NO. 18-16700

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REYNALDO GONZALEZ; THE ESTATE OF NOHEMI GONZALEZ; BEATRIZ GONZALEZ, Individually and as Administrator of the Estate of Nohemi Gonzalez; JOSE HERNANDEZ; REY GONZALEZ; PAUL GONZALEZ,

PLAINTIFF-APPELLANTS,

v.

GOOGLE LLC,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court
District for Northern California (Oakland)
Case No. 4:16-cv-03282-DMR

The Honorable Donna M. Ryu, Magistrate Judge

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE GOOGLE LLC AND AFFIRMANCE

Aaron Mackey
Sophia Cope
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Email: amackey@eff.org
Telephone: (415) 436-9333

Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: April 12, 2019

By: /s/ *Aaron Mackey*
Aaron Mackey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST[1]

Amicus curiae Electronic Frontier Foundation is a member-supported, non-profit civil liberties organization that works to protect free speech and privacy in the digital world. Founded in 1990, EFF has more than 31,000 members. EFF represents the interests of technology users in both court cases and broader policy debates surrounding the application of law to technology.

As explained in its motion for leave to file this brief, EFF has litigated or otherwise participated in a broad range of Internet free expression and intermediary liability cases because they often raise novel issues surrounding free expression and the rights of Internet users.

INTRODUCTION

Plaintiffs-Appellants' attempt to hold Google, as the owner of YouTube,[2] liable for third-party speech jeopardizes online platforms' ability to offer Internet users robust and open forums for speech. Holding online platforms liable for what

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(c), EFF certifies that no person or entity, other than Amicus curiae, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(2), amicus curiae has filed a motion for leave to file this brief.

[2] While Google is the official Defendant-Appellee, this brief will hereinafter refer to YouTube as the operative party since that is the platform at issue.

their users post also is contrary to both Section 230 (47 U.S.C. § 230)[3] and the First Amendment. The district court twice correctly dismissed Plaintiffs-Appellants' amended complaints under Section 230. *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1163–71 (N.D. Cal. 2017) ("*Gonzalez I*"); *Gonzalez v. Google, Inc.*, 335 F. Supp. 3d 1156, 1169–75 (N.D. Cal. 2018) ("*Gonzalez II*").

Section 230 plainly bars Plaintiffs-Appellants' claims and this Court should affirm on that basis. Parties have filed more than ten lawsuits in federal courts that seek to impose liability on online platforms under the Anti-Terrorism Act ("ATA") for hosting user-generated content.[4] The violent acts giving rise to the lawsuits are

[3] The statute was passed as Section 509 of the Communications Decency Act, part of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). It is sometimes colloquially referred to as "CDA 230" or "Section 230 of the Communications Decency Act." Amicus refers to it as "Section 230."

[4] *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 972 (N.D. Cal. 2016), *aff'd on other grounds*, *Fields v. Twitter, Inc.*, 881 F.3d 739 (9th Cir. 2018); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564 (E.D. Mich. 2018), *on appeal*, Case No. 18-1426 (6th Cir. 2018); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874 (N.D. Cal. 2017), *voluntarily dismissed on appeal*, Case No. 17-17536 (9th Cir. 2017); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 155–61 (E.D.N.Y. 2017), *on appeal*, *Force v. Facebook, Inc.*, Case No. 18-00397 (2d Cir. 2018); *Clayborn v. Twitter, Inc.*, Case Nos. 17-cv-06894, 18-cv-00543, 2018 WL 6839754 (N.D. Cal. Dec. 31, 2018), *on appeal*, Case No. 19-15043 (9th Cir. 2019); *Taamneh v. Twitter, Inc.*, 343 F. Supp. 3d 904 (N.D. Cal. 2018), *on appeal*, Case No. 18-17192 (9th Cir. 2018); *Copeland v. Twitter, Inc.*, 352 F. Supp. 3d 965 (N.D. Cal. 2018), *on appeal*, Case No. 18-17327; *Palmucci v. Twitter*, Case No. 18-cv-03947 (N.D. Cal. 2018); *Sinclair v. Twitter, Inc.*, Case No. 17-cv-05710 (N.D. Cal. 2017); *Colon v. Twitter, Inc.*, Case No. 18-cv-00515 (M.D. Florida 2018); *Retana v. Twitter, Inc.*, Case No. 19-cv-00359 (N.D. Tex. 2019).

abhorrent. Yet the online platforms the parties seek to hold liable played no direct role in any of the terrorist attacks at issue in these cases. Given the proliferation of these lawsuits, this Court should take the opportunity to definitively hold that Section 230 bars these claims, rather than leaving the question open as it did in an earlier case. *See Fields v. Twitter, Inc.*, 881 F.3d 739, 750 (9th Cir. 2018).

This case and the others seeking to hold platforms liable for user-generated content raise the precise concerns this Court identified in *Fair Housing Counsel of San Fernando Valley v. Roommates.Com, LLC*, when it held that these cases "must be resolved in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites, fighting off claims that that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties." 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc). Appellee-Defendant Google LLC aptly demonstrates why this conclusion is supported by well-settled law. Brief for Defendant-Appellee Google LLC at 13–40.

Amicus curiae EFF writes separately to emphasize the important policy goals underlying Section 230 and why it is vitally important that Section 230 continue to apply to those civil claims that are attendant to federal criminal statutes.

Additionally, even if Section 230 did not bar Plaintiffs-Appellants' claims, the First Amendment would.

First, online platforms have a First Amendment right to publish speech discussing or promoting terrorism. Such content does not automatically fall outside the First Amendment's protection unless it fits within narrow categories of unprotected speech, such as true threats or direct incitement to violence. Imposing civil liability on YouTube for the publication of user-generated content about terrorism would sweep up large swaths of protected speech—or this Court would be required to fashion an entirely new categorical First Amendment exception. This proposition is ill-advised and contrary to well-settled law.

Second, imposing liability on online platforms for the publication of content concerning terrorism would violate the First Amendment rights of Internet users. Internet users have a right to receive and gather information on a variety of topics, including speech about terrorism. By imposing liability on YouTube for hosting such speech, Plaintiffs-Appellants would force online platforms to restrict access to terrorist content or to remove it entirely, limiting the range of content and viewpoints available to Internet users.

Finally, allowing Plaintiffs-Appellants to undermine Section 230 and the First Amendment's protections for online platforms would mean undermining the free and open Internet. Internet intermediaries are an essential element of the modern Internet. They provide the very "vast democratic forums of the Internet" that, in the words of the Supreme Court, make the Internet one of the "most important places . .

. for the exchange of views." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Users rely on intermediaries to express themselves and to communicate with others online. Online platforms like YouTube give everyone and anyone the ability to reach an audience or engage with others, without having to learn how to code or expend significant financial resources, on all manner of topics, for all manner of reasons. If Plaintiffs-Appellants are successful in their efforts to impose liability on YouTube, Internet intermediaries would likely take steps to restrict the openness of their platforms, such as limiting who can use their service, screening content before it is even posted by those users, and removing even more speech than they already do. And those platforms that cannot afford to take these steps to avoid liability would simply cease to exist. This outcome would blunt the Internet's ability to be a powerful, diverse forum for political and social discourse—including about controversial topics such as terrorism.

ARGUMENT

I. THE FIRST AMENDMENT PREVENTS IMPOSING LIABILITY ON YOUTUBE FOR HOSTING CONTENT ABOUT TERRORISM.

A. Speech Discussing or Promoting Terrorism Is Not Categorically Excluded from the First Amendment.

Imposing liability on YouTube for hosting content discussing or promoting terrorism would violate its First Amendment rights by punishing the dissemination of speech that is fully protected by the First Amendment.

An unstated premise in Plaintiffs-Appellants' attempts to hold YouTube liable for hosting user-generated content discussing or promoting for terrorism is that the speech itself is unlawful, that it enjoys no First Amendment protection, and that YouTube can be held liable for publishing it. *See* AOB at 60 (describing ISIS' use of YouTube as "not merely bad; it is criminal").

But there are only a handful of historically unprotected categories of speech, and terrorist speech is not one of them. Although certain types of terrorist speech may be unprotected, such as true threats, *see Watts v. United States*, 394 U.S. 705, 708 (1969), and speech directly inciting imminent lawless acts, *see Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969), the vast majority of speech about terrorism is fully protected by the First Amendment.

Further, the Supreme Court has been loath to expand the list of unprotected categories of speech, even in cases involving extremely offensive speech. In *U.S. v. Stevens*, for example, the government sought to create a new category of unprotected speech that it could punish: graphic and disturbing depictions of animal cruelty. 559 U.S. 460, 469 (2010). The government proposed a balancing test to determine whether certain categories of speech fall outside the First Amendment: "the value of the speech against its societal costs." *Id*. at 470. The Supreme Court rejected the government's proposal as both "startling and dangerous." *Id*. The First Amendment does not permit the creation of new categories of unprotected speech, the Court held,

because the "guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Id*.

The Court reaffirmed this principle a year later in striking down a California law that banned the sale of violent video games to minors and would have created a *de facto* new category of unprotected speech by grafting portions of the definition of obscenity onto depictions of extremely violent video game content. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 792–93 (2011).

There is no historical basis for expanding the list of speech unprotected by the First Amendment to include speech discussing or promoting terrorism. Further, the First Amendment does not permit *ad hoc* judgments regarding the social value of speech to determine whether that speech is protected. Plaintiffs-Appellants cannot impose categorical liability on YouTube for publishing terrorist content without punishing platforms for disseminating speech fully protected by the First Amendment. And the creation of a new category of unprotected speech is unwarranted.

B. YouTube Cannot Be Held Liable for Incitement Based on the Knowing Publication of ISIS Content on Its Platform.

Some online speech promoting terrorism may constitute speech directly inciting violence and thus fall outside the First Amendment; but even then, YouTube could not be held liable for merely publishing such speech.

The First Amendment generally bars claims against publishers for inciting harmful conduct via the knowing publication of motivational or instructional speech. In *Herceg v. Hustler Magazine, Inc.*, for example, the Fifth Circuit overturned a jury verdict finding Hustler liable for a teen's death as a result of its publication of an article about autoerotic asphyxiation. 814 F.2d 1017, 1021–23 (5th Cir. 1987). The court held that liability could not be imposed on Hustler "without impermissibly infringing upon freedom of speech" because there was no evidence that the publisher intended, advocated for, or directly incited the teen to attempt the act. *Id*. at 1021–22 (citing *Brandenburg*, 395 U.S. 444); *see also Universal Studios, Inc. v. Corley*, 273 F.3d 429, 447 n.18 (2d Cir. 2001) (noting that even publication of instructions on how to commit illegal acts are subject to First Amendment scrutiny); *James v. Meow Media, Inc.*, 300 F.3d 683, 695, 699 (6th Cir. 2002) (refusing to hold video game, movie, and Internet companies liable for murder of students by fellow classmate, stating "attaching tort liability to the effect that such ideas have on a criminal actor would raise significant constitutional problems under the First Amendment").

Courts have held that publishers can only be held liable for content that results in death or bodily injury in cases where (i) the publisher has the specific intent to encourage the commission of violent acts, and (ii) the publisher provides specific

instructions to commit the acts, rather than abstract advocacy. *See Rice v. Paladin Enters.*, 128 F.3d 233, 242–43 (4th Cir. 1997).

This narrow class of cases in which the First Amendment will not bar platform liability based on content that resulted in death or bodily injury is not applicable here. Plaintiffs-Appellants cannot show that YouTube possessed the specific intent and direction required to hold the platform liable for the violence ISIS promoted online and ultimately perpetrated against Plaintiffs-Appellants in this case. Even if YouTube had actual knowledge of content that directly incited terrorism or other criminal acts, it would still lack the specific intent required to vitiate the First Amendment protection recognized in both *Herceg* and *Rice*. The allegations of YouTube's wrongful behavior are essentially that bad actors—in this case, alleged members of ISIS—used the platform's tools in much the same way as any other YouTube user would: to post content and to connect with other users. *See* AOB 28–29; 47–51; 57–63. There is no evidence that YouTube made any efforts to direct, incite, or encourage ISIS' violent actions beyond providing an open platform to all users. In fact, YouTube has policies that prohibit speech that encourages violence.[5]

[5] *See Violent or Graphic Content Policies*, YouTube Help, https://support.google.com/youtube/answer/2802008?hl=en (last visited Apr. 10, 2019); *Policies and Safety*, YouTube, https://www.youtube.com/yt/about/policies/#community-guidelines (last visited Apr. 10, 2019); *see also* Daisuke Wakabayashi, *YouTube Sets New Policies to Curb Extremist Videos*, N.Y. Times (June 18, 2017), https://www.nytimes.com/2017/06/18/business/youtube-terrorism.html.

Imposing liability on YouTube would violate Internet users' first amendment rights to receive and gather information about terrorism.

C. YouTube Users Have the Right to Receive Information About Terrorism

The First Amendment protects the right of platform users to receive and gather information, including offensive rhetoric advocating for terrorism that does not constitute either a true threat or directly incite violence. The Supreme Court has held that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (plurality); *see also Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980) (plurality) (protecting the right to gather information in courtrooms, because "free speech carries with it some freedom to listen"). This Court has acknowledged that the right to receive information "and the right to speak are flip sides of the same coin." *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002).

The right to receive information does not turn on the underlying merit of the ideas communicated. Quite the opposite: it ensures that people have access to different, controversial ideas and views. As the Supreme Court has recognized, "this right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society," *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (protecting the right to possess obscene materials at home), because it is essential to

fostering open debate. Indeed, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster Gen'l*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) (protecting the "right to receive" foreign publications).

Thus YouTube users have the right to receive speech, even on unpopular and abhorrent topics such as terrorism or from unpopular speakers who advocate terrorist ideology. Yet, should Plaintiffs-Appellants prevail on their theory of platform liability, platforms such as YouTube would likely react to this new legal liability by simply not publishing any speech *about* terrorism—not merely speech expressing true threats or directly inciting imminent terrorist attacks. *See infra* Section III. Depriving users of their right to receive and gather information about terrorism would do far more than simply limit which content is available online; it would stunt people's ability to be informed about the world and form opinions.

Additionally, as the Supreme Court recognized in *Pico*, the ability to access information is antecedent to engaging in speech protected by the First Amendment. *See* 457 U.S. at 867. The interplay between receiving information and engaging in speech exists for terrorism just like any other subject matter: journalists need to access and gather information about terrorism to report about it; academic researchers need the information to inform our social and political beliefs;

government officials and the general public need the information to engage in political and social debates about terrorism and related foreign and domestic policy.[6]

II. SECTION 230 IS ESSENTIAL TO INTERNET USERS' FREEDOM OF EXPRESSION ONLINE.

This Court should reject Plaintiffs-Appellants' call to undercut Section 230, which has enabled robust free expression online. In attempting to plead around Section 230, Plaintiffs-Appellants argue that none of their claims require the Court to treat YouTube as a publisher or speaker and further that YouTube played a direct role in the creation of the offensive content. AOB 28–29; 47–51; 57–63. The core of Plaintiffs-Appellants' case, however, is based on objecting to the fact that particular individuals and groups used YouTube in ways that any Internet user can. *Id.* at 62. That is, Plaintiffs-Appellants argue that YouTube's liability arises from the fact that ISIS members can and have posted content to YouTube, that the content was distributed to other YouTube viewers, and that YouTube arranged the videos in a way that other users could view them. *Id*. at 29.

Yet YouTube's activity that Plaintiffs-Appellants' object to is legally and practically indistinguishable from hosting an open online platform that allows

[6] *See, e.g.*, Heather J. Williams & Ilana Blum, *Defining Second Generation Open Source Intelligence (OSINT) for the Defense Enterprise*, RAND Corporation, at 12 (2018) (discussing social media as open sources of intelligence information), available at https://www.rand.org/pubs/research_reports/RR1964.html.

anyone to publish or view videos on any other topic, such as any of the roughly 400 hours of video uploaded to the platform every minute.[7] Or as the district court twice held, Plaintiffs-Appellants' "argument essentially tries to divorce ISIS's offensive content from the ability to post such content." *Gonzalez I*, 282 F. Supp. 3d at 1165; *see Gonzalez II*, 335 F. Supp. 3d at 1171.

Amicus curiae endorses the supporting arguments in Google's brief for why Section 230 bars the claims. Brief for Defendant-Appellee Google at 13–28. Amicus writes separately to emphasize two policy points underlying Section 230: (1) that Congress passed the law to encourage the development of open platforms for user-generated speech and (2) that policy decision including barring civil claims arising in attendant federal criminal statutes.

A. Congress Passed Section 230 to Encourage the Development of Open Platforms and Enable Robust Online Speech.

Plaintiffs-Appellants' claims threaten not just YouTube, but the ability of all Internet intermediaries to host platforms for diverse online speech. Online platforms—such as YouTube and other video-sharing services, social media websites, blogging platforms, and web-hosting companies—are the essential architecture of today's Internet. The Internet depends upon intermediaries, which

[7] Kit Smith, *46 Fascinating and Incredible YouTube Statistics*, Brandwatch (Jan. 4, 2019), https://www.brandwatch.com/blog/youtube-stats/.

serve "as a vehicle for the speech of others."[8] Indeed, they are often the primary way in which the majority of people engage with one another online. Intermediaries create democratic forums in which anyone can become "a pamphleteer" or "a town crier with a voice that resonates farther than it could from any soapbox." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). They give a single person, with minimal resources or technical expertise anywhere in the world, the ability to communicate with others across the globe. Online platforms host a wide range of diverse speech on behalf of their users, ensuring that all views—especially controversial ones—can be presented and received by platform users.

Congress clearly understood the essential function online platforms play in our digital lives. In passing Section 230, Congress created a statute that benefits the Internet as a whole. Congress recognized the Internet's power to sustain and promote robust individual speech, a value rooted in the First Amendment. Congress sought to further encourage the already robust free speech occurring online in the mid-1990s, and to speed the development of online platforms by providing broad immunity to service providers that host user-generated content. *See* 47 U.S.C. § 230(b)(2), (3) ("It is the policy of the United States . . . to encourage the development of technologies which maximize user control over what information is

[8] Anupam Chander & Uyên P. Lê, *Free Speech*, 100 Iowa L. Rev. 501, 514 (2015).

received by individuals, families, and schools who use the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."); *see also Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) ("Congress wanted to encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce.").

Congress recognized that if our legal system failed to robustly protect intermediaries, it would fail to protect free speech online. *Zeran v. AOL*, 129 F.3d 327, 330 (4th Cir. 1997). Given the volume of information being published online, it would be impossible for most intermediaries to review every single bit of information published through their platforms prior to publication. "Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted." *Id*. at 331. The resulting Internet would include a far more limited number of forums if intermediaries were forced to second-guess decisions about managing and presenting content authored by third parties.

By creating Section 230's platform immunity, Congress made the intentional policy choice that individuals harmed by speech online need to seek relief from the speakers themselves, rather than the platforms those speakers used. *Id*. at 330–31.

By limiting liability in this way, Congress decided that creating a forum for unrestrained and robust communication was of utmost importance, even if it might result—depending on how platforms moderate their sites—in the presence of harmful content online.

Thus, while Congress certainly did not intend to promote speech from terrorist organizations, Congress *did* decide that promoting robust online dialogue was more important than ridding the Internet of all harmful speech. Placing liability on YouTube in this case not only conflicts with the plain text and purpose of Section 230, it also would severely undercut the essential role online platforms play in fostering our modern political and social discourse.

B. Section 230 Applies to All Federal Civil Claims, Including Those That Are Attendant to Federal Criminal Statutes.

Holding that Section 230's exception for federal criminal prosecutions also applies to civil ATA claims—meaning that Section 230 would not bar civil claims that are attendant to federal criminal statutes—would swallow Section 230's broad protections for online platforms and frustrate Congress' purpose in enacting the law.

Plaintiffs mischaracterize Section 230(e)(1), which states that "[n]othing in this section shall be construed to impair the enforcement of . . . any other Federal criminal statute," to argue that Section 230 cannot provide online platforms immunity for a civil violation of the ATA. AOB 63. With the exception of recently enacted legislation that is not relevant here, however, Section 230(e)(1)'s limited

exception is reserved solely for prosecutions brought by the *government itself*. *See Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 23–24 (1st Cir. 2016) (holding that Section 230(e)(1)'s language "quite clearly indicates that the provision is limited to criminal prosecutions").[9]

Extending Section 230's federal criminal law exception beyond prosecutions to include civil actions authorized by the ATA—or any other criminal statutes with civil recovery corollaries—would result in very serious practical consequences for freedom of speech and innovation online. Prosecutorial discretion and the higher standard of proof together can mitigate against the chilling effect created by the lack of immunity for Internet intermediaries against criminal prosecutions due to Section 230(e)(1). Limiting Section 230's federal criminal law exception to actual prosecutions makes practical sense given that government prosecutors generally exercise their discretion to bring criminal charges with care because so much is at stake in criminal cases—that is, the defendants' life or liberty. Additionally, the standard of proof in criminal cases is much higher than in civil cases.

[9] Congress agrees with this position. Congress recently amended Section 230(e) to include a new exception to the immunity that permits civil actions against online platforms under the civil provisions of the criminal anti-trafficking law, 18 U.S.C. § 1595. *See* 47 U.S.C. § 230(e)(4)(A). The fact that Congress added a specific Section 230 exception enabling civil litigants to recover under the civil anti-trafficking statute demonstrates that Section 230(e)(1)'s criminal prosecution exception is indeed limited to federal prosecutions.

By contrast, private plaintiffs typically do not exercise such judiciousness in deciding whether to bring lawsuits where money damages are the remedy and the standard of proof is lower. It is very easy to bring a civil case—and sometimes private plaintiffs do not even intend to see their case to the end; rather, they simply want to scare the defendant into silence.[10]

Exposing Internet intermediaries to the decisions of a broad array of civil litigants whose claims are authorized by statutes that have criminal corollaries would disincentivize online innovation and ultimately diminish the free speech and the free exchange of ideas and information that Internet platforms facilitate. This unfortunate result would be contrary to Congress' recognition that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[11]

---

[10] Such cases are called "Strategic Lawsuits Against Public Participation" (SLAPPs). *See What Is a SLAPP Lawsuit?*, Protect the Protest, https://www.protecttheprotest.org/ (last visited Apr. 10, 2019); and Public Participation Project, https://anti-slapp.org/ (last visited Apr. 10, 2019).

[11] 47 U.S.C. § 230(a)(3).

III. FAILURE TO APPLY SECTION 230 AND THE FIRST AMENDMENT WOULD HARM INTERNET USERS' FREE SPEECH AND PLATFORMS' WILLINGNESS TO HOST THAT SPEECH.

Placing liability on YouTube in this case would severely undercut the essential role all online platforms play in fostering our modern political and social discourse. It would require fundamentally altering the relationship between platforms and their users by incentivizing platforms to dramatically curtail what people can share and discuss on online.

Instead of making open forums for participation by users around the world—a quintessential feature of Internet intermediaries—online platforms, saddled with potential or explicit liability based on the content their users post, would likely screen user-generated content to avoid the risk that their users might post offensive content that will create liability for the companies. And companies would take down any and all content that drew any complaint—especially by those complainants with resources to fund litigation—just as Congress feared, which was what prompted it to pass Section 230. These overreactions could include not only removing content after-the-fact, but also reviewing all content users intend to post and thereby preventing any potentially controversial comments or criticism from being published in the first place, and removing accounts whose content drew objections—potentially far beyond the content ISIS posted at issue here.

The ability—both logistically and financially—for modern platforms to conduct a fair review is dubious given the incredible volume of content generated by platform users. When Congress passed Section 230 in 1996, about 40 million people used the Internet worldwide, and commercial online services in the United States had almost 12 million individual subscribers. *See Reno*, 521 U.S. at 850–51. Today's Internet hosts third-party contributions from a broad array of voices, facilitating the speech of billions of people. As of January 2019, more than 4 billion people were online, with nearly 3.5 billion people using online social media platforms.[12] And the Web continues to grow at an accelerating pace. At the end of 2016, there were just over 1 billion websites; currently there are almost 1.7 billion websites.[13] Users of YouTube upload roughly 400 hours of video to the website *every minute*.[14] WordPress—a free and open-source content management system available in over 50 languages that allows users around to globe to create free

[12] *See Global Digital Population as of January 2019*, Statista: The Statistics Portal, https://www.statista.com/statistics/617136/digital-population-worldwide/ (last visited April 5, 2019).

[13] *Total Number of Websites*, Internet Live Stats, http://www.internetlivestats.com/total-number-of-websites/ (last visited April 9, 2019).

[14] Bree Brouwer, *YouTube Now Gets Over 400 Hours of Content Uploaded Every Minute*, Tubefilter (July 26, 2015), http://www.tubefilter.com/2015/07/26/youtube-400-hours-content-every-minute/.

websites or blogs—as of 2018 had been used to create around 75 million websites.[15] Medium—an online publishing platform that allows amateur and professional people alike to publish their work—had 60 million unique monthly visitors in 2016, only four years after the company launched.[16] Also, the Grindr dating app is today approaching 4 million daily active users.[17]

Small businesses also have an increasing online presence. In 2017, over 70 percent of small businesses in the United States had a website, and 79 percent of those small businesses had a mobile-friendly website.[18] And with platforms like Shopify—an e-commerce platform that helps customers create websites for their

---

[15] *2018's Most Surprising WordPress Statistics*, Who Is Hosting This?, https://www.whoishostingthis.com/compare/wordpress/stats/ (last visited Apr. 10, 2019).

[16] Ken Yeung, *Medium Grows 140% to 60 Million Monthly Visitors*, VentureBeat (Dec. 14, 2016), https://venturebeat.com/2016/12/14/medium-grows-140-to-60-million-monthly-visitors/.

[17] *See* Diana Bradley, *How the Grindr Ecosystem Evolved into More for Its 4 Million Users*, PR Week (Feb. 26, 2018), https://www.prweek.com/article/1457079/grindr-ecosystem-evolved-its-4-million-users.

[18] *What Percentage of Small Businesses Have Websites? – 2017*, SmallBusiness.com (Mar. 18, 2017), https://smallbusiness.com/digital-marketing/how-many-small-businesses-have-websites/.

online stores and currently powers over 800,000 online merchants[19]—it is easier than ever for small businesses to get online.

With such a staggering number of Internet users, the consequences of the new content-screening regime that Plaintiffs-Appellants' claims would lead to would be costly. To keep the cost of human reviewers down, larger, more sophisticated platforms would likely turn to algorithms or artificial intelligence to flag and block controversial comments or criticism. Defendant-Appellee YouTube, which now has nearly 2 billion users each month,[20] is already using algorithms or artificial intelligence to moderate content on its platform.[21] This is despite the fact that such systems are notoriously terrible at understanding context and cultural differences, are capable of being gamed by those looking to censor speech, and therefore are more likely to result in censorship of journalists, human rights activists, artists, or

---

[19] *A Commerce Solution Freelancers and Agencies Love*, Shopify Partners, https://www.shopify.com/partners/platform-features (last visited Apr. 10, 2019).

[20] *YouTube by the Numbers: Stats, Demographics & Fun Facts*, Omnicore (Jan. 6, 2019), https://www.omnicoreagency.com/youtube-statistics/.

[21] *About Our Mission*, Global Internet Forum to Counter Terrorism, https://www.gifct.org/about/ (last visited Apr. 10, 2019) (noting for YouTube, a forum member, that "98% of the videos YouTube removes for violent extremism are flagged by machine-learning algorithms").

any other creators of lawful content.[22] Use of these automated systems would only increase, and censorship would along with it.

Meanwhile, smaller platforms without the substantial resources required to manage potential liability in this way—or to weather the significant litigation costs they would face if they chose not to—would be forced to shut down. And new companies would be deterred from even trying to offer open platforms for speech. Indeed, even those platforms that would prevail on the merits of a lawsuit would incur significant legal fees. *See Roommates.Com*, 521 F.3d at 1175 ("[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles"); *cf. Wicks v. Miss. State Emp't Servs.*, 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").

If platforms are required to take some or all of the measures described above, it would lead to sanitized, milk-toast online platforms. Platforms would be incentivized to engage in self-censorship and host only non-controversial content, while actively discouraging any content that may draw objection, out of concern that

---

[22] *See* Corynne McSherry, *Platform Censorship: Lessons from the Copyright Wars*, EFF Deeplinks (Sept. 26, 2018), https://www.eff.org/deeplinks/2018/09/platform-censorship-lessons-copyright-wars; Sydney Li & Jamie Williams, *Despite What Zuckerberg's Testimony May Imply, AI Cannot Save Us*, EFF Deeplinks (Apr. 11, 2018), https://www.eff.org/deeplinks/2018/04/despite-what-zuckerbergs-testimony-may-imply-ai-cannot-save-us.

it may one day form the basis of a lawsuit against the company. The end result: the less controversial the content, the more likely it will remain on the platform.

Increased platform censorship would end the essential role intermediaries play in fostering social and political discourse on the Internet. Indeed, many individuals around the world use U.S.-based services to access and distribute all manner of content, from organizing in opposition to oppressive regimes[23] to sharing pictures of children with grandparents. Such robust, global online participation would never have been achieved without the immunity provided by Section 230, while the First Amendment continues to provide meaningful protections against publisher liability for incitement to violence. Granting would-be plaintiffs a clear avenue to circumvent Section 230's protections, or those of the First Amendment, would undermine this global phenomenon. Because platforms would be unwilling to take a chance on provocative or unpopular speech, the online marketplace of ideas would be artificially stunted. This is precisely what Congress sought to avoid in passing Section 230, and what the First Amendment should continue to protect against.

[23] *See, e.g.*, Philip N. Howard, et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?* (Sept. 1, 2011), available at http://philhoward.org/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/.

CONCLUSION

For the reasons outlined here, this Court should affirm the district court's dismissal based on Section 230, and also hold that the First Amendment immunizes YouTube from Plaintiffs-Appellants' claims in this case.

Dated: April 12, 2019

By: /s/ *Aaron Mackey*
Aaron Mackey

Aaron Mackey
Sophia Cope
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
Telephone: (415) 436-9333
amackey@eff.org

Counsel for Amicus Curiae Electronic Frontier Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus curiae Electronic Frontier Foundation in Support of Google LLC complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,563 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: April 12, 2019

By: /s/ *Aaron Mackey*
Aaron Mackey

Counsel for Amicus Curiae
Electronic Frontier Foundation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 12, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 12, 2019

By: /s/ *Aaron Mackey*
Aaron Mackey

Counsel for Amicus Curiae
Electronic Frontier Foundation