20-616

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAMES DOMEN, an individual,
CHURCH UNITED, a California not-for profit corporation,

Plaintiffs-Appellants,

v.

VIMEO, INC., a Delaware for-profit corporation,

Defendant-Appellee,

DOES, 1 through 25, inclusive,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York,
No. 1:19-cv-08418-SDA (Hon. Stewart D. Aaron)

BRIEF OF AMICUS CURIAE THE INTERNET ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

Samuel C. Leifer
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
617-526-6000

Patrick J. Carome
Ari Holtzblatt
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6000

August 7, 2020

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Second Circuit Local Appellate Rule 26.1, Amicus Curiae the Internet Association is not a publicly held corporation and does not have a parent corporation. No publicly traded corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The District Court Correctly Interpreted Section 230 of the CDA 4

A. Vimeo Is Immune Under Section 230(c)(1) From Litigation Challenging Its Decisions To Remove And Block Content Created By Appellants 5

B. Vimeo Is Also Immune Under Section 230(c)(2)(A) 10

II. The District Court's Rulings Advance Congress's Goals And Are Crucial For Amicus's Members 14

A. Section 230 Was Enacted To Encourage Online Providers To Self-Regulate Content On Their Websites 14

B. Section 230 Has Succeeded In Promoting Congress's Goal Of Encouraging Robust And Varied Content Moderation 17

C. Appellants' Contrary Interpretation Of Section 230 Would Undermine Congress's Goals 26

D. Section 230 Is Meaningful Only If It Immunizes Providers From The Burdens Of Litigation 29

CONCLUSION 33

CERTIFICATE OF COMPLIANCE 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page(s)

Almeida v. Amazon.com, Inc.,
456 F.3d 1316 (11th Cir. 2006) 4

Am. Freedom Def. Initiative v. Lynch,
217 F. Supp. 3d 100 (D.D.C. 2016) 6

Barnes v. Yahoo!, Inc.,
570 F.3d 1096 (9th Cir. 2009) 8, 9, 16

Barrett v. Rosenthal,
40 Cal. 4th 33 (2006) 27

Batzel v. Smith,
333 F.3d 1018 (9th Cir. 2003) 16

Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.,
206 F.3d 980 (10th Cir. 2000) 8, 16

Bennett v. Google, LLC,
882 F.3d 1163 (D.C. Cir. 2018) 12, 28, 29

Carafano v. Metrosplash.com, Inc.,
339 F.3d 1119 (9th Cir. 2003) 29

Cubby, Inc. v. CompuServe, Inc.,
776 F. Supp. 135 (S.D.N.Y. 1991) 15

Doe v. Internet Brands, Inc.,
824 F.3d 846 (9th Cir. 2016) 16

Dowbenko v. Google Inc.,
582 F. App’x 801 (11th Cir. 2014) 8

e-ventures Worldwide, LLC v. Google, Inc.,
No. 2:14-cv-646, 2017 WL 2210029 (M.D. Fla. Feb. 8, 2017) 8

Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.,
946 F.3d 1040 (9th Cir. 2019) 11, 27

Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC,
521 F.3d 1157 (9th Cir. 2008) ....*passim*

Fed. Agency of News LLC v. Facebook, Inc.,
432 F. Supp. 3d 1107 (N.D. Cal. 2020)..7

Force v. Facebook, Inc.,
934 F.3d 53 (2d Cir. 2019) ....*passim*

Freeman v. United States,
556 F.3d 326 (5th Cir. 2009) 30

FTC v. LeadClick Media, LLC,
838 F.3d 158 (2d Cir. 2016) 6

Fyk v. Facebook, Inc.,
808 F. App'x 597 (9th Cir. 2020)..7, 9

Gomez v. Zuckerburg,
5:20-cv-633 (N.D.N.Y July 23, 2020)...13

Green v. Am. Online (AOL),
318 F.3d 465 (3d Cir. 2003) 8, 10

Hepp v. Facebook, Inc.,
No. 19-4034, 2020 WL 3034815 (E.D. Pa. June 5, 2020) 13

Jane Doe No. 1 v. Backpage.com, LLC,
817 F.3d 12 (1st Cir. 2016)...28

Johnson v. Twitter, Inc.,
No. 18CECG00078 (Cal. Super. Ct. June 6, 2018)...7

Jones v. Dirty World Entm't Recordings LLC,
755 F.3d 398 (6th Cir. 2014) 4, 8, 16, 30

Klayman v. Zuckerberg,
753 F.3d 1354, 1359 (D.C. Cir. 2014)...8

Lewis v. Google LLC,
No. 20-cv-0085, 2020 WL 2745253 (N.D. Cal. May 20, 2020).....................5

Nemet Chevrolet v. Consumeraffairs.com,
591 F.3d 250 (4th Cir. 2009) 30

Riggs v. MySpace, Inc.,
444 F. App'x 986 (9th Cir. 2011)..7

Sikhs for Justice, Inc. v. Facebook, Inc.,
697 F. App'x 526 (9th Cir. 2017).. 7, 22

Stratton Oakmont, Inc. v. Prodigy Servs. Co.,
No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)........... 14, 15

Spy Phone Labs LLC. v. Google Inc.,
No. 15-cv-3756, 2016 WL 6025469 (N.D. Cal. Oct. 14, 2016)....................12

Taylor v. Twitter, Inc.,
No. CGC 18-564460 (Cal. Super. Ct. Mar. 8, 2019).................................. 7-8

Twitter, Inc. v. Superior Court ex rel. Taylor,
A154973 (Cal. App. Ct. Aug. 17, 2018) 8

U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.,
844 F.2d 1087, 1096 (4th Cir. 1988)..13

Wuterich v. Murtha,
562 F.3d 375 (D.C. Cir. 2009)...30

Zango, Inc. v. Kaspersky Lab, Inc.,
No. C07-0807, 2007 WL 5189857 (W.D. Wash. Aug. 28, 2007) 11

Zeran v. Am. Online, Inc.,
129 F.3d 327 (4th Cir. 1997) .... *passim*

STATUTES, RULES, AND REGULATIONS

47 U.S.C. § 230 .... *passim*

LEGISLATIVE MATERIALS

141 Cong. Rec. 22,045 .... 15, 27

H.R. Rep. No. 104-458 (1996) (Conf. Rep.) 15

S. Rep. No. 104-230 (1996) (Conf. Rep.)...15

OTHER AUTHORITIES

Abusive Behavior, General Guidelines and Policies,
TWITTER 18

Age-Restricted Content, Community Guidelines Enforcement,
YOUTUBE 21

Authenticity, Community Standards,
AIRBNB 21

Banning a Violent Network in the U.S.,
FACEBOOK (June 30, 2020) 25

Bullying and Harassment, Community Standards,
FACEBOOK 18, 21

Community Guidelines,
SNAP 18

Community Standards,
AIRBNB 19

Community Standards,
FACEBOOK 20

Content Guidelines,
YELP 21

COVID-19 Medical Misinformation Policy, YouTube Policies,
YOUTUBE (May 20, 2020), ...25

Developing Policies, Community Guidelines,
YOUTUBE 19

Do Not Post Sexual or Suggestive Content Involving Minors,
Account and Community Restrictions, REDDIT 19

Do Not Post Violent Content, Account and Community Restrictions,
REDDIT 20

Donie O'Sullivan, *Twitter Temporarily Restricts Donald Trump Jr.'s Account After He Posts Video Claiming Masks are Unnecessary*, CNN (July 28, 2020)..........26

Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020)..........13

Facebook by the Numbers, OMNICORE (Apr. 22, 2020)..........23

Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, FACEBOOK (Apr. 16, 2020)..........26

Information Note, *Assessment of the Code of Conduct on Hate Speech On-Line State of Play*, EUROPEAN COMMISSION (Sept. 27, 2019)..........24

Jennifer Langston, *How PhotoDNA for Video is Being Used to Fight Online Child Exploitation*, MICROSOFT (Sept. 12, 2018)..........24

LinkedIn Professional Community Policies, LINKEDIN..........19

Misrepresentation, Community Standards, FACEBOOK..........18

Monika Bickert, *Enforcing Against Manipulated Media*, FACEBOOK (Jan. 6, 2020)..........23

Objectionable Content, Community Standards, FACEBOOK..........18

Petition for Rulemaking of the National Telecommunications and Information Administration (filed with FCC July 27, 2020)..........13

Platform Manipulation and Spam Policy, General Guidelines and Policies, TWITTER..........19, 21

Reddit Content Policy, REDDIT..........19

Sensitive Media Policy, Twitter Rules and Policies, TWITTER..........22

Supantha Mukherjee, *Facebook Starts Fact-Checking Partnership with Reuters*, REUTERS (Feb. 12, 2020), ... 24

Twitter Rules and Policies, TWITTER 20

Twitter Safety, *New Disclosures to Our Archive of State-Backed Information Operations*, TWITTER (Dec. 20, 2019) 31

Twitter, Inc., Current Report (Form 8-K) (July 23, 2020) 23

Update to Our Content Policy, REDDIT (June 29, 2020) 24

Violent and Graphic Content, Community Standards, FACEBOOK 18

Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER, (May 11, 2020) 26

YouTube For Press, YOUTUBE 23

INTEREST OF AMICUS CURIAE[1]

The Internet Association represents the interests of leading internet companies and their customers. Its members include leading internet and technology companies such as Facebook, Google, LinkedIn, Microsoft, Snap, Twitter, and Uber.[2] It seeks to protect internet freedom and free speech, promote innovation and economic growth, and empower customers and users.

Amicus and its members have a substantial interest in the legal rules governing whether providers of interactive computer services may be subjected to lawsuits concerning their decisions to remove content or suspend users from their websites. They likewise have a substantial legal interest in being able to adopt and enforce robust community standards tailored to the needs of their users. Because amicus's members serve as platforms for communications and services among billions of users, its members have been, and will continue to be, parties to lawsuits in which they invoke immunity under Section 230 of the Communications Decency Act. The success of these online businesses—and the vitality of online media

---

[1] No counsel for a party authored this brief in whole or in part. No party, no party's counsel, and no person other than amicus or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties to this appeal consent to the filing of this brief.

[2] A complete list of Internet Association members is available at http://internetassociation.org/our-members/.

generally—depends on their being shielded from the risks, burdens, and uncertainty of lawsuits that seek to hold them liable for regulating content on their platforms.

Amicus and its members rely on the settled interpretations of 47 U.S.C. §§ 230(c)(1) and (c)(2)(A), granting broad immunity to online providers for publishing third-party content, including, as in this case, decisions to remove third-party content or suspend a user's account from their online platforms. The robustness of this immunity has been recognized by courts across the country, including most recently by the district court here. The district court's rulings under Sections 230(c)(1) and (c)(2)(A) are consistent with Congress's policy choices and with the vast majority of courts that have considered these issues. The interpretation of the statute reflected in these rulings is not only correct as a matter of law and precedent, but is crucial to the growth and success of the internet industry and a prerequisite for the provision of valuable and innovative services upon which the public has come to rely.

SUMMARY OF ARGUMENT

Amicus urges the Court to affirm the district court's rulings that Vimeo is immune under both Sections 230(c)(1) and 230(c)(2)(A) of the Communications Decency Act ("CDA") from litigation challenging its editorial decision to remove appellants' content and suspend their accounts from its platform. Section 230 grants online providers broad immunity to regulate content on their websites. Courts across

the country have consistently held that this immunity extends to providers' decisions about whether to remove or refuse to publish third-party content.

Amicus's members provide online platforms through which users can share news and opinions, advertise goods, rate and review service businesses and vendors, search for housing, and interact with individuals around the globe. To offer these and myriad other services, these providers depend heavily on their rights and ability to regulate the content on their websites, including by filtering, screening or otherwise preventing third-party users from posting material that violates the provider's content rules, often referred to as "community standards." *Force v. Facebook, Inc.*, 934 F.3d 53, 59-60 & n.5 (2d Cir. 2019). These community standards can vary enormously depending on a website's functions and goals, and may include, for example, prohibiting hate speech, requiring sellers to provide accurate information about their products, or penalizing users for artificially amplifying the significance of their posts (*e.g.*, by using fake accounts to increase the number of times a post is "liked"). Without the ability to prevent unwanted or offensive content, the services that amicus's members provide could become unsafe, unreliable, or unable to perform the functions on which the public and the global economy have come to rely.

Recognizing these concerns, Congress enacted Section 230 to encourage online providers to self-regulate the content on their websites, among other goals.

Several features of Section 230 are critical to achieving that goal, including: (1) granting providers the freedom to determine for themselves what content to permit and how to do so, "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2); and (2) ensuring that providers are immune "not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008).

The district court's decision that Vimeo is immune from appellants' claims under Sections 230(c)(1) and (c)(2)(A) furthers these legislative goals and is consistent with decisions by the overwhelming majority of courts that have reviewed similar allegations. The Court should affirm both rulings.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED SECTION 230 OF THE CDA

Courts in this Circuit and elsewhere have interpreted Section 230 of the CDA, 47 U.S.C. § 230, to provide broad protection for online intermediaries. *See Force*, 934 F.3d at 64; *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("'The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.'" (quoting *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006)).

Defendants who meet the statutory elements of Section 230's operative provisions—in this case, Sections 230(c)(1) or (c)(2)(A)—are immune from both liability and the burdens of litigation arising from their decisions about how to moderate content on their websites. *See Roommates.com,* 521 F.3d at 1175. Here, the district court correctly ruled that Vimeo satisfies the statutory elements of both Sections 230(c)(1) and (c)(2)(A) and is thus immune under both provisions from appellants' claims challenging its decision to remove their content and suspend their accounts. Joint Appendix ("JA") 15, 17.

A. Vimeo Is Immune Under Section 230(c)(1) From Litigation Challenging Its Decisions To Remove And Block Content Created By Appellants

Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This Section therefore provides immunity to defendants who: (1) provide an interactive computer service; (2) did not create the content at issue; and (3) are being treated in litigation as a "publisher or speaker" of that content. *Force*, 934 F.3d at 64 (reciting elements). Vimeo clearly meets each of these requirements.

First, Vimeo indisputably provides an "interactive computer service." 47 U.S.C. § 230(f)(2); *see Lewis v. Google LLC*, No. 20-cv-0085, 2020 WL 2745253, at *8 (N.D. Cal. May 20, 2020) ("YouTube [is a] provider[] of an interactive

computer service."); *Am. Freedom Def. Initiative v. Lynch*, 217 F. Supp. 3d 100, 104 (D.D.C. 2016) (same), *aff'd sub nom. Am. Freedom Def. Initiative v. Sessions*, 697 F. App'x 7 (D.C. Cir. 2017) (per curiam).

Second, the information at issue was created by another "information content provider"—*i.e.*, it was created by appellants. JA12. Section 230 defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development" of the content at issue. 47 U.S.C. § 230(f)(3). Vimeo was not responsible for the creation or development of appellants' videos promoting sexual orientation change efforts. Indeed, Vimeo's "community guidelines" expressly prohibit such content. JA8, 106.

Third, appellants' claims treat Vimeo as a "publisher" by seeking to hold Vimeo liable for "deleting the content of Church United and James Domen's account and banning them from its service." Appellants' Br. 1-2. "At its core, § 230 bars lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to *publish* [or] *withdraw* … content." *FTC v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016) (emphasis added) (citations and quotations omitted). The Courts of Appeals have therefore widely held that a provider's decision about whether to remove a third-party's content, or "prevent its posting," is "precisely the kind of activity for which

section 230 was meant to provide immunity." *Roommates.com*, 521 F.3d at 1170; *see Force*, 934 F.3d at 65.

In *Sikhs for Justice, Inc. v. Facebook, Inc.*, for example, the Ninth Circuit held that Section 230(c)(1) barred a lawsuit claiming that Facebook had unlawfully discriminated against the plaintiff by "hosting, and later blocking, [plaintiff's] online content" in India. 697 F. App'x 526, 526 (9th Cir. 2017); *see also Fyk v. Facebook, Inc.*, 808 F. App'x 597, 598 (9th Cir. 2020) (immunity for "de-publishing pages that [plaintiff] created and then re-publishing them for another third party"). Likewise, in *Riggs v. MySpace, Inc.*, the Ninth Circuit affirmed dismissal under Section 230(c)(1) of claims challenging MySpace's deletion of fake user profiles. 444 F. App'x 986 (9th Cir. 2011). In *Fed. Agency of News LLC v. Facebook, Inc.*, the court applied Section 230(c)(1) to dismiss claims challenging Facebook's decision to remove accounts that Facebook believed to be controlled by Russian intelligence. 432 F. Supp. 3d 1107 (N.D. Cal. 2020). In *Johnson v. Twitter, Inc.*, No. 18CECG00078 (Cal. Superior Ct. June 6, 2018),[3] the court held that Section 230(c)(1) barred a lawsuit challenging Twitter's decision to suspend a user after he attempted to raise money to "tak[e] out" a Black Lives Matter activist. And in *Taylor*

[3] *See* https://www.documentcloud.org/documents/4495616-06-06-18.html. All URLs in this brief were last visited on August 6, 2020.

v. Twitter, Inc., No. CGC 18-564460 (Cal. Superior Ct. Mar. 8, 2019),[4] the court likewise dismissed claims under Section 230(c)(1) challenging Twitter's decision to suspend the account of an avowed white supremacist based on Twitter rule against violent extremism.[5]

Pointing to dicta in a lone district court opinion, appellants argue that allowing Section 230(c)(1) to immunize decisions to remove content would render Section 230(c)(2)(A) "superfluous." Appellants' Br. 20 (quoting *e-ventures Worldwide, LLC v. Google, Inc.*, No. 2:14-cv-646, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017)). But as the district court in this case correctly explained, *e-ventures*'s interpretation—which does not appear to have been cited favorably by any other court—is unpersuasive because "Section 230(c)(2)'s grant of immunity, while

---

[4] *See* https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2910&context=historical; *see also Twitter, Inc. v. Superior Court ex rel. Taylor*, A154973 (Cal. App. Ct. Aug. 17, 2018) (Order Issuing Writ of Mandate), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2795&context=historical.

[5] *See also, e.g.*, *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("[T]he very essence of publishing is making the decision whether to print or retract a given piece of content."); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1103 (9th Cir. 2009) ("[R]emoving content is something publishers do."); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("[L]awsuits seeking to hold a service provider liable for … deciding whether to publish, withdraw, postpone or alter content … are barred."); *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (same); *Jones*, 755 F.3d at 407 (same); *Dowbenko v. Google Inc.*, 582 F. App'x 801, 805 (11th Cir. 2014) (same); *Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 986 (10th Cir. 2000) ("By deleting [plaintiff's] information, Defendant was simply engaging in the editorial functions Congress sought to protect.").

overlapping with that of Section 230(c)(1), also applies to situations not covered by Section 230(c)(1)." JA14-15 (citations and quotations omitted). As the Ninth Circuit explained in *Barnes*, Section 230(c)(1) "shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties." 570 F.3d at 1105. Section 230(c)(2)(A) simply "provides *an additional shield* from liability," encompassing, for example, those service providers "who cannot take advantage of subsection (c)(1) … because they developed, even in part, the content at issue." *Id.* (emphasis added); *see also* Appellee's Br. 14-16 (providing more examples).

Appellants also argue that Section 230(c)(1) immunity should not apply because Vimeo allegedly had "discriminatory" motives. Appellants' Br. 14. But "nothing in § 230(c)(1) turns on the alleged motives underlying the editorial decisions of the provider." *Fyk*, 808 F. App'x at 598 ("Section 230(c)(1) immunity" does not contain an "anti-discrimination" requirement). When deciding whether Section 230(c)(1) immunity applies, what matters is not how plaintiffs choose to characterize their claims—*e.g.*, as being "based on Vimeo's discriminatory ban," Appellants' Br. 14—but simply whether the cause of action seeks to impose liability for "publishing conduct." *Barnes*, 570 F.3d at 1103; *see Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude

material that third parties seek to post online is perforce immune under section 230.”).

As Vimeo meets the above requirements, the district court correctly held that Vimeo is immune under Section 230(c)(1) from litigation challenging its decisions to remove appellants’ content and suspend their accounts. *See* JA12-15.

B. Vimeo Is Also Immune Under Section 230(c)(2)(A)

Section 230(c)(2)(A) of the CDA states that “[n]o provider or user of an interactive computer service shall be held liable” for “any action voluntarily taken in good faith to restrict access to or availability of material” that the provider “considers to be … objectionable.” 47 U.S.C. § 230(c)(2)(A). This provision therefore provides immunity for a defendant that: (1) provides an interactive computer service; (2) restricts content it considers objectionable; and (3) restricts such content in good faith. *Id.*

Section 230(c)(2)(A) allows online providers to establish “standards of decency without risking liability for doing so.” *Green*, 318 F.3d at 472. Given the wide range of platforms on the internet, there can be no one objective “standard[] of decency.” *Id.* A website about veganism, for example, might find material about hunting objectionable. Or a forum for Catholics might find material about reproductive rights objectionable. Accordingly, “Section 230(c)(2)(A) … does not require that the material *actually be* objectionable; rather, it affords protection for

blocking material that the provider or user *considers to be* objectionable." *Zango, Inc. v. Kaspersky Lab, Inc.*, No. C07-0807, 2007 WL 5189857, at *4 (W.D. Wash. Aug. 28, 2007) (emphasis added) (quotations omitted), *aff'd* 568 F.3d 1169 (9th Cir. 2009).

As discussed, there is no question that Vimeo provides an interactive computer service. *See* JA12. Nor is there any question that Vimeo "considers" appellants' content "objectionable." 47 U.S.C. § 230(c)(2)(A). Vimeo's Community Guidelines have expressly prohibited videos that "promote Sexual Orientation Change Efforts (SOCE)" since 2014, years before appellants ever used the Vimeo service. JA93, ¶ 4; JA106. This prohibition continued through 2016, when appellants created their account. JA93, ¶ 3. And Vimeo reiterated its prohibition of SOCE videos in emails sent directly to appellants in November and December 2018, before Vimeo enforced that prohibition against them. JA5-8.[6]

---

[6] Appellants do not appear to argue that the phrase "otherwise objectionable" should be somehow limited in light of the other categories of content enumerated in Section 230(c)(2)(A). And for good reason, as the Ninth Circuit recently explained: Because the "specific categories listed in § 230(c)(2) vary greatly … they provide little or no assistance in interpreting the more general ['otherwise objectionable'] category." *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1051 (9th Cir. 2019). Rather, this final "catchall" category "was more likely intended to encapsulate forms of unwanted online content that Congress could not identify in the 1990s." *Id.* at 1052.

Vimeo's actions were also taken in good faith. Vimeo notified appellants of its concerns before taking any action through its Community Guidelines and by emailing appellants directly. JA5-7. Vimeo also gave appellants a chance to cure their violations and recommended appellants "download [their] videos" to ensure that they would "be able to keep them." JA6. Further, appellants conceded that Vimeo removed their videos and suspended their accounts "based on [appellants'] viewpoint," not their identities, JA51, ¶ 47, and the complaint's allegations did not plausibly suggest that Vimeo's stated reason for removing appellants' content and suspending their accounts was "pretextual." *Spy Phone Labs LLC. v. Google Inc.*, No. 15-cv-3756, 2016 WL 6025469, at *8 (N.D. Cal. Oct. 14, 2016).

Appellants argue that they have alleged a lack of good faith by claiming "disparate treatment." Appellants' Br. 23. But even if that claim had been plausibly alleged—and it does not appear to have been so alleged (*see* Appellee's Br. 21)—a mere claim of selective enforcement is not sufficient to show a lack of good faith under Section 230(c)(2)(A). Indeed, this provision was expressly enacted to provide immunity for providers that "remove[] some—but not all—offensive material from their websites." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018); *see also Force*, 934 F.3d at 71 (Section 230 immunity applies where a provider "undertake[s] efforts to eliminate objectionable" content even where it "has not been effective or *consistent* in those efforts" (emphasis added)). And because wholly

uniform application of content-moderation policies at scale is almost impossible, allowing Section 230(c)(2)(A) immunity to be defeated by an allegation that someone else's similar content was not removed would render the statute a virtual dead letter. That is not the result Congress intended.

Accordingly, the district court correctly held that Vimeo is also immune under Section 230(c)(2)(A). *See* JA15-17.[7]

---

[7] The Administration's recent Executive Order and Petition for rulemaking relating to Section 230 do not change the calculus. *See* Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020); Petition for Rulemaking of the National Telecommunications and Information Administration (filed with FCC July 27, 2020) ("Pet."). As neither document was "issued pursuant to statutory mandate or a delegation from Congress of lawmaking authority," neither has the force of law. *U.S. Dep't of Health & Human Servs. v. Fed. Labor Relations Auth.*, 844 F.2d 1087, 1096 (4th Cir. 1988); *see also* Order at 5, *Gomez v. Zuckerburg*, 5:20-cv-633 (N.D.N.Y July 23, 2020), ECF No. 3 ("EO 13925 does not provide a basis for Plaintiff's claim"); *Hepp v. Facebook, Inc.*, No. 19-4034, 2020 WL 3034815, at *4 (E.D. Pa. June 5, 2020) (similar). Further, the interpretations advanced in these documents directly conflict with the plain language and clear policies of Section 230, as well as nearly a quarter century of consistent judicial interpretation. For example, the Petition argues that the district court's opinion in this case "rendered section 230(c)(2) superfluous," Pet. 28-29, but that view has been rejected by all but one of the numerous courts to have ruled on the issue. *See supra* at p. 8-9. Similarly, the Petition argues that the phrase "that the provider … considers to be" should be read out of Section 230(c)(2)(A) entirely. *See* Pet. 31-38. But the Administration's preference that Congress had drafted Section 230 differently cannot change the plain words of the statute.

II. The District Court's Rulings Advance Congress's Goals And Are Crucial For Amicus's Members

Beyond the statutory elements discussed above, amicus and its members also urge this Court to affirm because the district court's rulings further the legislative intent behind Section 230 and will help to promote the continued success of innovative and vibrant online platforms that greatly benefit society. To illustrate these points, it is instructive to briefly explain the statute's history.

A. Section 230 Was Enacted To Encourage Online Providers To Self-Regulate Content On Their Websites

Section 230 was enacted in response to a 1995 New York state court decision holding online providers potentially liable for third-party content on their platforms. *See Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995); *Force*, 934 F.3d at 63-64 & n.16 (Congress enacted Section 230 to "overrule *Stratton*"). The online provider, Prodigy, operated a platform for two million users, each of whom could post content to its "bulletin boards." *See Stratton*, 1995 WL 323710, *1-2. Prodigy held itself out as running a "family oriented" website and, in pursuit of that goal, issued "content guidelines" and used screening software to remove offensive or objectionable content from its website. *Id.* at *2-3.

But Prodigy's attempt to address unwanted content backfired. Specifically, Prodigy was held potentially liable for third-party content on its bulletin boards

because, rather than passively allowing all messages, Prodigy had attempted to make "decisions as to content," such as "actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and bad taste." *Id.* at *4 (citations and quotations omitted). The court distinguished Prodigy's actions from those described in an earlier New York federal case, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), in which a similar online platform was held free from liability for third-party content because it had "no opportunity to review" the content at issue and exercised "little or no editorial control" over its platform. *Stratton*, 1995 WL 323710, at *4 (quotations omitted). In short, the *Stratton* court ruled that online providers that voluntarily attempt to filter *some* third-party content will become liable for *all* of it, while providers who do nothing will be liable for none.

The following year, Congress enacted Section 230 to overrule *Stratton* and reject the "massive disincentive" *Stratton* had created for online providers to regulate content on their platforms. 141 Cong. Rec. 22,045 (1995) (statement of Rep. Cox); *see* H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) ("One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy*," so as to avoid penalizing providers for "restrict[ing] access to objectionable material"); S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.) (containing the same quotation).

Congress's goal of promoting voluntary self-policing is evident on the face of the statute. The statute is titled "Protection for private blocking and screening of offensive material." 47 U.S.C. § 230. It begins with congressional findings, including that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." *Id.* § 230(a)(4). The statute also expresses Congress's goals "to preserve the vibrant and competitive free market that presently exists for the Internet" and "to remove disincentives for the development and utilization of blocking and filtering technologies." *Id.* § 230(b)(2), (4). And the title of subsection (c)—which encompasses both of the Section 230 immunities at issue here—is "Protection for 'Good Samaritan' blocking and screening of offensive material." *Id.* § 230(c).

In light of this history and statutory intent, courts have uniformly recognized that Congress "designed" Section 230 to "encourage voluntary monitoring" of objectionable content. *Barnes*, 570 F.3d at 1099-1100; *see also Force*, 934 F.3d at 79 (Katzmann, C.J., concurring) (Congress "sought to empower interactive computer service providers to self-regulate").[8] Indeed, Congress worried that

---

[8] *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851-52 (9th Cir. 2016) (the "core policy of section 230(c)(1)" is to allow online providers "to self-regulate offensive third party content without fear of liability"); *Jones*, 755 F.3d at 408 ("[Section] 230 encourages interactive computer service providers to self-regulate."); *Batzel v. Smith* 333 F.3d 1018, 1028 (9th Cir. 2003) (Section 230 was intended "to encourage interactive computer services and users of such services to self-police"); *Ben Ezra*, 206 F.3d at 986 ("Congress clearly enacted § 230 to forbid the imposition of

without Section 230, providers might "abstain from self-regulation" entirely. *Zeran*, 129 F.3d at 333.

To encourage voluntarily self-policing, Congress granted online providers the robust immunities under Sections 230(c)(1) and (c)(2)(A) discussed in Part I. But these immunities serve Congress's goals only if they grant providers broad flexibility to decide what content to allow and how to regulate it, as well as immunize providers not only from ultimate liability but also from the burdens of litigation.

B. Section 230 Has Succeeded In Promoting Congress's Goal Of Encouraging Robust And Varied Content Moderation

As Congress intended, the broad construction of Section 230 that courts across the country have nearly unanimously adopted has succeeded in encouraging online providers to adopt and enforce effective content moderation policies. Building on this legal foundation, online providers have issued community standards prohibiting various categories of objectionable material from their websites, including:

---

publisher liability on a service provider for the exercise of its editorial and self-regulatory functions."); *Zeran*, 129 F.3d at 331 (Congress sought "to encourage service providers to self-regulate the dissemination of offensive material over their services").

- "Hate speech," such as content attacking someone based on race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability. [9]
- "Bullying," "harassment," or "threats," such as conveying an intent to release "personally identifiable information" about another.[10]
- "Violent," "graphic," or "sexual" content.[11]
- Impersonating others, such as by creating a misleading profile that assumes "the persona of or speaking for another person or entity."[12]

In addition to these and other broad categories, providers have also adopted community standards prohibiting more targeted types of content, including material

---

[9] Community Guidelines, SNAP, https://www.snap.com/en-US/community-guidelines; Objectionable Content, Community Standards, FACEBOOK, https://www.facebook.com/communitystandards/objectionable_content.

[10] Bullying and Harassment, Community Standards, FACEBOOK, https://www.facebook.com/communitystandards/bullying; Abusive Behavior, General Guidelines and Policies, TWITTER, https://help.twitter.com/en/rules-and-policies/abusive-behavior; Community Standards, AIRBNB, https://www.airbnb.com/trust/standards.

[11] Violent and Graphic Content, Community Standards, FACEBOOK, https://www.facebook.com/communitystandards/graphic_violence.

[12] Misrepresentation, Community Standards, FACEBOOK, https://www.facebook.com/communitystandards/misrepresentation.

that sexually exploits or endangers children,[13] supports terrorism,[14] misrepresents commercial listings,[15] or artificially amplifies the apparent significance of content (*e.g.*, by manipulating the number of "votes," "likes," or "follows" a post receives).[16] These community standards are easily accessible through providers' websites and, in general, users must accept them as a pre-condition to posting content or otherwise accessing the platform.

Typically, platform operators are also clear about *why* they have adopted their respective community standards, which are often tailored to achieve the specific goals of their platforms and "developed in partnership with a wide range of external industry and policy experts" as well as based on direct feedback from users.[17] For example, Facebook's stated "goal" is to "create a place for expression and give people a voice." Accordingly, Facebook has crafted community standards "that are

---

[13] Do Not Post Sexual of Suggestive Content Involving Minors, Account and Community Restrictions, REDDIT, https://www.reddithelp.com/hc/en-us/articles/360043075352.

[14] LinkedIn Professional Community Policies, LINKEDIN, https://www.linkedin.com/help/linkedin/answer/34593/linkedin-professional-community-policies?lang=en.

[15] Community Standards, AIRBNB, https://www.airbnb.com/trust/standards.

[16] Reddit Content Policy, REDDIT, https://www.redditinc.com/policies/content-policy-1; Platform Manipulation and Spam Policy, General Guidelines and Policies TWITTER, https://help.twitter.com/en/rules-and-policies/platform-manipulation.

[17] Developing Policies, Community Guidelines, YOUTUBE, https://www.youtube.com/howyoutubeworks/policies/community-guidelines/#developing-policies.

inclusive of different views and beliefs, in particular those of people and communities that might otherwise be overlooked or marginalized."[18] Similarly, Twitter has recognized that "[v]iolence, harassment and other similar types of behavior discourage people from expressing themselves, and ultimately diminish the value of global public conversation," and thus Twitter's rules are designed "to ensure all people can participate in the public conversation freely and safely."[19]

The community standards adopted by online providers reflect the diversity of the internet itself, with each online provider adopting standards specifically tailored to the diverse needs of its particular community of users. While online providers that (like Prodigy did) seek to create "family-oriented" platforms may broadly prohibit violent or graphic content, others may allow such content in limited contexts, such as for "educational, newsworthy, artistic, satire" or "documentary" purposes, or may require the user posting the content to self-identify it (by, for example, flagging it as "Not Safe For Work") so other users can easily avoid it.[20] Social network platforms may implement protections to prevent harassment of

---

[18] Community Standards, FACEBOOK, https://www.facebook.com/community standards/.

[19] Twitter Rules and Policies, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules.

[20] Do Not Post Violent Content, Account and Community Restrictions, REDDIT, https://www.reddithelp.com/en/categories/rules-reporting/account-and-community-restrictions/do-not-post-violent-content.

younger users given that such content can "have more of an emotional impact on minors."[21] Retail and rental platforms may prohibit users from posting inaccurate product information given the importance of buyers knowing what they are purchasing.[22] Platforms that compile user reviews may prohibit users from posting anonymous or irrelevant reviews, or may prevent users from reviewing their own, friends' or relatives' businesses.[23] And platforms frequented by influential figures may prohibit users from misleadingly impersonating such figures, which could deceive other users or disrupt financial markets.[24]

Online providers likewise take a range of different approaches in deciding *how* to enforce their standards. Many providers offer special "modes" that restrict access to content otherwise available on the platform. Providers may allow users to voluntarily *opt-in* to these modes, such as YouTube's "Restricted Mode," which allows users (like parents or schools) to block access on their accounts to videos containing age-restricted content (like vulgar language).[25] Or providers may require

---

[21] Bullying and Harassment, Community Standards, FACEBOOK, https://www.facebook.com/communitystandards/bullying.

[22] Authenticity, Community Standards, AIRBNB, https://www.airbnb.com/trust/standards.

[23] Content Guidelines, YELP, https://www.yelp.com/guidelines.

[24] Platform Manipulation and Spam Policy, General Guidelines and Policies, TWITTER, https://help.twitter.com/en/rules-and-policies/platform-manipulation.

[25] Age-Restricted Content, Community Guidelines Enforcement, YOUTUBE, https://support.google.com/youtube/answer/2802167?hl=en.

users to affirmatively *opt-out* of such modes, such as Twitter's "Sensitive media policy," which requires users to click past a "warning message" to view certain content.[26] Providers may also mandatorily enforce content limitations based on where a user is located. *See, e.g.*, *Sikhs for Justice*, 697 F. App'x 526.

Further, amicus's members employ a multitude of general-purpose technologies to support their content moderation efforts, such as providing users with "report abuse" buttons and other mechanisms to flag problematic content or contact the companies with complaints. Members also devote significant staff and resources to monitoring, analyzing and enforcing compliance with their respective community guidelines. In addition, providers have developed sophisticated software and algorithms to detect and remove harmful content. In many instances, they have shared these technologies to help others eradicate that harmful content as well. Some providers also dedicate large teams of staff—for example, Facebook employs approximately 15,000 "content moderators" in the U.S.—to enhance their ability to provide quick responses to evolving problems.

Flexibility has played a critical role in enabling platforms to experiment and thereby refine their approaches to content moderation over time. Moderating content

---

[26] Sensitive Media Policy, Twitter Rules and Policies TWITTER, https://help.twitter.com/en/rules-and-policies/media-policy.

is not easy given the almost unfathomable volumes of content online and the need to make sometimes-nuanced distinctions. For example,

- YouTube has over 2 billion users and over a billion hours of video viewed on its platform every day.
- Facebook has more than 2.6 billion users, who send 3 million messages every 20 seconds.
- Twitter has more than 186 million users and hosts hundreds of millions of tweets per day.[27]

It is therefore critically important that providers have room to learn, adapt, and update their approaches over time. This includes the flexibility to decide what content is objectionable and how to prevent it from being posted. *See Force*, 934 F.3d at 60 ("Facebook is also experimenting with artificial intelligence to block or remove text that might be advocating for terrorism." (quotations omitted)); *id.* ("Violating [Facebook's] policies may result in Facebook suspending or disabling a user's account, removing the user's content, blocking access to certain features, and contacting law enforcement."); Monika Bickert, *Enforcing Against Manipulated Media*, FACEBOOK (Jan. 6, 2020) (banning so-called "deepfake" videos, which use

[27] YouTube For Press, YOUTUBE, https://www.youtube.com/about/press/; Facebook by the Numbers, OMNICORE, https://www.omnicoreagency.com/facebook-statistics/; Twitter, Inc., Current Report (Form 8-K) (July 23, 2020).

artificial intelligence to alter videos to "mislead someone into thinking that a subject of the video said words that they did not actually say").[28]

Due largely to the flexibility afforded by broad Section 230 immunity, service providers have become increasingly successful at removing objectionable content from their websites. In September 2019, the European Commission determined that amicus members Google, YouTube, Facebook, Twitter, Microsoft, LinkedIn, Instagram, and Snap had reviewed nearly 90% of identified illegal hate speech on their websites less than 24 hours after it was reported.[29] Just a few weeks ago, Reddit announced that it had banned thousands of "subreddits," including for violating the platform's hate speech policy,[30] and Facebook likewise announced that it had

---

[28] Amicus's members also partner with third-parties to remove objectionable content from the Internet. For example, Microsoft donated PhotoDNA, image-matching software that detects child sexual abuse material, to the National Center for Missing and Exploited Children, so that it could be licensed for free to other entities to identify versions of previously reported abuse. *See* Jennifer Langston, *How PhotoDNA for Video is Being Used to Fight Online Child Exploitation*, MICROSOFT (Sept. 12, 2018), https://news.microsoft.com/on-the-issues/2018/09/12/how-photodna-for-video-is-being-used-to-fight-online-child-exploitation/. And Facebook recently teamed up with Reuters to fact-check content on its platform. *See* Supantha Mukherjee, *Facebook Starts Fact-Checking Partnership with Reuters*, REUTERS (Feb. 12, 2020), https://www.reuters.com/article/us-facebook-partnership-reuters/facebook-starts-fact-checking-partnership-with-reuters-idUSKBN2062K4.

[29] Information Note, *Assessment of the Code of Conduct on Hate Speech On-Line State of Play*, EUROPEAN COMMISSION (Sept. 27, 2019), https://data.consilium.europa.eu/doc/document/ST-12522-2019-INIT/en/pdf.

[30] *Update to Our Content Policy*, REDDIT (June 29, 2020), https://www.reddit.com/r/announcements/comments/hi3oht/update_to_our_content_policy/.

successfully removed hundreds of accounts for violating Facebook's standards, including accounts linked to a "violent US-based anti-government network" with members engaged in "racism and anti-Semitism."[31]

Section 230 immunity has also provided online platforms with breathing space to develop evolving content regulation policies, without fear of judicial second-guessing and without needing to involve the courts in decisions about restricting access to material that may be "constitutionally protected." 47 U.S.C. § 230(c)(2)(A). This has proven crucial, for example, to fighting misinformation about the global pandemic. YouTube now prohibits content that "contradicts [the World Health Organization] or local health authorities' guidance" on treatment, prevention, diagnosis, or transmission of COVID-19.[32] Twitter and Facebook

---

[31] *Banning a Violent Network in the U.S.*, FACEBOOK (June 30, 2020), https://about.fb.com/news/2020/06/banning-a-violent-network-in-the-us/.

[32] COVID-19 Medical Misinformation Policy, YouTube Policies, YOUTUBE (May 20, 2020), https://support.google.com/youtube/answer/9891785?hl=en.

prohibit or provide warning labels for similarly misleading information.[33] And providers have been rigorously enforcing these policies.[34]

C. Appellants' Contrary Interpretation Of Section 230 Would Undermine Congress's Goals

Appellants' interpretations of Sections 230(c)(1) and (c)(2)(A) would frustrate the objectives that Congress sought to achieve in enacting Section 230.

Appellants cast their allegations in terms of "discrimination," but they essentially just second-guess Vimeo's judgment about what content it should consider objectionable. Appellants allege that Vimeo incorrectly determined that their videos "harass, incite hatred, or include discriminatory or defamatory speech," because, according to appellants, their videos actually relate to their "Christian principles," "religious beliefs" and "preferred sexual orientation." JA50-51, ¶¶ 39-44. Appellants' opening brief repeats this position, arguing that Vimeo should not have "classif[ied]" their videos as violating its guidelines because none "illustrated harassment, hatred, discriminatory [sic] or defamation." Appellants' Br. 6; *see id.*

---

[33] Yoel Roth & Nick Pickles, *Updating Our Approach to Misleading Information*, TWITTER, (May 11, 2020), https://blog.twitter.com/en_us/topics/product/2020/updating-our-approach-to-misleading-information.html; Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, FACEBOOK (Apr. 16, 2020), https://about.fb.com/news/2020/04/covid-19-misinfo-update/.

[34] Donie O'Sullivan, *Twitter Temporarily Restricts Donald Trump Jr.'s Account After He Posts Video Claiming Masks are Unnecessary*, CNN (July 28, 2020), https://www.cnn.com/2020/07/28/tech/twitter-donald-trump-jr/index.html.

at 23 ("None of Church United and Domen's videos contained … objectionable material."). In short, Appellants seek to legally invalidate Vimeo's rule against videos that promote Sexual Orientation Change Efforts.

This attempt to impose a top-down, one-size-fits-all approach to content moderation conflicts with Congress's intent in enacting Section 230. Congress recognized that the internet had "flourished" with a "minimum of government regulation" and sought to "preserve the vibrant and competitive free market that presently exists" online "unfettered by Federal or State regulation." *See* 47 U.S.C. § 230(a)(4), (b)(2). As Section 230's lead sponsor put it: Congress "d[id] not wish to have content regulation by the Federal Government of what is on the Internet." 141 Cong. Rec. 22,045 (statement of Rep. Cox). Rather than adopt a single, national standard for objectionable content, Congress pegged immunity to what a provider "*considers to be*" objectionable. 47 U.S.C. § 230(c)(2)(A) (emphasis added); *see Enigma*, 946 F.3d at 1052. "[T]o promote active screening by service providers," in other words, Congress "contemplated self-regulation, rather than regulation compelled at the sword point of tort liability." *Barrett v. Rosenthal*, 40 Cal. 4th 33, 53 (2006).

Appellants' arguments likewise contravene Congress's intent by inviting courts to second-guess *how* platforms enforce their moderation policies. Appellants, for example, challenge Vimeo's decision to suspend them entirely, rather than just

remove "certain videos." *See* Appellants' Br. 23. But there is "no meaningful difference" between an online provider that allows "no submissions" and another that "select[s] material to be removed." *Roommates*, 521 F.3d at 1170 n.29; *see Force*, 934 F.3d at 67 ("the decision to host third-party content in the first place" is an "editorial choice[]"); *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) ("[R]ules about *whether a person may post* after attempting to enter [prohibited content] … are editorial choices that fall within the purview of traditional publisher functions." (emphasis added)). Subjecting providers to liability over their methods of self-regulation would deprive providers of the flexibility that Section 230 was meant to guarantee.

Similarly problematic is appellants' argument that Vimeo should not be entitled to immunity because it failed to delete "similar videos" posted by other users. Appellants' Br. 23. This is a strange objection, given that Congress enacted Section 230 specifically to provide immunity for providers who "remove[] some—but not all—offensive material from their websites." *Bennett*, 882 F.3d at 1166. More fundamentally, appellants' argument ignores the realities of the internet. When Congress enacted Section 230, online providers already had "millions of users," *Zeran*, 129 F.3d at 331—a number that has now skyrocketed into the billions. Given the "staggering" amount of information generated and communicated by these users, Congress recognized that it would be "impossible for service providers to

screen each of their millions of postings for possible problems." *Zeran*, 129 F.3d at 331. Appellants' position—that online providers must enforce their policies with perfect consistency—would thus render Section 230(c)(2)(A) meaningless because no online provider could ever qualify for immunity under it.

In sum, when Congress enacted Section 230, it "'made a policy choice … not to deter harmful online speech through … imposing tort liability on companies that serve as intermediaries" for third-party content. *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Instead, "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect." *Id.* at 1124 (quoting *Zeran*, 129 F.3d at 331). These broad protections have served as a foundational underpinning for the development and growth of the internet as a medium for free expression and commerce. *See Bennett*, 882 F.3d at 1166 ("[Section 230] paved the way for a robust new forum for public speech as well as a trillion-dollar industry centered around user-generated content." (quotations omitted)). But if Section 230 were narrowed as appellants request, online providers would be deterred from self-regulating and could be forced to significantly curb their services.

D. Section 230 Is Meaningful Only If It Immunizes Providers From The Burdens Of Litigation

Congress made the policy decision to draft Section 230 as an immunity statute. It provides that "*[n]o cause of action may be brought* and no liability may

be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). Because it is an immunity statute, Section 230 protects interactive computer service providers like Vimeo "not merely from ultimate liability, but from *having to fight costly and protracted legal battles*." *Roommates.com*, 521 F.3d at 1174-1175 (emphasis added); *Jones*, 755 F.3d at 417 (Section 230 "is an immunity from suit rather than a mere defense to liability"); *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (same). Whenever Section 230's broad protections apply, then, the statute "'precludes courts from *entertaining*'" the impermissible claim. *Zeran*, 129 F.3d at 330 (emphasis added).

Accordingly, courts have emphasized that Section 230 attaches and should be decided "at the earliest possible stage of the case." *Nemet Chevrolet*, 591 F.3d at 254; *see also id.* at 254 (Section 230 should be "accorded effect at the first logical point in the litigation process"). Section 230 operates like all other immunities, which "shield the defendant from the burdens of defending the suit, including the burdens of discovery." *Freeman v. United States*, 556 F.3d 326, 342 (5th Cir. 2009); *see also Wuterich v. Murtha*, 562 F.3d 375, 382 (D.C. Cir. 2009) (similar).

Providing immunity from such burdens furthers Congress's goals to "promote the continued development of the Internet and other interactive computer services and other interactive media" and "preserve the vibrant and competitive free market."

47 U.S.C. § 230(b)(1)-(2). Litigating the merits of every disputed decision to remove content or ban users would place an impossible burden on existing internet services and deter the development of new ones. This is particularly true given amicus's members' billions of users.

Last December for example, Twitter banned more than 88,000 accounts that had manipulated content on its platform, including by artificially amplifying messages through coordinated "liking, Retweeting and replying."[35] And as discussed, Facebook recently banned hundreds of accounts and Reddit banned thousands of subreddits. It would place an impossible burden on providers to litigate, and on courts to adjudicate, the merits of even a minute fraction of such decisions. Congress understood these realities when it drafted Sections 230(c)(1) and (c)(2)(A) so that immunity could be determined at the motion to dismiss stage.

Congress also understood that having to litigate the merits of every content-related decision would hamper providers' ability to operate at all. Many online providers, including amicus's members, offer their platforms to the public for free. This free access, coupled with the ability to regulate content according to the needs

[35] Twitter Safety, *New Disclosures to Our Archive of State-Backed Information Operations*, TWITTER (Dec. 20, 2019), https://blog.twitter.com/en_us/topics/company/2019/new-disclosures-to-our-archive-of-state-backed-information-operations.html.

of their platforms, has allowed the internet to "flourish" to the tune of billions using an extraordinary array of valuable services.

The "staggering" amount of content that these users generate already requires providers to devote immense resources to self-regulating and maintaining the safe and functional experience that the public has come to expect. If providers faced the threat that each content moderation decision might, at any point, subject the provider to the immense costs of discovery, the cost of running their platforms could grow exponentially, putting the entire enterprise of the internet at risk.

Ensuring that Section 230's immunities are available at the threshold of a litigation, and afforded at the motion to dismiss stage as in the court below, is thus essential to ensuring that providers can continue to offer the panoply of free services that Congress sought to protect when it enacted Section 230.

CONCLUSION

For the foregoing reasons, the Court should affirm.

Respectfully submitted,

/s/ Patrick J. Carome

Patrick J. Carome
Ari Holtzblatt
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
202-663-6000

Samuel C. Leifer
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
617-526-6000

August 7, 2020

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32 and Local Rule 32.1. The brief contains 7,000 words, excluding the parts exempted by the rules, as provided in Fed. R. App. P. 32(f).

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 360 in font size 14 Times New Roman.

/s/ Patrick J. Carome
PATRICK J. CAROME

August 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August 2020, I electronically filed the foregoing with the Clerk using the appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Patrick J. Carome
PATRICK J. CAROME