

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 THE CATO INSTITUTE, R STREET
INSTITUTE, AND AMERICANS FOR TAX
REFORM AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

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January 19, 2023

QUESTION PRESENTED

Whether Section 230(c)(1) of the Communications Decency Act immunizes interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limits the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?

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INTEREST OF *AMICI CURIAE*¹

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This case concerns *amici* because this Court's interpretation of Section 230 will have enormous implications for how websites moderate speech online, a critical issue in the digital age.

¹ No party's counsel authored this brief in any part and *amici* alone funded its preparation and submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230(c)(1) of the Communications Decency Act 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). Petitioners claim that YouTube’s algorithmic recommendations of third-party content based on users’ past engagement with other content does not qualify for Section 230’s protection.

Over the course of this litigation, Petitioners have attempted to support this argument with two mutually incompatible theories. First, in their petition for certiorari, Petitioners relied on recent lower-court dissents and “reluctant concurrences” that argued Section 230 protections are contingent on passing a novel “traditional editorial functions” test. The petition urged that this test should indeed be used to determine whether Section 230 applies, and that the use of content recommendation algorithms fails this test.

In their brief on the merits, Petitioners now claim that, under a different test that has conventionally been used by the lower courts to resolve Section 230 cases, YouTube’s recommendation algorithms do not qualify for Section 230 protection.

Both theories are wrong. Petitioners’ “traditional editorial functions” test is unsupported by the text of Section 230, and it is not even consistent with the lower-court decisions that purportedly make use of it. The conventional, three-pronged “*Barnes* test,” which

lower courts typically use to determine whether Section 230 applies, is a much better fit. This Court should adopt the *Barnes* test rather than Petitioners' conception of the "traditional editorial functions" test.

Further, Google's algorithmic recommendations satisfy all three prongs of the *Barnes* test and are thus entitled to Section 230 protection. Contrary to Petitioners' suggestion, YouTube's labeling relevant videos with the words "up next" does not void Section 230 protection, just as a newspaper guiding readers to the remainder of a front-page story with the words "continued on page 25" would not void that newspaper's own legal protections. Nor does YouTube lose Section 230 protection for arranging its site in a way that is navigable and relevant for its readers. A newspaper does not waive otherwise applicable legal protections for publishing an article when it puts that article on the front page, and YouTube does not lose protections for hosting a video when its algorithm makes that video "up next." And even if recommendations were distinct pieces of content rather than necessary byproducts of organizing content, those recommendations would be generated by user inputs subject to neutral algorithmic rules and thus not speech developed by YouTube.

Finally, a ruling for Petitioners would lead to dire consequences for online speech, thwarting the purpose of Section 230. The new risk of liability would lead websites to remove many of the functionalities that have allowed online readers to find speech relevant to their interests, a crucial tool that has accelerated the growth of the marketplace of ideas like nothing before. A ruling for Petitioners would

contravene both the letter and the spirit of Section 230, and the ability of speakers and listeners to use online platforms to their fullest potential would be severely hampered.

Accordingly, the Court should affirm the Ninth Circuit's decision and deny Petitioners' claim as barred by 47 U.S.C. § 230(c)(1).

ARGUMENT

I. THE *BARNES* TEST COMMONLY USED BY LOWER COURTS IS AN EXCELLENT FIT FOR THE TEXT OF SECTION 230; PETITIONERS' ALTERNATIVE IS NOT

Section 230, part of the Communications Decency Act of 1996, was enacted by Congress in response to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995). This decision held Prodigy, an early example of an "interactive computer service," liable for failing to remove allegedly defamatory content provided by its users. The court's rationale was that Prodigy had effectively made itself a party to the spread of the defamatory content, because Prodigy moderated the content its users posted to its message boards but failed to remove the content at issue.

This reasoning threatened to incentivize interactive computer services to not moderate at all in order to avoid liability for third-party content. To prevent the burgeoning internet from turning into a cesspool of objectionable content, particularly for young users, Congress created Section 230. 47 U.S.C.

§ 230(b); *see also* Jeff Kosseff, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 53–60 (2019).

To fulfill this purpose, Section 230’s scope is broad. Its language does not limit its protections to any particular categories of claims. *See Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101–02 (9th Cir. 2009). In just 26 words, the law specifies only that (1) no “interactive computer service” shall be (2) treated as a “publisher or speaker” of (3) content provided by another “information content provider.” *Id.* at 1100.

This Court has not yet had an opportunity to give guidance to lower courts on the appropriate test to use in deciding whether Section 230 applies. But lower courts have, with admirable consistency, stuck to the text of the statute in resolving these cases. Applying the “*Barnes* test,” lower courts have asked whether each of the three criteria listed above applies. *See, e.g., Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019) (“[I]n *Barnes v. Yahoo!, Inc.*, we created [a] three-prong test for Section 230 immunity.”). If all three prongs are met, Section 230 confers its protection. If not, Section 230 does not apply.

As a very close fit to the language of the law, the *Barnes* test is superior to the vaguer and murkier test that Petitioners propose, which focuses on the phrase “traditional editorial functions.” That test, as Petitioners frame it, derives from both the dissent in *Force v. Facebook, Inc.*, 934 F.3d 53 (2d Cir. 2019), and the dissent in the panel decision below. Under that test, the question is not whether a lawsuit treats an interactive computer service as a publisher or speaker

of other people’s content, but instead whether the suit seeks to hold it liable for engaging in certain “traditional editorial functions.”

Petitioners’ preferred test has no foundation in the plain text of the statute. Indeed, under this test, critically important questions that are demanded by the plain text fall by the wayside. Moreover, the version of the “traditional editorial functions” test that Petitioners would have the Court adopt was not actually used in a majority of those few lower-court cases where “traditional editorial functions” language has been invoked.

II. PETITIONERS’ VERSION OF THE “TRADITIONAL EDITORIAL FUNCTIONS TEST” IS UNSUPPORTED BY THE CASELAW ON WHICH IT RELIES

Petitioners’ “traditional editorial functions” test derives primarily from the late Judge Katzmman’s dissent in *Force*. Pet. at 22–23. Judge Katzmman, in turn, drew from *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016), to justify reading a “traditional editorial functions” standard into Section 230. See *Force*, 934 F.3d at 81 (Katzmann, J., dissenting) (“[O]ur precedent does not grant publishers CDA immunity for the full range of activities in which they might engage. Rather, it ‘bars lawsuits seeking 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’ provided by another for publication.”) (quoting *LeadClick*, 838 F.3d at 174). But this misreads *LeadClick*, as well as

Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997), the decision from which *LeadClick* adopted the “traditional editorial functions” language.

In *Zeran*, the Fourth Circuit held that Section 230 “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.” 129 F.3d at 330. Establishing the phrase that Petitioners now seize upon, the opinion explained that “lawsuits seeking 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—are barred.” *Id.*

This passage established two things about what the *Zeran* court meant by “traditional editorial functions.” First, it demonstrated the reason a court might inquire into “traditional editorial functions.” A court may ask this question to help determine whether a suit would in fact treat the service as a publisher (the second prong). And second, this passage showed that the publisher’s role is of interest only if the service has been publishing third-party content. If it publishes its *own* content, a site fails the third prong, whether or not it is performing traditional editorial functions.

In *LeadClick*, the Second Circuit adopted *Zeran*’s language as part of its inquiry into whether the FTC’s claim against LeadClick, LLC treated the defendant “as the publisher or speaker of content provided by another.” *LeadClick*, 838 F.3d at 174–75. Although the Second Circuit denied Section 230 protection to LeadClick, this was not because LeadClick failed to perform any of the functions traditionally associated

with publishers. Indeed, LeadClick unquestionably *did* perform such functions, most obviously by agreeing to disseminate its clients' links through its affiliate network. *Id.* at 162–63. Rather, LeadClick lost out on Section 230 protection because its involvement in creating and developing the content its clients were linking to—fake news sites advertising weight-loss products—was extensive enough to make it an “information content provider” of that content. *Id.* at 176. In other words, LeadClick failed the third prong, because the content at issue was not solely provided by another.

The Second Circuit explicitly held that LeadClick was “not being held liable as a publisher or speaker of another’s content.” Rather, LeadClick was “being held accountable for its *own* deceptive acts or practices.” *Id.* (emphasis in original). The court further stressed that LeadClick’s liability was “not derived from its status as a publisher or speaker,” meaning that imposing liability did not “inherently require[] the court to treat [LeadClick] as the ‘publisher or speaker’ of its affiliates’ deceptive content.” *Id.* at 176–77 (citing *Barnes*, 570 F.3d at 1102).

LeadClick thus does not champion a “traditional editorial functions” test of the sort Petitioners recommend. If the critical question to ask in Section 230 cases were really whether the service engaged in traditional editorial functions, then *LeadClick* itself would have been wrongly reasoned, since it dispensed with that question altogether in favor of deciding the

case based on whether the content at issue was provided by the service or by a third party.

Deeper scrutiny of the origins of the “traditional editorial functions” language in *Zeran* reveals that to the extent this line of inquiry—which is nowhere to be found in the text of Section 230—can be helpful, it is as an aid to answering the more relevant question of whether an interactive computer service has published third-party content. Moreover, as *LeadClick* makes clear, asking about “traditional editorial functions” is strictly optional even where it could be done. *LeadClick* itself invoked the concept, yet the outcome was actually determined on other, more textually supported grounds.

It is thus wrong to say, as Petitioners do, that six decisions “have adopted th[e] traditional editorial functions standard,” or that this standard is the “prevailing interpretation of section 230.” Pet. at 22–23. Rather, of the six decisions to which Petitioners cite in support of this claim, fully five—*Zeran*, 129 F.3d 327; *Ben Ezra, Weinstein, & Co., Inc. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000); *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014); *Oberdorf v. Amazon.com, Inc.*, 930 F.3d 136 (3d Cir. 2019)—make no greater use of the “traditional editorial functions” test than *LeadClick* does, mentioning the language only in passing and resolving their analysis on textual grounds more akin to the *Barnes* test.

Petitioners’ attempt to take “traditional editorial functions” out of context and reimagine it as a

standalone test asks entirely too much of this humble phrase. It was not designed to conclusively determine whether Section 230 immunity applies, nor to displace a textually supported inquiry into who provided the content that gives rise to a claim. Indeed, trying to force this test into such a role would make the reasoning incoherent in the majority of the cases in which it has appeared. The Court should accordingly reject Petitioners' theory and decide this case using the conventional and textually grounded *Barnes* test.

III. UNDER THE *BARNES* TEST, GOOGLE'S ALGORITHMIC RECOMMENDATIONS OF CONTENT ARE PROTECTED BY SECTION 230

Under the *Barnes* test, Google qualifies for Section 230 immunity if it is (1) an “interactive computer service” that (2) is treated by the claim against it as a “publisher or speaker” of (3) content provided by another “information content provider.” *Dyroff*, 934 F.3d at 1097.

A. Google is an “Interactive Computer Service”

An “interactive computer service” for Section 230 purposes is “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2). Google, through the YouTube platform on which it made the recommendations at issue in this case, meets that standard. YouTube is an information service that

allows any number of users computer access to its servers.

In a departure from their arguments to the courts below, Petitioners now claim that YouTube should not be considered an “interactive computer service” because it only provides users with server access when users affirmatively ask for it, say by clicking on a link. Pet. Br. at 44. This is irrelevant under the text of Section 230, which only requires that the interactive computer service afford its users server access. There is no exception for “access on demand” in the text of the law.

B. Petitioners’ Claim Treats Google as a “Publisher or Speaker”

What is a “publisher” for Section 230 purposes? The law does not define this term, but lower courts have correctly applied its plain meaning. At bottom, publishing “involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Barnes*, 570 F.3d at 1100; *see also Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (defendant not liable “for exercising the usual prerogative of publishers to choose among proffered material and to edit the material published while retaining its basic form and message”); *Zeran*, 129 F.3d at 330 (those who “publish, withdraw, edit, or alter” content all act as publishers or speakers).

Closer to the heart of this case, a publisher may use “tools such as algorithms that are designed to match [third-party] information with a consumer’s interests.” *Force*, 934 F.3d at 66. Likewise, “[b]y recommending user groups and sending email

notifications, [an interactive computer service] act[s] as a publisher of others' content." *Dyroff*, 934 F.3d at 1098. In short, the lower courts agree that if an interactive computer service makes content available to others, makes content unavailable, or makes content more suitable for dissemination (which may include at least minor modifications or changes), it is acting as a "publisher" of that content.

Petitioners argue that Section 230's use of the word "publisher" should be understood in the context of defamation law, drawing on the statute's partial origin in *Stratton Oakmont*. Pet. Br. at 19–24. Petitioners contend that "publication" has a unique meaning in defamation law, and that Section 230 uses "publisher" (and "speaker," which Petitioners read the same way) in this sense and this sense only. *Id.* at 20.

Petitioners contend that "[u]nder section 230(c)(1) so construed, some recommendation-based claims would treat the defendant as the publisher of third-party content, but others"—including those at issue in this case—"would not." *Id.* at 26. How can one tell which kinds of "recommendation-based claims" would qualify and which would not under Petitioners' preferred approach? According to Petitioners, "sending a user harmful content posted by a third party" would be protected publication of that third-party content, but "a claim seeking to hold a defendant liable for other actions, such as sending a user information (e.g. a recommendation) *about* that third-party content," is not publication of the third-

party content itself and thus not protected. *Id.* at 26–27 (emphasis in original).

The first problem with this argument is that it is conclusory. It makes sense only if one assumes that a “recommendation” of third-party content cannot be understood as an act of publishing the third-party content itself. But Petitioners do nothing to show that this is so; they leave it as an implicitly assumed premise. And as Respondent convincingly explains, this premise is faulty because publishing inherently involves prioritizing some speech over others, such as placing one article under the front-page headline and another on page 35. If displaying some content more prominently than others is “recommending,” then recommending is inherent to the act of publishing.

Second, Petitioners’ claim is incompatible with the simple truth, recognized in *Zeran*, *Batzel*, and *Barnes*, that publication in defamation cases can involve direct, if minor, edits to the third-party content itself. *See supra* p. 11. It would make little sense for Congress to have enacted a law that protects those who make small edits to content but does not protect those who disseminate content to a user unaltered, merely ordering and arranging it in such a way that a user is more likely to find relevant content.

Third, Petitioners’ argument is not enough by itself to change the outcome of this case, even if accepted. Even if algorithmic sorting and ordering of content were considered “recommendations” of third-party content, and even if those recommendations amounted to something beyond merely publishing that third-party content, a recommendation about

third-party content would still be publication *of the recommendation itself*. In other words, even in the best-case scenario for Petitioners where a recommendation was considered content in itself, the Court would still have to address the third prong of the *Barnes* test and determine whether the recommendation was in fact provided by YouTube or “provided by another information content provider.” See 47 U.S.C. § 230(c)(1). For the reasons explained in the following section, even if the recommendations at issue are considered distinct pieces of content rather than the necessary byproduct of editorial organizing, they would consist of content provided by other “information content providers,” not by YouTube.

For these reasons, Petitioners’ claim treats Google as the “publisher or speaker” of at least its content recommendations.

C. Google’s Algorithmic Recommendations Do Not Make it an “Information Content Provider” of Others’ Content

Under Section 230, “[t]he term ‘information content provider’ means 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). While “creation or development” is not given a precise definition, the statutory context shows that not all interactions with content by an interactive computer service constitute “creation or development” sufficient to make it an “information content provider.” This is demonstrated by Section

230’s definition of “access software provider,” a type of interactive computer service.

According to 47 U.S.C. § 230(f)(4), an “access software provider” is “a provider of software (including client or server software), or enabling tools that do any one or more of the following: (A) filter, screen, allow, or disallow content; (B) pick, choose, analyze, or digest content; or (C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.” This implies that none of these activities should be deemed “creation and development.” Otherwise, access software providers would never qualify for Section 230 protection for more than an instant: as soon as they engaged in any of their characteristic interactions with other people’s content, they would become an “information content provider” of that content and lose immunity.

This definition provides a clear floor for the kinds of interactions with content that do *not* void Section 230’s protection. It includes several interactions, such as “transmit[ting], display[ing], [or] organiz[ing] content,” that are on their face analogous to the activity engaged in by interactive service providers like Google when they make algorithmic recommendations. *See, e.g., Force*, 934 F.3d at 58 (“Facebook uses algorithms . . . to determine the content to display to users on the newsfeed webpage. Newsfeed content is displayed within banners or modules and changes frequently. The newsfeed algorithms—developed by programmers employed by Facebook—automatically analyze Facebook users’ prior behavior on the Facebook website to predict and

display the content that is most likely to interest and engage those particular users.”).

Crucially, like newsfeed rankings or friend suggestions, YouTube video recommendations are a method of organization. Other interactions, such as “translat[ing],” may involve making slight changes to third-party content, an idea that fits naturally with lower-court precedent holding that minor edits are permissible and do not void Section 230 protections. *See supra* p. 11.

If 47 U.S.C. § 230(f)(4) establishes a floor for the kinds of operations on third-party content protected by Section 230, where is the ceiling? Though the statute itself is silent on the subject, the Ninth Circuit’s decision in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) is instructive. In that case, Roommates.com, an interactive computer service, compelled its users to supply information on what kind of people they’d prefer to live with as a precondition of using the site. The plaintiffs contended that these disclosures violated housing discrimination laws. *See id.* at 1166 (“[T]he part of [a Roommates.com user] profile that is alleged to offend [housing] discrimination laws—the information about sex, family status and sexual orientation—is provided by subscribers in response to Roommate’s questions, which they cannot refuse to answer if they want to use defendant’s services.”).

The court concluded that Roommates.com was not entitled to Section 230 immunity, because the company’s affirmative solicitation of the allegedly

discriminatory disclosures from its users—disclosures required for using the site—rose to the level of “development” of the content at issue. *See id.* at 1165–66 (“The CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate’s own acts—posting the questionnaire and requiring answers to it—are entirely its doing and thus section 230 of the CDA does not apply to them By requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others; it becomes the developer, at least in part, of that information”).

Thus, a website only “develops” content and loses Section 230 protection if it somehow prompts or guides uploaders to lead them to create illegal content, thus “contribut[ing] materially to the alleged illegality of the conduct.” *Id.* *See also Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016) (Yelp’s display of an allegedly defamatory review, even augmented by Yelp’s “signature star-rating system,” did not rise to the level of a “material contribution”).

YouTube’s algorithmic processes for generating video suggestions are nothing like the actions of Roommates.com. Here, Petitioners allege that YouTube “recommends content—including ISIS videos—to users based upon users’ viewing history and what is known about the users,” and that YouTube “similarly targets users for advertising based on the content they have selected and other information about users.” Pet. App. 38a. Like the user

profiles in *Roommates*, the algorithmic recommendations in this case are the product of past user inputs. Here, though, YouTube does not compel any particular type of disclosure or input. Rather, inputs are freely provided by users in the form of searches, views, likes, follows, and skips. Videos too are uploaded by users without prompting or coaching from YouTube as to what they should contain. YouTube’s algorithmic processing of user-provided input does not, absent something as drastic as compelled disclosure, rise to the level of a “material[] contribut[ion],” which is necessary for an interactive computer service to have “developed” the content for the purposes of 47 U.S.C. § 230(f)(3). *See Roommates*, 521 F.3d at 1167–68 (interpreting “development” to refer “not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness”).

The court below correctly observed that the process behind YouTube’s algorithmic recommendations is akin to that powering a “traditional search engine.” Pet. App. 41a. YouTube’s “algorithms select the particular content provided to a user based on that user’s inputs.” *Id.* at 38a. Crucially, YouTube “provided a neutral platform that did not specify or prompt the type of content to be submitted.” *Id.* Of course, an online video platform like YouTube may moderate its algorithms to exclude unwanted or inane results, just as search engines do. But this constant, imperfect moderation process neither contributes to the content of what users upload nor to the choices users make that feed YouTube’s algorithm. If the display of a recommended

video is itself considered a piece of content, separate from the video itself, that recommendation is made on the basis of independent user choices. Ultimately, YouTube’s open-ended, user dictated format makes it a neutral tool; it is a user’s own choices that determine the recommendations that the format will produce.

There is a related, important conceptual device for distinguishing protected ways of processing user content from features that contribute to the unlawfulness of user-created speech. Interactive computer services do not engage in “creation or development” of third-party content when they offer neutral publishing tools which may be used either lawfully or unlawfully. As long as the tools are neutral with respect to lawful and unlawful purposes—unlike the racial preference tools at issue in *Roommates*—their providers are protected from liability for unlawful uses. See *Daniel v. Armslist*, 926 N.W.2d 710, 722 (Wis. 2018) (Section 230’s protections applied in a lawsuit concerning an allegedly illegal online gun sale because the website’s “provision of an advertising forum and the related search functions” were all “neutral tools” that could “be used for lawful purposes”); see also *Roommates*, 521 F.3d at 1171 (the provision of “neutral tools” for displaying content does not vitiate Section 230 protection); *Klayman*, 753 F.3d at 1358 (a “website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online”); *Kimzey*, 836 F.3d at 1270 (Yelp’s star rating system, which accompanies and augments user-posted reviews, is a “neutral

tool[]’ operating on ‘voluntary inputs’ that [does] not amount to content development or creation”); *Dyroff*, 934 F.3d at 1096 (defendant is “immune from liability under the CDA because its functions, including recommendations and notifications, were content-neutral tools used to facilitate communications”); *Jones*, 755 F.3d at 417 (website form asking users to “Tell us what’s happening” is an example of a “tool[], neutral (both in orientation and design) as to what third parties submit” that “does not constitute a material contribution to any defamatory speech that is uploaded”); *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1270–71 (D.C. Cir. 2019) (Google’s “translation of third-party information [about locksmiths] into map pinpoints does not convert them into ‘information content providers’ because defendants use a neutral algorithm to make that translation,” and the algorithms “do not distinguish between legitimate and scam locksmiths in the translation process”).

This conception of neutrality hinges on a tool having a user-determined purpose, as opposed to providing particular solicitation of, or assistance to, unlawful content. Cases that have found Section 230 protection to be waived due to a site’s development of the illegal content have focused on these factors. *See, e.g., FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200–01 (10th Cir. 2009) (because Accusearch “solicited requests for confidential information protected by law, paid researchers to find it, knew that the researchers were likely to use improper methods, and charged customers who wished the information to be disclosed,” it “contributed mightily” to unlawful

conduct, was accordingly not a “provider of neutral tools,” and was not entitled to immunity under Section 230); *LeadClick*, 838 F.3d at 176 (“LeadClick’s role in managing the affiliate network far exceeded that of neutral assistance.”). The phrase “neutral assistance” is helpful because it emphasizes the contrast with offering particular or special assistance to potentially unlawful content.

Petitioners complain that courts depart from the law when they inquire into the neutrality of a defendant’s interactions with third-party content to help determine whether the defendant has become an information content provider. Pet. Br. at 41–42 (“[T]he section 230(c)(1) defense is inapplicable to all information provided by the defendant itself, not merely to information created by the defendant in some non-neutral or non-objective manner. . . . If a defendant in some manner recommends ISIS videos, the legal significance of that action under section 230(c)(1) would not be altered by evidence that the defendant also recommended, to an equal or greater degree, videos from the United States Department of Defense.”). This argument misunderstands both how algorithmic recommendations work and why courts might ask the neutrality question in cases like this one. *If* a recommendation is itself a distinct piece of content separate from the video being recommended, then neutrality is relevant to the question of whether that recommendation was created by the site or by its users.

Algorithms like YouTube’s process user inputs according to sets of defined rules. Although a given user’s inputs may be unique, the process treats

different users' inputs similarly, which sets algorithmic recommendations apart from the truly personalized movie recommendations friends might offer one another, or an editor's decisions about what should be published. This idea has proven controversial in the past: In his *Force* dissent, Judge Katzmann claimed that when "Facebook uses the algorithms to create and communicate its own message[,] it thinks you, the reader—you, specifically—will like this content." *Force*, 934 F.3d at 82 (Katzmann, J., dissenting). But in fact, if YouTube can be seen to "think" anything in relation to a particular recommendation, it merely "thinks" that a user's pattern of engagement is similar to the patterns of other users that have viewed the recommended content.

YouTube's algorithmic recommendations are a product of both YouTube's design and users' inputs. Here, there is no suggestion that YouTube's design favored ISIS content—indeed, YouTube's policies and moderation practices disfavor such content. Therefore, YouTube's recommendation feature is a neutral tool that makes no "material[] contribut[ion]" to recommended videos' unlawfulness that might qualify as content "development" under 47 U.S.C. § 230(f)(3). *Roommates*, 521 F.3d at 1167–68; *Kimzey*, 836 F.3d at 1269. *See also O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 355 (6th Cir. 2016) ("automated editorial acts" do not qualify as "creation or development").

To correct Petitioners' earlier analogy: if an interactive computer service was alleged to have designed its algorithm to specifically promote ISIS

content, it would not matter if it had also recommended videos from the United States Department of Defense. *See supra* pp. 21. However, that has not been alleged here. Instead, YouTube’s algorithms are merely alleged to have responded to users’ preferences, whether for videos of ISIS or from the DOD.

Thus, if recommendations are considered their own separate content, YouTube’s algorithms do not “contribute materially to the alleged illegality of [third-party] conduct” in the manner contemplated and held to void Section 230 protection by *Roommates*, 521 F.3d at 1167–68. The algorithms at issue in this case are, at most, the type of interactions with third-party users that allow those users to generate their *own* content; they do not rise to the level of “creation or development” of that content itself. For these reasons, even if YouTube recommendations are considered distinct pieces of content, Petitioners have failed to show that YouTube acted as an “information content provider” of that content.

IV. EXEMPTING RECOMMENDATIONS FROM SECTION 230 PROTECTION WOULD HAVE DIRE CONSEQUENCES FOR THE FREE FLOW OF SPEECH

Algorithmic recommendations are at the core of the modern internet. From Facebook’s friend and group suggestions, to dating app matching algorithms, to Twitter’s algorithmic feed and the YouTube video recommendations at issue in this case, algorithmic recommendation is a ubiquitous method

for matching speakers with interested listeners, patterns, or relevant audiences. The benefits of Section 230's protections accrue not just to the providers of interactive computer services, but also to their billions of users. However, perfectly policing unlawful content is impossible. Any system that caught every piece of illegal content would also block an unacceptable number of false positives, ultimately quashing valuable speech. This is true whether in the broader context of content published by interactive computer services, or the more limited context of content included in algorithmic recommendation features.

If algorithmic recommendations were held to be outside Section 230's protections, the false positive problem would immediately become very real, with the potential for enormous harm to lawful speakers and listeners. If YouTube could not rely on Section 230 to shield it from suits over its recommendation of allegedly illegal, tortious, or harmful videos, it would have to either engage in continual litigation or ensure that such videos were not recommended by its algorithms. Even if YouTube could bear the cost of defending these suits, smaller competitors like Rumble would not be able to.

In order to ensure that potentially actionable videos were not recommended by its algorithm, YouTube would have two options. First, it could train its algorithm to exclude anything resembling the unwanted content, eliminating false negatives by embracing false positives. Alternatively, it could recommend only content pre-screened by human YouTube employees. In either case, much lawful,

valuable expression would be excluded from YouTube's speech discovery algorithms along with the bad.

Crucially, controversial but lawful speech about religion, politics, and health would likely face the most exclusion. To eliminate extremist religious speech, platforms would exclude esoteric or merely misunderstood theological discussion. To eliminate bad health advice, useful debates over experimental treatments would have to go, and so on. The result would be a winnowing of our many modern public squares, which would only push extremism further into private spaces, with fewer opportunities for observation or counterspeech.

This is not a result anyone should desire. To preserve the benefits of algorithmic discovery for the most pressing conversations in our society, it is important to recognize that recommendation algorithms are fully protected by Section 230.

CONCLUSION

For the above reasons, Petitioners' claim with respect to Google's algorithmic recommendations of user content fulfills all three prongs of the *Barnes* test. Respondent therefore qualifies for immunity from liability under 47 U.S.C. § 230(e)(1), and the judgment below should be affirmed.

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January 19, 2023