

No. 21-1333

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**In the Supreme Court of the United States**

REYNALDO GONZALEZ, ET AL., PETITIONERS,

*v.*

GOOGLE LLC, RESPONDENT.

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

**BRIEF IN OPPOSITION**

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### **QUESTION PRESENTED**

Section 230 of the Communications Decency Act shields providers of “interactive computer service[s],” including websites, from claims that seek to treat the provider “as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1).

The question presented is:

Whether a claim seeks to treat an interactive computer service provider as a “publisher,” and is thus barred by section 230, when the claim targets the provider’s display of third-party content of potential interest to individual users.

## II

### **CORPORATE DISCLOSURE STATEMENT**

Google LLC is a subsidiary of XXVI Holdings, Inc., which is a subsidiary of Alphabet Inc. Alphabet Inc. is a publicly traded company, but no publicly traded corporation owns 10% or more of its stock.

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**BRIEF IN OPPOSITION**

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**INTRODUCTION**

Section 230 of the Communications Decency Act bars claims that seek to hold providers of “interactive computer service[s]” (*e.g.*, websites like YouTube) liable “as the publisher or speaker” of any content that the service did not create or develop. 47 U.S.C. § 230(c)(1). This case involves the application of section 230 to YouTube’s selection and arrangement of third-party content to display to users—what petitioners (at i) call “targeted recommendations.”

As petitioners (at 5) candidly acknowledge, whether section 230 applies when websites like YouTube display recommended content “has not resulted in a conflict in the precedents in the circuits at issue.” Petitioners identify only two circuits—the Second and Ninth—that have addressed the application of section 230 in this context. Both held that section 230 protects websites as

“publishers” when displaying recommended content, and this Court denied certiorari in both cases. *See Force v. Facebook, Inc.*, 934 F.3d 53, 65 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2761 (2020). The Ninth Circuit’s decision below simply hewed to its existing precedent and agreed with the Second Circuit. Given the continued lack of any circuit split, this Court should again deny review.

Petitioners also allude to broader questions about when claims treat a website as “the publisher” for purposes of section 230. But the question presented reaches only the narrow issue of “targeted recommendations.” Regardless, the circuits broadly agree on how to interpret section 230. Section 230 bars claims that seek to hold websites liable for activities that publishers traditionally perform, like selecting, editing, and disseminating third-party content. Section 230 does not protect only 1990s-style chatrooms that permit users to post whatever they want. Not only is there no circuit split on broader questions about section 230’s scope; the Court has uniformly denied review in 20-plus petitions raising such issues.

This petition would be an especially unsuitable candidate for addressing section 230. The complaint’s threadbare allegations impair any assessment of how section 230 should apply to algorithms that display content writ large. Indeed, it remains unclear which specific aspects of YouTube’s technology are even at issue.

The context of this case—which involves civil liability under the Anti-Terrorism Act (ATA)—compounds the vehicle problems. The section 230 question is not

outcome-determinative: Petitioners’ ATA claims, to the extent based on “targeted recommendations,” independently fail on the merits under Ninth Circuit precedent for lack of proximate causation and insufficiently substantial assistance. This case is also unusually messy procedurally, as it is the subject of a conditional petition on ATA issues. *See Twitter, Inc. v. Taamneh*, No. 21-1496 (filed May 26, 2022). Further, Congress is in the midst of considering legislation that would alter section 230’s ambit, and is currently grappling with policy-laden questions regarding section 230’s application to various technologies.

Finally, review is not warranted because the decision below is limited and correct. Applied here, a claim treats an online service as a “publisher” within the meaning of section 230 when the claim targets the service’s curation and display of third-party content of potential interest to each user. “[A]ctively bringing [a speaker’s] message to interested parties . . . falls within the heartland of what it means to be the ‘publisher’ of information.” *Force*, 934 F.3d at 65 (citation omitted); *accord* Pet.App.31a. That conclusion follows from section 230’s text and structure, while avoiding difficult line-drawing issues created by petitioners’ interpretation. The Court should deny the petition.

## STATEMENT

### A. Statutory Background

Users post torrents of content on the internet, to such a degree that it is “impossible for service providers to screen” all third-party content for illegal or tortious material. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Concerned that the threat of liability could prompt sweeping restrictions on online activity,

Congress enacted section 230 to protect “the vibrant and competitive free market” of the internet. 47 U.S.C. § 230(b)(2). Section 230 thus provides 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.” *Id.* § 230(c)(1).

A defendant invoking section 230’s protections must show three things:

- The defendant must use or operate “an interactive computer service,” which section 230 defines to include a computer system that allows multiple users to access a server, such as a website. 47 U.S.C. § 230(f)(2); *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1268 (9th Cir. 2016).
- The plaintiff’s claim must seek to treat the defendant as “the publisher or speaker” of content. 47 U.S.C. § 230(c)(1).
- The content must have been generated by a different “information content provider.” *Id.* § 230(c)(1), (f)(3).

Section 230 defines “interactive computer service,” to include “software . . . or enabling tools” that “pick, choose, analyze, . . . search, subset, organize, reorganize, or translate content.” *Id.* § 230(f)(2), (4).

#### **B. Factual and Procedural Background**

1. Respondent Google LLC owns and operates YouTube, an online service that more than a billion people worldwide use to post, share, and comment on videos. C.A. Excerpts of Record (E.R.) 117. Every minute, YouTube users upload over 500 hours of new content. YouTube, *YouTube for Press*, <https://bit.ly/3GLvLad>.

To help users find videos of potential interest, YouTube currently offers a variety of features. Users can search for videos by key terms (*e.g.*, “Baby Shark Dance”). E.R.184. Users can subscribe to the “channel” of favorite content creators (*e.g.*, Justin Bieber). YouTube, *Subscriptions*, <https://bit.ly/3tejrK0>. And users can select from a sidebar of videos curated based on user inputs like watching history (*e.g.*, users frequently watching Wayne Gretzky highlight reels may see a menu of hockey videos). E.R.184-85. All of those features rely on computer algorithms to identify content most likely to interest users.

YouTube users agree to follow YouTube’s rules, E.R.115, which prohibit material “intended to praise, promote, or aid” terrorist organizations. YouTube, *Violent Criminal Organizations Policy*, <https://bit.ly/393bUXx>. YouTube deploys various automated and manual tools to ensure compliance. Even before the events at issue, YouTube employed Arabic speakers to review videos flagged as promoting terrorism 24 hours a day, seven days a week. E.R.82, 177. YouTube removes prohibited content and deletes the accounts of users who break the rules. E.R.82, 176. And YouTube tags each video with a unique digital “fingerprint” to automatically prevent reupload of previously deleted videos. E.R.82.

2. Petitioners are the estate and family members of Nohemi Gonzalez, an American woman killed during a November 2015 terrorist attack in Paris, France. E.R.85, 88. The Islamic State, also known as ISIS, claimed responsibility. E.R.162.

In 2016, petitioners sued Google in the Northern District of California. Pet.App.8a. Petitioners allege that, by operating YouTube, Google incurred liability under

the ATA, 18 U.S.C. § 2333, and committed or abetted “an act of international terrorism” that caused Ms. Gonzalez’s death. E.R.187-92.

Petitioners do not allege that Google had any role in encouraging or committing the Paris attack. Nor do petitioners allege that any of Ms. Gonzalez’s attackers were recruited via YouTube or used YouTube to plan the Paris attack. The only alleged link between the attackers and YouTube was that one “was an active user of social media, including YouTube,” who once appeared in an ISIS propaganda video. E.R.148-50.

Rather, petitioners allege that ISIS generally used YouTube to recruit members and “communicate its desired messages.” E.R.118. In petitioners’ view, YouTube videos helped fuel “the rise of ISIS,” so YouTube is directly responsible for causing the Paris attack. E.R.117. The complaint briefly asserts that YouTube “recommended ISIS videos to users.” E.R.182. But the complaint does not allege that any terrorists saw such a recommendation or that such recommendations had any connection to the Paris attack. Nor does the complaint explain which of YouTube’s user-input-driven features petitioners challenge or why. The complaint simply contains a single screenshot from late 2016 purporting to “show[] a video that was recommended to a user based upon other videos he had viewed in the past.” E.R.182.

3. The district court dismissed the complaint, concluding that section 230 barred petitioners’ claims. Pet.App.203a, 207a. Petitioners did not dispute that YouTube provides an “interactive computer service,” so the court focused on section 230’s other requirements: whether petitioners’ claim treated YouTube as “the

publisher” of content created by another “information content provider.” Pet.App.193a. The court reasoned that, because petitioners sought “to impose liability on [YouTube] for knowingly permitting ISIS and its followers to post content on YouTube,” the complaint treated YouTube as “the publisher” of ISIS videos. Pet.App.195a. And because ISIS, not YouTube, made those videos, YouTube was not the “information content provider.” Pet.App.200a. The court held that displaying videos related to user inputs did not turn YouTube into the “creat[or] or develop[er]” of those videos. Pet.App.201a-202a; 47 U.S.C. § 230(f)(3).

The court alternatively dismissed petitioners’ direct-liability claims for failure to state an ATA claim. Pet.App.209a-210a. The ATA requires proximate causation, yet petitioners did “not allege any facts plausibly connecting the general availability of YouTube with the attack itself.” Pet.App.212a.

4. The Ninth Circuit affirmed in a consolidated opinion resolving two other ATA cases against social-media companies.

As relevant here, the Ninth Circuit held that petitioners’ claims seek to treat YouTube as a publisher protected from liability under section 230. Pet.App.30a. Publishing, at root, “involves reviewing, editing and deciding whether to publish or withdraw from publication third-party content.” Pet.App.31a (citation omitted). The Ninth Circuit held that petitioners’ core allegation—that YouTube “failed to prevent ISIS from using its platform”—fell squarely in that category. Pet.App.31a.

The Ninth Circuit further held that ISIS, not YouTube, was the information content provider that “creat[ed]” or “develop[ed]” the relevant content.

Pet.App.31a-32a. Under circuit precedent, a website that uses “neutral tools” to “deliver content in response to user inputs” is not the “content creator or developer.” Pet.App.34a (citing *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1171 (9th Cir. 2008) (en banc)). The Ninth Circuit had already applied that rule to online tools that display content to users based on past activity. Pet.App.37a. Such content-neutral features are merely “‘tools meant to facilitate the communication and content of others,’ and ‘not content in and of themselves.’” Pet.App.37a (quoting *Dyroff*, 934 F.3d at 1098).

The Ninth Circuit reasoned that YouTube does not create content but “select[s] the particular content provided to a user based on that user’s inputs.” Pet.App.38a. YouTube does not “specifically target[] ISIS content” for promotion, but neutrally selects what content to display. Circuit precedent thus barred petitioners’ claims. Pet.App.39a.

Judge Berzon concurred. Pet.App.81a. She expressed the view that “if not bound by Circuit precedent,” she would have held that section 230 does not apply to claims based on “activities that promote or recommend content.” Pet.App.82a.

Judge Gould dissented in relevant part. He agreed with the majority that “neutral tools like algorithms are generally immunized by Section 230.” Pet.App.104a. But given the “unique threat posed by terrorism compounded by social media,” he would have held that section 230 does not apply on these facts. Pet.App.104a.

The Ninth Circuit denied rehearing en banc. Pet.App.261a. Only Judges Gould and Berzon noted that they would have granted rehearing. Pet.App.261a-262a.

### REASONS FOR DENYING THE PETITION

The question presented asks whether section 230 applies to interactive computer service providers’ “targeted recommendations” of third-party content. Pet. i. As petitioners (at 5) acknowledge, the circuits are not divided on that issue. This Court recently denied petitions for certiorari by the same petitioners’ counsel in the two other cases to raise this issue. *Force*, 140 S. Ct. 2761; *Dyroff*, 140 S. Ct. 2761. And this Court has denied certiorari in at least 20 cases, from most circuits, raising broader section 230 issues.<sup>1</sup>

The Court should deny this petition as well. Nothing has strengthened the case for certiorari since this Court last denied review. Indeed, this case would be a worse vehicle to address section 230 than those two previous petitions. The only development petitioners (at 6) identify is the decision below, which reached the same result as the earlier Ninth Circuit decision in *Dyroff*, 934 F.3d 1093,

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<sup>1</sup> *Doe v. Facebook, Inc.*, 142 S. Ct. 1087 (2022); *Domen v. Vimeo, Inc.*, 142 S. Ct. 1371 (2022); *Lewis v. Google LLC*, 142 S. Ct. 434 (2021); *Diez v. Google, Inc.*, 142 S. Ct. 139 (2021); *Fyk v. Facebook, Inc.*, 141 S. Ct. 1067 (2021); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13 (2020); *Daniel v. Armslist, LLC*, 140 S. Ct. 562 (2019); *Herrick v. Grindr LLC*, 140 S. Ct. 221 (2019); *Beckman v. Match.com, LLC*, 139 S. Ct. 1394 (2019); *Hassell v. Yelp, Inc.*, 139 S. Ct. 940 (2019); *Silver v. Quora, Inc.*, 137 S. Ct. 2305 (2017); *O’Kroley v. Fastcase, Inc.*, 137 S. Ct. 639 (2017); *Jane Doe No. 1 v. Backpage.com, LLC*, 137 S. Ct. 622 (2017); *Medytox Sols., Inc. v. Investorshub.com, Inc.*, 577 U.S. 869 (2015); *Klayman v. Zuckerberg*, 574 U.S. 1012 (2014); *Doe v. MySpace, Inc.*, 555 U.S. 1031 (2008); *Delfino v. Agilent Techs., Inc.*, 552 U.S. 817 (2007); *Batzel v. Smith*, 541 U.S. 1085 (2004); *Green v. Am. Online, Inc.*, 540 U.S. 877 (2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 531 U.S. 824 (2000); *Zeran v. Am. Online, Inc.*, 524 U.S. 937 (1998).

and the Second Circuit decision in *Force*, 934 F.3d 53. The count thus remains 2–0.

Further, the decision below is correct. Section 230 bars claims that treat websites as publishers of third-party content. Publishers’ central function is curating and displaying content of interest to users. Petitioners’ contrary reading contravenes section 230’s text, lacks a limiting principle, and risks gutting this important statute.

#### **I. There Is No Circuit Split**

1. The question presented involves one narrow application of section 230 to online platforms’ “targeted recommendations” of content that third parties create. Pet. i. As petitioners (at 5) concede, the only two circuits to address that specific issue both answer that question in the affirmative. In *Force*, the Second Circuit held that section 230 covers Facebook’s “newsfeed” and “friend suggestion” features, which suggest social-media posts and “friends” of potential interest to an individual user based on the user’s past activity. 934 F.3d at 65. The Ninth Circuit below expressly noted that its precedent dictated “the same outcome” as the Second Circuit, namely that online platforms can invoke section 230 for features that display third-party content based on user inputs. Pet.App.39a.

Petitioners (at 5) portray the lack of a split as “happenstance,” noting that Judge Berzon concurred below only because she was bound by circuit precedent. Pet.App.82a. As Judge Berzon observed, however, the Ninth Circuit was free to revisit its precedent via the en banc process. Pet.App.82a. A majority of active judges declined, with only two noted dissents. Pet.App.261a. The Second and Ninth Circuits thus remain firmly

aligned, after the normal application of the en banc process.

Petitioners (at 3-6, 20-21, 30, 32) highlight separate writings and purported differences in the Second and Ninth Circuit's reasoning to argue that this issue is "thoroughly vetted" for the Court's review. But vetting an issue and reaching the same result is not a circuit split, much less a reason for this Court to exercise plenary review. The circuits also see no such divergence in reasoning—Second and Ninth Circuit majorities have repeatedly cited each other with approval. Pet.App.31a, 39a; *Force*, 934 F.3d at 64, 66-70.

Even were there some difference in reasoning, that would be all the more reason for percolation as the circuits fully air this question. Because the underlying claims in cases that implicate section 230 can often be brought in many venues, the Second and Ninth Circuits will not be the last courts to weigh in. *See, e.g.*, 18 U.S.C. § 2334(a) (providing venue in ATA actions wherever any plaintiff resides).

Petitioners (at 21) alternatively assert a wider split over when a defendant is "treated as the publisher" under section 230. There is no split there either. As petitioners (at 22-23) note, the D.C., First, Third, Fourth, Sixth, and Tenth Circuits ask whether the claim seeks to hold the defendant liable for "traditional editorial functions." *Accord Malwarebytes*, 141 S. Ct. at 16 (Thomas, J., respecting the denial of certiorari) (collecting cases).

But petitioners (at 25) are incorrect that the Second and Ninth Circuits employ a different test (which petitioners notably do not specify). The Second Circuit asks whether the claim faults the defendant for engaging in "traditional editorial functions—such as deciding

whether to publish, withdraw, postpone or alter content.” *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (citing Fourth and Sixth Circuit precedent). The Ninth Circuit likewise “agree[s]” with other circuits’ “traditional editorial functions” definition. *Batzel v. Smith*, 333 F.3d 1018, 1031 n.18 (9th Cir. 2003). Thus, in the Ninth Circuit, like its sister circuits, “publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (citing Fourth Circuit precedent); Pet.App.83a.

Petitioners (at 22-23) invoke Chief Judge Katzmann’s dissent in *Force* as proof of a split, but that opinion instead notes the circuits’ consensus. 934 F.3d at 81 (Katzmann, C.J., dissenting in part). Chief Judge Katzmann canvassed cases from eight circuits, including the Second and Ninth, and framed the uniform inquiry as whether the defendant is engaged in “traditional editorial functions.” *Id.* He simply thought that the majority misapplied that standard to the facts of *Force*, which (unlike here) involved software that allegedly contributed to “real-world social networks” outside the social-media platform. *Id.* at 82. That case-specific disagreement does not evince a broader split.

Contrary to petitioners’ assertions, the circuits do not even disagree over how to apply the “traditional editorial functions” test to different factual contexts. All six cases cited by the petition (at 22-23) as supposedly splitting with Second and Ninth Circuits *grant* section 230 protection, just like the decision below. And the circuits agree that section 230 reaches beyond the chatrooms and bulletin boards of the early internet that petitioners (at 2) present as section 230’s core.

Indeed, the circuits consistently read section 230 to protect online platforms from claims challenging decisions about what content to show users and how to display it. The D.C. Circuit, for example, has held that the “decision to present th[e] third-party data in a particular format” is a protected publisher activity. *Marshall’s Locksmith Serv. v. Google, LLC*, 925 F.3d 1263, 1269 (D.C. Cir. 2019) (Garland, C.J.). There, Google allegedly translated inexact location data provided by “scam locksmiths” into exact map pinpoints to help users find services near them. *Id.* at 1269-70. Section 230 protected that publication of third-party content, despite “augment[ation] and alter[ation].” *Id.* at 1269 (citation omitted).

The Sixth Circuit has held that section 230 protected a website that actively selected, edited, and anonymized user submissions. *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 403 (6th Cir. 2014). And seven circuits have held that section 230 applies to search engines, which similarly select what information to display based on user inputs.<sup>2</sup> All of those cases, like the decision below, recognize section 230’s application to editorial decisions about how to repackage third-party content for user consumption.

In short, no circuit suggests, much less holds, that section 230 exempts “targeted recommendations” from

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<sup>2</sup> *Marshall’s Locksmith*, 925 F.3d at 1270 n.4; *Small Just. LLC v. Xcentric Ventures*, 873 F.3d 313, 322 (1st Cir. 2017); *Obado v. Magedson*, 612 F. App’x 90, 93 (3d Cir. 2015); *O’Kroley v. Fastcase, Inc.*, 831 F.3d 352, 354 (6th Cir. 2016); *Roommates.com*, 521 F.3d at 1175; *Getachew v. Google, Inc.*, 491 F. App’x 923, 926 (10th Cir. 2012); *Dowbenko v. Google Inc.*, 582 F. App’x 801, 805 (11th Cir. 2014).

coverage. The Second Circuit—the only other circuit petitioners identify that has addressed such technology—reached the same result as the Ninth Circuit here. And there is no broader disagreement over section 230’s application to traditional editorial functions, which this petition does not even squarely implicate. The continued uniformity among the circuits over both the question presented and broader questions about section 230 are reason enough to deny review.

## **II. This Case Has Multiple Vehicle Problems**

This Court has already denied numerous section 230 petitions, including two recent petitions raising virtually identical questions. *Supra* p. 9 & n.1. This petition would be an even worse vehicle for this Court’s review.

1. As noted above, the Second and Ninth Circuits, like the, the D.C., First, Third, Fourth, Sixth, and Tenth Circuits, interpret section 230 to bar claims implicating “traditional editorial functions.” Petitioners do not ask this Court to review that consensus standard, which petitioners (at 28) agree is correct.

Rather, petitioners ask this Court to review the application of that standard to one narrow application of section 230, to what petitioners call “targeted recommendations of information.” Pet. i. Petitioners (at 3) identify only two circuit cases to address this application other than the decision below. As petitioners’ other citations illustrate, the more typical section 230 fact pattern involves websites’ decisions (or lack thereof) about what third-party content to host or remove on the site. *E.g.*, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 16-17 (1st Cir. 2016); *Jones*, 755 F.3d at 407; *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206

F.3d 980, 986 (10th Cir. 2000); *Zeran*, 129 F.3d at 329. Those cases present distinct interpretive questions not raised in the petition, such as whether section 230 excludes “distributor” liability. *See Malwarebytes*, 141 S. Ct. at 15 (Thomas, J., respecting the denial of certiorari). Taking a case involving a highly circumscribed and non-representative fact pattern would stymie consideration of the full range of section 230 issues.

Petitioners (at 35-37) invoke policy concerns about social-media companies selectively moderating content. But that issue is also not presented here. Petitioners allege that YouTube acted as a “neutral platform” with respect to ISIS videos. Pet.App.38a. This case does not present the question of whether section 230 applies to speaker “discrimin[ation] in removing content.” *See Malwarebytes*, 141 S. Ct. at 17 (Thomas, J., respecting the denial of certiorari).

Algorithms that display content of potential interest are particularly ill-suited for this Court’s first foray into section 230 given “rapidly changing technological, economic, and business-related circumstances.” *Cf. Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021). The earliest circuit case petitioners identify as addressing analogous technology was not decided until 2019. *Force*, 934 F.3d 53.

Further, since the 2015 Paris attack, YouTube has overhauled its terrorism policies, as one of petitioners’ sources recognizes. Jack Nicas, *How YouTube Drives People to the Internet’s Darkest Corners*, Wall St. J. (Feb. 7, 2018), <https://on.wsj.com/3tgToSr>. YouTube has invested more engineering resources in the technology that identifies and removes terrorism-related videos and worked to “identify content that may be being used to

radicalise and recruit extremists.” Kent Walker, *Four Steps We’re Taking Today to Fight Terrorism Online*, Google (June 18, 2017), <https://bit.ly/3zbyPKV>. Petitioners’ own authority underscores the effectiveness of these efforts: The detailed study petitioners (at 19 n.6) cite about content that users “regret[ted]” watching turned up not a single terrorism-related example. Mozilla, *YouTube Regrets* annex (July 2021), <https://bit.ly/3NYK2T5>. The relevance of this case to the YouTube of 2022 is far from clear.

2. Compounding the problem, petitioners’ complaint fails to pinpoint which YouTube features purportedly subject YouTube to liability. Below, petitioners’ primary theory was that YouTube violated the ATA by taking insufficient steps to prevent ISIS from posting content. E.R.110-35, 140-54, 163-70. As to YouTube’s recommendations, the complaint asserts only that YouTube “recommended ISIS videos to users” and includes one unverified screenshot from almost a year after the Paris attack. E.R.182. Despite years of litigation, petitioners never fleshed out this allegation in their pleadings.

That lack of pleading specificity would preclude this Court’s meaningful consideration of the question presented. While petitioners (at 33) analogize YouTube’s technology to telling someone that a certain “novel is terrific,” YouTube offers no such endorsements. The only screenshot in the complaint shows a queue of videos that are “up next.” E.R.182. Further muddying the waters, petitioners (at 31-32) appear to concede that section 230 protects search engines, as every circuit to address the issue has held. *Supra* p. 13 & n.2. But search engines and content-suggestion tools generally operate similarly.

Both use algorithms to identify content most likely to interest the user based on user inputs, underscoring the ambiguity of petitioners' pleadings as to what, specifically, makes YouTube's technology distinct from other widely used technologies that petitioners agree are covered by section 230.

3. The ATA context of petitioners' underlying claims introduces additional vehicle issues. For starters, the question presented is not outcome-determinative. As the district court explained, petitioners' claims seeking to hold YouTube directly liable for the Paris attacks independently fail for lack of proximate causation. Pet.App.207a-215a. Ninth Circuit ATA plaintiffs must establish that the "defendant's acts were a substantial factor in the sequence of responsible causation." *Fields v. Twitter, Inc.*, 881 F.3d 739, 744 (9th Cir. 2018) (internal quotation marks omitted). Petitioners' failure to plead any link between ISIS's general use of YouTube and the Paris attack necessarily forecloses those claims. Pet.App.215a.

Petitioners' ATA aiding-and-abetting claims likewise fail, because the decision below forecloses any argument that YouTube, via "targeted recommendations," "knowingly provid[ed] substantial assistance" to terrorists. 18 U.S.C. § 2333(d)(2). The Ninth Circuit rejected petitioners' separate ATA allegations that YouTube shared ad revenue with ISIS. Pet.App.66a. Because the complaint was "devoid of any allegations about how much assistance [YouTube] provided," the court could not "conclu[de] that [YouTube's] assistance was substantial." *Id.* That reasoning necessarily dooms petitioners' claim that YouTube recommendations, in particular, aided and abetted ISIS. Here, too, the

complaint nowhere alleges how much assistance those features provided, barring any conclusion that the support was “substantial.” Nor does the complaint allege that YouTube “knowingly” recommended ISIS content, much less than any such recommendation was connected to the Paris attack. This Court should not grant a section 230 case for the first time ever when the bottom-line result will be the same regardless.

On top of that, the ATA claims in this case have produced a procedural morass. The Ninth Circuit’s decision below simultaneously resolved three separate ATA cases against social-media companies. In one companion case, *Taamneh v. Twitter, Inc.*, the Ninth Circuit allowed aiding-and-abetting claims to go forward for a different ISIS attack. Pet.App.75a. The panel declined to address the companies’ section 230 defense because the district court had not reached the issue. Pet.App.68a. Petitioners’ counsel agrees that *Taamneh* and this case “are related as a practical matter.” See Resps.’ Mot. to Extend Time, *Taamneh*, No. 21-1496 (filed June 21, 2022). But the parties in *Taamneh* have since stipulated that the Ninth Circuit’s section 230 analysis in *Gonzalez* controls their case. Pet. 2, *Taamneh*, No. 21-1496. Likewise, the complaint here could not survive if this Court reverses the judgment in *Taamneh*. The messiness of the interplay between the ATA and section 230 claims in the decision below is yet another strike against review.

4. This Court’s intervention would also be premature because Congress currently has before it over a dozen

proposals to modify section 230.<sup>3</sup> Some proposals would obviate the question presented. H.R. 5596, for example, would prospectively repeal section 230 for “personalized recommendation[s]” in certain situations. And S. 2972 and H.R. 874 would repeal section 230 altogether. As the dissenting judge below recognized, the “regulation of social media companies would best be handled by the political branches.” Pet.App.94a (Gould, J., dissenting in part). If Congress thought section 230’s application in this context was problematic, Congress could act.

Letting Congress weigh its options makes particular sense given Congress’ track record of adapting section 230 in response to judicial decisions. After the First Circuit applied section 230 to prohibit certain sex-trafficking claims in *Jane Doe*, 817 F.3d 12, Congress amended section 230 to carve out such claims. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253 (2018). Were Congress concerned about circuits’ uniform application of

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<sup>3</sup> 21st Century Foundation for the Right to Express and Engage in Speech Act, H.R. 7613, 117th Cong. (2022); Civil Rights Modernization Act of 2021, H.R. 3184, 117th Cong.; Justice Against Malicious Algorithms Act of 2021, H.R. 5596, 117th Cong.; Protecting Americans From Dangerous Algorithms Act, S. 3029, 117th Cong. (2021); Protecting Americans from Dangerous Algorithms Act, H.R. 2154, 117th Cong. (2021); Don’t Push My Buttons Act, S. 2335, 117th Cong. (2021); DISCOURSE Act, S. 2228, 117th Cong. (2021); Limiting Section 230 Immunity to Good Samaritans Act, H.R. 277, 117th Cong. (2021); A Bill to Repeal Section 230 of the Communications Act of 1934, S. 2972, 117th Cong. (2021); Stop Shielding Culpable Platforms Act, H.R. 2000, 117th Cong. (2021); Abandoning Online Censorship Act, H.R. 874, 117th Cong. (2021); Protect Speech Act, H.R. 3827, 117th Cong. (2021); Curbing Abuse and Saving Expression in Technology Act, H.R. 285, 117th Cong. (2021).

section 230 to services like YouTube's, Congress would have ready legislative proposals at hand.

### III. The Decision Below Is Correct

The circuits' uniform conclusion that section 230 applies to neutral algorithms displaying recommended content is also correct.

1. Start with the text: Section 230(c)(1) 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.” A “publisher” is “one that makes public” or “reproduce[s] a work intended for public consumption.” *Webster's Third New International Dictionary* 1837 (1993). As petitioners (at i) thus agree, “traditional editorial functions (such as deciding whether to display or withdraw [information])” are the heartland of publishing. *Accord* Pet.App.31a.

YouTube's circa-2015 technology falls comfortably in that heartland. YouTube used a sidebar tool to show videos automatically added to the user's queue, selected based on user inputs like viewing history. Users saw thumbnail screenshots from the third-party videos (often chosen by the third parties) and hyperlinked titles (also chosen by the third parties). The sidebar thus “display[ed] . . . information” created by a third party and is therefore protected by section 230. Pet. i.

YouTube does not produce its own reviews of books or videos or tell users that a given video is “terrific.” *Contra* Pet. 28, 33. What petitioners challenge is YouTube's display of content responsive to user inputs—the internet version of a newspaper putting a story of interest to international readers on the cover of the international

edition or a book publisher offering three popular mystery novels together as a bundle. Section 230 protects these quintessential paper-and-ink publisher activities in the internet context. “Pairing” one third-party video with another based on the user’s activity does not change the “underlying content.” Pet.App.34a.

The rest of section 230 confirms this reading. Section 230 applies to “interactive computer service[s],” which the statute defines to include tools that “pick, choose, analyze, . . . search, subset, organize, reorganize, or translate content.” 47 U.S.C. § 230(f)(2), (4). That definition covers an array of tools, like YouTube’s, that “pick,” “organize,” and “reorganize” third-party content into new formats. Petitioners (at 2-3) are thus incorrect to suggest that “publish[ing]” content only involves passive display. Were that all section 230 protected, Congress would have had no reason to define “interactive computer service” so capaciously. Congress does not give with one hand what it takes away with another. *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 57 (2013).

2. Petitioners’ contrary reading presents significant line-drawing problems. Seven circuits have held that section 230 protects search engines. *Supra* p. 13 & n.2. While petitioners (at 25-26) accuse the Ninth Circuit of unduly emphasizing YouTube’s similarity to a search engine, petitioners (at 31-32) appear to agree that search engines are protected.

Invoking section 230’s statement of purpose, petitioners (at 32) argue that search engines are different because they allow “a user to select what information he or she will receive.” That distinction misunderstands the technology. Search engines, like features that display recommended content, “are implemented through

automated algorithms, which select the specific material to be recommended to a particular user based on information about that user that is known to the interactive computer service.” *See* Pet. 3; Pet.App.38a. A search algorithm takes the information the user puts in the search box and displays the information most likely to be of interest. Likewise, YouTube takes user inputs—like previous videos watched—and displays thumbnail videos of potential interest. Petitioners’ reading of section 230(c)(1) offers no way to distinguish between the two.

Petitioners (at 29-30) argue that displaying recommended content creates new content by implicitly informing users how to access third-party materials—apparently even by providing hyperlinks. But every publication tells a reader how to access content—“click here” or “read on”—and implicitly represents that the content may be worth reading. If that suffices to support liability, section 230 would be a dead letter.

This Court should not lightly adopt a reading of section 230 that would threaten the basic organizational decisions of the modern internet. To help users navigate the vast amount of data online, interactive computer services have to make constant choices about what information to display and how, so that users are not overwhelmed with irrelevant or unwanted information. Artful pleading might characterize all of those choices as “recommendations.” When a chatroom moderator leaves up one post but deletes another, the moderator could be described as “recommending” that the user read the first post, but not the second. Petitioners (at 2) present such chatroom posts as section 230’s archetypal application worthy of protection, yet simultaneously assert that the

content here is unprotected. Petitioners' textual argument does not support that line.

**CONCLUSION**

The petition for certiorari should be denied.

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