NO. 24-1116

In the Supreme Court of the United States

JASON FYK,

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE DAVID W. MORGAN IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

DAVID W. MORGAN is a retired U.S. Air Force Lieutenant Colonel and Vietnam veteran. At 85, he has no financial interest in this case – only a lifelong commitment to defending the liberties that define our nation. He served with distinction as a fighter pilot, built a successful career in private enterprise, and now directs his resources towards humanitarian efforts through the Dave and Wendy Morgan Foundation, which has funded clean water wells and rebuilt schools in rural Uganda.

He files this brief not as a lawyer, but as a citizen – one who believes that freedom is never more than a generation away from being lost. He has watched with growing concern as private companies, shielded by expansive interpretations of Section 230, have gained unchecked power to shape, suppress, or silence speech. Platforms that once hosted the digital public square now curate it – often under the shadow of political influence and without accountability.

Mr. Morgan respectfully urges this Court not to wait for the "perfect" Section 230 case, but to recognize that the *Fyk* petition presents the right opportunity to bring clarity. This is the moment to reaffirm

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[1] No counsel for any of the parties authored this brief in whole or in part, and no counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. No other person, aside from Mr. Morgan and his counsel, has made such a monetary contribution. Counsel of record for the parties timely received Mr. Morgan's notice of intent to file this brief at least 10 days in advance of the deadline.

that the First Amendment belongs not just to platforms or governments – but to the people.

For the sake of every citizen whose voice still matters – and whose silence should never be forced – Mr. Morgan respectfully submits this brief.

Mr. Morgan has no financial interest in this case.

SUMMARY OF THE ARGUMENT

47 U.S.C. § 230 ("Section 230") was passed as part of the Communications Decency Act — not the Communications Immunity Act. Its purpose was to encourage responsibility, not indifference. Over time, the law's original intent has been inverted. Platforms now enjoy immunity not only when they remove indecent material, but also when they host or amplify it — even if it violates the spirit of community decency the law was meant to uphold. The result is a legal structure that protects power, not principle.

The vast majority of the time Section 230 is invoked by defendants, they cite purported immunity granted by 47 U.S.C. § 230(c)(1). Courts have expanded this subsection so far beyond its original intent that it now silences users (everyday citizens using these platforms to express their lawful views) while denying them access to justice and nullifies the responsibility Congress placed in Section 230(c)(2) to moderate "otherwise objectionable" content. Under a reasonable interpretation of the statute, it would work like this:

- Section 230(c)(1) is the passive shield: it prevents platforms from being treated as the publisher of content posted by others. It exists to protect neutral hosting — not editorial control.
- Section 230(c)(2) is the active sword: it allows platforms, in good faith, to remove obscene, violent, or otherwise harmful material.

Instead, some Circuits have interpreted subsection (c)(1) to unconditionally protect all decisions of a service provider, completely swallowing the conditional protections of subsection (c)(2). This is contrary to the purpose of Section 230 and standard canons of statutory interpretation. The result of this bastardization of Section 230 is a legal imbalance that lets powerful platforms suppress lawful speech while avoiding accountability — even when acting in bad faith or under government political pressure. This is not what Congress intended, and it is not what the First Amendment permits.

ARGUMENT

I. By Its Plain Text, Section 230(c)(1) Protects Neutral Hosting – Not Editorial Control, Including Removal, Promotion, and Artificial Suppression of Third-Party Content

Section 230(c)(1) provides that no 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). It does not say platforms are entitled to blanket immunity "for any action taken concerning that content." *See* Adam Candeub, *Reading Section 230 as Written*, 1 J. FREE SPEECH L. 139, 154–58 (2021). Nor does it say "even when the platform makes editorial decisions." *See id.* And it certainly does not say "regardless of whether the conduct in question involves third-party speech or the platform's own." *See id.*

Section 230(c)(1) was written to protect hosting platforms from being treated as the publisher or speaker of content created by others. *M.P. by & through Pinckney v. Meta Platforms Inc.*, 127 F.4th 516, 520 (4th Cir. 2025); Gregory M. Dickinson, *Section 230: A Juridical History*, 28 STAN. TECH. L. REV. 1, 6 (2025). But courts have expanded this protection far beyond its text — granting immunity even for the platform's own conduct, including removal decisions, algorithmic promotion, and content suppression. *See e.g.*, *Sikhs for Just., Inc. v. Facebook, Inc.*, 697 F. App'x 526 (9th Cir. 2017); *Force v. Facebook, Inc.*, 934 F.3d 53, 58 (2d Cir. 2019); *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1098 (9th Cir. 2019) (finding that the plaintiff

could not "plead around Section 230 immunity by framing [recommendation algorithms] as content").

The result of this overly-broad interpretation has been not just protection from liability — but immunity from accountability, even when platforms act as active participants in shaping what users see, hear, or are allowed to say. *Force*, 934 F.3d at 59, 67 (holding that Section 230(c)(1) provided a shield for algorithmic promotion of Hamas's content, which empowered Hamas to "carry out communication components of [its] terror attacks.)

This Court need not rewrite Section 230(c)(1). Instead, it should grant certiorari and restore its original meaning and congressional intent by reaffirming a simple principle: Section 230(c)(1) protects platforms from liability for the speech of others — not from the consequences of their own actions. When a platform removes content, shadow bans users, or amplifies certain voices over others, it ceases to be a neutral host. It becomes an editor — and editors should not be entitled to immunity. *Candeub*, *supra*, at 150–51. A platform engages in editorial control not merely by hosting or passively ranking content, but by actively shaping visibility—removing, promoting, or suppressing content based on subjective criteria or platform policies.

The vast majority of courts continue to shield all manner of content moderation decisions under Section 230(c)(1), even when the platforms take the affirmative step of pushing the content on their users. *See e.g.*, *M.P.*, 127 F.4th at 526. In reading this broad immunity into Section 230(c)(1), courts continue to rely on *Zeran v. America Online, Inc.*, which held that content moderation decisions for online platforms, such as whether to "publish, withdraw, postpone or alter content" were

all "traditional editorial functions," not independent publisher roles. 129 F.3d 327, 330 (4th Cir. 1997).

But *Zeran* was wrong about the nature Section 230's provisions. It mistakenly read a broad editorial immunity into Section 230(c)(1) and ignored the congressionally-provided — and limited — immunity provided in Section 230(c)(2). In doing so, the *Zeran* court relegated 230(c)(2) to canonically-frowned upon surplusage. Candeub, *supra*, at 151; A. Scalia & B. Garner, READING LAW 228 (2012).

The courts should not grant a windfall by providing that a platform can act as curator, recommender, editor, censor, and amplifier with impunity — while claiming to be none of these things. By restoring the boundary between hosting third-party content and exerting control of the entirety of the viewer's experience, the Court can ensure that Section 230 continues to protect the Internet — without eroding the congressional goals that motivated the adoption of Section 230.

II. Section 230(c)(2) provides a Limited Safe Harbor for Platforms to Remove Third-Party Content, but It Does Not Grant a Blank Check for Censorship

Zeran's mistake in providing broad immunity for content moderation reads out the explicit statutory provided-for immunity. But Congress's grant of immunity was intentionally a limited one. The congressional record surrounding the adoption of Section 230 demonstrates that the focus of (c)(2) was not in providing for freewheeling editorial removal. 141 Cong. Rec. 22044-47 (1995). Instead, every legislator who discussed the bill highlighted its ability to empower platforms to take down content that was deemed not "family-friendly,"

the overarching goal of the Communications Decency Act. Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, 1 J. FREE SPEECH L. 175, 185 (2021). Nowhere does the congressional record support reading in a blanket sword into Section 230 to take-down.

Instead, Congress provided an enumerated list of materials for which restrictions would not result in liability. The list includes material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable." Each of these categories was broadly understood to be speech that was regulable by Congress, so it made sense to empower platforms to independently clean their own houses. *See id.* at 176. And the "catchall" provision, "otherwise objectionable," does nothing to change this analysis. Again, Section 230(c)(2) is a sword, but only a short one.

Under the doctrine of *ejusdem generis*, the Court should interpret "otherwise objectionable" to mean only material similar in nature to that which precedes it: obscenity, harassment, violence, and similarly harmful content. Scalia & Garner, *supra*, at 199–214; Candeub & Volokh, *supra*, at 178–83. Such a ruling would preserve Congress's intent to protect users and children — while preventing the clause from becoming an open-ended license to censor.

The catalog of Section 230 cases demonstrate a notable dearth of considering the application of *ejusdem generis*. Candeub & Volokh, *supra*, at 178. One notable exception was the Ninth Circuit's tacit rejection of the canon on the grounds that the specific terms were not sufficiently similar to provide assistance in understanding the meaning of "otherwise objectionable." *Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*,

946 F.3d 1040, 1051–52 (9th Cir. 2019). However, as Professors Candeub and Volokh argue, this misses the goal of Section 230's adoption. The terms are similar because they are all aimed at content that was deemed regulable in the context of telecommunications technologies and otherwise discussed throughout the CDA. *Id.*

With this context, the terms should not be understood as dissimilar. Instead, *ejusdem generis* provides a clear picture of the narrow range of regulable content. Like the preceding terms, "otherwise objectionable" only includes the content that was similarly addressed in the CDA and subject to congressional regulation in this context; as the professors note, this would likely include some forms of anonymous speech. *Id.* at 176. But what it certainly does not mean is that platforms can make free-wheeling decisions about what is objectionable. Nor can their definition of objectionable cover core constitutional speech, such as political expression or dissent.

Further, Section 230(c)(2) puts a cap on the enumerated list by emphasizing that — within the confines of the enumerated list—the platforms can restrict the content "whether or not such material is constitutionally protected." 47 U.S.C. § 230(c)(2). That phrase deserves this Court's close attention. The First Amendment prohibits Congress from abridging lawful speech — yet this clause effectively licenses private censorship of protected speech with no judicial review.

While platforms are private actors, the law not only shields their suppression of constitutionally protected expression but does so even when they act under informal pressure or guidance from government officials. This opened up the very problem this Court was faced with in *Murthy v. Missouri*, 603 U.S. 43 (2024).

The unduly broad reading of Section 230(c)(2) has opened an ever-present, cross-political temptation for proxy censorship. This is no hypothetical concern. Both Republican and Democratic administrations have engaged in jawboning efforts, a path greased by Section 230(c)(2)'s improper reading. Will Duffield, *Jawboning Against Speech*, Cato Policy Analysis, (September 12, 2022).[2] This amounts to a congressional workaround of the First Amendment — not in form, but in function. If lawful speech can be suppressed with guaranteed platform immunity, then the right to speak becomes discretionary, not constitutional. This Court should not overlook that danger.

This Court should restore the limits of Section 230(c)(1). If it does so, it cannot ignore the structural invitation for abuse embedded in Section 230(c)(2). The phrase "otherwise objectionable" has no statutory definition — and, under current interpretation, no boundaries. Platforms have invoked it to remove or suppress not just indecent content, but lawful political opinions, satire, and dissent — all under the cloak of discretionary objection. This Court need not rewrite the statute. Instead, it should apply the appropriate narrowing construction.

III. The Legislative Promise of Section 230 Has Been Broken by Over-Interpretation

This misplaced reliance on Section 230(c)(1) to empower all forms of censorial content moderation, displacing the proper role of (c)(2), has caused a misalignment between the statute's text and its impact. Section 230 was passed to empower innovation, protect

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[2] Available at: https://www.cato.org/sites/cato.org/files/2022-09/PA_934.pdf.

children, and ensure that platforms could moderate "objectionable" material without being buried in litigation. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 405 (2017). Its architects — then-Representatives Chris Cox and Ron Wyden — made clear: this was not a blank check for platforms, but a balanced exchange. As Senator Wyden later recalled:

> The shield is for the little guys, so they don't get killed in the crib, and the sword would give platforms the opportunity to take down things like opioid ads while providing protections for the good actors . . . What we do in 230 is curate some content, leave some up, and give them a chance to get the slime out.

Emily Stewart wrote, "Ron Wyden wrote the law that built the internet. He still stands by it – and everything it's brought with it," *Vox* (May 16, 2019).[3]

But that legislative balance has shifted. Today, platforms are no longer the "little guys . . . in the crib." They are the publishers, censors, and amplifiers of a global speech ecosystem. This ecosystem has concentrated winners worth billions or trillions of dollars, often to the exclusion of new networks. Jacob Shamsian, *What Smart People are Saying About Meta's Argument that it is not a Social Media Monopoly*, BUSINESS INSIDER (April 16, 2025).[4] And thanks to expansive

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[3] Available at: https://www.vox.com/recode/2019/5/16/18626779/ron-wyden-section-230-facebook-regulations-neutrality.

[4] Available at: https://www.businessinsider.com/ftc-meta-trial-mark-zuckerberg-antitrust-2025-4?utm_source=chatgpt.com.

judicial interpretation, they enjoy immunity even for actions that suppress lawful speech, silence dissent, or prioritize influence over fairness."

Moreover, Section 230 should not be interpreted to give platforms permanent immunity when they knowingly host unlawful content. A platform that is put on notice of illegal activity — and does nothing — is no longer acting in good faith or as a "Good Samaritan."

Section 230 has become a monster – protecting horrifying negative outcomes all falsely invoking the value of protecting free speech, but at the same time Section 230 has been interpreted to permit platforms to monopolize the new town square and then act to suppress free speech, leaving our marketplace of ideas no longer wide open and robust as Americans deserve. Instead, it is as if the marketplace was bought up by a couple of big-box stores that sell the same mass produced products, with no room for competition. Section 230 was designed for the 1994 version of the Internet, and while every other technological advance since then has changed, adapted, and been updated, Section 230 has sat, static and gathering confusing legal moss. It acts as the core of the Internet's "terms of use," but while every website updates its terms on a regular basis, the common terms, Section 230, have failed to even evolve a single day since its original inception.

Section 230 now denies relief to individuals not because they lack a claim, but because the courts have shut the doorway in their faces. This is not what Congress intended, nor is it commanded by the text. And the Constitution does not prohibit this Court from correcting the lower courts' errors.

IV. The Original Congressional Findings No Longer Reflect the Reality of the Modern Internet

The perverted interpretation of Section 230(a) is especially disconcerting when viewed in the context of the aspirations of Congress when it passed Section 230. The statute contains one particularly notable goal from Congress in 1996. It reads: "The Internet . . . represents an extraordinary advance . . . a forum for a true diversity of political discourse . . . flourishing with a minimum of government regulation." But the reality today stands in sharp contrast to that hope. In place of open discourse, we now find:

- Content removed or suppressed without explanation;
- Shadow bans applied through algorithms;
- Terms of service written in vague, one-sided language; and
- Speech chilled not by law, but by the fear of platform retaliation.

Users are promised "control" over the information they receive — but are given little transparency or choice about what content is algorithmically prioritized, demoted, or hidden. Frank Pasquale, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION 4 (2015) (describing how algorithms operate as impenetrable "black boxes," making decisions about content visibility without user awareness or understanding). Congress hoped to empower families and individuals. But in practice, the power now lies with a handful of corporations who operate as publishers in all but name, and whose immunity has

been broadened not by law, but by judicial expansion. Moreover, Section 230 was passed as part of the Communications Decency Act to protect children from obscene and harmful content. Yet today, children have easier access than ever to hardcore pornography, violent content, and targeted manipulations, while parents are left with few meaningful tools — and even fewer legal remedies. *Teens and Pornography*, Common Sense (January 10, 2023).[5]

CONCLUSION

The First Amendment was not written to protect consensus. It was written to preserve liberty — the kind of liberty that allows citizens to speak out even when they are wrong, offensive, angry, or alone. It draws no line between credentialed and uncredentialed voices, between polished opinion and raw protest. So long as speech is peaceful, the Constitution defends it — even when others call it misinformation, disinformation, or dangerous thought.

Section 230 was enacted not to erase that freedom, but to support it — by protecting platforms that host lawful speech and by empowering them to act against truly harmful material. It created two tools: a shield and a sword. But that balance — and that statutory design — has been broken. Courts have fortified the shield beyond recognition, expanding it to cover even editorial conduct and speech suppression not mentioned or implied in the text. At the same time, they

[5] Available at: https://www.commonsensemedia.org/research/teens-and-pornography.

have made the sword irrelevant, stripping (c)(2) of meaning and accountability. The result is an unchecked power to silence, paired with a near-total immunity from responsibility.

This brief is not about Jason Fyk. It is about the citizen who posts an opinion which is erased without recourse. It is about the imbalance between billion-dollar corporations and the people they silence — people with no comparable power, no platform of their own, and no practical means of fighting back.

This Court can clarify the line between hosting and controlling — and in doing so, restore the balance Congress created in Section 230 and the freedom of speech the Constitution protects. For the sake of every citizen whose voice still matters — and whose silence should never be forced — Mr. Morgan respectfully submits this brief.

Respectfully submitted,

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