

No. 21-1333

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IN THE  
**Supreme Court of the United States**

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REYNALDO GONZALEZ, *et al.*,

*Petitioners,*

*v.*

GOOGLE LLC,

*Respondent.*

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

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**BRIEF OF *AMICI CURIAE* ELECTRONIC  
FRONTIER FOUNDATION, AMERICAN LIBRARY  
ASSOCIATION, ASSOCIATION OF RESEARCH  
LIBRARIES, FREEDOM TO READ FOUNDATION,  
AND THE INTERNET ARCHIVE IN SUPPORT OF  
RESPONDENT**

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**STATEMENT OF IDENTITY AND INTEREST  
OF AMICI CURIAE<sup>1</sup>**

The Electronic Frontier Foundation (“EFF”) is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect innovation, free expression, and civil liberties in the digital world. On behalf of its more than 39,000 dues-paying members, EFF ensures that users’ interests are presented to courts considering crucial online free speech issues, including their right to transmit and receive information online.

EFF has litigated or otherwise participated in a broad range of internet free expression and intermediary liability cases because they often raise novel issues surrounding free expression and the rights of internet users. EFF often files *amicus curiae* briefs in these cases because their outcome can significantly impact, and sometimes curtail, the free expression rights of all internet users who rely on those platforms. *See Packingham v. North Carolina*, 137 S.Ct. 1730, 1735 (2017) (citing EFF’s *amicus curiae* brief). EFF believes that 47 U.S.C. § 230 is a foundational law that enables internet speech by protecting the intermediaries that host people’s speech.<sup>2</sup> EFF thus

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1. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than Amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

2. *See Section 230*, EFF, <https://www.eff.org/issues/cda230>.

regularly participates in cases that seek to limit Section 230 because they jeopardize users' free speech.

The American Library Association (“ALA”), established in 1876, is a nonprofit professional organization of more than 57,000 librarians, library trustees, and other friends of libraries dedicated to providing and improving library services and promoting the public interest in a free and open information society.

The Association of Research Libraries (“ARL”) is an association of 126 research libraries in North America. ARL’s members include university libraries, public libraries, and government and national libraries. ARL programs and services promote equitable access to and effective use of recorded knowledge in support of teaching and research. These library associations represent over 117,000 libraries in the United States.

The Freedom to Read Foundation (“FTRF”) is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

The Internet Archive is a public nonprofit organization founded in 1996 to build an “Internet library,” with the purpose of offering researchers, historians, scholars, artists, and the general public permanent access to historical collections in digital format. Located in San



Francisco, California, the Internet Archive receives data donations and collects, records, and digitizes material from a multitude of sources, including libraries, educational institutions, government agencies, and private companies. The Internet Archive then provides free public access to its data—which include text, audio, video, software, and archived Web pages. The Internet Archive’s Wayback Machine uses automated tools to capture, index, and make public historic versions of websites for the benefit of researchers, historians, and all internet users.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Online intermediaries provide the fundamental building blocks of the “vast democratic forums of the Internet,” which this Court recognized as “the most important place[] . . . for the exchange of views” today. *Packingham*, 137 S.Ct. at 1735 (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)). Few internet users have the technological know-how or financial resources to build their own websites, transmit their own email messages, or ensure that their creative content is delivered to ready audiences. Online intermediaries proved essential in hastening the internet’s evolution from a military project to a tool used by virtually everyone, and they provide the underlying structure that enables the internet “to alter how we think, express ourselves, and define who we want to be.” *Id.* at 1736.

In enacting 47 U.S.C. § 230 (“Section 230”), Congress recognized the crucial role that online intermediaries play in users’ ability to speak freely online. Section 230’s immunities protect the architecture of the internet—the

services that provide the “essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.” *Packingham*, 173 S.Ct. at 1735. When everyone with an internet connection can access others’ expression, a user who created content can become “a pamphleteer” or “a town crier with a voice that resonates farther than it could from any soapbox.” *Reno*, 521 U.S. at 870. Section 230 fostered the development of services that would realize the internet’s promise to give everyone that power.

The text, structure, and purpose of Section 230 confirm that Congress granted online intermediaries robust protections precisely because it decided that immunizing them from lawsuits related to harmful content created by their users and from lawsuits related to managing user content would provide significant benefits. Congress understood that Section 230 would: (1) enable the vast development of diverse forums for free expression and (2) incentivize services to moderate their users’ expression and give users tools to manage their own online experiences. Internet users have benefitted greatly from Section 230, which has increased their opportunities to express themselves. The statute’s legal protections have thus enabled a revolution in the types of forums available for everyone to speak while lowering the costs once associated with mass communications.

Petitioners seek a narrow interpretation of Section 230(c)(1) that would drastically erode the significant benefits Congress sought in enacting the statute.

Specifically, Petitioners seek to exclude from Section 230(c)(1)’s immunity a platform’s decision to recommend,

notify users about, or even *provide a URL* (or link with a URL) to content so internet users can access the content. If providing a URL to content falls outside Section 230(c)(1), as Petitioners argue, then *all* hosting of third-party content is unprotected. Creating such a legal distinction would harm internet users' ability to communicate freely and to connect with others online, by radically altering how easily everyone can create and share content online. After all, the entire point of hosting third-party content—or any content—is so that others can access it. And the way everyone accesses content online is via URLs. Under the legal regime proposed by Petitioners, online intermediaries would be forced to curtail users' ability to access content that has not been vetted for potential legal exposure. Even under Petitioners' narrowest argument to limit Section 230(c)(1), online platforms would censor far more user expression if they could be liable based on claims that they “promoted or encouraged—or at least tacitly assented to—the illegality of third parties.” See *Fair Housing Counsel of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc).

## ARGUMENT

Petitioners advance a radical argument to narrow Section 230(c)(1) that runs contrary to the statute's text, structure, and purpose. Each confirm that Congress sought to broadly immunize online services from legal claims based on the speech of one of the millions of pamphleteers using them. Section 230(c)(1) expressly protects giving users access to content “provided by another” individual or entity, as well as protecting an online service's choice to emphasize some content and

filter others. 47 U.S.C. § 230(f)(4). As a technical and common-sense matter, this must include both hosting and recommending that content.

Beyond those legal errors, the judicial interpretation of Section 230 that Petitioners seek would be detrimental to all users' speech online. It would incentivize online services to take down even more user-generated content, and would likely limit services' ability to provide essential tools that organize content for users. Petitioners' broadest argument—that URLs are unprotected “information” generated by online platforms themselves—would remove all hosting from Section 230(c)(1)'s protection, because URLs are necessary for users to access third-party content.

Moreover, Section 230 provides one of the legal foundations that enable online intermediaries to provide their services to internet users. “Section 230 has allowed third-party content-based services to flourish in the United States.”<sup>3</sup> “[I]t is not an accident that U.S. websites are relatively liberal with third-party content; Section 230 allows them to take those liberties.” *Id.*

### **I. Narrowing Section 230(c)(1)'s Immunity Would Harm Internet Users' Free Speech**

Internet users' free expression would be gravely harmed should this Court endorse Petitioners' arguments and interpret Section 230(c)(1) as not immunizing

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3. Jeff Kosseff, *The Twenty-Six Words That Created The Internet*, Cornell University Press, 4 (2019) (“Kosseff, *Twenty-Six Words*”).

recommendations and other basic tools that online services employ to make user-generated content available over the internet. Online services' recommendations reflect their choices about how to arrange and display user-generated content. In this way, they act just as print publishers did before them.<sup>4</sup> Narrowing Section 230(c)(1) immunity as Petitioners urge this Court to do would fundamentally change the relationship between online platforms and their users by incentivizing companies to drastically alter the digital services they provide while simultaneously curtailing what people can post online.

Online intermediaries would face increased substantive liability, and they would also spend increased time and money defending lawsuits that may drag on for years and be exceedingly costly, regardless of the substantive merits of the claims.<sup>5</sup> The fear of both would drive fundamental changes to how online platforms operate, including an increase in censorship of user content.

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4. Newspapers traditionally made, and continue to make, decisions to direct readers to certain articles or advertisements, including where they place that content in the newspaper, what size headlines to use, which to accompany with photographs, etc. These decisions may be customized for different editions of the newspaper since the publisher is aiming at different audiences. Newspapers have not traditionally published all articles in the same font organized solely by when the article was completed.

5. Section 230 is both a defense against liability and a procedural means to end a lawsuit early. *See Roommates.com*, 521 F.3d at 1175 (“[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles.”). *Cf. Wicks v. Miss. State Emp’t Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) (“[I]mmunity means more than just immunity from liability; it means immunity from the burdens of defending a suit”).

### A. Platforms Would No Longer Allow Users to Benefit From Recommendations

At minimum, if online intermediaries know that they may be exposed to substantive claims related to how their systems recommend, promote, rank, arrange, or otherwise display content posted by their users, companies will cease to curate user-generated content in any helpful way, beyond perhaps listing it in reverse chronological order.<sup>6</sup> This is particularly true given the challenges of monitoring user-generated content at scale—that is, the content of millions or billions of users.<sup>7</sup> The end of niche curation would harm internet users, as recommendations and notifications help users find content relevant to their interests and connect with other users that share their interests and values. For example, a service may stop providing users with new content that is like material they have viewed in the past, on the theory that such basic matching is a recommendation that falls outside Section 230. The internet would become a much less dynamic and less valuable space for online communities, largely because services may no longer introduce people to new content that they might find interesting.

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6. See Daphne Keller, *Amplification and Its Discontents*, Knight First Amendment Institute at Columbia University, 23-24 (June 9, 2021), <https://knightcolumbia.org/content/amplification-and-its-discontents>.

7. See, e.g., Mathew Ingram, *The challenges of global content moderation*, The Media Today, Columbia Journalism Review (June 10, 2021), [https://www.cjr.org/the\\_media\\_today/the-challenges-of-global-content-moderation.php](https://www.cjr.org/the_media_today/the-challenges-of-global-content-moderation.php).

**B. Section 230(c)(1) Immunity Would Be Eviscerated by Legally Distinguishing Between User-Generated Content and the URL to Find That Content**

A conclusion by this Court that an online intermediary’s creation of a URL triggers the loss of Section 230(c)(1) immunity would be disastrous for the whole of the internet—not just YouTube—as every piece of content online has a URL.

Petitioners attempt to assuage concerns by arguing that such decoupling of a piece of content and its URL—*i.e.*, the way it can be found and shared online—means that Section 230(c)(1) still applies to “dissemination of harmful related third-party material.” Pet. Br. 42. What Petitioners think this means in practice is not clear.

Petitioners take a fundamental aspect of internet architecture—the URL—and contort it to fit their legal argument. The moment a piece of content is posted online—*e.g.*, a video, photo, or textual statement—a URL is created. The URL is the public address for that content, allowing others to find it and to share it. This is not something “extra” that an online platform does; rather, URL creation is a process that is baked into how the internet functions at a basic level.<sup>8</sup>

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8. *See, e.g.*, Mozilla, *What is a URL?*, MDN Web Docs (Jan. 2, 2023) (“A URL is nothing more than the address of a given unique resource on the Web. In theory, each valid URL points to a unique resource. Such resources can be an HTML page, a CSS document, an image, etc.”), [https://developer.mozilla.org/en-US/docs/Learn/Common\\_questions/What\\_is\\_a\\_URL#summary](https://developer.mozilla.org/en-US/docs/Learn/Common_questions/What_is_a_URL#summary).

Congress never intended to create a legal distinction based on disaggregating a technical component that enables users to interact with others' content online from the content itself. As discussed below, Congress simply wanted to shield online intermediaries from being held liable for content that others create. *See infra* Part III. Thus, it should not matter that, as a technical matter, user-generated content also automatically comes with an intermediary's self-created internet address. The URL is a technical byproduct of a content-creation process that is ultimately user-driven: the publicly accessible link to the user-generated content did not exist prior to the user uploading the content to the service.<sup>9</sup>

Exposing online intermediaries to liability for their creation of URLs associated with problematic user-generated content essentially means exposing internet intermediaries to liability *for* problematic user-generated content. There is no practical distinction. Petitioners argue that “A YouTube thumbnail (typically a video still combined with a hyperlink) provides a user the URL that YouTube itself created for the video, which is not content ‘created by another.’” Pet. Br. 39. If that YouTube video is harmful, concluding that YouTube may be sued for *displaying the link* (via URL) to that harmful video is the functional equivalent of concluding that YouTube may be sued for *hosting* that harmful video.

Under this new legal regime, intermediaries would hesitate to make content accessible via URL. Searching

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9. YouTube users can also customize the URLs pointing to their videos—further evidence that URL creation is a byproduct of user action. *See* Google, *Custom URL overview*, YouTube Help, <https://support.google.com/youtube/answer/2657968?hl=en>.



and sharing would be severely limited. Content could exist online but only in an unindexed vacuum. A content creator or original poster may be able to see the content they uploaded, but online platforms would prevent other users from knowing where to find it or how to share it. Further, platforms may hesitate to index their own users' content, usually done to allow people to conduct internal searches on a given website, for fear of triggering this new liability. YouTube, for example, would simply never let other people watch user-generated videos at the scale it does today, as all user-generated content on the site is accessed via URLs. And YouTube would certainly be hesitant to provide the URL to a user for them to disseminate further, out of fear of losing Section 230 immunity.

A rule that a URL is not user-created and so may be the basis for a loss of Section 230(c)(1) immunity would also have immense consequences for all services up and down the internet "stack,"<sup>10</sup> not just social media companies. See *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 406 n.2 (6th Cir. 2014) (describing how 230's immunity extends to "broadband providers, hosting companies, and website operators"). For example, a web hosting company, which facilitates the creation of a URL by a consumer-facing platform or application by providing the storage space for the content that the URL points to, could lose Section 230(c)(1) immunity and thus face liability along with the platform or app that created the URL. And the same legal theory could reach the domain

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10. See Geoffrey A. Fowler and Chris Alcantara, *Gatekeepers: These tech firms control what's allowed online*, Washington Post (March 24, 2021), <https://www.washingtonpost.com/technology/2021/03/24/online-moderation-tech-stack/>.

name registrar that enables the URL to exist in the first place and to be found on the internet.<sup>11</sup>

Thus, although this case concerns Section 230(c)(1)'s application to a social media platform, any interpretation of the statute that weakens its protections impacts the various intermediaries in the chain of content creation, hosting, and distribution—thereby threatening user speech at multiple choke points.<sup>12</sup>

### C. Platforms Would Severely Censor User-Generated Content

Separate from Petitioners' specific arguments, any narrowing of Section 230(c)(1)'s immunity would lead online platforms to either *pre-screen* or *remove after-the-fact* any user content that may be even *remotely* problematic to mitigate their legal exposure. Pre-screening is particularly worrisome as it would prevent content from being published in the first place, ending the unique ability of anyone with an internet connection to communicate with others around the world cheaply, easily, and quickly.<sup>13</sup>

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11. See Cloudflare, *What is a domain name registrar?* <https://www.cloudflare.com/learning/dns/glossary/what-is-a-domain-name-registrar/>.

12. See *Free Speech: Only As Strong As the Weakest Link*, EFF, <https://www.eff.org/free-speech-weak-link>.

13. Paige Collings & David Greene, *General Monitoring is not the Answer to the Problem of Online Harms*, EFF Deeplinks (Aug. 16, 2022), <https://www.eff.org/deeplinks/2022/08/general-monitoring-not-answer-problem-online-harms>.

Yet the ability—both logistically and financially—for modern online platforms to conduct a fair review is dubious given the incredible volume of content generated by internet users, resulting in wholly legitimate content being censored as well. The difficulty of fairly reviewing digital content remains even more true than when Congress passed Section 230 in 1996, given the scale and continued growth of the internet. At that time, about 40 million people used the internet worldwide, and commercial online services in the United States had almost 12 million individual subscribers. *See Reno*, 521 U.S. at 850–51. Today’s internet hosts third-party contributions from a broad array of voices, facilitating the speech of billions of people. As of April 2022, there were more than 5 billion people online, with 4.7 billion people using online social media platforms.<sup>14</sup> Those billions of internet users are creating more content than at any point in humanity’s history. In 2015, YouTube users uploaded roughly 400 hours of videos to the website *every minute*.<sup>15</sup> By 2022, YouTube users were uploading 500 hours of videos each minute, and between 2014 and 2020, the number of videos uploaded increased by 40 percent.<sup>16</sup>

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14. *See Number of internet and social media users worldwide as of July 2022*, Statista (Sept. 20, 2022), <https://www.statista.com/statistics/617136/digital-population-worldwide/>.

15. Bree Brouwer, *YouTube Now Gets Over 400 Hours of Content Uploaded Every Minute*, Tubefilter (July 26, 2015), <http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute/>.

16. Jason Wise, *How many videos are uploaded to YouTube a day in 2022?* Earthweb (Nov. 22, 2022), <https://earthweb.com/how-many-videos-are-uploaded-to-youtube-a-day/>.

Given the staggering number of users on today's internet, requiring online services to review every piece of user-generated content they host is simply not feasible for any open platform of even moderate size. Thus, the consequences of the new censorship regime that Petitioners' arguments would lead to would be felt by all internet users.

To keep the cost of human reviewers down, larger, more sophisticated platforms would likely turn to algorithms or artificial intelligence to flag and block problematic content. YouTube, which now has over 2 billion users each month,<sup>17</sup> is already using algorithms or artificial intelligence to moderate content on its platform.<sup>18</sup>

But automated tools are not a solution to the sheer volume of user-generated content created on YouTube or other platforms, because even the best automated systems lack the ability to identify nuance, context, and cultural differences.<sup>19</sup> Automated systems are more likely to result in censorship of journalists, human rights

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17. *YouTube By The Numbers*, YouTube Official Blog, <https://blog.youtube/press/>.

18. Susan Wojcicki, *Expanding our work against abuse of our platform*, YouTube Official Blog (Dec. 5, 2017) ("98 percent of the videos we remove for violent extremism are flagged by our machine-learning algorithms."), <https://blog.youtube/news-and-events/expanding-our-work-against-abuse-of-our/>.

19. See Carey Schenkman et al., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Center for Democracy & Technology, 29-30 (May 2021), <https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf>.

activists, artists, or any other creators of *lawful* content.<sup>20</sup> In response to the increased liability Petitioners seek, use of these automated systems would only increase, as would online censorship.

Meanwhile, smaller platforms without the substantial resources required to manage potential liability in this way—or to weather the significant litigation costs they would face if they chose not to—would be forced to shut down. And new companies would be deterred from even trying to offer open platforms for speech or would be unable to attract investors in the face of such massive legal exposure.<sup>21</sup>

In the specific context of this case, exposing online intermediaries to potential liability for content that is terrorism-related or terrorism-adjacent would have consequences for online speech and internet users' ability to access information about real-world events. Online platforms would limit the display or dissemination of any speech that may be considered related to terrorism, hindering the ability of journalists, human rights activists, and intelligence analysts to access valuable open-source

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20. See Corynne McSherry, *Platform Censorship: Lessons from the Copyright Wars*, EFF Deeplinks (Sept. 26, 2018), <https://www.eff.org/deeplinks/2018/09/platform-censorship-lessons-copyright-wars>; Sydney Li & Jamie Williams, *Despite What Zuckerberg's Testimony May Imply, AI Cannot Save Us*, EFF Deeplinks (April 11, 2018), <https://www.eff.org/deeplinks/2018/04/despite-what-zuckerbergs-testimony-may-imply-ai-cannot-save-us>.

21. See Ethan Wham, *The Economic Case for Section 230*, *Disruptive Competition Project*, Computer & Communications Industry Association (Sept. 6, 2019), <https://www.project-disco.org/innovation/090619-an-economic-case-for-section-230/>.

data.<sup>22</sup> But censored content may be also completely unrelated to terrorism—it would be *any content* that a plaintiff might be able to argue is actionable.

Increased legal risk would end the essential role intermediaries play in fostering social and political discourse on the internet—not just in the U.S. but across the globe. Indeed, many individuals around the world use U.S.-based services to access and distribute all manner of content, from organizing in opposition to oppressive regimes<sup>23</sup> to sharing pictures of children with grandparents. Indeed, the three largest internet companies globally by revenue are American companies: Alphabet (Google), Amazon, and Meta (Facebook).<sup>24</sup> Such robust, global online participation would never have been achieved without the immunity provided by Section 230.<sup>25</sup>

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22. See, e.g., Amnesty International, Citizen Evidence Lab (“[T]he Digital Verification Corps (DVC) is a network of multidisciplinary students at six partner universities who authenticate videos and images found on social media to support human rights research.”), <https://citizenevidence.org/about-us/>.

23. See, e.g., Holly Dages, *Meet Iran’s Gen Z: the Driving Force Behind the Protests*, Foreign Policy (Nov. 1, 2022) (“Circumvention tools allow access to blocked international social media platforms, such as Facebook, Twitter, and YouTube.”), <https://foreignpolicy.com/2022/11/01/iran-protests-gen-z-mahsa-amini-social-media/>; Matt Burgess, *Iran’s Protests Reveal What’s Lost If Twitter Crumbles*, Wired (Dec. 1, 2022), <https://www.wired.com/story/protests-in-iran-twitter/>.

24. Andrew Bloomenthal, *World’s Top 10 Internet Companies*, Investopedia (Dec. 28, 2022), <https://www.investopedia.com/articles/personal-finance/030415/worlds-top-10-internet-companies.asp>.

25. See Kosseff, *Twenty-Six Words* at 145-166.

Granting would-be plaintiffs an avenue to circumvent Section 230(c)(1)'s protections would undermine this global phenomenon. Because platforms would be unwilling to take a chance on provocative or unpopular speech, the global online marketplace of ideas would be artificially stunted, and would instead become a sanitized, bland, homogenous online experience.

## **II. Section 230 Incentivizes the Development of Diverse Online Platforms for User Speech**

Section 230's robust protections for online intermediaries—such as YouTube and other video-sharing services, social media websites, blogging platforms, web-hosting companies, and email services—ensure that they can provide the essential free expression architecture of today's internet. The internet depends upon intermediaries, “who serve as a vehicle for the speech of others.”<sup>26</sup> Indeed, they are the primary way in which most people engage with one another online. They give a single person, with minimal resources or technical expertise anywhere in the world, the ability to communicate with others across the globe. *See Reno*, 521 U.S. at 870.

### **A. Congress Wanted to Maximize Opportunities for User Speech Online While Limiting Government Interference**

Although this case concerns an online intermediary's immunity for user speech that it hosts, Section 230

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26. Anupam Chander & Uyên P. Lê, *Free Speech*, 100 Iowa L. Rev. 501, 514 (2015).

appropriately immunizes from liability the broad range of editorial and curatorial decisions an intermediary may make: where to publish, which user posts to highlight or emphasize, which to deemphasize or omit. This broad protection has cultivated a diverse ecosystem of online platforms benefiting both speakers and audiences.

Congress intended this result because it understood the essential function online intermediaries play in our digital lives. “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). Congress continued: “Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.” 47 U.S.C. § 230(a)(5).

In passing Section 230, Congress recognized the internet’s power to sustain and promote robust individual speech, a value rooted in the First Amendment. Congress sought to further encourage the already booming free speech occurring online in the mid-1990s, and to speed the development of online platforms by providing legal breathing room to service providers that host user-generated content.

Importantly, Congress had a deregulatory purpose in passing Section 230. Congress intended for the statute “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). As the Fourth Circuit stated, “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.” *Zeran v. American Online*, 129 F.3d 327, 330 (4th Cir. 1997).

### **B. Section 230 Encourages Diverse Forums for User Speech**

In enacting Section 230 as a whole, including Section 230(c)(1) and companion immunities in Section 230(c)(2),<sup>27</sup> Congress sought to incentivize online intermediaries to create diverse forums for user speech, in terms of communities served and the range of editorial approaches, from highly permissive to more strictly managed. Section 230’s immunities allow online intermediaries to decide for themselves what user speech they host and how they host it, by greatly diminishing the fear of liability for those decisions.

Section 230 thus broadly protects editorial and curatorial discretion and promotes a variety of forums for user speech.<sup>28</sup> The statute has, as Congress intended,

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27. Section 230(c)(2)(A) immunizes online platforms from liability for “any action voluntarily taken in good faith to restrict access to or availability of material” that the platform finds objectionable. Section 230(c)(2)(B) immunizes “any action taken to enable or make available to information content providers or others the technical means to restrict access” to objectionable material online.

28. Courts have applied both Section 230(c)(1) and Section 230(c)(2)(A) to immunize a service’s editorial decisions. *See, e.g., NetChoice, LLC v. Moody*, 546 F. Supp. 3d 1082, 1090 (N.D. Fla. 2021), *aff’d on other grounds*, 34 F.4th 1196 (11th Cir. 2022) (user content takedown analyzed under Section 230(c)(2)(A)); *Domen v.*

facilitated the “true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.” 47 U.S.C. § 230(a)(3).

Although it is impossible to catalog the many online intermediaries and approaches to hosting user speech enabled by Section 230, as they are as “diverse as human thought,” *Reno*, 521 U.S. at 852, examples include:

**Large, general audience platforms:** A majority of the most popular websites in the United States—YouTube, Facebook, Reddit, Wikipedia, Twitter, and eBay—offer users a variety of ways to create and share different types of media.<sup>29</sup>

**Services that cater to particular types of content creation:** Instagram provides users with an opportunity to primarily share photographs, while TikTok caters to users creating short videos.<sup>30</sup>

**Services designed to share and build knowledge:** Wikipedia is a free online encyclopedia that is written by an enormous number of anonymous contributors, most of whom are volunteers.<sup>31</sup> The site has more than 60 million

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*Vimeo, Inc.*, 433 F. Supp. 3d 592, 602 (S.D.N.Y. 2020), *aff’d on other grounds*, 2021 WL 4352312 (2d Cir. 2021) (user content takedown analyzed under Section 230(c)(1)).

29. See Kosseff, *Twenty-Six Words* at 4.

30. See *About Instagram*, Instagram, <https://about.instagram.com/>; *Our Mission*, TikTok, <https://www.tiktok.com/about?lang=en>.

31. See *Wikipedia: About*, Wikipedia, <https://en.wikipedia.org/wiki/Wikipedia:About>.

articles in more than 300 languages.<sup>32</sup> Libraries offer similar opportunities for users to help create knowledge. Harvard Library Office of Scholarly Communications, for example, maintains an open access repository for research by Harvard community members. These community members have uploaded over 45,000 works of scholarship, including articles, conference proceedings, working papers, case studies, books and book chapters, theses, and dissertations, into the repository.<sup>33</sup> Many other academic libraries maintain repositories where community members can upload materials.<sup>34</sup> Libraries also provide online platforms where community members can upload oral histories.<sup>35</sup> Likewise, the Library of Congress’ “By The People” crowdsourcing platform enables patrons to tag and annotate parts of its collection.<sup>36</sup> The National Archives’ “Citizen Archivist” program invites users to “contribute to the National Archives Catalog by tagging,

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32. *Id.*

33. Harvard Library, DASH, <https://library.harvard.edu/services-tools/dash>.

34. *See, e.g.*, Yale Law School Lillian Goldman Law Library, *Communities in Yale Law School Open Scholarship Repository*, <https://openyls.law.yale.edu/>; University of Notre Dame Law School Kresge Law Library, *NDLS Scholarship*, <https://scholarship.law.nd.edu/>.

35. *See, e.g.*, Library of Congress, *Veterans History Project*, <https://www.loc.gov/programs/veterans-history-project/>; Mid-Continent Public Libraries, *Tell Me a Story Oral History Projects*, <https://www.mymcpl.org/genealogy/collections/tell-me-a-story>; Erie County Public Library, *Covid-19 Oral History Project*, <https://erielibrary.org/resources/covid19-history-project/>.

36. Library of Congress, *How to Tag*, <https://crowd.loc.gov/help-center/how-to-tag/>.

transcribing and adding comments to our records.”<sup>37</sup> Other institutions providing similar interactive computer services include the New York Public Library,<sup>38</sup> the University of Iowa Libraries,<sup>39</sup> and the Smithsonian Institution.<sup>40</sup> Similarly, *amicus* Internet Archive regularly gathers “snapshots”—accessible copies—of content on the World Wide Web through its “crawling” and indexing processes to prevent the internet and other digital content from disappearing into the past. The Internet Archive currently crawls and archives approximately 80 million webpages per day, many of which are archived by users.<sup>41</sup>

**Services that enable people to practice their faith:**

Even prior to the COVID-19 pandemic, many religious groups were using online services to offer or to extend their religious services. For example, a YouTube channel called *Living Lchaim* started in 2017 with the goal of distributing videos “to help enrich the lives of Orthodox Jews & the world.”<sup>42</sup> Various religious services also relied on Zoom and other videoconferencing services to meet

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37. National Archives and Records Administration, Citizen Archivist, <https://www.archives.gov/citizen-archivist>.

38. New York Public Library, Building Inspector, <http://buildinginspector.nypl.org/>.

39. University of Iowa Libraries, DIY History, <http://diyhistory.lib.uiowa.edu/>.

40. Smithsonian Institution, Smithsonian Digital Volunteers, <https://transcription.si.edu/>.

41. *Save Pages in the Wayback Machine*, The Internet Archive, <https://help.archive.org/help/save-pages-in-the-wayback-machine/>.

42. *See About, Living Lchaim*, <https://www.youtube.com/@LivingLchaim/about>.

amid the pandemic, with some continuing to offer them today because they allow remote participation.<sup>43</sup>

**Services that enable people to create their own websites and forums:** WordPress is a free and open-source content management system available in over 50 languages that allows users around the globe to create free websites or blogs.<sup>44</sup> By 2022, people had used WordPress to create more than 455 million websites. Many of those WordPress sites are blogs, and WordPress users create an estimated 70 million new blog posts each month.<sup>45</sup>

**Services that create online marketplaces:** Shopify is an e-commerce platform that helps customers create websites for their online stores.<sup>46</sup> Etsy is an online site that allows individuals to sell handmade crafts, jewelry, toys, art, and other goods.<sup>47</sup> Etsy serves as the intermediary for

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43. See Melissa Florer-Bixler, *Why My Church Isn't Dropping Our Online Service*, Sojourners (Feb. 2, 2022), <https://sojo.net/articles/why-my-church-isn-t-dropping-our-online-service>; Ivy Eisenberg, *How the Zoom Minyan Brought Me Closer to Judaism*, Table (Jan. 18, 2021), <https://www.tabletmag.com/sections/belief/articles/zoom-minyan-brought-me-closer-to-judaism>.

44. Radoslov Ch., *What Percentage of Websites are WordPress in 2022?*, Techjury (Oct. 16, 2022), <https://techjury.net/blog/percentage-of-wordpress-websites/>.

45. *Id.*

46. *A Commerce Solution Freelancers and Agencies Love*, Shopify Partners, <https://www.shopify.com/partners/platform-features>.

47. Meira Gebel, *What is Etsy? Everything You Need to Know Before Buying or Selling on the Handmade and Vintage E-commerce Platform for Independent Creators*, Business Insider (Dec. 18, 2020), <https://www.businessinsider.com/guides/tech/what-is-etsy>.

buyers and sellers, who use the platform to manage their inventory, orders, and shipping.<sup>48</sup> Other online services that create spaces for individual buyers and sellers include eBay,<sup>49</sup> which similarly facilitates sales directly between two parties, and Craigslist, the online classified advertising website.<sup>50</sup>

**Services that cater to users based on their viewpoints and special interests:** Gettr is a “social media platform founded on the principles of free speech, independent thought, and rejecting political censorship and ‘cancel culture,’”<sup>51</sup> but nevertheless reserves the right to “address” content that attacks any religion or race.<sup>52</sup> Roblox, a rapidly growing social network where users build and play their own games, warns that its Community Standards “prohibit things that certain other online platforms allow.”<sup>53</sup> It prohibits: “Singling out a user or group for ridicule or abuse,” “all sexual content or activity of any kind,” “The depiction, support, or glorification of war crimes or human rights violations, including torture,” and much political content, including any discussion of political parties or candidates for office.<sup>54</sup> As the Eleventh Circuit summarized:

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48. *Id.*

49. Ebay, <https://www.ebayinc.com/>.

50. Craigslist, <https://www.craigslist.org/about/sites>.

51. Gettr, <https://gettr.com/onboarding>.

52. *Terms of Use*, Gettr, <https://gettr.com/terms>.

53. *Roblox Community Standards*, Roblox, <https://en.help.roblox.com/hc/en-us/articles/203313410-Roblox-Community-Standards>

54. *Id.*

Social-media platforms include both massive websites with billions of users—like Facebook, Twitter, YouTube, and TikTok—and niche sites that cater to smaller audiences based on specific interests or affiliations—like Roblox (a child-oriented gaming network), ProAmericaOnly (a network for conservatives), and Vegan Forum (self-explanatory).

*NetChoice*, 34 F.4th at 1204.

**Services created in response to concerns about large online intermediaries:** Social media site Parler was founded in response to concerns about the largest intermediaries’ content-moderation policies. Parler states that it “is the solution to the problems that has surfaced in recent years due to changes in Big Tech policy influenced by various special-interest groups.”<sup>55</sup>

**Services that offer a diverse range of moderation practices:** Many platforms work with users to moderate content and to establish community guidelines. For example, Reddit and Discord rely on certain users to moderate content through the practice of “community moderation.” Reddit users manage and create thousands of communities, called “subreddits.” Although Reddit has an overriding content policy, a moderator makes the decisions within each subreddit as guided by Reddit’s “Moderator Guidelines for Healthy Communities.”<sup>56</sup>

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55. *Social Media, The Way it Was Intended*, Parler, <https://parler.com/about.html>.

56. *Moderator Code of Conduct*, Reddit, <https://www.redditinc.com/policies/moderator-guidelines> (effective Sept. 8, 2022).

Discord employs a similar model.<sup>57</sup> Each site empowers some users to remove and down-rank other users' speech if that speech is against the community's rules.<sup>58</sup> These platforms allow some users to change what other users see on the platform. Other platforms allow individual users to report content that violates the law or the platform's policies and change what content they themselves see.<sup>59</sup>

**Services that give users tools to create their own online experience:** Section 230 also empowers internet users and service providers to control their online experiences and to decide for themselves what content they would like to view.<sup>60</sup> This ultimately ensures that internet users have a plethora of choices when looking for filtering tools, either for themselves or their families, workplaces, schools, libraries, and so on. Section 230 also ensures that platforms have choices so they can create online spaces for a diverse array of audiences. For example, Section 230(c)(2)(B) incentivizes tools such as Privacy Badger, developed by *amicus* EFF. Privacy Badger is a browser add-on that was designed for internet users who want to browse the internet without having a

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57. *Moderating on Discord*, Discord, <https://discord.com/moderation>.

58. *See, e.g., Reddiquette*, Reddit, <https://reddit.zendesk.com/hc/en-us/articles/205926439-Reddiquette>.

59. *See, e.g., How to Report Things*, Facebook, <https://www.facebook.com/help/181495968648557?rdrhc>; *How do I take a break from someone's profile on Facebook?*, Facebook, <https://www.facebook.com/help/1638212473101795>.

60. *See* 47 U.S.C. § 230(c)(2)(B).



third party secretly track them.<sup>61</sup> It allows users to block trackers and advertisements as they browse the web.<sup>62</sup>

### III. Section 230(c)(1)'s Text Broadly Protects Internet Intermediaries From Claims Based on the User-Generated Content They Host

Section 230(c)(1)'s text, structure, and exceptions confirm that it immunizes online services from a broad range of civil claims that seek to treat them as the originator of harmful content created by users.

Section 230(c)(1) states: “No provider or user of an interactive computer service shall be *treated* as the publisher or speaker of any information provided by *another* information content provider.” (Emphasis added). Section 230 defines “information content provider” as “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.” 47 U.S.C. § 230(f)(3).

The phrase “treated as the publisher or speaker” cannot be excised from the modifying clause “of any information provided by another information content provider,” and must be read along with the definition of “information content provider.” A plain reading of these statutory provisions together shows that a plaintiff

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61. *What is Privacy Badger?*, EFF, <https://privacybadger.org/#What-is-Privacy-Badger>.

62. *Privacy Badger*, EFF, <https://www.eff.org/privacybadger>; *How does Privacy Badger work?*, EFF, <https://privacybadger.org/#How-does-Privacy-Badger-work>.

harmed—defamed or otherwise—by content can sue the creators and developers for their role in publishing that content online (and for the content itself). But the plaintiff cannot sue any of the numerous intermediaries who did not create or develop the content, such as YouTube, whom the creators used to transmit their speech to their audience. Online services that host content created by others are thus broadly immunized from any legal claim (not expressly exempted in the statute) that treats the provider of the intermediary service as the creator of the speech alleged to be harmful.<sup>63</sup> And as Google demonstrates, Section 230(f)(4)’s definition of “Access Software Provider” plainly protects intermediaries when they recommend, filter, or pick certain user-generated content to display more prominently than others. Resp. Br. 37, 40.

Petitioners and *amici* supporting them spend a great deal of time focusing on Section 230(c)(1)’s use of “publisher” to argue that the immunity is much narrower than described above—in particular, that it is limited by traditional notions of defamation law. Pet. Br. 19-24; Cyber Civil Rights Initiative and Legal Scholars Amicus

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63. Section 230(c)(1)’s immunity is not without limits. Section 230(f)(3) limits online intermediaries from invoking the provision’s immunity when the harm at issue in the legal claim is based on the content created by or the conduct of the service itself, rather than the content of a third-party user. *See Lemmon v. Snap, Inc.*, 995 F.3d 1085, 1093 (9th Cir. 2021). The Ninth Circuit held that Section 230(c)(1) did not bar a negligent design claim because the harm that the plaintiffs suffered (the death of their children in a car crash) flowed from the fact that Snapchat added a “speed filter” that encouraged users to drive too fast; the claim was not based on the *content* of user posts. *Id.* at 1093 n.4. *See also Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (holding Section 230(c)(1) inapplicable to a failure to warn claim by a content creator assaulted by a user who read her modeling profile).

Br. 11-14. But their historical analysis of that word is untethered from the “ordinary public meaning of the statute’s language at the time of the law’s adoption.” *Bostock v. Georgia*, 140 S.Ct. 1731, 1741 (2020). Congress did not limit Section 230’s scope to defamation law. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101 (9th Cir. 2009) (“But a law’s scope often differs from its genesis, and the language of the statute does not limit its application to defamation cases.”) (cleaned up). To the contrary, Congress overruled not just *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), but “any other similar decisions which have treated such providers and users [of interactive computer services] as publishers or speakers of content *that is not their own...*”<sup>64</sup> *See also* Pet. Br. 21-22. Thus the ordinary public meaning of “publisher or speaker of any information provided by another information content provider” includes a range of traditional publishing activities, including the historically common practice of recommending or otherwise directing readers to specific content, but not creating that content.

Section 230(e)’s “Effect on Other Laws” limitation also dispels Petitioners’ “publisher” arguments that Section 230’s immunities are limited to defamation or claims in which publication is an element. Pet. Br. 19-24. Section 230(e) contains a list of enumerated laws to which Section 230’s immunities do *not* apply, including “any law pertaining to intellectual property,” and “the Electronic Communications Privacy Act of 1986.” 47 U.S.C. §§ 230(e)(2), (4). The limited exceptions in Section

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64. Conference Report for Telecommunications Act of 1996 [S. 652], S. Rep. No. 104-230 (104<sup>th</sup> Congress) (Feb. 1, 1996) (emphasis added), <https://www.congress.gov/104/crpt/srpt230/CRPT-104srpt230.pdf>.

230(e) indicate that Congress intended Section 230(c)(1) to apply broadly to claims it did not except from the statute's immunity. *See Bostock*, 140 S.Ct. at 1747 (stating “when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule”); *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”).

As a result of Section 230(c)(1)'s broad immunity, online intermediaries can provide users with the immense benefits described above. *See supra* Part II. When online intermediaries are protected from liability for their users' speech, they do not need to take any of the censorious actions described above, *see supra* Part I, including pre-screening all user-generated content before it is posted—a process that is practically impossible for all but the very, very smallest sites, and even at a small scale would slow down internet communications to a crawl.

Section 230 also ensures that online intermediaries have strong legal incentives to keep protected speech online in the face of a person's threat to sue over a particular piece of user speech. Yet under Petitioners' legal theory, there is increased risk to keeping user-generated content up in the face of such legal threats. Thus, intermediaries would be more likely to remove the content at issue rather than investing resources in investigating or fighting the complaint. In this way, Section 230 protects against the heckler's veto, which has been used to stifle protected speech. *See Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966).

**CONCLUSION**

*Amici* respectfully request that this Court affirm and ensure that Section 230 broadly protects internet users' speech.

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