No. 22-555

IN THE
Supreme Court of the United States

NETCHOICE, LLC D/B/A NETCHOICE; AND COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION D/B/A CCIA,
Petitioners,

v.

KEN PAXTON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Amicus Brief of Senator Josh Hawley in Support of Respondent

JOSH HAWLEY
U.S. SENATOR
Counsel of Record
JOHN S. EHRETT
JAMES COMPTON
115 Russell Senate Office Bldg.
Washington, D.C. 20510
(202) 224-6154
Ellen_James@hawley.senate.gov

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INTEREST OF *AMICUS CURIAE*[*]

As a Member of the U.S. Senate, Ranking Member of the Senate Judiciary Committee's Subcommittee on Privacy, Technology, and the Law, and a former state attorney general with a long record of engagement on technology policy, Senator Josh Hawley has a strong interest in upholding Congress's ability to regulate the Nation's most powerful corporations and information channels. *Amicus* urges the Court to affirm the decision of the Court of Appeals and interpret the First Amendment in a manner consistent with the common-law legal principles that anchor the American constitutional framework.

SUMMARY OF ARGUMENT

I. American publication law has always reflected a commonsense principle: individuals who play an active role in disseminating others' speech are liable for any unlawful harm that speech causes. Despite the evolution and "constitutionalization" of libel law over the centuries, this principle generally remains intact.

In the late twentieth century, Congress and the courts needed to square this principle with the realities of the internet age, in which tech platforms host—but do not carefully vet—vast amounts of individual users' speech. The result was Section 230 of the Communications Decency Act, which broadly insulated platforms from civil liability for hosting user-generated content. At the time, Section 230 was justified on the theory that platforms *could not*

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

exercise publisher-level control over the speech generated by third-party users.

II. Despite decades arguing for this position, today the tech platforms take precisely the opposite line. They claim that their content hosting and curation decisions *are* in fact expressive—expressive enough that they enjoy First Amendment protection.

The Court should not bless the platforms' contradictory positions, much less constitutionalize them. Doing so would effectively immunize the platforms from *both* civil liability in tort and regulatory oversight by legislators. Among other harms, such a ruling would undercut the Court's recent *Twitter* v. *Taamneh* decision, which was predicated on the assumption that companies do not exercise substantial control over the content on their platforms. It would also disrupt the policy logic behind both Section 230 and the American publisher-liability regime as a whole, granting vast and unprecedented powers to the tech industry. That sector is not, and never has been, entitled to blanket immunity from both regulation and liability.

ARGUMENT

I. Traditional liability law, both before and after the digital age, reflects a complex balance of policy concerns.

Across the centuries, the American law of liability has reflected a consistent principle: when a person affirmatively prints or disseminates speech that wrongs another, the responsible party is liable in tort to the injured party. The exceptions granted to web platforms are qualified modifications of that rule,

predicated on specific assumptions about how web platforms work.

A. Traditionally, a publisher's editorial decisions were protected by the First Amendment, but could incur civil liability.

"Editorial decisions" are not free of consequences. Consistent with this principle, early American libel law was far more expansive than modern libel law. Politicians who were defamed in the press routinely sought damages through civil suits. See Norman L. Rosenberg, *The New Law of Political Libel: A Historical Perspective*, 28 Rutgers L. Rev. 1141 (1975). In one high-profile proceeding, multiple appellate courts upheld a ruling in favor of Erastus Root, who was falsely accused of being drunk while presiding over the New York legislature. *Id.* at 1145.

The courts' approach made policy sense. As Chancellor Reubon Walworth explained, allowing a publisher to escape liability for defamation would seriously undermine the political process by deterring qualified individuals from participating. No person "who had any character to lose, would be a candidate for office under such a construction of the law of libel." *Id.* at 1145. In the context of false and damaging speech, civil liability serves an important public interest.

To be sure, it is harder to bring such cases today. In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), the Court significantly curtailed the scope of libel law, through what has been described as its "constitutionalization." Invoking a broad vision of the First Amendment's speech protections, the *Sullivan*

Court significantly curtailed public officials' right to bring defamation claims.

But crucially, *Sullivan* did not create an all-purpose civil liability shield, giving individuals carte blanche to publish or distribute whatever they wanted. Far from it. Three years later, the Court explained in *Curtis Publishing* that "the Constitution presents no general bar to the assessment of punitive damages in a civil case" involving defamation. *Curtis Pub. Co.* v. *Butts*, 388 U.S. 130, 159 (1967). "Publishers," the Court stressed, "engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee." *Id.* at 159–60.

So too, such an exemption would venture well outside the American legal tradition. In cases of affirmative misconduct, a liability shield would violate the longstanding principle that "men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." *Day* v. *Woodworth*, 54 U.S. 363, 371 (1851). A policy of blanket immunity from liability for affirmative publication or distribution decisions would—rightly—have been unthinkable to any of the jurists involved. Neither *Sullivan* nor the First Amendment itself dictate such a result.

Because this rule of publisher liability proved difficult to translate into the digital age, Congress created Section 230.

B. Section 230, which insulates tech platforms from most civil liability, was enacted on the theory that treating tech platforms as traditional publishers was a mistake.

Congress originally passed Section 230 to address the questions of whether and how internet service providers could be held liable for user-generated content. As potentially defamatory postings on early internet message boards began to circulate, courts had started to hold that service providers were "publishers" if they engaged in any content moderation at all. See *Stratton Oakmont, Inc.* v. *Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995). Without congressional intervention, internet service providers would be deterred from moderating content or even hosting user-generated content in the first place. In such a world, the internet as we know it might not exist.

The original justification for Section 230 immunity was therefore straightforward: the internet contains too much content for web platforms to meaningfully edit it. "The amount of information communicated via interactive computer services is… staggering . . . . It would be impossible for service providers to screen each of their millions of postings for possible problems." *Zeran* v. *Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Tech platforms repeat this refrain to this day, arguing that "[w]ith every website accessible to billions of Internet users around the planet, and many websites hosting millions of users generating their own content, the fundamental

principle of Section 230 that websites should not be liable for monitoring user-generated content is even more relevant today than ever." Brief for Amici Curiae Chris Cox and NetChoice Supporting Platinff at 6, *Homeaway.com, Inc.* v. *City of Santa Monica*, 2018 WL 1281772, No. 2:16-CV-06641-ODW (C.D. Cal. Mar. 9, 2018); see also Brief for Amici Curiae Electronic Frontier Foundation, et al. Supporting Respondent at 22, *Gonzalez* v. *Google LLC*, 598 U.S. 617 (2023) (21-1333) ("[t]he ability - both logistically and financially - for modern platforms to conduct a fair review [of user-generated content] is dubious given the incredible volume of content generated by platform users."); Brief for Amicus Curiae Twitter Supporting Respondent at 11, *Gonzalez* v. *Google LLC*, 598 U.S. 617 (2023) (21-1333), ("[Section 230] facilitates robust development of the Internet by preventing crippling liability for websites that disseminate 'staggering' volumes of online communications.").

However, there were limits. This new congressionally-created immunity was not a *blanket* immunity. Properly understood, Section 230 retained a principle of distributor liability: companies would continue to be liable in tort for content they affirmatively *amplified*. But the Fourth Circuit gutted that (correct) understanding of the law in *Zeran*, which collapsed "distributor"-type liability into "publisher"-type liability and found that Section 230 precluded the imposition of both. 129 F.3d at 332. *Cf.* Brief for Senator Josh Hawley as Amicus Curiae Supporting Petitioners, Gonzalez *v. Google LLC*, 598 U.S. 617 (2023) (No. 21-1333).

C. Section 230's exception from the traditional rule of publisher liability is predicated on, and qualified by, critical assmptions about how platforms work.

Crucially, both Section 230 and the *Zeran* decision were rooted in the notion that companies really do not seek to communicate anything substantive at all through their content-hosting decisions. Platforms are, by logistical necessity, just the conduits of other users' speech. *Cf. NetChoice LLC* v. *Paxton,* 49 F.4th 439, 459 (5th Cir. 2022) ("virtually everything . . . is just posted to the Platform with *zero* editorial control or judgment") (emphasis in original); see also *Force* v. *Facebook, Inc.*, 304 F. Supp. 3d 315, 328 (E.D.N.Y. 2018) (Facebook posts may be made "without prior approval from Facebook").

Indeed, the immunity platforms enjoy is logically premised on their alleged inability to curate the content they host. Because platforms (ostensibly) cannot meaningfully review all the content on their websites, the law protects them from the liability that would conventionally result. Their liability shield extends directly from their inability to control what users post. This has been the position of the industry for the last twenty-seven years.

That factually-predicated liability shield is an exception from the basic common-law rule. Historically, the norm has been to hold individuals liable for the speech they choose to publish or amplify. However, given the unique circumstances involved, Congress—through Section 230—modified those traditional liability rules in the digital context.

This modification of liability was always a *qualified* modification. It had limits. Congress never intended to extend absolute immunity to tech

platforms for whatever speech-related actions they might take. And yet this is the result that, in principle, the platforms now seek.

II. The Court should not grant tech platforms an impenetrable liability shield.

The platforms seek to turn their qualified liability shield into an absolute one by rejecting the factual premises underlying Section 230 doctrine, while retaining its protections. Traditional liability law—and Section 230, as originally designed—reflect a delicate balance between holding publishers and distributors accountable for harmful material they print or amplify, and allowing individual citizens to communicate freely—including online. That balance made sound policy sense. The platforms now aim to upend it.

A. The tech platforms' case for blanket immunity is based on a fundamental conceptual contradiction.

Having insisted for decades that they cannot meaningfully prune the thicket of user content they host, the platforms now insist that their own editorial practices are not only effective, but *expressive*. "[Platforms'] editorial choices are expressive, reflect platforms' values, and convey a message about the platforms and the communities they hope to foster." Brief of Appellees at 6, *NetChoice, LLC* v. *Paxton*, 49 F.4th 439 (5th Cir. 2022) (21-51178). "[Websites] constantly engage in editorial filtering, providing curated experiences and limiting how their customers and advertisers may use their websites, pursuant to policies they publish and enforce." Petitioners' Br. at 31. Rather than serving as passive hosts of user

expression, the platforms are now apparently *careful curators*, intentionally selecting which expression to publish and which to disallow.

The contradiction is blatant. On one hand, there is the longstanding proposition—which drives the policy logic of Section 230—that platforms are *not* traditional publishers, because they are merely conduits for others' speech. Until now, the volume of content involved supposedly meant that users' expression could not be attributed to the platform in any way, "even where the interactive service provider has an active, even aggressive role in making available content prepared by others." *M.A. ex rel. P.K.* v. *Vill. Voice Media Holdings, LLC*, 809 F. Supp. 2d 1041, 1053 (E.D. Mo. 2011) (quoting *Blumenthal* v. *Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998)).

On the other hand, platforms now argue that they *are* traditional publishers, and so their own content moderation decisions constitute "speech" worthy of First Amendment protection. Now, the platforms insist that the way they filter content is intentionally expressive: "everything readers and viewers see on covered websites is arranged according to the websites' distinctive editorial policies." Petition for Writ of Certiorari at 3, *NetChoice* v. *Paxton* (No. 22-555). A far cry from the passive hosts of the 1990s, the web platforms of the 2020s claim that their curation is so bespoke as to *become speech itself*.†

† To be clear, the situation is *not* that platforms curate some content—for which they receive First Amendment protection—and leave untouched a sea of unexamined user posts—for which they receive Section 230 protection. Platforms have claimed that Section 230 immunizes them against claims based on *any* user content, even that which they curate or promote. See, e.g., *Nemet*

It is, of course, in the platforms' interest to maintain this contradiction. Equivocating on their role in "publication" allows the platforms to invoke Section 230 to shield their behavior from private suits, and simultaneously invoke the First Amendment to shield their behavior from Texas's law in the instant case.

But the platforms' argument completely undercuts the logic of Section 230. Under Section 230, providers shall not be treated by courts as the publishers of others' speech because, *in fact*, they are not. They are, in principal part, conduits. The statute explicitly distinguishes an "information content provider" from an "interactive computer service" by stipulating that a "content provider" is the individual responsible "for the creation or development of information *provided through*" the internet or any related "interactive computer service." 47 U.S.C. § 230(f)(3). The *service* is not a creator or developer of the information at issue. The content provider—the individual speaking online—is the party responsible. Such a reading does not preclude holding companies responsible for their affirmative acts under a theory of distributor liability—but it does mean that platforms are not "publishers" in the sense that they

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Chevrolet, Ltd. v. *Consumeraffairs.com, Inc.*, 591 F.3d 250, 258 (4th Cir. 2009) (Section 230 immunity granted where website allegedly revised defamatory statement); *Jones* v. *Dirty World Ent. Recordings LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (Section 230 immunity applied where website selected allegedly defamatory statements for publication). And they argue now that the First Amendment protects all of their moderation decisions, even their decision to *not* moderate. See Petitioner's Br. at 20–21.

speak by merely hosting content. Else, the statute makes no sense as written, because every "interactive computer service" would also, by dint of their editorial practices, also be an "information content provider."

In an effort to square this circle, the platforms have previously alleged that Section 230's stipulation that tech platforms are not "treated as" publishers is just a smokescreen. On their interpretation, tech platforms *are in fact* publishers, but Section 230 temporarily creates a legal fiction that they are not—at least for purposes of civil liability. In reality, they claim, said publishers still have a viable First Amendment stake in the content they host, even though they cannot be held liable for anything they do. See *NetChoice*, 49 F.4th at 466–67. This is an esoteric interpretation of the statute that flies in the face of both text and logic. Nothing in the words of Section 230 is so cabined or convoluted. And this reading is entirely inconsistent with the longstanding legal principle that, when publishers or distributors commit misconduct, injured parties should be able to hold them liable.

In any event, this case is an appropriate vehicle for clearing away years of this jurisprudential debris. Above all, the Court should not, whether implicitly or explicitly, bless the underlying *factual* contradiction here: the platforms' evolving and internally inconsistent position on their own role in disseminating users' speech. It is time for the Court to finally resolve what, *in reality*, tech platforms do when they host the speech of third parties.

B. Embracing the platforms' contradictory position would undermine the Court's recent decision in *Twitter* v. *Taamneh*.

Conceptual consistency is not an abstract concern. Accepting the platforms' position in this case would directly undermine the Court's own recent precedent. In *Twitter, Inc.* v. *Taamneh*, 598 U.S. 471 (2023), this Court considered whether content moderation on a web platform constituted affirmative expressive conduct and concluded that it did not. Granting the web platforms First Amendment protections in this case would gut the logic of that ruling, less than a year after it was issued.

In *Taamneh*, the Court addressed petitioners' allegation that the web platform defendants aided and abetted ISIS by hosting and promoting its videos. The algorithms promoting ISIS content in that case were essentially the same (and in the case of Google, exactly the same) as the algorithms used by NetChoice members to curate their content. The Court found that the platforms did not aid and abet ISIS for a number of reasons, but the meat of the Court's analysis focused on the lack of a concrete nexus between the platforms and ISIS. In concluding that there was no such nexus, the Court wrote, "the only affirmative 'conduct' defendants allegedly undertook was creating their platforms and setting up their algorithms to display content relevant to user inputs and user history." *Taamneh*, 598 U.S. at 498.

But the opinion went even further. The Court stated that web platforms do not screen content uploaded to them or exercise selectivity based on a user's message:

> [T]here is not even reason to think that defendants carefully screened any content before allowing users to upload it onto their platforms. If anything, the opposite is true: By plaintiffs' own allegations, these platforms appear to transmit most content without inspecting it . . . . As presented here, the algorithms appear agnostic as to the nature of the content, matching any content (including ISIS' content) with any user who is more likely to view that content.

Id. at 498–99. The Court's characterization of *Taamneh* hinged on platforms' moderation being passive and content-agnostic. It stands to reason that a ruling for the platforms in *this* case—that web platforms' editorial practices are expressive—would pull the rug out from under *Taamneh*.

In short, siding with the platforms here would create a direct conflict in the Court's precedent. Platforms would be both passive observers and expressive curators; they would be both message-conscious and content-agnostic. The Court's precedent would permanently enshrine the platforms' contradictory, self-serving position—rendering this area of law confusing, unpersuasive, and unworkable.

C. Adopting the web platforms' inconsistent positions would grant them unprecedented power—de facto immunity from private or public regulation.

Enshrining a platform-friendly contradiction in the law would free the platforms from any real form of accountability. Platforms would be functionally immune from both private suit and government regulation. This, when layered on top of their existing ability to control internet traffic, would be disastrous. They would be free to direct online discourse as they wish, unrestrained by any external checks or limits.

Section 230 already grants web platforms an unprecedented degree of protection from liability. Shielded from the threat of private suit, platforms are able to engage in business practices that would be unthinkable in any other industry. Meta alone is responsible for exposing hundreds of thousands of young girls to unwelcome sexual advances. *Social Media and the Teen Mental Health Crisis: Hearing Before the S. Jud. Subcom. on Privacy, Technology and the Law,* 118th Cong. 3 (2023) (Written Testimony of Arturo Bejar). Victims know Meta is responsible, and Meta has intentionally ignored this problem—and even fostered it, see James Vincent, *Instagram's Recommendation Algorithms Are Promoting Pedophile Networks*, The Verge (June 7, 2023, 8:01 AM), https://www.theverge.com/2023/6/7/23752192/instagrams-recommendation-algorithms-promote-pedophile-networks-investigation. Yet even so, Section 230 bars the door to civil relief. No other

business in any sector of the economy is allowed to conduct itself in this way.

But this is not enough for the platforms; they want even more. Insulated by statute from any threat of private accountability, they now want to be free from government accountability as well. Petitioners are not a modest trade group of publishers, despite what their briefing may imply. The companies represented by NetChoice are the most powerful force in American economy and culture. Just two, Meta and Yahoo, have almost 4 billion users between them. See Meta Investor Relations, *Meta Reports Fourth Quarter and Full Year 2022 Results,* Meta (February 1, 2023), https://investor.fb.com/investor-news/press-release-details/2023/Meta-Reports-Fourth-Quarter-and-Full-Year-2022-Results/default.aspx;
Yahoo, *Yahoo Analytics* (2023), https://legal.yahoo.com/us/en/yahoo/privacy/topics/analytics/index.html.
Google, which processes 85% of computer web searches and 95% of mobile web searches in the United States, is a member of NetChoice and part of this suit. Complaint at 31, *United States* v. *Google*, No. 1:20-cv-03010 (D.D.C. 2020). Amazon, which hosts nearly a third of internet cloud infrastructure, is a member of NetChoice and part of this suit. See Synergy Research Group, *Q1 Cloud Spending Grows by Over $10 Billion from 2022; the Big Three Account for 65% of the Total*, (April 27, 2023), https://www.srgresearch.com/articles/q1-cloud-spending-grows-by-over-10-billion-from-2022-the-big-three-account-for-65-of-the-total.

Extending an ahistorical blanket immunity to this sector will have real-world consequences. To invoke a frighteningly realistic hypothetical, nothing could stop a web platform's algorithm from promoting

content designed to addict and harm young people.‡ Take, as an example, content promoting eating disorders (a shockingly common phenomenon on modern social media). Companies could choose to affirmatively undermine the mental and physical health of America's youth, while enjoying the protections of Section 230. While teens starved and parents looked on, no private action would lie.§ And then, when the government stepped in, the platforms could simply invoke their First Amendment immunity. Promoting eating disorders could be, after all, an *editorial choice*. Nestled in a comfortable fissure between legal doctrines, the platforms could look on as their algorithms—or affirmative curation decisions—devastated a generation.

Neither constitutional nor statutory authority demands a world where tech platforms are *de facto* immune from legal control, whether by lawmakers or by private citizens in civil actions. It is an elementary principle of American governance that no one is above the law. And yet that is, in essence, what the

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‡ See, e.g., Billy Perrigo, *Instagram Makes Teen Girls Hate Themselves. Is That a Bug or a Feature?*, Time (September 16, 2021, 12:06 PM) https://time.com/6098771/instagram-body-image-teen-girls/ ("Facebook, which owns Instagram, has known for years that the platform is harmful to the mental health of many teenagers—particularly girls—but has kept internal research about the issue private"); Georgia Wells, Jeff Horwitz, & Deepa Seetharaman, *Facebook Knows Instagram is Toxic for Teen Girls, Company Documents Show*, Wall St. J. (September 14, 2021, 7:59 AM) https://www.wsj.com/articles/facebook-knows-instagram-is-toxic-for-teen-girls-company-documents-show-11631620739?mod=article_inline ("We make body image issues worse for one in three teen girls.").

§ This is, of course, the actual status quo. Whether that remains true depends on the Court's decision in this case.

platforms now demand. The Court should not bless their wish.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

JOSH HAWLEY
U.S. SENATOR
Counsel of Record
JOHN S. EHRETT
JAMES COMPTON
115 Russell Senate Office Bldg.
Washington, D.C. 20510
(202) 224-6154
Ellen_James@hawley.senate.gov

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