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 FOR THE STATES OF TENNESSEE, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, VERMONT, VIRGINIA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The States of Tennessee, Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Idaho, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Rhode Island, South Carolina, South Dakota, Vermont, Virginia, and the District of Columbia have a significant interest in protecting their historic powers from incursion by the federal government.[1] Since the founding, our federal system has principally relied on state law to compensate victims of wrongful conduct. But the States' ability to remedy internet-related wrongs has been severely hampered by the judicial expansion of internet "publisher" immunity under Section 230 of the Communications Decency Act. What was enacted as a narrow protection from defamation liability has become an all-purpose license to exploit and profit from harmful third-party conduct, with ordinary people in the *amici* States left to pay the price. *Amici* thus urge this Court to reverse the decision below and adopt an interpretation of publisher immunity that preserves the States' traditional authority to allocate loss among private parties.

SUMMARY OF THE ARGUMENT

The federalism canon supports a narrow interpretation of Section 230's "publisher" immunity.

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

I. This Court considers federalism when determining the scope of federal statutes. Recognizing that Congress legislates against the backdrop of our federal system, the Court typically allows only the clearest textual commands to alter the balance of state and federal power. This federalism-based interpretive principle is deeply rooted in this Court's jurisprudence and is often invoked to preserve the States' broad authority.

II. Current precedent fails to account for federalism when interpreting Section 230. Adopting an ever-expanding view of what it means to "treat[]" an internet company as a "publisher" of third-party content, lower courts have granted immunity beyond anything Congress intended. This broad interpretation of Section 230 has resulted in the widespread preemption of state laws and the concomitant erosion of traditional state authority to allocate loss among private parties.

III. The Court should apply the federalism canon to interpret Section 230 narrowly in this case. Congress intended the statute's "publisher" immunity provision to provide only a limited carve-out for those who operated like traditional publishers in what was then—in 1996—a nascent internet. But internet companies now do far more than simply publish third-party content; they actively engage and interact with their users through tailored content recommendations and other sophisticated programming. The text of Section 230 does not cover novel interactions like the targeted promotion at issue here—much less in a clear

or obvious way. Accordingly, a straightforward application of the federalism canon weighs heavily in favor of reversal.

ARGUMENT

I. This Court Presumes That Acts of Congress Respect Traditional State Prerogatives.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty" that divides power "between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Under that system, the federal government wields only the "enumerated powers" surrendered by the States in the Constitution, *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), which are necessarily "few and defined," The Federalist No. 45, at 313 (J. Madison) (J. Cooke ed. 1961).

The States, by contrast, retain "numerous and indefinite" powers that "extend to all the objects . . . concern[ing] the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity" of the country. *Id.*; *see also* U.S. Const. amend. X ("reserv[ing] to the States [and] the people" all "powers not delegated" to the federal government or "prohibited" by the Constitution). Thus, while legitimate acts of Congress are the "supreme Law of the Land," U.S. Const. Art. VI, cl.2, the very fact that "[t]he States exist" and exercise broad residual power "refut[es]" any notion that the federal government acts as the "ultimate, preferred mechanism for expressing the people's will," *Alden v. Maine*, 527 U.S. 706, 759 (1999).

This division of power "preserves the integrity, dignity, and . . . sovereignty of the States," *Bond v. United States* (*Bond I*), 564 U.S. 211, 221 (2011), and thereby "secures to citizens the liberties that derive from the diffusion of sovereign power," *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013) (quoting *Bond I*, 564 U.S. at 221); *see also* The Federalist No. 51, at 351 (J. Madison) (J. Cooke ed. 1961) (discussing the "double security" provided by the "compound republic of America"). Indeed, the federal system "assures a decentralized government . . . sensitive to the diverse needs of a heterogenous society," "increases opportunity for citizen involvement in democratic processes," "allows for more innovation and experimentation," and "makes government more responsive by putting the States in competition for a mobile citizenry." *Gregory*, 501 U.S. at 458. These safeguards are a driving force behind the success of the American experiment.

Recognizing the importance of state sovereignty, this Court has long presumed that Congress legislates with an eye toward "preserv[ing] the constitutional balance between the National Government and the States." *See Bond v. United States* (*Bond II*), 572 U.S. 844, 862 (2014) (quoting *Bond I*, 564 U.S. at 222). To displace traditional spheres of state authority, Congress must therefore "make its intention to do so 'unmistakably clear in the language of [a] statute.'" *Gregory,* 501 U.S. at 460 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). And that is no low hurdle: The text itself must contain "exceedingly clear language . . . to significantly alter the balance between federal and state power." *U.S. Forest*

Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–1850 (2020).

This federalism-based interpretive principle is deeply rooted in the Court's jurisprudence and is often invoked when construing acts of Congress. The Court has respected federalism when interpreting laws that implicate civil rights, property rights, natural resources, and criminal punishment. *See id.* at 1849–1850; *Bond II*, 572 U.S. at 857–860; *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Jones v. United States*, 529 U.S. 848, 858 (2000); *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 544 (1994); *Will*, 491 U.S. at 65; *United States v. Bass,* 404 U.S. 336, 349–350 (1971). It has respected federalism when protecting state power to regulate local transportation services and labor relations. *See United Auto., Aircraft & Agric. Implement Workers of Am. v. Wisc. Emp. Rels. Bd.*, 351 U.S. 266, 274–275 (1956); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 513 (1940); *Palmer v. Com. of Mass.*, 308 U.S. 79, 84 (1939). It has respected federalism when considering laws setting qualifications for state office, *Gregory*, 501 U.S. at 457–464, and laws regulating interactions between state officials and their constituents, *McDonnell v. United States*, 579 U.S. 550, 576–577 (2016). And it has repeatedly shown respect for federalism when construing congressional delegations of legislative power. *See Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *United States v. Five Gambling Devices Labeled in Part "Mills," & Bearing Serial Nos. 593-221*, 346 U.S. 441, 449–450 (1953); *FTC v. Bunte Bros.*, 312 U.S. 349, 351 (1941).

In each of these contexts, and countless others, "'it is incumbent upon the . . . courts to be certain of Congress'[s] intent before'" holding that a "'law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond II*, 572 U.S. at 858 (quoting *Gregory*, 501 U.S. at 460).

II. Lower Courts Have Misconstrued Section 230 and Displaced Broad Swaths of State Law.

Unfortunately, the lower courts have largely disregarded federalism when interpreting and applying Section 230.

"[C]ases applying [Section 230] are notable for their expansive interpretation." Agnieszka McPeak, *Platform Immunity Redefined*, 62 Wm. & Mary L. Rev. 1557, 1574 (2021). Courts have "relied on policy and purpose arguments to grant sweeping protection to Internet platforms." *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 15 (2020) (Thomas, J., statement respecting denial of certiorari). This approach embraces "a capacious conception of what it means to treat" an internet company "as the publisher or speaker of information provided by a third party." *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016) (paraphrasing 47 U.S.C. § 230(c)(1)). In the name of "Congress's objectives," courts openly "favor . . . immunity," *Force v. Facebook, Inc.*, 934 F.3d 53, 64 (2d Cir. 2019), and freely ignore the limitations of Section 230's text, *see Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–334 (4th Cir. 1997) (blurring the distinction between "publisher"

and "distributor" liability). These decisions have "extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress." 1 Rodney A. Smolla, Law of Defamation § 4:86 (2d ed. 2019) (Nov. 2022 Update).

The result has been widespread preemption of state law to which "publishing" third-party content is at best "tangentially related." Gregory M. Dickinson, *The Internet Immunity Escape Hatch*, 47 BYU L. Rev. 1435, 1471 (2022). Straining to protect internet companies as "publisher[s]," courts have used Section 230 to preempt state-law claims for breach of contract, *Goddard v. Google, Inc.*, No. C 08-2738 JF (PVT), 2008 WL 5245490, at *5 (N.D. Cal. Dec. 17, 2008); gross and ordinary negligence, *Doe v. MySpace, Inc.*, 528 F.3d 413, 422 (5th Cir. 2008); negligence per se, *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019); unlawful and unfair competition, *Kimzey v. Yelp Inc.*, 21 F. Supp. 3d 1120, 1121, 1123 (W.D. Wash. 2014); products liability, negligent design, and failure to warn, *Herrick v. Grindr, LLC,* 306 F. Supp. 3d 579, 588–592 (S.D.N.Y. 2018); the intentional infliction of emotional distress, *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 402, 417 (6th Cir. 2014); public nuisance, *Armslist*, 926 N.W.2d at 726; civil conspiracy, *id.*; infringement of state-based intellectual property rights, *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108, 1118–1119 (9th Cir. 2007); state cyberstalking and securities violations, *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007); tortious interference with a business expectancy, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 252–253 (4th Cir. 2009); and aiding or

abetting other tortious conduct, *Goddard*, 2008 WL 5245490, at *7; *Armslist*, 926 N.W.2d at 726.

Indeed, the broad displacement of state law has created a "rift between the law applicable to online versus offline entities," essentially eradicating state law claims against any defendant who "happens to operate online." Dickinson, *supra*, 47 BYU L. Rev. at 1471.

This precedent strikes at the heart of one of "the classic concerns" of state law: allocating loss among private parties. *See* John Conyers, Jr., *Class Action "Fairness"—A Bad Deal for the States and Consumers*, 40 Harv. J. on Legis. 493, 501 (2003). Although the past century has seen increasing "willing[ness] to regulate all sorts of behavior through the federal government . . ., Congress has scrupulously, and with very few exceptions, respected the right of the states to develop, enforce, and apply" their own judgment as to "what kinds of behaviors give rise to a private action for damages." Roger Trangsrud, *Federalism and Mass Tort Litigation*, 148 U. Pa. L. Rev. 2263, 2266 (2000) (footnotes omitted). "[D]uring all that period, Congress [largely] respected tort law as a state prerogative." Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 Ariz. L. Rev. 917, 921 (1996). For example, while the Federal Aviation Administration "comprehensively regulates the airline industry, passengers injured in crashes sue under state law." Transgrud, *supra*, at 2266 (footnotes omitted). While the Food and Drug Administration reviews "[t]he safety and efficacy of prescription drugs . . ., state law provides the remedy for those hurt

by such products." *Id.* And while the Occupational Safety and Health Administration "regulates working conditions of buildings and construction sites," workers' "injuries are remedied under state law." *Id.*

When it comes to the internet, however, the campaign toward ever-expanded "publisher" immunity increasingly eliminates States' ability to allocate losses for internet-related wrongs. Without the courts' aggressive reading of Section 230, the States would have been free to "try novel social and economic experiments" in assigning such losses. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). That approach "comports with basic federalism principles," Coby Warren Logan, *Federal Class Action Reform Legislation: The "Unfair" Approach to Addressing the Issues of Modern Mass Tort Litigation*, 40 Tort Trial & Ins. Prac. L.J. 1145, 1171 (2005), and is particularly appropriate in areas where new technology raises the question of who should bear the costs of a harm.

But instead of letting state law sort it out, courts have almost completely prevented people from holding internet companies "accountable for harms," even when those harms "were facilitated or *caused by* the[ir] internet platforms," Val Rigodon, *Death by a Thousand Duck Bites in a No-Man's Land: Navigating Section 230's Scope and Impact in a Changing Internet and World*, 25 CUNY L. Rev. 311, 311 (2022) (emphasis added). It is highly unlikely Congress intended this near-global displacement of state law when it enacted Section 230 in 1996. By its terms, the statute

only prohibits the "treat[ment]" of an internet company "as the publisher or speaker" of third-party expression. 47 U.S.C. § 230(c)(1). It does not use "exceedingly clear language" setting out a general immunity from the plethora of personal-injury actions described. *Cowpasture*, 140 S. Ct. at 1849–1850; *supra* Part I. In other words, "[t]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (en banc). But as a result of the judicial gloss on Congress's terse language, losses that originate on the internet now simply lie where they fall.

III. Due Respect for Federalism Supports a Narrow View of "Publisher" Immunity That Does Not Reach the Targeted Promotion of Content.

This Court is free to ignore that gloss, *see CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 471 (2008) (Thomas, J., dissenting), and it should. Returning to Section 230's text and interpreting it with federalism in mind yields a more limited view of "publisher" immunity that leaves intact traditional state authority.

The term "publisher" has a well-recognized pedigree that should inform the statute's meaning. *See Stokeling v. United States,* 139 S. Ct. 544, 551 (2019). Under traditional defamation law, "publishers" exercise editorial control over the content they disseminate, and are thus subject to liability when they "reprint[]" someone else's libel. Restatement (Second) of Torts § 578, *Comment b* (1977). Their ability to filter

libelous statements thus distinguishes "publishers" from mere "distributors" of libel—like "news vendors, book stores, and libraries"—whose actual knowledge of the libel must be proved "before liability can be imposed." *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 139 (S.D.N.Y. 1991).

"In its early days, the internet more closely resembled the traditional publication world, and pre-Section 230 courts quickly adopted [these] publication-world principles." Gregory M. Dickinson, *Rebooting Internet Immunity*, 89 Geo. Wash. L. Rev. 347, 365 (2021). But libel law's distinction between "publishers" and "distributors" soon created a perverse incentive. As illustrated by the now-infamous *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), an internet company's efforts to moderate third-party posting could be construed as "editorial control" that would make the company a "publisher" as opposed to a mere "distributor," *id.* at *4. And as "millions of people flocked to the internet" to post their (sometimes libelous) thoughts, "manually moderating millions of comments, content, and posts became a heavy burden." Rigodon, *supra*, at 316. Thus, a company could either avoid defamation liability by letting third-party posters run amok, or it could attempt to clean up as much third-party content as possible and risk liability as a "publisher" of any libel that happened to slip through the cracks. Read against this backdrop, Congress's choice of the term "publisher" plainly took aim at eliminating a particular species of defamation liability, not the digital "printing" of third-party content more generally. *See* McPeak, *supra*, at 1574; *Force*, 934 F.3d at 78–80

(Katzmann, C. J., concurring in part and dissenting in part) (providing detailed account of the meaning of "publisher" at the time of enactment).

Since 230's enactment, however, advances in computer technology have made the internet a dramatically different place. Social media companies that now claim Section 230 immunity do not just "publish" user-generated material; they actively *exploit* it. To make money, they "run ads." *Facebook, Social Media, Privacy, and the Use and Abuse of Data: Joint Hearing Before the S. Comm. on Com., Sci., & Transp. and the S. Comm. on the Judiciary*, S. Hrg. No. 683, 115th Cong., Tr. (Doc. J-115-40) at 21 (statement of Mark Zuckerberg, Chairman and CEO of Facebook).[2] And their customers (the advertisers) "want as many [people] as possible to see th[ose] ads." Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 Geo. L. Tech. Rev. 147, 148 (2017). The platforms thus seek to maximize ad exposure by "engaging" users, getting them to spend as much time as possible "interacting with content on the platform, including viewing, liking, commenting, sharing, and saving [third-party] posts." *Id.* at 147–148.

To drive this "engagement," the companies use sophisticated computer programming that recommends content to users in an intentional, deliberate way. *Id.* at 149–151; *see also* Dickinson, *supra*, 89 Geo. Wash. L. Rev. at 370 (crediting "backend data storage and processing technologies" for "enabl[ing] a shift" to this

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[2] https://www.congress.gov/115/chrg/CHRG-115shrg37801/CHRG-115shrg37801.pdf.

"dynamic and interactive" model). "Even if a user is passive and does not engage with a post," computer algorithms "record[] the duration of time [the] user keeps the post on [his or her] screen" and takes it as "an indication of the user's interest in the content of the post." Kim, *supra*, at 150. The companies then use that information to recommend other content to users—including, as alleged in this case, harmful ISIS content. So users post content (text, pictures, videos, etc.) on a platform to reach a wide audience, and the company running the platform uses that content to hook other users and sell ad space. *See* Pet.App. 83a–84a (Berzon, J., concurring) (noting that platforms "amplify and direct . . . content" to users "interested in or susceptible to those messages" so that users will "stay on the platform to watch more"). When this arrangement generates collateral damage, however, injured parties have been consistently denied recovery for the internet companies' own "design choices and actions" because courts have placed those actions within the role of "publisher." Rigodon, *supra*, at 318.

If Congress wants to immunize internet companies from liability to this dramatic extent, it needs to pass a law expanding Section 230. "Section 230 offers no guidance on how to separate the third-party content from the [platform operator's] design choice." *Id.* at 324. And "it strains the English language to say that in . . . recommending" content to users, a platform "is acting as 'the *publisher* of . . . information provided by another information content provider.'" *Force*, 934 F.3d at 76–77 (Katzmann, C. J., concurring in part and dissenting in part) (quoting 47 U.S.C. § 230(c)(1)). By telling "the reader—you, specifically—will like this

content," internet companies act more like "a matchmaker" than "a publisher." *Id.* at 76, 82. And, here, YouTube's algorithms allegedly matched a user with and promoted harmful ISIS content. "[T]hese types of targeted recommendations and . . . interactions" fall squarely "outside the scope of traditional publication." Pet.App. 84a (Berzon, J., concurring).

At a minimum, Congress has not "ma[de] its intention" to displace state law in these circumstances "'unmistakably clear in the language of [Section 230].'" *Gregory,* 501 U.S. at 452 (quoting *Will*, 491 U.S. at 65). Thus, the federalism canon resolves any ambiguity in the interpretive question and weighs heavily against a broad reading of Section 230 immunity. *See supra* Part I.

This does not, of course, mean that modern internet companies will inevitably face liability for recommending content. For centuries, state law has sorted through "questions of intent, negligence, foreseeability, causation, and the like" when novel economic arrangements produce novel externalities. Dickinson, *supra*, 89 Geo. Wash. L. Rev. at 377. And courts are perfectly capable of recognizing "attenuated causal chain[s] . . . forged entirely out of surmise." *Jane Doe*, 817 F.3d at 25. Reining in Section 230 immunity thus would not open the floodgates; it would simply allow cases to proceed "where a plaintiff's injury *is* causally connected to third-party-created content, [and] the defendant's alleged wrongdoing *is not* based on a failure to moderate that content." Dickinson, *supra*, 89 Geo. Wash. L. Rev. at 372. That approach both adheres to Section 230's text and respects the role of federalism.

* * *

The federal system cannot thrive without state law playing its proper, traditional role. Although Congress may limit that role when it regulates "Commerce . . . among the several States," U.S. Const. Art. I, § 8, cl. 3, this Court should look askance at the notion that Congress intended the targeted language of Section 230 to immunize internet companies from nearly all forms of private liability. The federalism canon counsels against that result and favors reversal here.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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