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 U.S. SENATOR TED CRUZ, CONGRESSMAN MIKE JOHNSON, AND FIFTEEN OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY**

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are seventeen members of the United States Senate and House of Representatives: Senators Ted Cruz, Mike Braun, Joni Ernst, Lindsey O. Graham, Charles E. Grassley, Bill Hagerty, James Lankford, Mike Lee, Cynthia M. Lummis, Marco Rubio, and Roger F. Wicker; and Representatives Mike Johnson, Jodey C. Arrington, Scott Fitzgerald, Doug Lamborn, Victoria Spartz, and Tom Tiffany.

*Amici* have a strong interest in the proper interpretation of § 230. Several *amici* sit on Committees that oversee matters related to Section 230 of the Communications Decency Act, including the Senate Committee on the Judiciary; the Senate Committee on Commerce, Science, and Transportation; and the House Committee on the Judiciary.

Several *amici* have also proposed their own legislation to revise or repeal § 230, but all agree that the lower courts' interpretation of the current § 230 has strayed far from its text. These misguided decisions have conferred near-absolute immunity on Big Tech companies to alter and push harmful content, while simultaneously censoring conservative viewpoints on important political and social matters. *Amici* are united by their interest in seeing courts

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket-consent letters.

construe § 230 according to its clear but narrow text, rather than based on the courts' policy judgments.

## SUMMARY OF THE ARGUMENT

The internet and social media are "the most important places … for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). But that marketplace of ideas has been under assault by Big Tech companies that selectively censor and remove opposing viewpoints on a wide range of important political and social matters—all without the slightest fear of legal liability, and in defiance of Congress's mandate that the "Internet and other interactive computer services offer a forum for a true diversity of political discourse." 47 U.S.C. § 230(a)(3).

This state of affairs is largely the result of lower courts' erroneous interpretations of two provisions of § 230(c) of the Communications Decency Act of 1996. *See* 47 U.S.C. § 230(c); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 133, 138 (1996). This Court should correct those flawed interpretations and remand this case so the lower courts can reevaluate Petitioners' claims under the proper framework.

*First*, § 230(c)(1) states that internet service providers cannot be deemed the "publisher" or "speaker" of third-party content on their platforms. Like many lower courts, Petitioners' Question Presented erroneously assumes this provision "immunizes" certain conduct, including "traditional editorial functions," Pet. i, but that is doubly wrong. Section 230(c)(1) is merely definitional—it does not provide immunity. And it applies only to those liability regimes like defamation whose elements turn on whether the defendant is a mere "distributor" of

others' speech, or instead is the publisher or speaker itself. Historically, publishers and speakers faced different liability regimes than distributors, although neither group was considered "immune" from liability. For such causes of action, all § 230(c)(1) does is preclude courts from treating internet service providers as the speaker or publisher of third-party content on their websites. *See* Part I, *infra*.

*Second*, § 230(c)(2)(A) does expressly provide immunity, but only where platforms "in good faith" remove or restrict access to third-party content that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A). Under standard canons of interpretation, the "otherwise objectionable" language refers only to material in the same league as the terms preceding it—i.e., especially egregious telecommunications content over which Congress was understood to have regulatory authority, consistent with the First Amendment. *See* Part II, *infra*.

Despite the narrow textual scope of these provisions, lower courts have persistently held that § 230(c) provides internet platforms with immunity from almost *all* suits that pertain in any way to online content.

For example, the decisions below held that § "230(c)(1) precludes liability" in almost all suits about "material posted on the website by someone else," Pet.App.19a, 29a, because such suits effectively treat the platforms as "publishers" and challenge their "editorial decisions" or "traditional editorial

functions" in deciding which content to keep or remove, Pet.App.31a, 38a, 39a, 41a, 244a.

That analysis is wrong at every step. Section 230(c)(1) does not directly "preclude[] liability" at all, let alone based on whether the platform is exercising "traditional editorial functions," a term that appears nowhere in the statute. Because almost any decision about preserving, removing, or altering content can be described as an "editorial function," the lower courts' misinterpretation of § 230(c)(1) has led to a broad grant of immunity completely untethered from the text of the statute, and it has also rendered entirely superfluous the limited grant of immunity in § 230(c)(2) for removal of especially egregious content.

As a result of this warped view of § 230(c)(1), platforms have been found immune from suits far outside the narrow scope of immunity Congress actually authorized in § 230(c)(2), which has been largely eviscerated. Confident in their ability to dodge liability, platforms have not been shy about restricting access and removing content based on the politics of the speaker, an issue that has persistently arisen as Big Tech companies censor and remove content espousing conservative political views, despite the lack of immunity for such actions in the text of § 230(c).

This Court should return § 230(c) to its textual scope and make clear that beyond that realm, the statute is silent. Because the lower courts' erroneous interpretation of § 230(c) so infected their analysis in

this case, this Court should remand for those courts to apply the corrected framework to Petitioners' claims in the first instance. *See* Part III, *infra*.

Under that framework, § 230(c)(1) does not directly provide any immunity for Google. At most, it requires that Google not be deemed the publisher or speaker of certain content, but that determination is relevant only if the elements of Petitioners' claims under the Anti-Terrorism Act turn on whether Google itself is the publisher or speaker of the challenged content—an issue on which *amici* take no position. Even if Google is deemed not to be the speaker or publisher of the challenged content, that does not mean Google necessarily receives immunity, as § 230(c)(1) itself does not provide immunity at all. Nor does § 230(c)(2) provide immunity here, as Google's challenged actions do not fall within the narrow scope of that provision, which does not grant *carte blanche* for social media companies to invoke immunity for removing content that any eggshell-psyche user might possibly deem offensive.

## ARGUMENT

### I. Section 230(c)(1) Does Not Provide Immunity and Is Relevant Only to Claims Whose Elements Require Treating a Platform As the Publisher or Speaker.

Lower courts have consistently held that § 230(c)(1) precludes liability for a wide swath of claims against internet service providers. But both aspects of that approach are wrong.

Section 230(c)(1) does not provide any immunity. Rather, it states a definition: no internet service provider "shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C § 230(c)(1). Although this requirement can *indirectly* affect liability, it (1) does not directly confer immunity, and (2) applies only in limited circumstances where the elements of a claim turn on treating an internet platform as the speaker or publisher of others' words. Outside of this limited realm, § 230(c)(1) plays no role whatsoever, and the lower courts—including the Ninth Circuit below—have erred by turning § 230(c)(1) into a super-immunity provision.

### A. The Correct Scope and Effect of § 230(c)(1).

"To see how far we have strayed from the path on which Congress set us out, we must consider where that path began." *Force v. Facebook, Inc.*, 934 F.3d 53, 77 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part) (arguing that courts have drastically misinterpreted § 230(c)).

Justice Thomas has explained how § 230(c)(1)'s text—in particular its reference to "publisher or speaker"—invokes the terminology of traditional common-law liability, which should guide courts' interpretation of § 230(c)(1) today. "Traditionally, laws governing illegal content distinguished between publishers or speakers (like newspapers) and distributors (like newsstands and libraries)." *Malwarebytes, Inc. v. Enigma Software Grp. USA,*

*LLC*, 141 S. Ct. 13, 14 (2020) (Thomas, J., respecting denial of certiorari). Publishers "could be strictly liable for transmitting illegal content" "because they exercised editorial control" over the publication of that content. *Id.* Distributors, on the other hand, were liable "only when they knew (or constructively knew) that content was illegal" because they "acted as a mere conduit without exercising editorial control." *Id.* Accordingly, even when not labeled as the publisher or speaker, a defendant was not given immunity, although the plaintiff's burden was higher.

Congress was aware of this distinction when it enacted § 230(c)(1) in response to the New York state trial court decision in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which had likewise "use[d] the same terms"—i.e., "publisher" and "distributor"—in the context of libel claims against an online platform, *Malwarebytes*, 141 S. Ct. at 15–16 (Thomas, J., respecting denial of certiorari) (citation omitted).

Section 230(c)(1), then, has a narrow scope. It targets only those causes of action that "include, in their elements, treating the … platform … as a publisher or speaker of another's words." Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 147 (2021); *see Force*, 934 F.3d at 81 (Katzmann, C.J., concurring in part and dissenting in part) ("The question is … whether to establish the claim the court must necessarily view the defendant, not as a publisher in the abstract, but rather as *the* publisher of that third-party information."). The "classic example is defamation," Candeub, *Reading*

*Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 147, although § 230(c)(1) is not limited to defamation claims.

And § 230(c)(1) also has a narrow effect for any qualifying causes of action: the court is merely barred from treating the online platform as the publisher or speaker of another's content. In the context of defamation, for example, § 230(c)(1) provides that platforms can be held liable for third-party content only if the defendant would be culpable under the higher standard for "distributor" liability. *See Malwarebytes*, 141 S. Ct. at 14 (Thomas, J., respecting denial of certiorari). Although this provides platforms with a strong litigation advantage, it does not mean they are entitled to *immunity*.

Statutory context confirms this interpretation of § 230(c)(1). If Congress had intended to fully immunize internet service providers from distributor liability, it could have done so using the same language it did in the very next subsection, which provides that "[n]o provider or user of an interactive computer service shall be held liable" in certain specified circumstances. 47 U.S.C. § 230(c)(2). Indeed, courts' erroneously broad interpretation of § 230(c)(1) has rendered entirely superfluous the narrower § 230(c)(2) immunity. *See* Part II, *infra*.

Further, Congress elsewhere indicated that it was not providing immunity for distributors. "Congress expressly imposed distributor liability in the very same Act that included § 230" by making it a crime to "'knowingly … display' obscene material to children,

even if a third party created that content." *Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari) (citing 47 U.S.C. § 223(d)).

### B. Lower Courts Have Dramatically Misinterpreted § 230(c)(1).

Despite its clear text, lower courts have warped § 230(c)(1) beyond all recognition, holding that it provides broad immunity against a wide range of claims involving online content even while openly acknowledging that the statutory text itself says no such thing. *See, e.g.*, *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 406 (6th Cir. 2014) ("Although § 230(c)(1) does not explicitly mention immunity or a synonym thereof, this and other circuits have recognized the provision to protect internet service providers for the display of content created by someone else.") (collecting authorities); *see also* Pet.App.29a–31a; *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18–19 (1st Cir. 2016); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014).

#### 1. *Zeran:* The Original Flawed Decision.

Almost every erroneous § 230(c)(1) decision can trace its roots back to *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), which held that § 230(c)(1) provides immunity whenever a suit seeks "to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content." *Id.* at 330.

The immunity conferred by *Zeran* is expansive because most claims involving online content can be framed as a challenge to removing, keeping, or altering content. *See Force*, 934 F. 3d. at 81 (Katzmann, C.J., concurring in part and dissenting in part) (rejecting the view that § 230(c)(1) covers "the full range of activities in which [entities subject to § 230(c)(1)] might engage").

*Zeran* rests on several errors. *First*, it mistakenly collapsed the publisher/distributor distinction. The court believed that distributor liability "is merely a subset, or a species, of publisher liability" because "distributors are considered to be publishers" in many scenarios. 129 F.3d at 332. The court pointed to examples like "the negligent communication of a defamatory statement" and argued that in such scenarios, distributors "may also be regarded as participating to such an extent … as to be regarded as publishers." *Id.*

Rather than acknowledge that sometimes it may be difficult to determine whether a party is acting as a publisher or as a distributor, *see Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari), the Fourth Circuit instead held that distributors of online content *necessarily* act as publishers of that same content.

But not every act of distribution "constitute[s] publication." *Zeran*, 129 F.3d at 332. In many circumstances, even online, it is easy to distinguish the two because a distributor acts only as a conduit that "delivers or transmits matter *published by a*

*third person*." Restatement (Second) of Torts § 581 (1977) (emphasis added). There is also a distinction in how an entity can react to allegedly illegal material. *See* William E. Buelow III, *Re-Establishing Distributor Liability on the Internet*, 116 W. VA. L. REV. 313, 345 (2013). A platform generally acts like a publisher if it can directly edit or alter the specific offending material, but it acts like a distributor if all it can do is remove the post or video in its entirety. *See id.*

More importantly, Congress itself distinguished between publisher and distributor liability, and courts cannot subsequently interpret that distinction into oblivion. As noted above, "Congress enacted the [Communications Decency Act] in response to" *Stratton Oakmont,* which itself expressly distinguished between publisher and distributor liability based on *who* was responsible for publication, *F.T.C. v. Accusearch Inc.*, 570 F.3d 1187, 1195 (10th Cir. 2009). On the way to holding that the defendant internet service provider was a "publisher rather than a distributor," the court in *Stratton Oakmont* contrasted liability where the provider "republishes … as if he had originally published" (*i.e.*, "publisher"-based liability), with distributor liability. *Stratton Oakmont*, 1995 WL 323710, at *3 ("In contrast [to the liability of republishers], distributors such as book stores and libraries may be liable for defamatory statements of others only if they knew or had reason to know of the defamatory statement at issue.").

It was error for *Zeran* to disregard the finely tuned distinction that both Congress and *Stratton Oakmont*

had employed. *See Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting denial of certiorari).

*Second*, having vastly expanded the scope of conduct covered by § 230(c)(1), *Zeran* committed another error by granting immunity for that broad group. As explained above, § 230(c)(1) does not immunize any conduct at all. It simply directs that certain conduct be treated as falling into one of two different liability regimes, neither of which necessarily results in immunity for the defendant.

This judicially imposed immunity was premised largely on non-textual statutory "purposes" and on the "Internet context." 129 F.3d at 333. "If computer service providers were subject to distributor liability, they would face potential liability each time they receive notice" of illegal third-party content on their platform. *Id*. While it "might be feasible for the traditional print publisher" or distributor to handle the management of such potentially illegal content, the court reasoned, "the sheer number of postings on interactive computer services would create an impossible burden in the Internet context." *Id*. "Because the probable effects of distributor liability on the vigor of Internet speech and on service provider self-regulation are directly contrary to § 230's statutory purposes," the court concluded that Congress did not "intend[]" to leave platforms exposed to distributor liability in § 230(c)(1). *Id*.

The Fourth Circuit seems to have believed that the text of § 230(c)(1) was not strong enough, and that Congress must have meant to go further and provide

immunity—despite the notable omission of any such language in the statutory text and the fact that Congress did expressly provide immunity for a narrow set of conduct in the very next subsection. But as this Court has recognized in other contexts, "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 568 U.S. 41, 55 n.4 (2012).

*Third*, *Zeran* asserted that providers would be entitled to immunity even for content they had "alter[ed]." 129 F.3d at 330. But that conflicts with another provision in the Communications Decency Act, which states that an "information content provider" includes anyone "responsible, in whole or *in part*, for the creation or development" of the content, 47 U.S.C. § 230(f)(3) (emphasis added), and "[n]owhere does [§ 230(c)(1)] protect a company that is itself the information content provider," *Malwarebytes*, 141 S. Ct at 16 (Thomas, J., respecting denial of certiorari). Stated another way, content created by a platform is not third-party content at all, and thus § 230(c)(1) does not apply, contrary to *Zeran*. *See* Candeub, *Reading Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 151–52.

### 2. *Zeran*'s Flawed Analysis Has Led to the Widespread Erroneous Conferral of Immunity.

Numerous circuits, including the Ninth Circuit as recognized in the decision below, have readily adopted

*Zeran*'s flawed logic, and the results confirm just how far those courts have strayed from the text of § 230(c)(1).

Courts have invoked § 230(c)(1) to find immunity from a wide variety of causes of action that pertain in any way to online content, under the doubly erroneous view that all such claims treat platforms as publishers and that any publication activities are entitled to immunity. This includes claims that online providers engaged in or encouraged housing discrimination, *see Chi. Law. Comm. for Civil Rts. Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671–72 (7th Cir. 2008); negligence, *see Green v. Am. Online (AOL)*, 318 F.3d 465, 470–71 (3d Cir. 2003); securities fraud and cyberstalking, *see Universal Comm. Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420–22 (1st Cir. 2007); and sex trafficking, *see Jane Doe*, 817 F.3d at 16–21. The Ninth Circuit has even provided immunity for content that the service provider itself had altered, which is not covered by § 230(c)(1) at all. *See Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

A recent case demonstrates just how expansively courts continue to interpret § 230(c)(1) to provide Big Tech platforms with almost unquestioned immunity. In *Anderson v. TikTok, Inc.*, No. 22-cv-1849, 2022 WL 14742788 (E.D. Pa. Oct. 25, 2022), the district court relied on Third Circuit precedent to hold that the video-sharing platform TikTok was immune under § 230(c)(1) for distributing videos of teenagers engaged in the "Blackout Challenge," where "users strangle themselves with household items and then encourage others to do the same." *TikTok*, 2022 WL

14742788, at *2. The plaintiff argued that her claims—for design defects and failure to warn—properly treated TikTok as a distributor (not a publisher) in accordance with § 230(c)(1), but the court held that the claims actually required treating TikTok as a publisher because the case "involves decisions related to the … distribution of [third-party] content." *Id.* at *7.

Invoking *Zeran*, the court erroneously conflated publication and distribution to the point that it covered almost anything an internet service provider does (or does not do) with respect to content. *Id* at *4. And then, also invoking *Zeran*, the court compounded that error by holding that § 230(c)(1) grants immunity against any claims falling within that overbroad scope of "publication." *See id.* at *4–7.

* * *

Some courts have justified their expansive misreading of § 230(c)(1) on the premise that "section 230 should not be construed grudgingly." *Jane Doe*, 817 F.3d at 18. But a statute should be construed according to its "ordinary, contemporary, common meaning"—neither "grudgingly" nor expansively. *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022). Anything beyond that common meaning is a policy decision for Congress, not the courts. *See Malwarebytes*, 141 S. Ct. at 18 (Thomas, J., respecting the denial of certiorari) (stating that courts have "filter[ed] their decisions through the policy argument that Section 230(c)(1) should be construed broadly") (internal quotation marks omitted).

This Court should hold that the ordinary, contemporary, common, and natural reading of § 230(c)(1) provides only a definitional statement for a limited set of cases, rather than the "nearly impenetrable super-First Amendment" that the lower courts have construed it to mean. JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 95 (2019).

## II. Restoring § 230(c)(1)'s Proper Scope Will Reinvigorate § 230(c)(2)(A), Which Provides Immunity in Limited Circumstances.

As noted above, one of the strongest arguments supporting the view that § 230(c)(1)'s definitional statement does not provide immunity is that Congress expressly provided immunity in the very next subsection, § 230(c)(2), which precludes liability where internet service providers "in good faith" remove material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." 47 U.S.C. § 230(c)(2)(A).

But few courts have had to interpret § 230(c)(2) because it has been rendered irrelevant by their erroneous transformation of § 230(c)(1) into a super-immunity provision. *See* JOSH HAWLEY, THE TYRANNY OF BIG TECH 128 (2021) ("[W]hen the dust had cleared from this strenuous bout of judicial renovation, Section 230 had been completely rewritten."). For example, when an organization for Sikhs alleged that Facebook used race to determine who could access the group's Facebook page, the district and circuit courts

both analyzed the claim under § 230(c)(1), rather than § 230(c)(2), even though the latter directly addresses restriction of access to content. *See Sikhs for Just., Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1094–95 (N.D. Cal. 2015), *aff'd*, 697 F. App'x 526 (9th Cir. 2017). Given the courts' longstanding erroneous interpretation of § 230(c)(1), they unsurprisingly granted immunity, even though restricting access to a Facebook page on the basis of race is in no way a "good faith" restriction of content on par with removing obscenity, as § 230(c)(2) would require before a court could confer immunity.

Restoring § 230(c)(1) to its proper scope would revitalize § 230(c)(2)'s narrow grant of immunity, where "Congress expected that tech companies would carry others' speech without favor to any specific viewpoint, and would keep defamatory and other unlawful speech off their platforms." Senator Ted Cruz, Letter to Ambassador Robert Lighthizer, United States Trade Representative, Nov. 1, 2019, *available at* https://tinyurl.com/2kuhrrpx. But because of courts' erroneous expansion of § 230(c)(1), large platforms currently enjoy immunity even for censoring content with which they simply disagree on political grounds.

And Big Tech companies have not been shy about "routinely censor[ing] lawful—overwhelmingly conservative—speech with which they disagree. From Twitter locking the account of Senate Majority Leader Mitch McConnell's campaign to YouTube demonetizing a conservative comedian's account following pressure from the left, the examples of

censorship are as disturbing as they are numerous." Press Release, Senator Ted Cruz, *Sen. Cruz Calls on USTR to Eliminate Inclusion of Special Protections for Big Tech in U.S. Trade Deals* (Nov. 1, 2019).[2]

But removing or restricting content because of the politics of the user is not "good faith" and thus not entitled to immunity under § 230(c)(2). As scholars have argued, "a pattern of dishonest explanation of the basis for removal—for instance, referring to facially neutral terms of service while covertly applying them in a viewpoint-discriminatory way—

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[2] *See also, e.g.*, Chuck Grassley, Opinion, *'Big Tech' Is Censoring Conservatives*, THE GAZETTE (Feb. 28, 2022), https://tinyurl.com/2sesc4vb ("I was surprised to learn that Facebook recently flagged a news article I posted on one of my Facebook pages as 'false information.'"); Mike Lee, Opinion, *Big Tech Companies Falsely Claim No Bias Against Conservatives—They May Be Violating Law*, FOX NEWS (Oct. 29, 2020), https://tinyurl.com/2e7u7sx5; Diana Glebova, *Zuckerberg Admits Facebook Suppressed Hunter Biden Laptop Story Ahead of 2020 Election*, NAT'L REVIEW (Aug. 26, 2022), https://tinyurl.com/z5v9mwjz; Matt Schlapp, Opinion, *Big Tech Keeps Trying to Silence Conservatives and It Won't Stop Until We Stop Them*, FOX NEWS (Mar. 30, 2022), https://tinyurl.com/2tr4rnnx (discussing YouTube banning videos of Donald Trump's speech at the 2022 Conservative Political Action Conference); Felicia Somnez & Amy B. Wang, *YouTube Suspends Ron Johnson for a Week After GOP Senator Touts Questionable Drugs to Fight COVID-19*, WASH. POST (June 11, 2021), https://tinyurl.com/ms44ckzz; Avi Selk, *Facebook Told Two Women Their Pro-Trump Videos Were 'Unsafe'*, WASH. POST (Apr. 10, 2018), https://tinyurl.com/2fyshj46; Erik Schelzig, *Twitter Shuts Down Blackburn Campaign Announcement Video*, AP NEWS (Oct. 9, 2017), https://tinyurl.com/2rv3v577; Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016), https://tinyurl.com/4xjdhbnz.

might be inconsistent with 'good faith,' which is often defined as requiring an honest explanation of one's position." Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 177 (2021).

Moreover, conservative viewpoints on social and political matters do not rise to the level of being "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable," § 230(c)(2)(A), and thus removal of such content is not eligible for immunity at all. Platforms sometimes invoke the catch-all "otherwise objectionable," but the canon of *ejusdem generis* squarely rejects that view. That canon provides that "[w]here general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Yates v. United States*, 574 U.S. 528, 545 (2015) (cleaned up).

Accordingly, § 230(c)(2)'s "otherwise objectionable" phrase must mean material that is in the same league as "obscene, lewd, lascivious, filthy, excessively violent, [or] harassing" material. 47 U.S.C. § 230(c)(2)(A). Those examples largely track categories of especially egregious telecommunications speech that were commonly believed to be regulable by the government. *See* Candeub & Volokh, *supra*, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. at 180–83. But so-called misinformation, "'disinformation,' 'hate speech,' 'misgendering,' [and] 'religious hatred'" do not rise to that level—and thus removal or restriction of such content does not qualify

for immunity under § 230(c)(2). Candeub, *Reading Section 230 as Written*, *supra*, 1 J. FREE SPEECH L. at 143.

One court has gotten it right, however. In upholding Texas's social media law H.B. 20, which generally bars social media platforms from removing posts made by users in Texas based on their viewpoints, the Fifth Circuit confirmed that "read in context, § 230(c)(2) neither confers nor contemplates a freestanding right to censor," but rather "only considers the removal of limited categories of content, like obscene, excessively violent, and similarly objectionable expression"—and thus "says nothing about viewpoint-based or geography-based censorship." *NetChoice, LLC v. Paxton*, 49 F.4th 439, 468 (5th Cir. 2022).

Finally, online platforms' own behavior confirms the inapplicability of § 230(c)(2) to censoring conservative viewpoints. Platforms often remove certain material when posted by conservatives, while consciously leaving the same type of material online when posted by liberals or others.[3] Content-removal

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[3] *See, e.g.*, Marco Rubio, Opinion, *We Must Stop Silicon Valley-Democrat Collusion Before Conservatives Are Silenced for Good*, FOX NEWS (July 28, 2021), https://tinyurl.com/yc8d3nap (noting the "hypocrisy" of social media companies censoring Covid-19 vaccine skepticism when "President Biden himself cast suspicion on the efficacy of the vaccines … [and] Vice President Kamala Harris … declar[ed] that '[i]f Donald Trump tells us that we should take it, I'm not taking it.'"); Michael Rubin, *Why Does Big Tech Censor Conservatives and Not Terrorists*, AM. ENTERPRISE INST. (Mar. 3, 2021), https://tinyurl.com/wx9wm968; Brian

decisions that turn on the identity of the speaker, rather than the nature of the content, are not covered by § 230(c)(2) at all and also confirm that platforms do not view the content as on par with obscenity and excessive violence.

Once the Court restores the proper interpretation of § 230(c)(1), the important but narrow immunity that Congress conferred in § 230(c)(2) will regain its place of prominence in suits about online service providers' removal and restriction of content.

## III. The Court Should Correct the Ninth Circuit's Flawed Interpretation of § 230(c) and Remand for Reevaluation of Petitioners' Claims.

The courts below relied on the misguided *Zeran* line of cases to hold that Google is immunized from Petitioners' claims under the Anti-Terrorism Act because § 230(c)(1) allegedly precludes liability for any challenge to a platform's "editorial decisions" or "traditional editorial functions." Pet.App.39a, 244a.

The lower courts' analysis was so thoroughly infected by their erroneous precedent on § 230(c) that this Court should pronounce the correct view of § 230(c) and then remand for the lower courts to reevaluate Petitioners' claims under the proper framework. *See Force*, 934 F.3d at 84 (Katzmann, C.J., concurring in part and dissenting in part) (arguing the

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Flood, *Twitter, Facebook Have Censored Trump 65 Times Compared to Zero for Biden, Study Says*, FOX NEWS (Oct. 19, 2020), https://tinyurl.com/3u3yd4us.

case should be remanded for reevaluation under the correct interpretation of § 230(c)).

In particular, this Court should hold that § 230(c)(1) does not directly provide immunity at all, and it applies only to claims whose elements turn on treating Google as the publisher or speaker of other parties' content. Even for such claims, § 230(c)(1) does not necessarily confer immunity but instead only precludes a court from treating Google as the speaker or publisher of third-party content. Whether that ultimately affects or precludes liability will turn on Petitioners' specific causes of action. But § 230(c)(1) itself does nothing more, nor has Google sought immunity pursuant to the narrow confines of § 230(c)(2).

*Amici* take no position on whether Petitioners ultimately should prevail, nor on whether algorithms pushing ISIS videos constitute Google's own content or instead remain third-party content. *Amici* contend that those issues would be best addressed afresh by the lower courts after this Court has scraped away the layers of erroneous § 230(c) precedent on which the decisions below relied.

## CONCLUSION

The Court should remand so the lower courts can reevaluate Petitioners' claims under the correct interpretation of § 230(c) as pronounced by this Court.

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