housing preferences that potentially violated housing law. The court determined that the platform was "undoubtedly the 'information content provider'" and thus not entitled to Section 230's protections, because it had "created the questions and choice of answers" and had "designed its website registration process around them," including by "forcing subscribers to answer them as a condition of using its services." *Id*. at 1164.

The neutral tools standard explained why the platform was liable even though a platform in a prior case—*Carafano* v. *Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003)—had not been. There, the platform had hosted offending content "created and developed entirely by the malevolent user," and it supported the offending posts only with "neutral tools" that "did absolutely nothing to encourage the posting of defamatory content." *Roommates.Com*, 521 F.3d at 1171. The platform in *Roomates.Com,* by contrast, had left its fingerprints all over the alleged discrimination. Thus, the neutral tools standard proved a meaningful check on housing discrimination propelled by the platform. To ask more of a housing website than to supply the neutral tools to match renters with lessors—making them liable if their technology unintentionally worked an injustice or discouraging them from screening out discrimination at all—could ultimately deprive people suffering from housing instability or

already experiencing housing discrimination from finding a home altogether.

Similarly, *National Coalition on Black Civic Participation* v. *Wohl*, 2021 WL 4254802, at *1 (S.D.N.Y. Sept. 17, 2021), demonstrates the power of the neutral tools standard to punish platforms for facilitating voter suppression. That case concerned a ploy to sow voter confusion in Black communities by transmitting a robocall falsely alleging that voting by mail led to serious privacy violations. *Id*. *2. The robocall company invoked Section 230, but the court, applying the neutral tools standard, rejected that defense. *Id*. at *9. Aware of the voter intimidation plot, the provider affirmatively aided in its execution by identifying predominantly Black zip codes to target. *Ibid*. Once again, far from enabling the violation of civil rights, the neutral tools standard supplied the court with an intelligible principle for vindicating them. And as with housing discrimination, expanding the scope of liability in the voting rights context would ultimately do more harm than good, diminishing the tools at the disposal of political organizers to mobilize voters of color and other marginalized voting blocs.

C. Undermining Section 230 would harm, rather than protect, the civil rights of marginalized people.

Undermining Section 230 by eliminating its protections for neutral tools—including recommendation engines—that make the internet work will force platforms to make an impossible choice between content moderation or free expression. However platforms react, the marginalized and underserved voices that the internet has empowered will bear the negative consequences of that choice.

Section 230 empowers platforms to police their pages for harmful and offensive speech. Weakening the law would compel a new calculus, convincing some platforms to practically abandon efforts to moderate content. Discriminatory content would proliferate, harming the civil rights of marginalized people. For example, Facebook relies on the flexibility Section 230 provides to prohibit discriminatory ad targeting, even though the law does not bear on its own legal liability for such content. Keller, *Toward a Clearer Conversation About Platform Liability*, *supra*. Likewise, an online job board or housing website, suddenly unable to trust that it can safely use neutral tools to screen listings for discriminatory terms, might abandon those efforts entirely for fear of being held liable for anything they miss.

On the other hand, weakening Section 230 might compel platforms to moderate content even more aggressively to purge liability risks. Historically, overzealous content moderation has further marginalized already underserved voices. Indeed, "a growing body of evidence suggests that" wrongful removals of accounts following complaints by other users "disproportionately harm vulnerable or disfavored groups." Keller, *Toward a Clearer Conversation About Platform Liability*, *supra.* For instance, Black and transgender social media users are disproportionately likely to be suspended from platforms despite not violating any terms of service. Oliver Haimson, et. al., *Disproportionate Removals and Differing Content Moderation Experiences for Conservative, Transgender, and Black Social Media Users: Marginalization and Moderation Gray Areas*, 5 Proceedings of the ACM on Human-Computer Interaction 1 (2021). At stake includes non-traditional but nonetheless copyrightable expression that often attracts mainstream audiences to new

ideas and artforms. See, *e.g.*, *id*. at 18 (discussing the wrongful removal of art produced by LGBTQ+ creators as "adult" content).

In either scenario, it is the internet's most marginalized users who stand to suffer. For more than 25 years, Section 230 has enabled platforms to empower voices outside of the mainstream—not just amplifying their speech but assembling an audience to hear it. If platforms lose their ability to curate, moderate, and recommend content through the application of neutral tools, it will be to the detriment of the speakers most in need of discovery—that is, marginalized speakers who lack resources and cultural dominance. And it will be to the detriment of internet users as a whole, who are enriched, challenged, and moved by what marginalized speakers have to say.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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