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 AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA, AND DAPHNE KELLER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF *AMICI CURIAE*[1]

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to defending the principles embodied in the Federal Constitution and our nation's civil rights laws. The **ACLU of Northern California** is the Northern California affiliate of the ACLU and its Technology and Civil Liberties Program works on legal issues at the intersection of technology and free speech and other civil liberties and civil rights. Since its founding in 1920, the ACLU has frequently appeared before this Court, the lower federal courts, and state courts in cases defending Americans' free speech and freedom of association, including their exercise of those rights online.

Daphne Keller directs the Program on Platform Regulation at Stanford University's Cyber Policy Center. The Program's work focuses on current or emerging law governing Internet platforms, with an emphasis on laws' consequences for the rights and interests of Internet users and the public. Until 2015, she served as associate general counsel to Google. She has no ongoing employment or consulting relationship with the company.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation and submission.

SUMMARY OF ARGUMENT

The Internet has democratized speech, creating a forum for public self-expression and connecting billions of speakers and listeners who never could have found each other before. The forum is not without faults, to be sure, but never before have so many people been afforded so many opportunities to speak, be heard, and share information with others. Section 230 of the Communications Act, 47 U.S.C. § 230 ("Section 230"), is essential to the Internet's ability to serve this function. Congress enacted Section 230 to promote 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), (b)(1).

Section 230 establishes that interactive computer service providers ("providers" or "platforms") and users shall not be treated as the publishers or speakers of content provided by third parties, and shall not be held liable for good faith content moderation efforts to remove "objectionable" content. *Id.* § 230 (c).

In this case, the estate and relatives of the victim of an attack by the Islamic State (ISIS) seek to hold YouTube (and its parent company, Google) liable for the terrorist act that killed their relative. They do not assert that YouTube intentionally furthered that act, or terrorism more generally. Rather, they initially contended that YouTube should be liable for any harm to which ISIS-related videos contributed because it failed to do more to take down the videos from its website—even though its policy prohibits such content. Plaintiffs also alleged that YouTube is liable because, in plaintiffs' words, it "recommended" the

videos to users when its algorithm identified the ISIS videos as potentially of interest to viewers who had watched similar videos (much as the algorithm might suggest tennis-related videos to someone who has watched a tennis video). In this Court, plaintiffs have abandoned their theory of liability for failing to take down ISIS videos, and focus instead exclusively on their claim that YouTube "recommended" ISIS videos by listing them on users' homepages as "Up Next." Plaintiffs and the United States argue that a platform's publication of third-party content is not protected because there is an "implicit message" of "recommendation" of that content.

In *amici*'s view, Section 230 bars plaintiffs' claim, because the gravamen of their complaint is that they were harmed by the publication of ISIS-related videos, and YouTube was the publisher of those videos. Such a claim falls in the heartland of Section 230 immunity, because it seeks to treat YouTube "as the publisher" of someone else's content.

Section 230 is not a broad grant of immunity to platforms. It does not apply to platform conduct that falls outside the publication of others' content, such as discriminatory targeting of ads for housing or employment on the basis of race or sex. It does not immunize platforms from antitrust laws if they engage in restraint of trade, or from privacy laws if they collect their users' private information in violation of privacy laws. Indeed, Section 230 does not provide immunity from any laws that regulate the platforms for conduct that goes beyond publishing the content of another. And because Section 230 affords immunity only for the publication of *third-party content*, it provides no immunity from liability for the platform's own content. Here, however, plaintiffs seek

to hold YouTube liable for "terrorist" videos created by others, which they claim contributed to the terrorist act that killed their relative by building support for ISIS.

Plaintiffs' principal argument is that Section 230's immunity is unavailable when a platform does not merely publish third-party content, but also "recommends" it to users, as in YouTube's "Up Next" list of similar videos. These "recommendations," they argue, constitute "information provided by the defendant itself," not by a third party, and therefore fall outside Section 230's protection. Pet. Br. 33.

But that argument proves too much, because virtually every decision to publish third-party content online involves such an implicit "recommendation." Given the vast amount of material posted every minute, platforms must select and organize content in order to display it in any usable manner. There is no way to visually present information to users of apps or visitors to webpages without making editorial choices that constitute, in plaintiffs' terms, implicit "recommendations." When a platform places a post at the top of a user's newsfeed, in the center of her homepage, or at the top of a list of content responsive to her search query, it is "recommending" that content to the user. If the recommendation implicit in selecting particular material to display is sufficient to negate Section 230 immunity, there would be nothing left of the statute's protection. Recommendations, in the sense plaintiffs use it here, are inextricable from the very act of publishing third-party content online in the first place.

The fact that recommendations are shown to particular users based on information about the user

does not alter the result where, as here, the alleged basis for liability, or gravamen of a plaintiff's claim, is the third-party content. Whether a platform publishes third-party content to everyone, to a small group, or to an individual, does not matter under Section 230, so long as the plaintiff seeks to hold the platform liable for the third-party content it has published. (By contrast, where the gravamen of the complaint focuses on the platform's basis for targeting, rather than the third-party content, as in discriminatory ad-targeting cases, Section 230 does not apply).

Section 230 immunity also does not protect a platform from liability for its own independently-created content. Thus, a platform that published its own independent reviews of videos that users posted on the site could be sued for those reviews—although not for the underlying videos. Nor is a platform protected when it participates in "development" of third-party content in whole or in part, whereby it itself becomes an information content provider. But plaintiffs here seek to hold YouTube liable for third-party content where it did no more than list that content as potentially of interest—something every decision to publish implies. Because that type of decision is inextricable from the very act of publishing, Section 230 immunity attaches.

ARGUMENT

I. Section 230 Promotes Online Discourse and Empowers Platforms to Curate Content on Their Sites by Immunizing Them from Liability for Claims Arising from Third-Party Content Based on the Platforms' Decisions About Whether and How to Publish That Content.

In order to facilitate the free exchange of ideas on the Internet, Section 230 provides critical immunity to social media platforms and other "interactive computer services" providers (hereinafter "platforms" or "providers").[2] In particular, it expressly protects them from liability based on their online publication of content provided by another. The law protects their decisions both to publish and not to publish such content, and expressly recognizes that providers "search, subset, organize, reorganize, or translate" third-party content. 47 U.S.C. § 230(f)(4).

Section 230(c)(1) establishes that: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230 (c)(1).

Section 230(c)(2) in turn immunizes providers from liability for good faith efforts to "restrict access to or availability of … objectionable [material], whether or not such material is constitutionally protected." *Id.* § 230 (c)(2).

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[2] Platforms are a subset of interactive computer services or access software providers, and include Internet search engines, social media, communications services, and services hosting creative expression. 47 U.S.C. § 230(f)(2).

The paired immunities of Subsections (c)(1) and (c)(2) ensure that platforms are protected when they publish content that users submit without reviewing it first. Absent such immunity, platforms could decide to avoid liability for publishing others' content by reviewing as much content as possible and blocking any posts that they could not review or which might conceivably pose a risk of legal exposure. This would threaten the Internet as a forum for individuals to speak freely and directly, and would undermine Congress's goals of promoting a diversity of cultural, political, and intellectual discourse and services. *Id.* § 230 (a)(3), (b)(1).

At the same time, Section 230 enables platforms to curate and remove content they deem "objectionable," without incurring liability. Congress acted in response to a New York state court decision holding that if a provider moderated some content on its site, it took on liability for posts that it did not remove. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Congress wanted platforms to be able to filter, remove, and block defamatory and other objectionable material without thereby incurring liability for the posts they did not remove.

The choice to immunize platforms from liability for third-party content that they publish and to facilitate content moderation has achieved much of what Congress set out to do. Section 230 has enabled diverse platforms to take a variety of approaches to hosting the speech of others, and has made the Internet a critically important forum for ordinary people to speak and access information freely. In large part because of Section 230's protections, online services have become our "principal sources for

knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." *Packingham v. North Carolina*, 137 S.Ct. 1730, 1732 (2017). Social media websites "provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Id.* at 1737. Without Section 230's protections, the Internet could not serve these functions.

II. Section 230(c)(1) Provides Immunity Only Where a Claim Seeks to Hold the Platform Liable for the Content of Others That It Has Published or Spoken.

Section 230 does not by any means immunize everything platforms do. The immunity it affords is carefully circumscribed to claims arising from the speech of others that the platform has published or declined to publish.

Section 230(c)(1) immunity applies when a provider or user is being "treated as the publisher or speaker" of information "provided by another information content provider." 47 U.S.C. § 230(c)(1). An information content provider includes any "entity that is responsible, in whole or in part, for the creation or development of information." *Id.* § 230 (f)(3).

Thus, while platforms cannot be held liable for the speech of others that they have published, they are not generally immunized for their own conduct, or for their own speech. Section 230, therefore, does not immunize claims arising from publication that are not predicated on third-party content. Section 230 offers no immunity, for example, from claims that a platform's own conduct violates civil rights laws by

targeting housing or employment ads on a discriminatory basis; in that context, the claim arises from the platform's conduct, not the third-party content. Nor does it provide a shield against claims that a platform's own conduct has violated privacy law by impermissibly gathering or using people's private information, or has violated competition law by agreements in restraint of trade. It has no application to claims that challenge the many things a platform may do that extend beyond publishing the content of another.

Moreover, platforms are immune only from claims based on publishing information *provided by another information content provider*. They are not immune from liability for information that they themselves create or develop, in whole or in part. Thus, a platform can be held liable when its own speech is illegal, or when it becomes too actively involved in "development" of third-party content that contravenes law. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) ("*Roommates.Com*").

But where, as here, liability is said to derive from the publication of videos wholly created by others, and the only additional conduct complained of consists of organizing that information for publication on its site, the platform is entitled to Section 230 immunity.

A. A "publisher" is one who communicates content to others.

Section 230 precludes claims that treat a platform "as a publisher," and thus, at the outset the Court must consider what constitutes treating a platform as a publisher. Here, plaintiffs' claim against

YouTube arises from its publication of the videos of alleged terrorists, which plaintiffs assert helped ISIS spread its message, enlist support, and recruit members, thereby contributing to terrorist acts. Third Amended Complaint, ¶¶ 14, 207–223, 535; J.A. 17, 67–72, 169. That claim treats YouTube as a "publisher" in its ordinary, everyday meaning—namely, as one who makes a communication public. *Webster's Third New Int'l Dictionary* 1837 (1981); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) (citing *Webster's Third New Int'l Dictionary*); *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016) (same).

Under this ordinary meaning of the term, "even distributors are considered to be publishers," including "[t]hose who are in the business of making their facilities available to disseminate ... information gathered by others." *Zeran v. America Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 803 (5th ed. 1984)). Publishing includes "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

B. Section 230 immunity is limited, and leaves platforms otherwise accountable for legal obligations applicable to their own conduct.

Section 230(c)(1) immunizes publishers not from any and all claims arising from publishing, but only from those that treat the provider as "the publisher or speaker of any information *provided by another information content provider*." 47 U.S.C.

§ 230(c)(1) (emphasis added). Thus, Section 230(c)(1) does not bar claims that seek to hold the platform responsible for its own conduct. For example, civil rights laws proscribe discriminatory advertising that makes it harder for people in protected classes to access jobs, housing, or other opportunities. Section 230 does not provide a safe harbor for platforms that provide advertisers with tools designed to target ads to users based on sex, race, or other protected characteristics in areas covered by civil rights laws. Nor do they provide immunity from claims that a platform's own ad delivery algorithms are discriminatory. In these scenarios, the alleged basis for liability is not the third-party content, but the platform's own discrimination. The third-party content posted—such as an advertisement for housing—may be entirely lawful on its own. The subject of the advertisement as a housing ad brings it into the scope of civil rights protections, but it is the platform's decision to provide discriminatory targeting tools or discriminate in ad delivery that gives rise to the cause of action. *Roommates.Com*, 521 F.3d at 1169–70.

Nor does Section 230 shield online businesses from an obligation to comply with generally applicable rules and regulations that address conduct other than the publication of third-party content. For example, claims against Amazon based on the sale of defective products are not immunized. *See, e.g., Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019); *see also City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (Section 230 does not bar collection of a city amusement tax from an online ticket resale platform, because the tax "does not depend on who 'publishes' any information or is a 'speaker'");

HomeAway.com, Inc. v. City of Santa Monica, 918 F.3d 676 (9th Cir. 2019) (Section 230 does not preempt a local ordinance prohibiting the booking of unlicensed short-term rental properties, because liability arises from the transaction rather than user content); *Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 123 (4th Cir. 2022) (provider acting as a "consumer reporting agency" under the Fair Credit and Reporting Act was not immunized for claims that it failed to meet procedural "obligations as a member of that regulated industry.").

Section 230 accordingly does not afford broad immunity for online businesses generally. They can be held liable for their own illegal conduct or content. But none of the cases above are even close to the claim at issue here. The gravamen of plaintiffs' claim is that in publishing "terrorist" videos created by others, YouTube incurred liability for the asserted consequences of viewers' exposure to that third-party content. Such a claim falls in the heartland of Section 230's protection.

C. Section 230 does not protect a platform from liability for publishing its own content or for content it helps to create or develop.

Section 230(c)(1) provides immunity only for publishing content created by *another*. Thus, its immunity applies where the gravamen of the plaintiffs' claim is the third-party content that the platform published. If the claim does not arise from the third-party content, Section 230(c)(1) does not apply. 47 U.S.C. § 230(c)(1).

In addition, if the platform itself is "responsible, in whole or in part" for "creating or developing" the

actionable material, it can be held liable because it then is itself an information content provider. *Id.* § 230 (c)(1), (f)(3). The law was specifically designed to protect the publication of the speech of *others*, not to give online entities license to publish their own illegal content.

For example, in *La Liberte v. Reid*, 966 F.3d 79, 89 (2d Cir. 2020), the defendant was not immune from liability for a defamatory social media posting she herself authored.

Immunity also does not apply where providers are too actively involved in "development" of hosted content. A provider does not have immunity if it illegally collaborated or conspired to obtain and publish content, for example. *FTC v. Accusearch, Inc.*, 570 F.3d 1187 (10th Cir. 2009) (Section 230 did not apply to provider soliciting third parties to provide it with telephone records so that website could illegally make those records publicly available).

Similarly, in *Roommates.Com*, 521 F.3d at 1172, the provider filtered users' search results and notifications based on allegedly illegal discriminatory criteria and preferences that it prompted users to input in order to use the service. *Id.* at 1166, 1167, 1169–70. In that case, the defendant "materially contribut[ed] to [the content's] alleged unlawfulness." *Id.* at 1167–68. Consequently, the defendant was an "information content provider" of the discriminatory material, and was not merely publishing someone else's content. *Id.* at 1165.

In contrast, the platform was immune from liability for discriminatory preferences independently expressed by users in a free-form text box for "Additional Comments." Publishing those user-

initiated comments, the *Roommates.Com* court explained, "is precisely the kind of situation for which section 230 was designed to provide immunity." *Id.* at 1174. While defining how much involvement in third-party content is too much can be difficult, there is no allegation here that YouTube created or developed the content of the videos that were posted.

In short, Section 230 does not give online businesses free rein to engage in illegal conduct or protect them from liability for content that they materially contributed to developing. But it does protect, at its core, against claims, like plaintiffs' here, that seek to hold a platform liable for the third-party content published on its site.

III. Section 230 Immunizes YouTube's Recommendations of the Third-Party Content at Issue Here Because They Are Inextricable from Its Publication of That Content.

Plaintiffs' principal argument is that YouTube can be held liable because it did not merely publish the offending videos, but "recommended" them to potentially interested users through the application of an algorithm that automatically suggests other similar videos to users who choose to watch a video. That routine editorial decision, undertaken when a user watches a YouTube video, plaintiffs contend, deprives YouTube of Section 230's protection because it constitutes a "recommendation" and is the speech of YouTube, not of the third party that created and posted the offending video.

But plaintiffs' theory proves too much. *Every* online publisher of third-party content organizes and displays it in ways that implicitly "recommend" some

content over other content—by placing it at the top of the page or list, or at the center of the page, and indeed by choosing to display it in the first place. And where the alleged basis for liability is the third-party content, Section 230 provides no basis to treat publication to an individual or small group differently from publication to the public at large. While some recommendations of content may constitute the platform's own speech—such as online reviews containing the platform's own independent views—the mere editorial decision to display content to a user cannot defeat immunity for claims arising from the publication of third-party content without negating Section 230 immunity altogether.

A. Organizing content is inextricably intertwined with publishing content online, and is protected where the gravamen of a claim rests on third-party content.

As a practical matter, *all* online publishing of third-party content entails decisions about how to organize and display that content, and therefore *all* such decisions implicitly convey the publisher's editorial judgment (and hence, in plaintiffs' terms, "recommendation") about the relevance, reliability, or likely interest of the information to a user. In the absence of such content management decisions, the Internet would be a chaotic jumble of noise. A platform cannot show every piece of content to every user; it must make decisions about how to organize and display its content if the site is to be usable. At its most basic level, when organizing content for display, some content must be placed at the top of a site, making it more visible to the user. Yet even this choice

promotes and amplifies the information, thereby "recommending" it in plaintiffs' terminology.

In publishing the content of others online, there are no neutral choices. Every aspect of a platform's homepage effectively reflects decisions about how to filter and organize third-party content. Facebook, for example, may choose to show users their friends' posts on the homepage rather than other information. That effectively "recommends" those posts over other content that the user can see by clicking through to navigate to other Facebook pages, including direct messages and invitations from friends. Even on a single homepage, information placed at the top or center will generally be more visible to users—much like the front page or "above the fold" content in a newspaper, or the stories that the *New York Times* leads with on its news app.

That platforms must "organize" or otherwise moderate content—including promoting, blocking, filtering, and demoting—was as true in 1996 when Congress passed Section 230 as it is today. The definition of "interactive computer service provider" makes clear that Congress understood that platforms engage in a robust array of content management activities, and sought to immunize them from liability for the content of others while performing those activities. 47 U.S.C. § 230(f)(2), (4) (defining interactive computer services as including entities that filter, screen, pick, choose, analyze, digest, transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content). As one court has recognized, "arranging and distributing third-party information inherently forms 'connections' and 'matches'" among speakers, content, and viewers of content, whether in interactive internet forums or

in more traditional media. That is an essential result of publishing." *Force v. Facebook, Inc.*, 934 F.3d 53, 66 (2d Cir. 2019). The same is true of "recommending": all online publication decisions inextricably involve some sort of recommendation.

Publishers commonly make display decisions based on a number of factors, including the reliability and relevance of the content, a user's current requests (such as a search query on Wikipedia or Google), a user's previous searches or browsing, and other feedback from or information about users. As long as the plaintiff seeks to hold the platform liable for the content of a third party, Section 230 applies, and is not defeated by the fact that the very act of publication involves editorial decisions about how and to whom to display the content.

Congress expressly sought to protect content management in Section 230. For example, keeping indecent material away from minors, one of Section 230's animating purposes, requires editorial decisions about what content should be published to whom. Because Congress sought to promote such decisions, Section 230(c)(2) explicitly immunizes any "action voluntarily taken in good faith to *restrict access to or availability of* [certain] material." 47 U.S.C. § 230(c)(2)(A) (emphasis added)*; see also Reno v. ACLU*, 521 U.S. 844, 853 (1997) ("Publishers may either make their material available to the entire pool of Internet users, or confine access to a selected group, such as those willing to pay for the privilege."). The fact that all decisions about how and to whom to display third-party content can be described as "recommendations" reveals the flaw in plaintiffs' theory. An interpretation that would deny immunity to virtually every decision to publish third-party

content online cannot be accepted without doing violence to Congress's language and purpose. *Roommates.Com*, 521 F.3d at 1167 (stripping platforms of immunity based on ordinary publication functions would "defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides.").

Where, as here, a plaintiff seeks to hold a platform liable for publishing the content of others and the gravamen of the claim is the third-party content, immunity is not defeated by the mere fact that the publication of that material can be characterized as a "recommendation."

B. While some recommendations constitute the platform's own content, neither recommending nor targeting content to particular users by itself eliminates immunity where the gravamen of the claim is third-party content.

Amici acknowledge that *some* recommendations are properly treated as the platforms' own content and therefore would not be eligible for immunity. And some challenges to targeted recommendations, those that challenge the discriminatory decisions of the platform rather than the third-party content, are also not barred by Section 230. But claims based on the third-party content, and the platform's display of that content to particular users, as here, is surely protected.

Plaintiffs maintain that connecting particular content to particulatr users, or to each other, falls outside of Section 230. Pet. Br. 32–33. And they contend that routine terms affixed to content by the

platform, such as "up next", "suggested," "recommended," "trending," or "you might like," take recommendations outside of Section 230. *Id.* at 33. For its part, the United States asserts that algorithmic ranking communicates a non-immunized "message from YouTube that is distinct from the messages conveyed by the videos themselves[,]" implicitly telling the user that "she 'will be interested in' that content[.]" U.S. Br. 27.

These contentions cannot be accepted without vitiating Section 230 entirely. As explained above, all organizing and display of third-party content, including a platform's decision to display the content in the first place, implicitly convey the message that the platform believes users (or particular users) will want to see the content. Rank-ordering is implicit in online publishing, so cannot be sufficient to defeat immunity.

Nor does the choice to display certain content to certain users negate immunity for claims predicated on third-party content, even though that choice, too, can be characterized as a "recommendation." For claims arising from third-party content, Section 230 does not treat differently the choice to display that content to some people as opposed to everyone. If Section 230 immunizes the implicit message that "this offending content is something that everyone might want to see," it equally immunizes the implicit message that "this offending content is something that you might want to see."

Consider web searches. A response to a web search necessarily ranks, and therefore "recommends," third-party content as of interest to the particular user who submits the query. There is no

one "answer" to a user's query when there are trillions of webpages on the Internet. Search engine platforms necessarily make judgment calls, and therefore "recommendations," about which webpages the user who submitted the query will find most relevant.

Plaintiffs' efforts notwithstanding, Pet. Br. 15, 39, 44, there is no meaningful distinction between the "recommendations" that Google makes in response to a search query, and the "recommendations" YouTube makes in response to a user's choice to view particular videos. Both are "recommendations" in the sense plaintiffs use the term. And both receive Section 230 immunity where the gravamen of a plaintiff's claim arises from the third-party content thereby published.

To be clear, as noted in Point II.B, *supra*, not all claims challenging targeted publications are immune. Where, as in a discrimination claim, the alleged basis for liability is the illegality of the platform's targeting, and not the third-party content, immunity does not apply. But where the gravamen of the claim is the third-party content, not the targeting per se, the "recommendations" inextricable from publishing particular content to a particular user do not defeat immunity.

Moreover, where the platform does no more than make explicit the otherwise implicit message that the display of content conveys, with a label like "you might like," "up next," or "recommended for you," the same protection applies. When the "recommendation" expresses no more than the platform's decision to display the third-party content itself, the action is publishing within the scope of Section 230.

Where a platform communicates a message *beyond* those inherent in selecting, organizing, and publishing content online, Section 230 would not apply to that recommendation. If YouTube displayed its own review of a third-party video depicting alleged misbehavior by a politician or celebrity, declaring it an "accurate depiction of current events," that characterization would be the platform's own speech, not that of the video's producer. Such a testimonial goes beyond the "recommendation" inherent in presenting and moderating content. If the gravamen of a plaintiff's legal claim rests on *that* statement by the platform, and not on the content of the video or its display, Section 230 would not apply. So too if YouTube played a role in developing what is illegal about the third-party content.

Here, YouTube's engagement with the videos at issue consists solely of the ordinary acts of online publishing, and thus Section 230 protects it from liability based on the allegedly terrorism-promoting content of those videos. None of YouTube's actions took it outside of ordinary publishing or content-moderation activities, or converted it to an information content provider for purposes of the statute.

Plaintiffs claim that when YouTube shows its users the videos at issue it sends its own message that they should support ISIS. Pet. Br. 9–10, 44, 47. But that assertion begs credulity. YouTube's terms of service bar the display of terrorism-supporting videos. Resp. Br. 15–16. There is no evidence that YouTube's identification of similar videos "up next," which it does across the board for all content, sends any message of support for ISIS, any more than its suggestion of more

tennis videos to a user watching a tennis video sends a message that YouTube endorses tennis.

Finally, even if the Court were to disagree with *amici* and conclude that YouTube's organization and display of videos "Up Next" constitutes YouTube's own content not covered by Section 230, that would only permit legal claims premised on the platform's "recommendations" themselves, and not on the content of the videos. In other words, plaintiffs' claim would have to be predicated on the illegality of the recommendation itself, and not on the third-party content for which the platform is immunized from liability. But plaintiffs' claims here cannot be extricated from the allegedly unlawful or tortious content of the videos themselves. They claim that by hosting the videos, YouTube helped ISIS spread its message, enlist support, and recruit members, and thereby contributed to the group's acts of terrorism. But there is nothing about YouTube's recommendations, independent of the content of ISIS videos, that caused the harm. Therefore, even if the Court were to conclude that ranking, organizing, targeting, or recommending content constitutes speech of a platform that is not protected by Section 230, there would be no basis for liability here.[3]

[3] Plaintiffs do not contend that YouTube's use of algorithms to organize and display third-party content alters the analysis, nor should it. Where a platform is being sued for publishing third-party content, and the alleged basis for liability arises from that third-party content, it is irrelevant for purposes of Section 230 whether the publication decisions were made with or without algorithms.

IV. If the Court Adopts Plaintiffs' Interpretation of Section 230, It Will Undermine the Public's Ability to Speak, Associate, and Access Information Freely on the Internet.

A decision in this case that immunity does not apply will have vast negative consequences for users' ability to speak, be heard, and enjoy access to the speech of others on the Internet. The speech that most Internet users actually see online is delivered via ranked features such as home pages, newsfeeds, search engine responses, and YouTube's "Up Next" displays of videos of potential interest. Without meaningful ranking, valuable user speech could languish in some unvisited corner of the Internet. And people with interests outside of the mainstream, or who want to reach a select audience, will face serious obstacles to being heard, discovering relevant information, and connecting with other interested users.

Facing the risk of liability for managing offending content in a way that could be perceived as a recommendation, providers will be overly cautious, especially given the difficulty of distinguishing what plaintiffs call "recommendations" from what happens every time a platform publishes third-party content online. If a platform will lose legal immunity for making recommendations of offending content, it may seek to eliminate ranking entirely, creating a site consisting of disorganized content that will satisfy no one. Alternately, the platform might decide to offer usefully-ranked content, but limit its publication to anodyne and unobjectionable materials that it predicts a plurality of its users may want to see. To avoid liability, providers may decide they need to stop

recommending valuable information, such as breaking news or emergency warnings, while also halting steps they currently take to demote potentially inaccurate information, bot-generated web pages, "spam," conflict-provoking speech, and disreputable sources. Since any content moderation can be treated as a "recommendation" in plaintiffs' terms, platforms will be reluctant to undertake the effort at all for fear that what they allow to be posted will be treated as "recommended" by it.

Concerns about platforms removing lawful speech when faced with potential liability for offending content are not speculative. Studies document consistent and systematic removal by platforms responding to legal uncertainty.[4] Online service providers receive reams of mistaken and false accusations about content on their sites, often from people or organizations trying to silence their critics. False copyright claims have been used, for example, to have criticism of the Ecuadorian government[5] and videos of police brutality taken offline. False claims are also driven by monetary interest. An early study of removal requests that Google received under the Digital Millennium Copyright Act (DMCA) found that over half appeared to come from competitors seeking

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[4] *See* studies cited at Daphne Keller, *Empirical Evidence of Over-Removal by Internet Companies Under Intermediary Liability Laws*, Ctr. for Internet & Soc'y (Feb. 8, 2021), https://cyberlaw.stanford.edu/blog/2021/02/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws.

[5] Maira Sutton, *State Censorship by Copyright? Spanish Firm Abuses DMCA to Silence Critics of Ecuador's Government*, EFF (May 15, 2014), https://www.eff.org/deeplinks/2014/05/state-censorship-copyright-spanish-firm-abuses-DMCA.

to knock each other's businesses out of search results.[6] Erasing legal user speech is cheap. Defending it, or even paying lawyers to decide if it's legal, can be prohibitively expensive.

Smaller and less well-funded platforms in particular may lack the resources to look carefully and honor only legitimate requests. Some will resort to simply honoring any demand to silence user speech—precisely the sort of heckler's vetoes that this Court warned against in *Reno*, 521 U.S. 844; *see also Zeran*, 129 F.3d at 333 (providers do not face potential liability merely upon receiving notice of a potentially defamatory statement).

When Congress *has* chosen to subject platforms to liability for speech-related materials, it has generally acted with care, in order to avoid precisely the problems that plaintiffs' interpretation of Section 230 would create. In the Digital Millennium Copyright Act (DMCA), for example, Congress set forth specific rules and procedures for platforms that are removing users' speech, including notice and appeal options for users accused of violating the law, and penalties for bad-faith accusers. The DMCA also expressly precludes any requirement for platforms to actively monitor users' communications for infringement or proactively seek out unlawful material. 17 U.S.C. § 512(m)(1).

Congress enacted Section 230 to foster the exchange of ideas online by ensuring that liability for illegal third-party speech should fall on the third

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[6] Jennifer M. Urban & Laura Quilter, *Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 Santa Clara Comput. & High Tech. L.J. 621 (2006).

party, not the platform that published it. Congress also wanted to ensure that platforms could engage in content moderation without facing a volley of lawsuits for what they allowed up or took down. To these ends, the statute gives platforms safe harbor from liability for claims predicated on the publication of offending third-party content. If that immunity does not extend to the "recommendations" alleged here, the law will not achieve its intended purpose.

CONCLUSION

For the above reasons, the judgement of the court of appeals should be affirmed.

Respectfully submitted,

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