NO. 22-3061

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TAWAINNA ANDERSON, INDIVIDUALLY AND AS ADMINISTRATIX OF THE ESTATE OF N.A., A DECEASED MINOR,

PLAINTIFF – APPELLANT,

v.

TIKTOK, INC.; BYTEDANCE, INC.,

DEFENDANTS - APPELLEES.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania,
(D.C. Civil No. 2-22-cv-01849)
The Honorable Paul S. Diamond

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, CENTER FOR DEMOCRACY & TECHNOLOGY, FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION, PUBLIC KNOWLEDGE, REASON FOUNDATION, AND WIKIMEDIA FOUNDATION IN SUPPORT OF PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici* state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: October 7, 2024

s/ Sophia Cope
Sophia Cope

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici Electronic Frontier Foundation (EFF), Center for Democracy & Technology (CDT), Foundation for Individual Rights and Expression (FIRE), Public Knowledge, Reason Foundation (Reason), and Wikimedia Foundation (Wikimedia) are six nationally prominent non-profit organizations focused on defending the rights of internet users. They are all experts in civil liberties and technology, including Section 230 (47 U.S.C. § 230), the rights and liabilities of internet intermediaries, and importantly the ability of internet users to engage in online free expression. *Amici* have filed numerous briefs in federal and state courts across the country on these issues, including in the U.S. Supreme Court in *Gonzalez v. Google LLC*, 598 U.S. 617 (2023)[2] and *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024).[3] More detailed organizational statements of interests are available in the *Unopposed Motion for Leave to File Brief of Amici Curiae*.

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[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

[2] The *amicus* briefs in support of Google by Electronic Frontier Foundation, Center for Democracy & Technology, Public Knowledge, Reason Foundation, and Wikimedia Foundation are available at: https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/21-1333.html.

[3] The *amicus* briefs in support of NetChoice by all six *amici* are available at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-277.html.

INTRODUCTION

This Court should grant Defendants-Appellees' petition for rehearing *en banc*. The panel erred by holding that TikTok does not have Section 230(c)(1) immunity for recommending videos created by its users, and that First Amendment protection for editorial choices around the display of third-party speech is mutually exclusive from Section 230(c)(1) immunity. The panel dismissed the text of Section 230 and the reasonable rulings of other circuits. Moreover, whether Section 230(c)(1) applies to an online platform's video recommendations was extensively briefed in *Gonzalez v. Google LLC*, 598 U.S. 617 (2023). It is improbable that while the Supreme Court declined to rule on this issue in *Gonzalez*, it did so by implication in *Moody v. NetChoice, LLC*, 144 S.Ct. 2383 (2024). The panel's rule creates a huge loophole that would make Section 230(c)(1) immunity virtually meaningless, undermining Congress' policy goal of incentivizing internet intermediaries to facilitate third-party speech at scale. The panel's rule would ultimately harm internet users as online platforms would decrease useful content curation and increase censorship to reduce their legal exposure.

ARGUMENT

I. THE PANEL MISAPPLIED FIRST AMENDMENT PRECEDENT TO THIS SECTION 230 CASE

The panel erred by confusing two lines of First Amendment precedent and concluding that First Amendment protection for editorial choices around the display of third-party speech is mutually exclusive from Section 230(c)(1) immunity. Online platforms, including Defendant TikTok here, may enjoy both.

Section 230(c)(1) sought to fill a crucial gap in First Amendment protection given that the First Amendment applies differently to a publisher depending on the plaintiff's claim.

When a plaintiff sues a publisher for the editorial choices they make about whether and how to display content, those claims strike at the publisher's First Amendment right to make such choices, either about the publisher's own content or content created by a third-party. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), for example, the issue was whether a newspaper could be forced to print a candidate's reply to the newspaper's critical editorial. The Supreme Court held that the First Amendment prohibits forcing a newspaper to do so, stating, "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper … constitute the exercise of editorial control and judgment." *Id.* at 258 (1974). The Supreme Court in *Moody v. NetChoice, LLC*, 144 S.Ct. 2383, 2395, 2401 (2024), merely affirmed *Tornillo* and

its line of cases in the context of a challenge to Texas and Florida laws that restricted social media "platforms' choices about whether and how to display user-generated content to the public," holding that online platforms have a First Amendment right to compile and curate third-party speech.

On the other hand, when a plaintiff sues a publisher not because of those editorial decisions but because the underlying speech is itself legally actionable, whether that speech was created by the company or by someone else, the First Amendment provides limited protection.[4] *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (discussing variations in First Amendment protection for common law defamation claims). Section 230(c)(1) was meant to raise the level of legal protection in this second scenario to be at least as robust as that in the first scenario—in the context of online platforms that publish allegedly harmful third-party speech.

Section 230(c)(1) provides that an internet intermediary shall not "be treated as the publisher or speaker of any information provided by" a third party. *See* 47 U.S.C. § 230(c)(1). Thus, if a *print* newspaper publishes an advertisement or a

[4] Jeff Kosseff, *The Twenty-Six Words That Created the Internet*, Cornell University Press, 49 (2019) (explaining that "a finding that Prodigy was a publisher might mean that Prodigy would be responsible for [third-party] posts even if the company did not know of the alleged defamation. If Prodigy was merely a distributor, then the plaintiffs would need to prove that the company knew or had reason to know of the alleged defamation.")

letter to the editor, the newspaper may be held responsible if that third-party speech harmed someone. But in passing Section 230, Congress created a different rule for the *online* version of that newspaper, and other online publishers, to incentivize internet intermediaries to facilitate third-party speech at scale. Congress understood that legal exposure for content from millions or billions of users was massive and would result in online platforms being less willing to host user-generated content. As the Fourth Circuit stated, "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium." *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

However, *both* print publications and online platforms enjoy First Amendment protection for the editorial choices they make around the display of third-party speech, as this implicates a different line of First Amendment law.

Thus, online platforms like TikTok may have both Section 230(c)(1) immunity against claims based on harmful user-generated content—here, the Blackout Challenge videos posted by TikTok users—and First Amendment protection for their editorial decisions around whether and how to display that user-generated content, including recommendations (whether effectuated by algorithm or otherwise). The panel erred in suggesting that these two protections are mutually exclusive.

Further, the panel erred in conflating the inherent statutory exception for content created or co-created by an online platform, with the First Amendment-protected editorial choices about whether and how to display content affirmed by *Moody*. It is true that Section 230(c)(1), by its terms, does not provide immunity to internet intermediaries when content caused harm to a plaintiff and the platform was the "information content provider" at issue, which is defined as "any person or entity that is responsible, in whole or in part, for the creation or development of information." 47 U.S.C. § 230(f)(3). But as the Ninth Circuit held, a platform loses Section 230(c)(1) immunity only when the platform "materially contribut[ed] to [the content's] alleged unlawfulness." *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

TikTok had nothing to do with creating the Blackout Challenge videos—they were wholly produced and posted by TikTok users, and it was the content of the videos that led to the tragic death of Plaintiff's daughter in this case. *See Anderson v. TikTok, Inc.*, 2024 WL 3948248, at *1 (3d Cir. 2024). As the Second Circuit held in the context of another social media platform, "Merely arranging and displaying others' content to users of Facebook through such algorithms—even if the content is not actively sought by those users—is not enough to hold Facebook responsible as the 'develop[er]' or 'creat[or]' of that content." *Force v. Facebook, Inc.*, 934 F.3d 53, 70 (2d Cir. 2019). Similarly, the Ninth Circuit held that

recommendations made by algorithms "are tools meant to facilitate the communication and content of others" and "are not content in and of themselves." *Dyroff v. Ultimate Software Group, Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019).

II. SECTION 230 WOULD BE EVISCERATED AND INTERNET USERS WOULD BE HARMED IF ONLINE PLATFORMS' EDITORIAL CHOICES INCLUDING RECOMMENDATIONS WERE OUTSIDE OF SECTION 230 IMMUNITY

A. Section 230(c)(1) Immunity Covers Editorial Choices Including Recommendations

The panel erred in rejecting what every other circuit has held—that Section 230(c)(1) was also meant to immunize the editorial decisions, including recommendations, that online platforms make about whether and how to display user-generated content. *See* Pet. 9; *Anderson v. TikTok, Inc.*, 2024 WL 3948248, *3 n.13 (3d Cir. 2024) (stating "our holding may depart from the pre-*NetChoice* views of other circuits"). The panel erred for four reasons.

First, the panel ignored the text of Section 230(c)(1). The holdings of the other circuits are rooted in the term "publisher" in the statute. As the Ninth Circuit stated, "We need not perform any intellectual gymnastics to arrive at this result, for it is rooted in the common sense and common definition of what a publisher does." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). *See also* 47 U.S.C. § 230(f)(2), 230(f)(4)(C) (defining "interactive computer service" as an entity that, in part, "display[s]" and "organize[s]" content).

Second, importantly, Congress' policy goals are maximized when Section 230(c)(1) immunizes a platform's editorial choices around the display of user-generated content such as TikTok videos, and not only "the mere act of hosting those videos," as the concurrence wrongly concluded. See *Anderson v. TikTok, Inc.*, 2024 WL 3948248, *9 (3d. Cir. 2024) (Matey, J., concurring in the judgment in part and dissenting in part). Section 230(c)(1) provides immunity to online platforms against claims premised on harmful user-generated content. But if a plaintiff who was harmed by content posted by a third-party could simply engage in "creative pleading" to get around Section 230(c)(1) by focusing on how the platform chose to display that content, this would create a huge loophole that would make Section 230(c)(1) immunity virtually meaningless. *See, e.g., Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265-66 (9th Cir. 2016) (applying Section 230(c)(1) to Yelp!'s choice to display negative reviews as star ratings and stating "Kimzey apparently hoped to plead around [Section 230(c)(1)] to advance [what] the statute plainly bars: that Yelp published user-generated speech that was harmful to Kimzey").

Third, it also makes sense that Section 230(c)(1) would immunize a platform's editorial choices around the display of third-party speech—even when the platform also has First Amendment protection—because Section 230 immunity is both a defense against liability and a procedural means to end a lawsuit early. As

the Ninth Circuit stated, "[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Roommates.com*, 521 F.3d at 1175. *Cf. Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) ("[I]mmunity means more than just immunity from liability; it means immunity from the burdens of defending a suit"). This is critical to achieving Congress' policy goals since raising Section 230(c)(1) immunity on a motion to dismiss is a straightforward argument. *See Barnes*, 570 F.3d at 1100–01 (discussing the three elements of a Section 230(c)(1) defense). Otherwise, online platforms that eventually avoid liability by invoking the First Amendment or winning on the merits have to spend substantial resources defending themselves, potentially enduring discovery to do so. The fear of that alone would incentivize companies against hosting user-generated content, to the detriment of all internet users.

Fourth, recommendations of TikTok videos on a user's "For You Page," specifically, whether implemented by algorithm or otherwise, reflect decisions about how to display third-party content and are thus part of "a publisher's traditional editorial functions." *See Zeran*, 129 F.3d at 330. When a print newspaper, for example, decides to place an article on page A1, that is not only a decision about *how* to display the article (where to place it), but it is also an inherent recommendation—the newspaper is telling readers, *we recommend you*

read this article first. The same is true for social media platforms like TikTok. Thus, to the extent that online platforms' editorial choices related to third-party content are protected by Section 230(c)(1), online platforms' recommendations of that content are protected as well.

B. Weakening Section 230(c)(1) Immunity Would Harm Internet Users

If online platforms like TikTok do not have Section 230(c)(1) immunity for editorial choices including recommendations related to user-generated content, this would harm internet users as platforms would decrease useful content curation and increase censorship to reduce their legal exposure.

If online platforms know that they may be liable for how their systems recommend, promote, rank, arrange, or otherwise display content posted by their users, some companies may cease to curate user-generated content in any helpful way, beyond perhaps listing it in reverse chronological order[5] (although even reverse chronological order, as opposed to forward chronological order or alphabetical order, is an editorial choice). The end of niche curation would harm internet users as recommendations help people find content relevant to their interests and connect with others in what is otherwise a virtually unnavigable sea

[5] Daphne Keller, *Amplification and Its Discontents*, Knight First Amendment Institute at Columbia University, 23-24 (June 8, 2021), https://knightcolumbia.org/content/amplification-and-its-discontents.

of content and people. The internet would become a much less valuable space for online communities.

Companies also would be incentivized to avoid hosting any user-generated content that may in any way expose the companies to legal risk should that content be swept up in the companies' platform-wide recommendation algorithms. Online platforms would either *pre-screen* or *remove after-the-fact* any content that may be even remotely problematic to mitigate their legal risk. Pre-screening is particularly worrisome as it would prevent content from being published in the first place, ending the open internet—the unique ability of anyone with an internet connection to communicate with others around the world cheaply, easily, and quickly.[6]

Moreover, greater legal exposure due to a narrowing of Section 230(c)(1) immunity would only exacerbate the problem of content moderation at scale. It is impossible—both logistically and financially—for online platforms to conduct a fair review given the incredible volume of content generated by millions or billions internet users. TikTok has over 23 million videos uploaded per day.[7] Content moderation at scale inevitably results in false positives and thus legitimate content

[6] Paige Collins & David Greene, *General Monitoring is Not the Answer to the Problem of Online Harms*, EFF Deeplinks (Aug. 16, 2022), https://www.eff.org/deeplinks/2022/08/general-monitoring-not-answer-problem-online-harms.

[7] David Ch, *TikTok Statistics: Revenue & Usage*, SendShort (Sept. 1, 2024), https://sendshort.ai/statistics/tiktok/.

being censored as well.[8] This is especially true as online platforms seek to reduce the cost of human reviewers and turn to automation, because even the best automated systems lack the ability to identify nuance, context, and cultural differences.[9] Automated systems are more likely to result in censorship of journalists, human rights activists, artists, and other creators of lawful content.[10]

Meanwhile, smaller platforms without the substantial resources required to manage potential liability through adequate content moderation—or to weather significant litigation costs—would be forced to shut down. And new companies would be deterred from even trying to offer open platforms for speech or would be unable to attract investors in the face of such massive legal exposure.[11] This fallout would reduce competition and entrench the largest companies.

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[8] Evelyn Douek, *More Content Moderation is Not Always Better*, WIRED (June 2, 2021), https://www.wired.com/story/more-content-moderation-not-always-better/.

[9] Carey Shenkman et al., *Do You See What I See? Capabilities and Limits of Automated Multimedia Content Analysis*, Center for Democracy & Technology, 29-30 (May 2021), https://cdt.org/wp-content/uploads/2021/05/2021-05-18-Do-You-See-What-I-See-Capabilities-Limits-of-Automated-Multimedia-Content-Analysis-Full-Report-2033-FINAL.pdf.

[10] Sydney Li & Jamie Williams, *Despite What Zuckerberg's Testimony May Imply, AI Cannot Save Us*, EFF Deeplinks (April 11, 2018), https://www.eff.org/deeplinks/2018/04/despite-what-zuckerbergs-testimony-may-imply-ai-cannot-save-us.

[11] Ethan Wham, *The Economic Case for Section 230, Disruptive Competition Project*, Computer & Communications Industry Association (Sept. 6, 2019), https://www.project-disco.org/innovation/090619-an-economic-case-for-section-230/.

Additionally, increased legal risk would threaten the essential role online platforms play in fostering social and political discourse across the globe. The robust global participation we see online today from users of platforms with a U.S. presence would never have been achieved without the immunity provided by Section 230.[12] Indeed, TikTok alone has over one billion users worldwide.[13] Granting plaintiffs an avenue to circumvent Section 230(c)(1) protection by focusing not on the harmful content posted by users, but on how platforms chose to display that content, would undermine this global phenomenon. As platforms would be unwilling to take a chance on provocative or unpopular speech, the internet as we know it would instead become a sanitized and homogenous experience.

CONCLUSION

For the reasons stated above, this Court should grant Defendants-Appellees' petition for rehearing *en banc*.

[12] Kosseff, *supra* note 4, 145-166.

[13] Ch, *supra* note 7.

Dated: October 7, 2024

Respectfully submitted,

s/ Sophia Cope

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CERTIFICATIONS

I hereby certify the following:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit. 3d Cir. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of F.R.A.P. 29(a)(5) and 32(a)(7)(B) because this brief contains 2,599 words, excluding the parts of the brief exempted by F.R.A.P. 32(f) and 3d Cir. L.A.R 29.1(b).

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4. The text of the electronic brief is identical to the text in the paper copies. 3d Cir. L.A.R. 31.1(c).

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Dated: October 7, 2024

s/ Sophia Cope
Sophia Cope