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 AMICUS CURIAE OF M. CHRIS RILEY, AN INDIVIDUAL, FLOOR64, INC. D/B/A THE COPIA INSTITUTE, AND ENGINE ADVOCACY, A 501(C)(3/4) IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI CURIAE[1]

This case is about more than the legal fate of Google.[2] A decision that curtails the applicability of 47 U.S.C. §230 ("Section 230"), the statute at the heart of this case, stands to affect the entire Internet, reaching every user and service provider, including amici themselves and those amici represent.

Amicus M. Chris Riley[3] is an individual who runs his own social media platform at https://techpolicy.social/. The platform is one of thousands[4] of Mastodon[5] instances, a type of server software that provides users with a social media experience roughly akin to Twitter but distributed across independently-run servers that interconnect via an open protocol, rather than within a closed proprietary service like Twitter itself. Riley

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[1] No counsel for any party authored this brief in whole or in part. Amici and their counsel authored this brief in its entirety. No person or entity other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Or Twitter, as implicated by the companion case *Twitter v. Taamneh*, No. 21-1496.

[3] Riley is a distinguished research fellow at the Annenberg Public Policy Center at the University of Pennsylvania and the executive director of the Data Transfer Project. Previously he was a Senior Fellow in Internet Governance at the R Street Institute, Director of Public Policy at Mozilla, and a former internet freedom program lead at the U.S. Department of State. He holds a Ph.D. in computer science from Johns Hopkins University and a J.D. from Yale Law School. He submits this brief in his individual capacity and not on behalf of any employer, past or present.

[4] *See* https://joinmastodon.org/servers.

[5] https://en.wikipedia.org/wiki/Mastodon_(social_network).

administers this platform for the benefit of others, providing them with an alternative to commercial social networks by allowing them to have accounts through which they can engage in their own microblogging[6] and interact with others as well, either on his own service, where Riley moderates his own community of users, or on other Mastodon servers elsewhere on the Internet. If, however, Riley had to fear being liable, or even having to answer, for how his users use his service, he would not be able to provide these platform functions, and his users would have fewer options for services to use to speak online. This case directly implicates his ability to continue to provide this service by threatening the durability of the critical statutory protection that makes it possible.

Amicus Copia Institute is the think tank arm[7] of Floor64, Inc., the privately-held small business behind Techdirt.com ("Techdirt"), an online publication that has chronicled technology law and policy for nearly 25 years, publishing more than 70,000 articles on subjects

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[6] https://en.wikipedia.org/wiki/Microblogging.

[7] As a think tank the Copia Institute produces evidence-driven white papers examining the underpinnings of tech policy, including, of note, a white paper on replacing proprietary platforms with open protocols enabling interconnection by any service. Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMENDMENT INSTITUTE (Aug. 21, 2019), https://knightcolumbia.org/content/protocols-not-platforms-a-technological-approach-to-free-speech. Armed with its insight, it regularly files amicus briefs, regulatory comments, and other advocacy instruments on issues of tech policy to help educate lawmakers, courts, and other regulators, as well as innovators, entrepreneurs, and the public.

such as freedom of expression and platform liability. The site often receives more than a million page views per month, and its articles have attracted nearly two million reader comments – itself user expression that Techdirt depends on Section 230 to facilitate. The Copia Institute also depends on Section 230 for its own expression to reach audiences throughout the Internet and beyond thanks to the availability of other platforms it uses, including those allowing for its expression to be shared and spread and those that allow the Copia Institute to cultivate its readership community. This case therefore puts the Copia Institute's expressive interests in the line of fire by threatening the statute protecting any platform service it provides or uses.

Engine Advocacy ("Engine") is a non-profit technology policy, research, and advocacy organization dedicated to helping thousands of startups tell their story, especially to policymakers.[8] These startups can include smaller entities providing alternatives to larger, incumbent platforms, and new services that facilitate user activity and expression in innovative new ways. Engine and its community of entrepreneurs, support organizations, and investors have an interest in protecting the startup ecosystem that has thrived thanks to the robust protection Section 230 has so far provided. Whether a community bulletin board service where people can post events, a database service where

[8] It does so by conducting research, organizing events, and leading campaigns to educate elected officials, the entrepreneur community, and the general public on issues vital to fostering technological innovation.

others can aggregate information on collectibles, an online review service where visitors can rate locations' accessibility, or a service that lets readers comment on news,[9] or myriad other services already out there or yet to be dreamed up, Section 230 provides critical protection making the service they offer the public possible. This case therefore targets not just Google but these entities too.

SUMMARY OF THE ARGUMENT

Tragic events like those at the heart of this case understandably motivate courts and others to find remedy for the victimized, and if a 25+ year old statute seems to be standing in the way of that remedy, it can seem tempting to find a way around it. But it is a temptation that should be resisted. The important work Section 230 was written to do still needs to be done, with the same broad application it has long been found to have. It is not a statute where the baby can be split; any curtailment in its applicability would be fatal to its purpose.

Amici Riley, Copia Institute, and Engine write to urge the Court not to be swayed by the heightened emotions the facts of this case naturally incite, and to

[9] The startups Engine engages with are numerous and varied. The ones referenced here are highlighted specifically on a particular advocacy document about content moderation, a platform function directly implicated by this case. *See* https://engineis.squarespace.com/s/202206_Startup-spotlight-on-content-moderation.pdf.

resist being misled by the many misunderstandings that often plague discussion about how Section 230 works and why. As amici can attest from their direct experience it works as it does for very good reason and must be allowed to continue to work as intended, to make sure that those myriad platforms and services that make the Internet can still do their work supporting its operation. Reinterpreting the statute so it no longer is so broadly applicable would represent a profound policy change, with dire results to services and the expression they enable. Not only would it fail to remediate the sort of harm that occurred here but it would invite more, affecting not just the ability to mitigate it but to deliver any benefit to anyone.

ARGUMENT

I. Allowing Petitioners' claims to go forward would fundamentally rewrite Section 230 to no longer be a purposefully broad law and thus negate its protective effect

A. Online speech and services depend on the broad protection Congress intended Section 230 to provide

Observing that Section 230 has historically been broadly applied should not be a lament; instead, it should be recognition that the courts have read the statute as Congress intended and given it its intended effect. Section 230 was purposefully written as a broad statute, with flexible language capable of applying to a

range of Internet services – not only those in existence at the time of the law's passage but those that had yet to be created, such as YouTube and Google themselves. To now read the statute more narrowly, as Petitioners propose, by reading into it unstated limitations would result in a fundamental rewriting of the statute, gutting its utility and flouting its facially-evident goals and purpose.

It would have this dramatic effect because of the unique nature of online communications. For online expression to get from one person to another it needs systems and services to help it move from computer to computer. The statute calls these helpers "interactive computer service" ("ICS") providers. 47 U.S.C. §230(f)(2). Colloquially we often know them as service providers, intermediaries, or, as commonly used in this litigation, platforms. They come in many shapes and sizes: big with many users, small with just a few, commercial with a strong profit motive, or non-profit with more public service goals. They can be run by public companies, private companies, community organizations, or even, as Riley exemplifies, individuals. And they can provide all sorts of intermediating services, from network connectivity to messaging to content hosting and more. The content they intermediate can be textual, aural, visual, or any sort of digital content its users might transmit. They can support both static interaction and dynamic, facilitate both private communications and public, and enable both one-to-one connections and one-to-many. The Internet is made up of all of these services and more, and, thanks to its

broadly-written ICS provision,[10] Section 230's protection applies to all of them.

The purpose of Section 230 is to provide the legal protection needed to make sure that any ICS handling others' content can perform the helping functions needed to do it. When Congress contemplated the burgeoning field of computer-mediated communications developing in the mid-1990s, and the Internet in particular, it recognized that for the online world to fulfill its promise of providing "a variety of political, educational, cultural, and entertainment services," 47 U.S.C. §230(a)(5), enabling "a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," 47 U.S.C. §230(a)(3), Congress was going to need to make it possible for platforms to take the chance of being in the business of helping that online world flourish. *See* 47 U.S.C. §230(b)(2). At the same time, however, Congress also was concerned about the hygiene of this growing online world. *See* 47 U.S.C. §230(b)(4); *see also Reno v. ACLU*, 521 U.S. 844 (1997) (litigating the rest of the

[10] An ICS is "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. §230(f)(2). Notably Section 230 is not even limited to Internet service providers. In fact, the litigation that inspired it, *Stratton Oakmont v. Prodigy*, No. 31063/94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), involved a platform that used to be a separate dial-up service. *See* https://en.wikipedia.org/wiki/Prodigy_(online_service).

Communications Decency Act Section 230 was passed into law with).

In other words, Congress had two parallel and complementary goals: maximize the most beneficial content online and minimize the most harmful. Congress passed Section 230 to make it legally safe for platforms to do the best they could on both fronts. Thanks to Section 230 immunity they can afford to be available to facilitate the most content possible – including the most productive content – because they don't have to worry about ruinous liability if something ends up on their systems that is problematic. And they can also afford to moderate the most undesirable content, because they also don't have to worry about ruinous liability if in doing so they happen to remove more content than may be ideal.[11]

This policy has worked as designed: by being an incentive-based "carrot" sort of law, where Congress aligned platforms' interests with its own, rather than a punitive "stick" sort of law, where their interests would inherently be in tension, platforms, as well as the user expression they facilitate, have been able to proliferate, just as Congress had hoped, *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), because platforms have not had to fear being crushed by

[11] The former task is generally insulated by 47 U.S.C. §230(c)(1) and the latter by 47 U.S.C. §230(c)(2), but the provision at (c)(1) has also been found to insulate platforms from liability stemming from its moderation. *See*, *e.g.*, *Federal Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1119-20 (N.D. Cal. 2020).

threats of liability if they did not either facilitate or moderate user expression in a way that absolutely no one could ever take issue with.

Curtailing this protection, either outright by writing into it more limitations or exemptions than the statutory language contains, or, as explained below, even indirectly by making its protection conditional, alters the incentive-based mechanics that make it work and upends the critical balance Congress created with Section 230 by reintroducing the punitive sticks Congress had purposefully eliminated. If allowed to come into force all platforms will be deterred from trying to perform any of the necessary helping tasks we need them to do – to either facilitate user expression or moderate it, including by promoting, demoting, or removing user content – because it will become too existentially threatening when they inevitably won't be able to achieve the impossible and do it all exactly how everyone would demand. The result will at best be a more toxic online world platforms no longer feel safe moderating, and also a poorer one, with less online expression and less diverse discourse overall thanks to platforms feeling the need to preemptively refuse to facilitate more user expression in order to avoid liability. And likely there will simply be fewer platforms available to provide any online service at all, as it will be too dangerous to try.

We know this result will follow because we've seen it happen in the few areas where Section 230 already does not apply. Broad though its coverage generally is, covering all sorts of services against all sorts of claims,

there are a few exemptions, including one it was born with and one that was recently added. The former was an exception in coverage for claims involving potential violations of intellectual property rights, such as copyright. 47 U.S.C. §230(e)(2). If the liability claims arising from third party content implicated copyright, the only platform protection available is the more limited and conditional Digital Millennium Copyright Act ("DMCA"). 17 U.S.C. §512. But the DMCA has illustrated how limited and conditional platform protection is not adequate. Porous protection has left platforms forced to remove unadjudicated expression that may be entirely lawful based on mere accusation, and even when the accusations are uncredible, lest it risk devastating liability. *See BMG Rights Management v. Cox Communications*, 881 F.3d 293 (4th Cir. 2018) (finding platform protection waived by not acting on unadjudicated infringement claims, even when the lower court agreed many were invalid). And it has sometimes allowed the platforms to get obliterated entirely, as in the case of Veoh Networks, an erstwhile competitor to Google's YouTube service, which was drained into bankruptcy[12] having to litigate whether the conditional platform protection of the DMCA applied to them at all. *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006 (9th Cir. 2013) (finding the DMCA shielded Veoh Networks from liability for its users' content, but too late to save it). And when faced

[12] Peter Kafka, *Veoh finally calls it quits: layoffs yesterday, bankruptcy filing soon*, C|NET (Feb. 11, 2010), http://www.cnet.com/news/veoh-finally-calls-it-quits-layoffs-yesterday-bankruptcy-filing-soon/.

with a lack of protection we've seen platforms voluntarily exit entirely and refuse outright to even attempt to facilitate what should be entirely lawful content, as was the case of Craigslist, which shut down[13] its section allowing users to post personals ads after Section 230 was amended to add a new exemption to Section 230's protection.[14]

History has shown that when Section 230 is limited, platforms become unable to provide any of the helping functions the Internet depends on. Moderation becomes impossible, as liability could follow if platforms were even aware of content on its platform, which is a necessary first step to moderating effectively. *See Batzel v. Smith*, 333 F.3d 1018, 1029-30 (9th Cir. 2003) (explaining that Section 230 was passed in part to make sure knowledge would not deter moderation). And facilitation is deterred, as platforms find themselves faced with the perverse incentive to limit online speech and activities that are otherwise legitimate, valuable, and lawful. *See Zeran*, 129 F.3d at 331. Neither outcome is what Congress sought to achieve with Section 230; they are what it sought to avoid.

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[13] Mike Masnick, *SESTA's First Victim: Craigslist Shuts Down Personals Section*, TECHDIRT.COM (Mar. 23, 2018), https://www.techdirt.com/2018/03/23/sestas-first-victim-craigslist-shuts-down-personals-section/.

[14] *See* Pub. L. 115-164, §2, Apr. 11, 2018, 132 Stat. 1255, codified at 47 U.S.C. §230(e)(5).

B. Allowing Petitioners' claims would recast service provider functions as content creation and obviate Section 230's protective effect

Section 230 protects platforms from being liable for how they intermediate other people's expression. Yet that's exactly what Petitioners want: for Google to incur liability arising from its intermediation of others' expression. The essence of their argument is that because of how certain people have used its service, Google should face consequences for that usage. But such a claim is what Section 230 exists to preclude. Finding the statute inapplicable here would represent a significant, if not wholesale, curtailment of its protective utility.

Petitioners argue that it is inherently already curtailed, and as such inapplicable to their claims, because Section 230 only applies to an ICS provider, and not an "information content provider." *See* 47 U.S.C. §230(c)(1). But such is not a curtailment of its protection. Section 230 has never been a "get out of jail free" card for all liability ever; it only applies and only has ever applied to when the platform has been engaging in its helping functions intermediating others' expression, and not when it was creating its own. The dispute here is whether what Google did with respect to this content was a helping function or a content creation function. The Petitioners argue it was the latter and ask the Court to find that a platform serving specific user-generated content via a recommendation algorithm amounts to content creation. But it is an

invitation the Court should decline: finding liability here would still amount to finding a platform liable for content someone else created, which is at the core of what Section 230 prohibits. More specifically, it would be liability stemming from the platform having performed both functions, facilitation and moderation of content someone else already created, which Congress sought to protect with the statute. Liability here would thus jeopardize any platform's ability to perform these functions in the future.

To avoid Section 230's bar against liability arising from these functions, Petitioners argue that by choosing to serve the content someone else created the platforms somehow create new content. *See* Br. Petitioners 36. But if this were the rule it would eat the whole statute. Courts have thus resisted such arguments, and this Court should too. As the Second Circuit explained in *Force v. Facebook*, a case where plaintiffs pressed similar claims against a platform, when it comes to determining who created the wrongful content, "a defendant will not be considered to have developed third party content unless the defendant directly and 'materially' contributed to what made the content itself 'unlawful.'" 934 F.3d 53, 68 (2d Cir. 2019). It rejected the idea that Section 230 could hinge on employing the editorial judgment that went into deciding how user-generated content would be displayed. *Id.* at 66-67. Not only is display inherently not creation, but as a practical matter Section 230 could not hinge on how platforms exercised their editorial judgment in deciding how to display third party created content because *any*

display of content necessarily requires editorial judgment. *Id.* If the exercise of editorial judgment could ever obviate Section 230's protection, then the statute could never apply.

The Second Circuit further observed that using algorithmic tools[15] should not change the analysis because they simply help automate and implement the decisions that the platform was entitled to make anyway. *Id.* at 67. It may be true that those decisions are being made badly or irresponsibly. But they are decisions that the platforms are constitutionally entitled to make, regardless of whether they make them manually or automatically in volume. *See* discussion *infra* Section II.B. Section 230's protection will still pivot on who created the content, and even if the platform uses algorithms to decide whether to make certain content more "visible," "available," and "usable," that displaying of already-existing content does not amount to developing it. *Id.* at 70-71.

Nor could a terrorist using a platform make the platform a partner in the creation of their content, which, if it did, would present an impossible rule. *Id.* at 65. Identifying who is a terrorist, let alone

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[15] This brief avoids using the term "algorithms" alone because it is important to demystify technology, and alone the term tends to connote some sort of black box power imposing itself upon unwilling humans. In reality algorithms need not be complex: simply listing in chronological or alphabetical order is an algorithmic rendering. It is also important to remember, especially here, is that what is at issue is not some sort of foreign magic but tools of varying complexity that humans deliberately choose to employ as suits their expressive interests.

permanently barring them from the service, is a notoriously difficult task even for those qualified to make the assessment[16] and something no platform could be expected to have sufficient expertise to do. Deciding who should be considered a terrorist is also an inherently political decision, and one that can too easily be abused as a means of targeting dissidents and their speech.[17] There is also no assurance, even if it were possible for a platform to check users against a government-provided list, that unconstitutional animus, political or otherwise, or error, would not be a factor in choosing what names to include on the list.[18] *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) ("[T]he Government's authority and expertise in these matters do not automatically trump the Court's own obligation to secure the protection that the Constitution grants to individuals."). It is also anathema to the First Amendment to prevent someone from speaking solely because the government suspects that

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[16] *See*, *e.g.*, Conor Friedersdorf, *Is One Man's Terrorist Another Man's Freedom Fighter*, THE ATLANTIC (May 16, 2012), https://www.theatlantic.com/politics/archive/2012/05/is-one-mans-terrorist-another-mans-freedom-fighter/257245/ (describing several policy tensions affecting the decision for choosing whom to designate with the label).

[17] *See*, *e.g.*, Olivia B. Waxman, *The U.S. Government Had Nelson Mandela on Terrorist Watch Lists Until 2008. Here's Why*, TIME (Jul. 18, 2018), https://time.com/5338569/nelson-mandela-terror-list/.

[18] Checking names would also interfere with the First Amendment right to speak anonymously, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), if it were something platforms could no longer let their users do in order to keep their Section 230 protection.

he might speak in a way that is actionable. *See*, *e.g.*, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 556-62 (1976) (barring prior restraints against speech).

The Second Circuit noted that in cases where courts have found platforms liable as co-creators of problematic content, those platforms had generally played a much more active role in the development of that content than simply choosing how to display it. *Id.* at 69. One example it cited was the Ninth Circuit's decision in *Fair Housing Council of San Fernando Valley v. Roommates.com*, 521 F.3d 1157, 1172 (9th Cir. 2008), where "the defendant website's practice of requiring users to use pre-populated responses to answer inherently discriminatory questions about membership in those protected classes amounted to developing the actionable information for purposes of the plaintiffs' discrimination claim." *Force*, 934 F.3d at 69. Of course, as the Second Circuit noted, even in *Roommates.com*, while the platform was potentially liable for the illegally discriminatory content it *required* users to inject when creating their posts, *id.*, the platform was not liable for all potentially discriminatory content *voluntarily* supplied by its users. *Id.* at 70.[19]

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[19] *Roommates.com* also presents a salient illustration of the importance of Section 230 applying expansively to spare platforms the expensive drain of having to fend off disputes arising from user content, because it turned out, after years of litigation, that the user content in question was not actually illegal after all. *Fair Housing Council of San Fernando Valley v. Roommates.com*, 666 F.3d 1216 (9th Cir. 2012).

Although the decision did not specifically use this phrasing, what emerges from *Force* is the sensible observation that the statutory content provider is the party who *imbued* the content at issue with its objectionable quality. This framing is particularly helpful for several reasons. For one, not all platforms are like YouTube and open to general use. Some, including many smaller platforms, are specialized, and by being specialized may attract more contentious content. If that editorial decision to attract contentious content could cause a platform to lose Section 230 protection, then few could do it, and outlets for expressing lawful but provocative content would be lost, and with it such content itself. Thus merely *attracting* contentious content cannot count as creating it. In order to lose Section 230 protection the platform must have done something more to cause the created content to have its objectionable quality than simply facilitate it.

The framing is also helpful because Section 230 does not just insulate platforms from damage awards but the expense of having to answer for others' expression, even when the claims against them are unmeritorious. After all, plenty of content subject to dispute is actually lawful.[20] The First Amendment protects

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[20] The objectionability of content can also be contextual. For instance, there is nothing inherently wrongful about a user posting a housing rental. Whether such an ad is wrongful may depend on where the rental is located, if it is in a region where it might need to be registered and isn't. A user who posts a rental that violates local law will be the party to imbue it with its wrongful quality, not the platform, who might not ever be able to even know whether the listing was in compliance or not, especially if liability

significant amounts of odious expression. Petitioners seek to hold Google liable for having served odious content, but there is no evidence that Google made it odious, or imbued it with its odious quality, let alone made it unlawful. It simply intermediated content created by another[21] as an ICS performing those helper functions, and Section 230 should therefore apply to Google and to any other platform performing similar helper functions.

II. Curtailing Section 230's intentionally broad protection would have catastrophic consequences for online services and the expression they enable

A. Amici exemplify how curtailing Section 230 would hurt online services

The impact of this case is not confined to the parties. Denying Google's statutory protection here means denying it to everyone: to the Rileys trying to provide alternative social media experiences, to the Copia Institutes furthering their expressive agenda by interacting directly with their audiences, and to the expansive range of platforms Engine works with offering myriad useful services to the public in this digital age. A decision in favor of Petitioners threatens to

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was rooted in infinite jurisdictions' local law. Section 230 relieves platforms from being in the impossible position of having to know something it cannot know but having its fate depend on knowing it.

[21] The framing is also useful because what is at issue is content created by someone other than the service, who may not have been a user of the service itself.

reach every single service comprising the Internet, including amici and those amici represent. How it will affect them, if Section 230 is so restricted, can help illustrate why such curtailment will be so devastating to all services and the user expression they facilitate and abandon the policy goals Congress sought to vindicate with its passage.

i. As businesses

The Copia Institute is an example of a small business that depends on Section 230 in multiple ways. One prominent way is with its Techdirt site, which itself dates back almost to the birth of Section 230.[22] The site publishes articles and commentary while also allowing reader comments on its articles, thus acting as a platform for other user expression. These comments add to the richness of the discourse found on its pages and allows the Copia Institute to build a dialog around its ideas. The comments also often help the Copia Institute's own expression be more valuable, with story tips, error checking, and other feedback provided by the reader community.

To keep the discussion in the comments meaningful, the Copia Institute employs a system of moderation. Its current system is primarily community-driven, where readers can rate comments as insightful or funny, or flag them as abusive or spam, and then the Copia Institute employs algorithmic tools to

[22] The first article was published in 1997. *See* https://www.techdirt.com/articles/990317/0341214/august-17-23-1997.shtml.

automatically determine how the comments should be displayed based on that input. The Copia Institute chooses to facilitate user comments, and moderate them in this way, to fulfill its expressive objectives.[23] It could just as easily moderate them with a different system prioritizing different factors, or choose not to host them at all.[24] The First Amendment ensures that it can make these editorial and associative choices, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and Section 230 makes that right a practical reality by insulating it from constantly having to defend its First Amendment rights. This critical statutory protection is what makes it safe to both host any user comments, as well as remove any it feels warrant removal, without having to fear each of these decisions being challenged in court, should someone happen to object to them.

Such legal challenges are not an idle concern. As this litigation illustrates, technology policy can be contentious, and Techdirt's trenchant – and First Amendment-protected – commentary can ruffle feathers. Those who are ruffled may threaten litigation,[25]

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[23] *See* Elizabeth Djinis, *Don't read the comments? For news sites, it might be worth the effort*, POYNTER (Nov. 4, 2021), *available at* https://www.poynter.org/ethics-trust/2021/dont-read-the-comments-for-news-sites-it-might-be-worth-the-effort/.

[24] The decision to close comment sections has often been driven by concerns over their moderation. Djinis. Because moderation is so critical to whether a publication can self-host any user engagement, it is critical that it be able to do it.

[25] *See*, *e.g.*, Mike Masnick, *Hey North Face! Our Story About You Flipping Out Over 'Hey Fuck Face' Is Not Trademark Infringement*,

but thanks to the First Amendment and Section 230 those threats are ordinarily little more than toothless bluster. But on the occasion that one turned into a lawsuit, the results were devastating to the company. The price of defending the speech in question, which included a user comment, was lost time and money, lost sleep for the company's principal and editor, lost opportunity to further develop the company's business, and a general chilling of the company's expressive activities.[26] And that was just one lawsuit where the protected expression remained online.[27]

The value of Section 230 is not just to protect platforms from a damage award but to deter these lawsuits outright, or at least help the platforms get out of them relatively inexpensively, because the harm litigation can cause to platforms has little to do with their actual merit. Without the broad protection Section 230 gives against all lawsuits, platforms run the risk of a "death by ten thousand duck bites," *Roommates.com*, 521 F.3d at 1174, if they must potentially answer for any or all of their users' voluminous content. Companies like the

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TECHDIRT (Nov. 15, 2021), https://www.techdirt.com/articles/20211112/14074147927/hey-north-face-our-story-about-you-flipping-out-over-hey-fuck-face-is-not-trademark-infringement.shtml.

[26] *See* Mike Masnick, *The Chilling Effects Of A SLAPP Suit: My Story*, TECHDIRT (Jun. 15, 2017), https://www.techdirt.com/articles/20170613/21220237581/chilling-effects-slapp-suit-my-story.shtml.

[27] Mike Masnick, *Our Legal Dispute With Shiva Ayyadurai Is Now Over*, TECHDIRT (May 17, 2019), https://www.techdirt.com/articles/20190516/22284042229/our-legal-dispute-with-shiva-ayyadurai-is-now-over.shtml.

Copia Institute, or those startups Engine works with, cannot afford to face the onslaught of notoriously expensive civil litigation that curtailing Section 230 would invite. As Engine has told regulators, the cost of defending even one frivolous claim can easily exceed a startup's valuation. Engine, Primer: Value of Section 230 (Jan. 31, 2019), http://www.engine.is/s/Section-230-cost-study.pdf. It is orders of magnitude less expensive to simply comply with a demand letter, regardless of how meritless the demand, any bad faith motivation behind the letter, or the consequences to other users. But for a small company without the resources to engage counsel it may be the only viable option. *Id.* Because if they refuse, and the demand letter turns into live litigation, the costs stand to be even more ruinous. A motion to dismiss can easily cost tens of thousands of dollars. *Id.* And if the case does not end there, the platform will face the even more exorbitant costs of discovery, or, worse, trial. *Id.*

Without Section 230 platforms would be hurt, and in the case of an expressive business like the Copia Institute both directly and indirectly. The Copia Institute doesn't just provide a platform for third party expression in the form of Techdirt comments; it also is the user of other providers' platforms (including those of small startups, or companies that once were). Sometimes these are backend platforms, such as web hosts like Automattic or domain registrars. Other times they are specialized platforms that host other forms of content the Copia Institute produces, such as SoundCloud and the AppleStore, which serve its podcasts to

listeners. The Copia Institute thus needs for these platforms to all remain sufficiently protected for it to deliver its expression to audiences.

Platforms are also important in making the Copia Institute a sustainable business. In the past the Copia Institute has used ad platforms to monetize its Techdirt articles, and in general its monetization activities require the support of payment providers and other platforms like Patreon that help support the monetization of expression. One way the Copia Institute makes money is by allowing readers to become "Insiders" in exchange for certain perks, including being part of an exclusive reader community, and the Copia Institute is currently using the Discord platform to provide that community a forum to interact.

But none of these platforms could exist to support the Copia Institute's expressive business were it not for the Section 230. Affecting their protection will inevitably affect the Copia Institute as well, if not completely disappearing the platforms it uses then leading them to be less useful, as their resources get diverted into simply trying to stave off liability, rather than making their services better.

ii. As individuals

There is nothing in Section 230 that requires Internet services to be offered by companies, nor is there anything intrinsic about the nature of the Internet that would require it either. There is a public appetite for alternatives to large platforms, which has been

demonstrated by the rapid uptake in Mastodon usage as an alternative to Twitter,[28] which changed its moderation practices following a recent change in corporate ownership.[29] To get these alternatives, and the widest variety of services possible, the public should not have to depend on large companies to be the sole source of these services. Enriching platforms can be provided by others, including non-profits, and, as Riley personifies, individuals desiring to help their friends, colleagues, and even complete strangers connect online. The online services Congress sought to protect with Section 230 can be provided by anyone, and Section 230 protects anyone who does.

But without Section 230 Riley would find himself in an untenable position. While he could potentially try to protect himself by providing his Mastodon service through a corporation, or by obtaining insurance, neither cost is negligible, and without Section 230 mitigating the legal risk insurance may become unobtainable anyway. The more expensive and risky the endeavor, the fewer who will engage in it, and the less diversity of services there will be available for people to engage online.

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[28] Matt Binder, *Mastodon has gained millions of new users since Elon Musk bought Twitter*, MASHABLE (Dec. 20, 2022), https://mashable.com/article/mastodon-millions-users.

[29] Mike Masnick, *The Elon Speedrun Continues; Apparently Comedy Is Not Quite Legal On The New Twitter*, TECHDIRT (Nov. 11, 2022), https://www.techdirt.com/2022/11/07/elon-musk-continues-to-speedrun-the-content-moderation-learning-curve/.

While he may not provide a platform to others on the scale that a Google, Twitter, or even the Copia Institute or a startup in the Engine family does, a single lawsuit against him could be devastating. Even a litigation threat would be overwhelming, and without Section 230 he could potentially face any number of threats arising from any one of his many users' immeasurable posts. While the volume of user content may be less than larger platforms handle, it would still be infeasible to police it all to try to avoid trouble. Section 230 exists in part because Congress recognized that no platform could possibly review every bit of content users used the service for. *Zeran*, 129 F.3d at 331 (observing that the volume of information communicated via interactive computer services, even 25 years ago, was already "staggering"). Furthermore, without Section 230 keeping state and local regulators at bay through its preemption provision, 47 U.S.C. § 230(e)(3),[30] there might be no way to successfully moderate in a way to avoid trouble, especially as these jurisdictions can easily impose conflicting rules, and with dire consequences if he flouts any of them. Given the degree of controversy surrounding many topics, and the polarized positions currently taken by various state governments, the likelihood that user expression he allows will antagonize a state law is high, making

[30] The risk of state law imposing liability has been a concern from the outset and an impetus for passing Section 230, given that *Stratton Oakmont* itself was a case where a state court, interpreting state law, had created an enormous risk of platform liability based solely on local law. *Batzel*, 333 F.3d at 1029.

Section 230 thus critical to protecting himself from those consequences.

But even if he could somehow manage to review all of his users' content, there would be no way for him to have the expertise to review it all in a way that would meet with everyone's, or even anyone's, satisfaction. User posts may not even be in a language he can understand, let alone have intimate familiarity with the shifting cultural context and norms a particular piece of user expression implicates, and thus he would have little ability to judge its potentially objectionable quality. To avoid trouble he would have to block large swaths of content, or perhaps employ algorithmic tools produced by someone else to outsource the judgment needed to make the moderation decisions he needs to make.[31] As this case suggests, however, no one's judgment is infallible enough to avoid all trouble, and thus not something that could be relied upon to replace the assurance Section 230 itself is supposed to provide.

As an individual, Riley directly personifies how providing a platform service is itself an expressive activity that the First Amendment protects, and how critically important it therefore is to have a statute like Section 230 preventing the exercise of those expressive rights from being chilled. Like any platform provider – big or small, commercial or otherwise – Riley must

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[31] Including, perhaps, those of Google. Cristina Criddle, *Google develops free terrorism-moderation tool for smaller websites*, ARS TECHNICA (Jan. 3, 2023), https://arstechnica.com/tech-policy/2023/01/google-develops-free-terrorism-moderation-tool-for-smaller-websites/.

make choices in order to administer his service. These choices include deciding whom to provide accounts to,[32] what the rules for his user community should be in order to best foster user discourse and minimize abuse (and deciding then when and how to enforce them),[33] and, as discussed, what technical tools to employ in service of connecting people to the expression they seek to consume or avoid.[34] Like with the Copia Institute discussed above, the choices that he makes vindicate his own expressive interests. In his case, Riley has chosen to support users who are connected to the technology policy field. If Riley did not care about facilitating discussion about technology policy, he could make different choices. The First Amendment protects those expressive and associative choices. *Tornillo*, 418 U.S. at 258. But it is Section 230 that makes that

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[32] His is currently "intended for use by technology and internet policy professionals." *See* https://techpolicy.social/about.

[33] *See id.* ("Users wishing to join techpolicy.social are expected to act without malice and in good faith. Doing otherwise may lead to removal from the service, independent of whether a user violates the content moderation rules.").

[34] The current distribution (or version) of Mastodon offers a few algorithmic tools to modulate how content is intermediated, in particular regarding the general display of content published by users on other instances, as well as any "trending" content. The open nature of Mastodon's code allows for additional software to be written to provide more algorithmic functionality, either as part of the Mastodon server software itself or as external services or applications that can work with it, or even to replace the Maston server software itself with a compatible alternative. Providers of external services interacting with Mastodon may also depend on Section 230 when their systems handle content created by others.

Constitutional protection meaningful by insulating him from litigation arising from how he makes those choices in the course of facilitating user expression and moderating the user community he has cultivated. Without it, his own freedom to do so is in jeopardy.

B. Judicial reinterpretation curtailing Section 230 will not make the Internet better

No law can fix the ills of humanity so often on display on the Internet. But a good one, like Section 230, can help us cope with humanity's worst while enabling its best. The bitter irony is that by diminishing Section 230 in the quest to avoid all bad uses of online services it may prevent all good ones as well. It is not something that any lawmaker should seek to do.[35]

Ultimately what platforms do is connect people, which is both its curse and its blessing. For the first time in the history of civilization all eight billion of us can talk to each other. Many of the problems we face with the Internet stem from us having not yet figured out how to cope with this sudden increase in communications capability, plus the unfortunate reality that

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[35] It is also not something the courts should do. As this Court has noted, "The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1753 (2020). If the statute were unconstitutional it could perhaps be appropriate for courts to step in, but, as explained below, in the case of Section 230, it is only its curtailment that risks having unconstitutional effects.

not everyone the Internet connects uses that expressive ability for good. But these issues do not suggest that Section 230 is a failure, but rather that it is a success. Platforms may not have necessarily gotten everything right as the Internet has grown and evolved, but with Section 230 they have the freedom to get better.[36]

With a law like Section 230 we can put platforms in the position where they are free to do what they can to mitigate harms while still preserving and encouraging all the benefit that the Internet still has to offer. Amici are hardly exceptional in having little desire to help people bent on doing harm to others; instead they and their compatriots are most desirous to create safe, healthy, and relevant communities of users able to use their services to express themselves constructively. Section 230 is critical to platforms being able to do the best they can on both fronts, because inevitably they will come up short, turning away too much of something positive and allowing too much of something negative. As the Copia Institute has often observed, content moderation at scale is impossible to do well,[37] even for the most well-intentioned and well-resourced

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[36] And they already have. *See*, *e.g.*, The Copia Institute, *Content Moderation Case Study: Discord Adds AI Moderation To Help Fight Abusive Content (2021)*, TECHDIRT (Dec. 1, 2021), https://www.techdirt.com/2021/12/01/content-moderation-case-study-discord-adds-ai-moderation-to-help-fight-abusive-content-2021/.

[37] Mike Masnick, *Masnick's Impossibility Theorem: Content Moderation At Scale Is Impossible To Do Well*, TECHDIRT (Nov. 20, 2019), https://www.techdirt.com/2019/11/20/masnicks-impossibility-theorem-content-moderation-scale-is-impossible-to-do-well/.

platform, and it is simply not reasonable to expect any platform to do it perfectly, assuming we could even all agree on what perfectly would be.

And we don't all agree, which itself is a significant reason why caution should be exercised before curtailing Section 230. Such disagreement is inevitable, which is why the First Amendment's admonition to "make no law" told the government to get out of the business of imposing rules about what could be expressed. What some consider odious expression, others consider acceptable, even desirable. It is hardly controversial to note that politics today are highly polarized and there will be regulatory temptations at all points on the political spectrum to control online expression. Curtailing Section 230 would let political adversaries in governments play tug-of-war over platforms, each trying to create forms of liability to threaten platforms into imposing their moderation preferences by eliminating platforms ability to exercise their own.[38] Such unconstitutional meddling by state power is not something this Court should open the door to.

Ultimately what lets a provider like Riley, for example, say no to certain expression he does not want to be associated with, and allows some other Mastodon provider to say yes, is the First Amendment. Section 230 makes it practical to effectuate those decisions, but it is the First Amendment that protects the

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[38] *NetChoice v. Florida*, 34 F.4th 1196, 1201 (11th Cir. 2022) (*certiorari* pending No. 22-277 and 22-393). *See also Zeran*, 129 F.3d at 330.

government from forcing a platform provider to make them in a way it does not want to make them. The First Amendment does not permit compelling Riley to advance expression he does not want to advance, and at the scale of a single human the unconstitutionality of such an incursion on expressive liberty is easy to see. No law should be able to encumber Riley with the burden of providing the new public square as the price of choosing to help others speak online.

But the Constitutional rule against such compulsion applies to more than just a single individual; it applies to organizations and companies too. After all, the Copia Institute is a company started by an individual to further his own expression, which should be protected. Meanwhile the startups Engine works with are owned and run by individuals who have come together to pursue their businesses, and there is no reason that having come together should have waived those same expressive rights either. Even if those startups were to grow as big as Google there is no sensible rationale that could survive scrutiny to justify how these rights could be extinguished when a platform was run by a company of some arbitrary size. It would also deter the investment Congress sought to stimulate, *see Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018), if, by becoming too big, companies could suddenly lose their Section 230 protection.[39]

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[39] Much as Congress was keen to encourage startups with Section 230, the law was never intended to only protect them. Indeed, it was passed in response to litigation against Prodigy,

The freedom Riley enjoys to moderate and facilitate others' content, thanks to the First Amendment and Section 230 making its expressive rights something he can meaningfully exercise, means that anyone can offer a competing service to help get others' expression online. That freedom is not something Congress or the courts should interfere with.

CONCLUSION

For the forgoing reasons, this Court should find that Section 230 precludes Petitioners' claims.

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which was a platform started by CBS, IBM, and Sears. *See* https://en.wikipedia.org/wiki/Prodigy_(online_service).