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

Amicus Brief of Senator Josh Hawley in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*[*]

As a Member of the U.S. Senate and a former state government official with a long record of engagement on technology policy, Senator Josh Hawley has a strong interest in upholding Congress's proper purposes regarding Section 230's expansive liability shield. If this Court does not correct the mistaken history of interpretations of this law, policymakers will continue to face challenges to their Article I obligations to promote longstanding public interests—such as effective regulation of the Nation's most powerful corporations and information channels. *Amicus* urges the Court to reverse the decision of the Court of Appeals and interpret Section 230 in a manner consistent with its original statutory design and with background common-law legal principles.

SUMMARY OF ARGUMENT

I. At common law, a distinction existed between publisher liability and distributor liability. Publisher liability attaches to the making and publication of statements themselves. Distributor liability, by contrast, attaches to the dissemination of statements where a distributor knew or should have known that the statements were unlawful.

As Congress wrote it, Section 230 shielded online platforms from publisher liability—not distributor liability. The text of the statute does nothing to abolish distributor liability in the internet platform context.

[*] All parties have consented to the filing of this brief. No counsel for a party authored any portion of this brief. No person or entity other than the *amicus* signing this brief contributed money to preparing or submitting this brief.

Indeed, the Act of which Section 230 is a part *presupposes* the retention of such liability.

Almost as soon as the statute was enacted, though, courts did away with this distinction. That original error, in turn, has led to the pervasive misunderstanding that Section 230 is an all-purpose liability shield for platforms. It is not, and this Court should clarify that fact.

II. The principles of distributor liability, which Section 230 retained, favor a finding of liability in this case. Here, recommendation algorithms serve a two-fold purpose: they surfaced incendiary content like ISIS videos, establishing that Google did in fact have actual knowledge of their existence on the platform, and they went on to disseminate that content to other users.

In other words, Google—with the knowledge that ISIS was using its platform for recruitment—continued to operate the algorithms that spread unlawful content. Under a correct understanding of Section 230, distributor liability should therefore lie.

ARGUMENT

In 1996, Congress passed 47 U.S.C. § 230 ("Section 230") for a specific purpose: to help the nascent internet grow and thrive without being demolished by litigation. As websites like online messageboards started hosting user-generated speech, courts had begun treating those sites as the *publishers* of their users' speech if they engaged in any content moderation at all. See *Stratton Oakmont, Inc.* v. *Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995). This approach to legal doctrine effectively punished website owners for taking steps to

remove offensive material from their websites—creating a colossal disincentive for any site operator to moderate content at all. See William E. Buehlow III, *Re-Establishing Distributor Liability on the Internet: Recognizing the Applicability of Traditional Defamation Law to Section 230 of the Communications Decency Act of 1996*, 116 W. Va. L. Rev. 313, 332 (2013) (tracing the implications of the *Stratton Oakmont* ruling). If the internet was going to continue to develop, Congress needed to clarify the legal landscape to ensure that websites hosting user-generated content wouldn't be buried in personal injury lawsuits.

Section 230 was the resulting solution. In relevant part, that statute states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). So, for instance, when a user posts comments to social media, the platform will not be treated as the publisher of the speech—meaning that even if the speech is defamatory or otherwise unlawful, the platform is not automatically liable.

Exactly how far that liability shield extends is an unsettled question. In the years since, internet technology companies have argued for a liberal construction of Section 230 in both the courts and the public square. On their view, Section 230 essentially provides a blank check for any and all content-management decisions platforms make, extending even—as here—to content that their platforms *affirmatively recommend*. See, e.g., *Force* v. *Facebook, Inc.*, 934 F.3d 53, 62 (2d Cir. 2019) (claiming Section 230 immunity over algorithmic recommendations).

But the plain text—and governing logic—of Section 230 says nothing about a catch-all liability shield of this magnitude. Rather, Section 230 states only that interactive computer services will not be treated as *speakers or publishers* of other users' speech. Those are not the only relevant categories. Treating Section 230 as a totalizing shield collapses an important distinction: what about cases where internet platforms *distribute*, but do not *publish*, content that they know or should have known is illegal? That is a very different question.

I. Section 230 as Congress wrote it maintains the traditional distinction between publisher liability and distributor liability.

Common law traditionally provided a legal framework for adjudicating "distributor liability," as distinct from "publisher liability." Section 230, contrary to what some courts have held, does not collapse this distinction. The Court should take this opportunity to clarify it in this case.

A. Publisher liability is distinct from distributor liability.

Section 230 protects online platforms from *publisher* liability, not *distributor* liability. While courts have subsequently blurred the distinction between these two conceptions of liability, in principle the difference is logically straightforward and maps coherently onto the internet.

Publishers are those who originate statements in print. Distributors, conversely, are "those who perform a secondary role in disseminating . . . matter authored and published by others in the form of books, magazines, and the like—as in the case of libraries,

news vendors, distributors, and carriers." Keeton et al., *Prosser and Keeton on the Law of Torts* § 113, at 810–11 (5th ed. 1984). Whereas publishers are liable for the statements they print, distributors are not "subject to liability to anyone in the absence of proof that they knew or had reason to know of the existence of defamatory"—or otherwise unlawful—"matter contained in matter published." *Id.*

Consider the logical distinction between the responsibility of a *publishing outlet* and a *bookstore* where the spread of illegal material is concerned. A publishing outlet selects and voluntarily disseminates particular kinds of material, and accordingly becomes responsible for the contents of the works it publishes. Publishing outlets that produce defamatory material can and are held liable on account of that material. E.g., *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 348 (1974).

Bookstores, though, are different. A shopkeeper who maintains a bookstore cannot reasonably be expected to know the contents of all the materials he sells. *See Smith* v. *People of the State of California*, 361 U.S. 147, 153–54 (1959) ("If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed."). For instance, if a shopkeeper typically buys most new releases issued by a major publishing house, and one page of one volume contains defamatory material, his complicity in that defamation is negligible at best. However, if he *knows* the content of a book is defamatory and decides to sell it anyway—possibly to capitalize on public interest in its scandalous nature—liability still lies. *See id.* at 154.

Hence, the traditional distinction between publisher liability and distributor liability: publisher liability attaches to the dissemination of speech in general, while distributor liability only exists where a distributor knows or should have known that the material he distributes is illegal. Restatement (Second) of Torts §§ 578, 581 (1977); *Cubby, Inc.* v. *CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991); *Stratton Oakmont*, 1995 WL 323710, at *3. The common-law distinction recognizes the logical difference in culpability between an individual who consciously chooses to promulgate speech and an individual who merely makes available the speech of others.

B. Section 230 did not abolish the traditional distinction between publisher liability and distributor liability.

Section 230 did not abolish distributor liability in the context of the internet. The plain text of the statute makes this clear: Section 230(c)(1) immunizes a platform from being treated as "the publisher or speaker" of information provided by users. 47 U.S.C. § 230(c)(1).

This removal of *publisher* liability made sound policy sense. After all, an open-access internet platform is not structurally analogous to a publishing house. Vanishingly few platforms have front-end moderation mechanisms that would require user posts to be approved by the platform prior to dissemination online. See, e.g., *NetChoice, LLC* v. *Paxton*, 49 F.4th 439, 459 (5th Cir. 2022) ("virtually everything . . . is just posted to the Platform with *zero* editorial control or judgment"); see also *Force* v. *Facebook, Inc.*, 304 F. Supp. 3d 315, 328 (E.D.N.Y. 2018) (Facebook

posts may be made "without prior approval from Facebook").

So too, a platform that exists to facilitate discussion between users is not, simply by virtue of making a discussion space available, putting its imprimatur upon anything in particular said by the participants. *NetChoice*, 49 F.4th at 460 ("It is no answer to say . . . that an observer might construe the act of hosting speech as an expression of support for its message. . . . [E]ven schoolchildren know the difference between sponsoring speech and allowing it."). Holding platforms liable as *publishers* would be tantamount to making an individual who hosts a party responsible for any defamatory remark made by a party guest. That kind of liability regime would make little sense, and would indeed cripple the growth of the internet.

But *distributor* liability, which attaches where speech is distributed despite the fact it is known—or should have been known—to be unlawful, is quite different. Applying distributor liability to platforms would not cripple the internet's growth in the same way that retaining publisher liability would. This explains why, in Section 230(c)(1), Congress did not choose to abolish it.

Had Congress actually sought to prevent technology companies from being held liable as *distributors*—for disseminating content they knew or should have known to be illegal—it could have easily done so. For one thing, Congress could have simply stated that "[n]o provider or user of an interactive computer service shall be treated as the publisher, speaker, *or distributor* of any information provided by another information content provider." But that is not what the statute says.

Alternatively, if Congress had sought to provide platforms with the broadest level of protection possible, it could simply have written that "[n]o provider or user of an interactive computer service *shall be held liable on account of* any information provided by another information content provider." Indeed, Congress used that precise formulation in Section 230(c)(2). That portion of the statute provides that "No provider or user of an interactive computer service *shall be held liable on account of*" actions taken to remove certain types of objectionable material from a website. 47 U.S.C. § 230(c)(2) (emphasis added). See *Malwarebytes, Inc.* v. *Enigma Software Grp.*, 141 S. Ct. 13, 16 (2020) (Thomas, J., respecting the denial of certiorari) ("Where Congress uses a particular phrase in one subsection and a different phrase in another, we ordinarily presume that the difference is meaningful."); see also *Doe* v. *America Online, Inc.*, 783 So. 2d 1010, 1025 (Fla. 2001) (Lewis, J., dissenting). If Congress had wanted to confer, in Section 230(c)(1), the form of immunity specified in (c)(2), it would have used parallel language.

Congress chose neither of the aforementioned options. And where Congress did not speak, courts should not read new language into the law. On its face, there is no support in the text for a reading of Section 230 that abolishes the traditional publisher/distributor distinction.

C. Courts have distorted Section 230's original meaning over time.

Nevertheless, almost as soon as the ink dried on Section 230, courts did their best to undermine this publisher/distributor distinction. In 1997, the Fourth Circuit decided the case of *Zeran* v. *America Online*,

one of Section 230's first legal stress-tests. *Zeran* effectively repudiated the publisher/distributor distinction entirely, opining that distributor "liability is merely a subset, or a species, of publisher liability, and is therefore also foreclosed by § 230." 129 F.3d 327, 332 (4th Cir. 1997).

To reach that conclusion, the Fourth Circuit adopted a maximalist understanding of "publication" that would treat as publishers "[e]very one who takes part in the publication" of a given statement. *Id.* at 332 (citation and internal quotation marks omitted). For the Fourth Circuit, while the publisher/distributor distinction was still intelligible from a level-of-liability perspective, as a *definitional* matter the word "publisher" encompassed both the traditional roles of publisher and distributor. *Id.* at 332–33. Hence, applying this "traditional definition of a publisher" meant that distributors and publishers alike fell within Section 230's scope—and meant that distributors couldn't be held liable at all. *Id.*

Having adopted a sweeping reading of the word "publisher" in Section 230, the *Zeran* court justified this interpretation on legislative-purpose grounds. The *Zeran* court theorized that a broad notice-and-takedown regime for the internet—one in which individuals could inform online platforms of the presence of unlawful content, with an eye to having that content removed—"would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information's defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing the continued publication of that information." *Id.* at 333. This, the *Zeran* court opined, was too

burdensome for platforms, because "the sheer number of postings on interactive computer services would create an impossible burden in the Internet context." *Id.*

The *Zeran* court thus made a fateful choice: to venture beyond anything Congress had written, and to treat Section 230 as establishing a general policy of immunity for internet platforms. Many courts have followed *Zeran*'s rule in the decades following. See, e.g., *Blumenthal* v. *Drudge,* 992 F. Supp. 44, 51 (D.D.C. 1998); *Jones* v. *Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Force*, 934 F.3d at 63; see also Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 113, 122 (2019) (tracing the implications of *Zeran*). The governing assumption behind *Zeran*—that internet platforms should virtually *never* be responsible for the speech they host, recommend, or otherwise disseminate—now casts a long shadow over all subsequent debates in this arena.

D. The Court should interpret Section 230 in light of the governing background principle of distributor liability.

The *Zeran* court's reading of Section 230 is flawed in several ways. *Zeran*'s expansive definition of "publisher" treats as a "publisher" anyone involved with the communication of a statement to which liability may attach. *Zeran*, 129 F.3d at 332 (within "the larger publisher category . . . every party involved is charged with publication, although degrees of legal responsibility differ"). Based on this framing, the *Zeran* court concluded that distributor liability simply collapses into the catch-all category of publisher liability. *Id.* at

332–33. A closer look, however, reveals holes in that logic.

First, the Communications Decency Act—the larger law of which Section 230 is a part—explicitly imposed a form of distributor liability by criminalizing the "knowing[] . . . display" of obscene content to children, irrespective of who created that content. 47 U.S.C. § 223(d). This is difficult to square with *Zeran*'s maximalist reading of the "publisher" category: why would Congress *impose* a form of liability on platforms in one section of the statute while *immunizing* platforms against such liability in another? See *Malwarebytes*, 141 S. Ct. at 15 ("It is odd to hold, as courts have, that Congress implicitly eliminated distributor liability in the very Act in which Congress explicitly imposed it.").

Second, general principles of statutory interpretation—the canon against surplusage, the common-law canon, and the background legal principles canon—counsel against *Zeran*'s reading. Section 230(c)(1) specifies that a platform will not be treated as "the publisher *or speaker*" of information provided by users (emphasis added). If the category of "publisher liability" were so expansive as to encompass "every party involved" in the dissemination of an unlawful statement, why identify "speaker" liability as a separate category and specify that such liability will not lie?

It is a longstanding rule of statutory construction that statutes must be read so as to give effect to *all* their words. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs* v. *Winn*, 542 U.S. 88, 101 (2004) (internal citation omitted). And yet on the Fourth Circuit's

analysis, "speaker" becomes pure surplusage. By contrast, reading "publisher" more narrowly—treating the term as something distinct from "distributor"—makes the statute make sense. On this interpretation, Section 230 simply establishes that online platforms hosting speech won't be treated as *either* those who utter unlawful statements themselves (that is, speakers) or as those who actively put those unlawful statements in print (that is, publishers). Cf. *Batzel* v. *Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) (distinguishing "the traditional treatment of publishers, distributors, and speakers under statutory and common law").

Distributor liability—the liability that exists when a purveyor of speech knows or should have known of its unlawful contents—is simply not covered by the statutory text. That additional form of liability, as previously explained, is both rooted in the common-law tradition and emphasized in the cases forming the backdrop against which Congress worked. And it is settled doctrine that statutes should be read consistently with common-law principles and in view of the legislative context within which Congress was operating. *See Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident."); *Malwarebytes*, 141 S. Ct. at 15–16. Why, then, would *Zeran* abandon this framework?

At bottom, the *Zeran* court's maximalist interpretation of "publisher"—a reading of legal doctrine that was not obvious to prior courts—seems to have been principally motivated by that court's policy concern

not to overburden platforms with content-takedown responsibilities. But that concern no longer really exists. In recent decades, market demand has led the largest online platforms to develop elaborate content moderation teams, who review and remove content deemed to violate platform policies.

Indeed, Section 230 expressly *contemplates* good-faith content moderation on the parts of platform operators. See 47 U.S.C. § 230(c)(2); see also *Force*, 934 F.3d at 88 (Katzmann, C.J., concurring) ("The text and legislative history of the statute shout to the rafters Congress's focus on reducing children's access to adult material."). Notice-and-takedown procedures, even on the scale contemplated by the *Zeran* court, are thinkable now in a way they may not have been in 1997.

Even if that were not the case, though, the statutory text and context speak for themselves. *Zeran*'s reading of Section 230 was idiosyncratic and unsupported by the text, and this Court should take the opportunity to put forward a better one.

II. Applying traditional principles of distributor liability, online platforms that knowingly spread unlawful content via recommendation algorithms should not enjoy broad Section 230 immunity.

Restoring the distinction between publisher and distributor liability would create a pathway to resolving the case presently before the Court. Specifically, the role played by content-recommendation algorithms is twofold. First, their ongoing operation helps establish that platforms do in fact have knowledge of unlawful material circulating on their platforms.

Second, their continued operation serves to spread that same unlawful content to others. Taken together, these prongs satisfy the requirements for imposing liability under a traditional distributor liability framework.

A. Recommendation algorithms ensure that platforms have actual knowledge of unlawful content.

Online platforms, often propelled by ad-driven monetization models, seek to drive user engagement by recommending that they engage with types of content likely to increase their time spent on the platform. See, e.g., Ben Smith, *How TikTok Reads Your Mind*, N.Y. Times (Dec. 5, 2021), https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html. In practice, recommendation algorithms tend to surface the most outrageous and provocative content. See Luke Munn, *Angry by Design: Toxic Communication and Technical Architectures*, 7 Humanities and Soc. Sci. Comm'ns 1, 6 (2020) ("Recommending content based on engagement, then, often means promoting incendiary, controversial, or polarizing content."). Shock and outrage sell.

This model entails that, absent affirmative interventions by the platform, unlawful content intended to attract attention—like terrorist recruitment videos—isn't likely to stay buried in the depths of an online platform, like an illicit volume might remain hidden in the darkened corner of a bookseller's shop. That content will surface publicly, sooner or later, as the recommendation algorithm surfaces it to more and more users accessing the platform. See Dhiraj Murthy, *Evaluating Platform Accountability: Terrorist Content on YouTube*, 65 Am. Behav. Scientist 800,

816 (2021) ("[T]he behavior of YouTube's recommender system potentially did make it easier to find ISIS content. Some of these videos were challenging to find manually[.]").

The visibility of algorithm-recommended content means that platforms cannot credibly disclaim knowledge of the kinds of user-uploaded materials that their servers harbor. Indeed, in the runup to the events preceding this case, pro-ISIS video content posted to YouTube came to the attention of numerous stakeholders, including Google, soon after the content began circulating. See, e.g., Mark Bergen, *YouTube Went to War Against Terrorists, Just Not White Nationalists*, Bloomberg (Aug. 30, 2022), https://www.bloomberg.com/news/features/2022-08-30/youtube-s-video-purge-left-out-right-wing-extremism ("As the militant group ascended in Iraq and Syria, its members began uploading slick, cinematic propaganda to YouTube. . . . Such content was a nightmare for YouTube."). That material was unlawful, and Google plainly knew about it.

Thanks to the platform's recommendation algorithms, one of the necessary conditions for distributor liability to lie—actual knowledge of the presence of unlawful content—is thereby satisfied.

B. Where recommendation algorithms spread content that platforms know, or should know, is unlawful, distributor liability should lie.

In response to findings of illegal user-generated material on platforms, companies like Google have repeatedly claimed that they remove unlawful content when they find it. See Bergen, *supra* ("YouTube

scrubbed Islamic State clips as quickly as it could."). But however well-intentioned, such efforts amount to little more than a game of whack-a-mole when compared to the power of platforms' recommendation algorithms. Individual videos might have been taken down if users flagged them, but the *real* problem—the recommendation algorithms spreading and surfacing unlawful content in the first place—wasn't seriously addressed at the time. In other words, Google made a decision not to stop the distribution at its source.

Consider a bookstore owner who tasks his assistant with unpacking boxes of books and stocking the shelves in a way designed to attract maximum attention, all the while knowing that some of the contents of the boxes are illegal. Suppose further that the shopkeeper assures his critics—who are alarmed by the proliferation of illegal material—that he'll take down any illegal content he happens to find at some unspecified point in the future. In such a scenario, distributor liability should clearly lie. And such a scenario is analogous to Google's actions in this case.

During the course of events that precipitated this lawsuit, Google was well aware that its efforts to police terrorist content on its platform were incomplete. See Murthy, *supra*, at 801 ("Since its infancy, Islamic State (ISIS) placed a strong emphasis on communication via video content on YouTube. ISIS' YouTube footprint became a campaign issue during the 2016 U.S. presidential campaign."). This is evidenced by the fact that Google took major steps in 2017—after the events recounted in this case—to systematically reduce the visibility of terrorist-related content. See Bergen, *supra* ("It was pressure from advertisers, not politicians, that finally made YouTube overhaul its

approach."); *see also* Murthy, *supra*, at 801 (discussing "algorithmic upgrades as part of the accountability strategies implemented by YouTube after . . . 2017"). Had Google's prior methods been effective, there would have been no need for such changes.

What Google apparently did *not* do, in the runup to the 2017 reforms, was suspend entirely its system of algorithmic recommendations until it was reasonably confident it had eradicated pro-ISIS material from the platform. To the contrary, Google—by continuing to operate its recommendation algorithms under such conditions—*continued to spread* material it knew to be present and knew to be unlawful. That is another of the necessary conditions for distributor liability to exist.

To be clear, for distributor liability to lie, knowledge of *specific* unlawful videos on the platform is not required. Rather, what is required is that a distributor know that it is more generally engaged in the distribution of material it knows to *contain* unlawful content. See *Doe,* 783 So. 2d at 1015 (emphasis added) (emphasizing the "standard of liability for entities such as news vendors, book stores, and libraries who, while not charged with a duty to review the materials they distribute, are liable if they distribute materials they know or have reason to know *contain* defamatory statements"). Because Google used its recommendation algorithms to amplify content on its platform, while simultaneously *knowing* that terrorist propaganda was among the content being amplified, distributor liability should exist.

In the simplest terms: despite having actual knowledge of violent pro-ISIS material being hosted on its platform, Google continued to promote that

content by operating recommendation algorithms tailored to disseminate content in a manner that would drive maximum engagement. Section 230 has never immunized platforms from liability for such conduct.

C. The Court should not interpret Section 230 to shield platforms from liability for distributing unlawful content.

Until this Court clarifies the original purpose and design of Section 230, cases like this one will continue to emerge. For decades, lower courts have read the law to shield the Nation's largest and most powerful technology corporations from any legal consequences, in defiance of both the statute's text and its common-law backdrop. A narrow ruling in this case will ensure that courts will continue to do so, meaning that other iterations of this case will soon be back before the Court.

Far from making the internet safer for children and families, Section 230 now allows platforms to escape any real accountability for their decision-making—as the tragic facts, and procedural history, of this case make clear. Congress never intended that result, and the text Congress wrote does not compel it. The Court should hold that companies' recommendation algorithms are not shielded by Section 230, because Section 230 never abolished the traditional principle of distributor liability.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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