AN EVALUATION OF RECOMMENDATION-BASED ALGORITHMS IN THE CONTEXT OF *GONZALEZ V. GOOGLE*

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ABSTRACT

In response to the growth and development of the Internet, Congress passed the Communications Decency Act of 1996 ("CDA"). In Section 230, the CDA provides immunity for social media platforms and other online services from civil liability arising out of third-party content and allows platforms to moderate third-party content without fear of liability for failing to do so. In 2022, the Supreme Court of the United States took up *Gonzalez v. Google* as the Court's first occasion to address Section 230 but ultimately left the Section 230 question for another day. Gonzalez presented the question whether social media platforms are protected under Section 230 for use of recommendation-based algorithms as they are for other, traditional editorial functions such as decisions about whether to publish, edit, or withdraw content from a platform. This Note seeks to address the arguments for and against allowing recommendation-based algorithms to be covered under Section 230, focusing on statutory construction of the CDA. In doing so, this Note analyzes recommendation-based algorithms in the context of First Amendment considerations, political misinformation, and how misinformation leads to violence and illegal activity. As a result, social media platforms and other interactive computer services should be held liable for certain harms caused by content promoted through recommendation-based algorithms. Ultimately, this Note argues that the Supreme Court should have held that recommendation-based algorithms are not protected under Section 230, as both legal precedent and policy demand such a result. Finally, it proposes a test for determining whether algorithms should be protected under Section 230, focusing on the transformative nature and the moderative purposes of the algorithm.

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INTRODUCTION

New technologies have always posed problems for jurists as they seek to interpret the First Amendment.[1] The advent of social media has proven to be no different. Indeed, the law is grappling with how to uphold First Amendment values as the rise of social media threatens to make nonsense of old precedent and ideas.[2]

In an attempt to protect the purposes of the First Amendment and free speech on the Internet, Congress passed the Communications Decency Act of 1996.[3] Specifically, Section 230 of the Communications Decency Act provides immunity for social media platforms and other online services from civil liability arising out of third-party content.[4] It also purports to allow these platforms to moderate third-party content without fear of liability for failing to moderate certain content.[5] Section 230 has become controversial on the political scene, particularly in regards to algorithms used by social media platforms to moderate, regulate, and organize user content. Prior to its recent decision in *Gonzalez v. Google*,[6] the Supreme Court had not addressed Section 230 in any capacity.

In 2022, the Supreme Court granted two petitions for certiorari in cases involving Section 230, *Gonzalez v. Google* and *Twitter, Inc. v. Taamneh*, which were consolidated on appeal.[7] Specifically, these cases dealt with

1. *See, e.g.,* Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 400–01 (1969) (holding that, due to the scarcity of radio frequencies, the government's role in allocating those frequencies was permissible).

2. *Compare* New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *with* Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting) (challenging the validity of the *New York Times* doctrine); *id.* at 2426–27 (Gorsuch, J., dissenting) (agreeing with Justice Thomas's challenge to the validity of the *New York Times* doctrine).

3. 47 U.S.C. § 230 (1996). Section 230 was enacted in response to the outcome of Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (NY Supp. Ct. May 24, 1995), which held an interactive computer service liable as a publisher for a third-party's content. This case encouraged interactive computer services to monitor content instead of "bury[ing] their heads in the sand" to avoid liability stemming from not monitoring enough. *See also* Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 531 F.3d 1157, 1170 (9th Cir. 2008) ("Roommate's situation stands in stark contrast to *Stratton Oakmont*, the case Congress sought to reverse through passage of section 230.").

4. 47 U.S.C. § 230(c)(1) (1996).

5. 47 U.S.C. § 230(c)(2)(A) (1996). In essence, this part of the statute ensures that social media platforms do not simply turn a blind eye to nefarious content on their websites. In this way, moderation is encouraged rather than chilled.

6. Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021), *cert granted*, No. 21-1333, 2022 WL 4651229 (U.S. Oct. 3, 2022), and *cert granted sub nom.* Twitter, Inc. v. Taamneh, No. 21-1496, 2022 WL 4651263 (U.S. Oct. 3, 2022). This Note will only focus on *Gonzalez.*

7. *Gonzalez*, 2 F.4th at 880.

social media recommendation-based algorithms and whether they receive protection under Section 230.[8] In other words, the cases stood to decide whether "recommendations" receive the same amount of protection as other, traditional editorial functions such as decisions about whether to publish, edit, or withdraw content from a platform.[9] Typically, such as in *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096 (9th Cir. 2009), courts have held that social media platforms are protected when a party to seeks to hold them liable for performing traditional editorial functions. Unfortunately, despite its grant of cert, the Supreme Court dodged this question and declined to address the application of Section 230 because it determined that the complaint failed to state a claim for the underlying statutory violation.[10] This was a missed opportunity.

In wake of the Court's decision, it is prudent to consider whether, from both a policy and legal perspective, social media platforms *should* be able to engage in such recommendations without risking liability and losing protections under Section 230. At the heart of this debate is whether such recommendation-based algorithms implicate the First Amendment rights of the social media platforms themselves or whether the language of Section 230 casts a shadow on that notion, though the defendants in *Gonzalez* did not actually raise this issue. Differently stated, if Section 230 fails to provide protection for the platforms, could the First Amendment step in to protect them?

Using *Gonzalez* as a guide, this Note seeks to address the arguments for and against allowing recommendation-based algorithms to be covered under Section 230, focusing on statutory construction. Additionally, this Note discusses such recommendation-based algorithms in the context of political misinformation and how that misinformation may lead to violence that social media platforms and other interactive computer services should

8. *Id.* at 894 (considering whether recommendation-based algorithms are protected under Section 230 and determining that they are).

9. Petition for Writ of Certiorari, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333) ("The question presented is: 'Does section 230(c)(1) immunize interactive computer services when they make targeted recommendations of information provided by another information content provider, or only limit the liability of interactive computer services when they engage in traditional editorial functions (such as deciding whether to display or withdraw) with regard to such information?'"); *see also* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (establishing the protection of traditional editorial functions under the First Amendment).

10. Gonzalez v. Google LLC, 598 U.S. 617, 622 (2023).

be held liable for. Finally, this Note will recommend an ideal outcome for the Section 230 issue in *Gonzalez* since the Court failed to decide the question. Specifically, this Note argues that the Supreme Court should have held that recommendation-based algorithms are not protected under Section 230, as both legal precedent and policy demand such a result. This is particularly true when such algorithms are targeted and transformative of information originally posted by a third-party.

I. HISTORY

A. Background on Section 230

"Section 230 of the Communications Decency Act was adopted in 1996 at the dawn of the Internet age."[11] As more opportunity arose for users to post content on interactive computer services (such as social media platforms), Congress recognized a need to protect these companies from excessive liability.[12] This would allow these platforms to continue to provide a space for free speech to thrive without encouraging censorship or speech restriction by the platforms. Provisions on moderation were also intended to make the Internet a relatively safe place for children.[13] At the time Section 230 was adopted, it mostly applied to bulletin boards and chatrooms.[14] The social media giants we are familiar with today were unknown to Congress at the time of enactment. Indeed, today's social media platforms allow a more widespread sharing of information and force social media platforms to make choices about what types of content should be favored. As a result, the interpretation of Section 230 has become clouded

11. Petition for Writ of Certiorari at 2, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333).

12. 47 U.S.C. § 230(b) (stating the policy functions for Section 230).

13. This arguably has not been successful, but the legislative purpose of § 230 was, in part, to protect children. § 230(b)(4) states, "[i]t is the policy of the United States to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material . . ." 47 U.S.C. § 230(b)(4). *See* Sharyn Alfonsi, *More than 1,200 families suing social media companies over kids' mental health*, CBS News (Dec. 11 2022) (detailing parents' concern for their children's safety online; Meta responded to these concerns, in part, by identifying moderative efforts used on its platforms), https://www.cbsnews.com/news/social-media-lawsuit-meta-tiktok-facebook-instagram-60-minutes-2022-12-11/ [perma.cc/7W4H-PP34].

14. *See* Petition for Writ of Certiorari at 2–3, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333) ("Mere posting on bulletin boards and in chat rooms was the prevalent practice when section 230 was originally enacted").

and confused. Many judges and commentators have become concerned that Section 230 has been broadened too much and has overstepped congressional intent, allowing for dangerous implications and results.[15]

For the purposes of this Note, the most important components of Section 230 are the following: 47 U.S.C. § 230(c)(1), 47 U.S.C. § 230(c)(2)(A), 47 U.S.C. § 230(c)(2)(B). 47 U.S.C. § 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*" (emphasis added) and is widely regarded as the most influential portion of this statute. In fact, these are considered the 26 words that created the Internet.[16] 47 U.S.C. § 230(c)(2)(A) states that an interactive computer service will not be held liable for any moderating activities engaged in for the purpose of protecting users. Similarly, 47 U.S.C. § 230(c)(2)(B) also bars liability for moderation for which the interactive computer service provides tools to information content providers to restrict certain content.[17] The statutory construction alone reveals that moderation and Internet safety were the key goals advanced by Section 230.

B. Background on Gonzalez v. Google

This case arose out of YouTube's (owned by Google) recommendation of (and failure to remove) ISIS videos, including those directed at recruiting new members to terrorize their home countries, to persons predisposed to agreeing with the messages included therein.[18] Plaintiffs alleged, as a result of such recommendations and failure to remove, that Ms. Gonzalez was killed by terrorists, so Google should be held liable under the Anti-

15. *Id.* at 6–7.

16. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625 (2020).

17. For the purposes of this Note, "interactive computer service" and "social media platform" will be used interchangeably, although they are not exactly the same. Social media platforms are a type of interactive computer service—they are the type of interactive computer service at issue in cases like *Gonzalez.*

18. Gonzalez v. Google LLC, 2 F.4th 871, 881 (9th Cir. 2021) ("The Gonzalez Plaintiffs' theory of liability generally arises from Google's recommendations of content to users. These recommendations are based upon the content and 'what is known about the viewer.' Specifically, the complaint alleges Google uses computer algorithms to match and suggest content to users based upon their viewing history. The Gonzalez Plaintiffs allege that, in this way, Google has 'recommended ISIS videos to users' and enabled users to 'locate other videos and accounts related to ISIS,' and that by doing so, Google assists ISIS in spreading its message.").

Terrorism Act (ATA), 18 U.S.C. § 2333.[19] More specifically, Plaintiffs alleged that Google played an instrumental role in allowing ISIS to spread its message and, in this way, provided general assistance and services to the efforts of ISIS.[20] These concerns were especially salient, according to Plaintiffs, as Google was aware that their services had previously been used in connection with terroristic activity.[21]

Google claimed that Section 230 granted it immunity from liability in this situation, as the videos produced were produced by ISIS, not by Google; therefore, Plaintiffs were trying to hold Google liable as a *publisher*.[22] As previously stated, Section 230 is supposed to prevent interactive computer services from being held liable for content posted by users.[23] Although Plaintiffs disputed that they were trying to hold Google liable as a publisher, it is not entirely clear that this is correct.[24] Ultimately, however, this part of the case, if the Court had decided it, should have hinged on whether Google's recommendation-based algorithms did actually make it a *publisher* seeking to deliver its own message, as Section 230 "immunity only applies to the extent interactive computer service providers do not also provide the challenged information content."[25] The Ninth Circuit held that Section 230 immunized Google as long as its recommendation-based algorithms were applied uniformly, neutrally, and without specifically "encouraging" ISIS's content.[26] Separately, it should be noted that Plaintiffs did not seek to hold Google liable for simply allowing the posts to exist on

19. *Id.* at 882. For the purposes of this Note, it is irrelevant to discuss the intricacies of the ATA; it is just important to note that it is the basis for Plaintiff's allegations. The focus of this Note is rather on media law and First Amendment law.

20. *Id.* at 881; *see also* Petition for Writ of Certiorari at 10, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333) ("The plaintiffs alleged that Google, through YouTube, had provided material assistance to, and had aided and abetted, ISIS, conduct forbidden and made actionable by the [ATA].").

21. *Gonzalez*, 2 F.4th at 882.

22. *Id.* at 890 ("Google responds [to Plaintiffs allegations] that the content the TAC challenges was indeed created by third parties—presumably, ISIS—and that the Gonzalez Plaintiffs' claims impermissibly seek to treat Google as a publisher of that content.").

23. 47 U.S.C. § 230(c)(1) (1996).

24. *Gonzalez*, 2 F.4th at 890.

25. *Id.* at 892.

26. *Id.* at 895. It should be noted that the concurring justices simply felt they were bound by precedent, however. *See Id*. at 913 (Berzon, J., concurring) (endorsing Judge Katzmann's partial dissent in *Force*); *see also Id.* at 936–37 (Gould, J., concurring in part) ("[T]o the extent any of our Ninth Circuit precedent stands in the way of a sensible resolution of claims like those presented on appeal here, where terrorist organizations like ISIS have obviously played Google and YouTube like a fiddle, then in my view we should take these or other related cases *en banc* to give a full review.").

their platform, as that clearly passive conduct is covered under Section 230.[27]

From a policy perspective, other considerations demand attention. In the petition for certiorari, it is recognized that these recommendation-based algorithms have become so popular due to interactive computer services' financial incentives to get users to spend more time on their websites.[28] The more time users spend on the platforms, the more the platforms stand to earn in revenue from advertisements.[29] This reality has caused some to question whether social media platforms and other interactive computer services are simply placing profits over the safety of their users – especially when it has been brought to the platforms' attention that terroristic organizations are aided by their algorithms.[30] Perhaps such advertisement-based revenues create perverse incentives for social media platforms to act with dampened ethics. After all, any traffic on the platform will result in revenue to social media companies, even if such revenue comes from terrorist groups. For many, it is unclear what role, if any, these policy considerations should have played in the Supreme Court's ultimate decision in *Gonzalez.*

Of note, the Supreme Court has historically not allowed speech which advocates for illegal conduct or violence to be limited on that basis. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) cemented this principle. In other words, when First Amendment considerations are at play, the Supreme Court may be reluctant to take any action which may cause liability on the basis of speech. On the other hand, the Court has imposed lesser scrutiny on other areas of speech such as commercial or sexually explicit speech.[31] If the Court later takes up the Section 230 question, as it purported it would in *Gonzalez*, it may consider these policies or address an argument based on the platform's First Amendment rights.

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27. Petition for Writ of Certiorari at 11, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333)

28. *Id.* at 9–10 ("Today the income of many large interactive computer services is based on advertising . . .").

29. *Id.*

30. *Id.*

31. *See, e.g.,* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 562 (1980) (commercial speech); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 61 (1976) (sexually explicit speech).

C. Case Law Relevant to Recommendations and Section 230

Before proceeding into an analysis on recommendations and *Gonzalez* generally, it is prudent to address relevant case law on the topic of algorithms and Section 230, especially those algorithms that recommend content to users in a seemingly neutral way.

i. *Dyroff v. Ultimate Software Group, Inc.*

First, *Dyroff v. Ultimate Software Group, Inc.* arises out of allegations that the death of plaintiff's son from fentanyl toxicity, which he obtained from another website user, was due to the recommendations and notifications used by defendant interactive computer service.[32] Notably, *Dyroff* took place in the Ninth Circuit just like *Gonzalez*. Ultimately, the Court held for defendants and created a circuit split, stating that recommendations *were protected* under Section 230 since holding platforms liable for such recommendations would treat them as a publisher.[33] The Ninth Circuit rejected the idea that recommendations are themselves content.[34] Other circuit courts had adopted the "traditional editorial functions" rule which may or may not imply that recommendations are not protected under Section 230.[35] This circuit split is a central catalyst of the Supreme Court's review of *Gonzalez*. Moreover, even the circuit judges who are in agreement that algorithm-based recommendations should be protected do not agree on *why* they should be protected.[36] The circuit split created a question in dire need of resolution, so it is a shame that the Court

32. Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1095 (9th Cir. 2019).
33. *Id.* at 1094.
34. *Id.* at 1096.
35. *See, e.g.*, Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009 ("We have indicated that publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content."); Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016) ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred") (quotations omitted); Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997) ("Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.").
36. Petition for Writ of Certiorari at 4, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333).

declined to take the opportunity in *Gonzalez* to address it.

ii. *Force v. Facebook*

Additionally, *Force v. Facebook* somewhat aligns itself with the *Dyroff* perspective on recommendations.[37] These two cases, together, create the aforementioned circuit split. The dispute in *Force* arises out of allegations that Facebook's recommendation-based algorithms led to Hamas killings in Israel.[38] A divided court again held that these recommendation-based algorithms were protected by Section 230.[39] The *Force* court, by adopting an approach that these recommendations are "traditional editorial functions," also asserted that the impact of recommendation-based algorithms was basically the same as if Facebook simply allowed the posts to remain on the platform.[40] Although both the *Dyroff* and *Force* courts held that recommendations were protected under Section 230, their paths in reaching that conclusion were completely divergent. *Dyroff*, on one hand, did not rely on (and expressly rejected) the traditional editorial functions standard, while *Force* asserted that recommending *is* a traditional editorial function entitled to protection.[41] This discrepancy in reasoning has confused the issue and has necessitated its resolution.

iii. *Malwarebytes, Inc. v. Enigma Software Group USA, LLC*

Malwarebytes, Inc. v. Enigma Software Group USA, LLC,[42] for the purposes of this Note, is also a notable case for the sole reason of Justice Thomas's statement regarding denial of certiorari. *Malwarebytes* is important because Justice Thomas's statement called for the Court to take up the issue of Section 230 in the context of recommendation-based

37. Force v. Facebook, Inc., 934 F.3d 53, 76 (2d Cir. 2019); Judge Katzmann vehemently dissented from the majority's theory on traditional editorial functions and was more than skeptical that recommendations fell into this category. *Id.* at 83 ("Yet the creation of social networks goes far beyond the traditional editorial functions that the CDA immunizes.").

38. *Id.* at 65.

39. *Id.* at 76.

40. *Id.* at 66–67.

41. *Id.*; *Dyroff*, 934 F.3d at 1099 (using a "material contribution" test instead which is later used by the Ninth Circuit in *Gonzalez*);

42. Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13 (2020).

algorithms.[43] Justice Thomas argued that, by allowing recommendations to be protected under Section 230, it had been stretched beyond recognition and allows social media platforms to escape liability under a wide range of statutes.[44] Many of Thomas's concerns are reflected in the petition for *certiorari* in *Gonzalez*.[45] First, Thomas argued that social media platforms, under the Court's current understanding of Section 230, may be wrongfully immunized from liability in connection with their own published content, as recommendations are not traditional editorial functions.[46] Interestingly, he also notes that in cases involving recommendations, "the plaintiffs were not necessarily trying to hold the defendants liable 'as the publisher or speaker' of third-party content. . . [t]heir claims rested on alleged product design flaws—that is, the defendant's own misconduct."[47] This brings about another interesting argument for why recommendation-based algorithms should *not* be protected under Section 230, particularly when they lead to the violation of a generally applicable statute.

iv. *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*

Perhaps the most important precedential case to understand for the purposes of this Note is *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157 (2008). One's interpretation of this case may determine their beliefs about whether recommendation-based algorithms should be protected under Section 230. *Roommates* held that if an interactive computer service provides "neutral tools to carry out what may be unlawful or illicit searches," this does not result in a lack of coverage from Section 230.[48] It also later refers to dating matching services as

43. *Id.* at 14 ("I write to explain why, in an appropriate case, we should consider whether the text of this increasingly important statute aligns with the current state of immunity enjoyed by Internet platforms.")

44. *Id.* at 15 ("[C]ourts have relied on policy and purpose arguments to grant *sweeping* protection to Internet platforms.") (emphasis added).

45. *See generally* Petition for Writ of Certiorari, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333).

46. *Malwarebytes, Inc.*, 141 S. Ct. at 16.

47. *Id.* at 18; *see* Lemmon v. Snap, Inc., 995 F.3d 1085, 1093 (9th Cir. 2021) (holding defendants liable based on negligent design theory).

48. Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1169–70 (9th Cir. 2008) (holding that Roommates.Com was not immunized by Section 230 and was therefore liable under the Fair Housing Act).

conduct that would be protected under Section 230.[49] These statements were heavily relied upon by the Ninth Circuit as analogs in *Gonzalez* to determine that recommendation-based algorithms were protected under Section 230.[50] On the other hand, Justice Thomas offers a different interpretation of the *Roommates* case in *Malwarebytes*.[51] The Ninth Circuit in *Gonzalez* viewed Google's activities as more passive (and not developmental) and thereby falling under the "neutral tools" umbrella.[52] Those who disagreed felt that the recommendation-based algorithms constituted active conduct that amounted to more than the mere use of "neutral tools."[53]

D. Background Information About Types of Algorithms

To understand the issue at hand, it is important to briefly discuss the various types of algorithms used by popular social media platforms.[54] In

49. *Id.* at 1069 ("A dating website that requires users to enter their sex, race, religion and marital status through drop-down menus, and that provides means for users to search along the same lines, retains its CDA immunity insofar as it does not contribute to any alleged illegality; this immunity is retained even if the website is sued for libel based on these characteristics because the website would not have contributed materially to any alleged defamation.").

50. Gonzalez v. Google LLC, 2 F.4th 871, 893 (9th Cir. 2021).

51. *Malwarebytes*, 141 S. Ct. at 16 ("Courts have also departed from the most natural reading of the text by giving Internet companies immunity for their own content. Section 230(c)(1) protects a company from publisher liability only when content is 'provided by *another* information content provider.' (Emphasis added.) Nowhere does this provision protect a company that is itself the information content provider . . . And an information content provider is not just the primary author or creator; it is anyone 'responsible, *in whole or in part*, for the creation or development' of the content. § 230(f)(3) (emphasis added)." (citations omitted). *Roommates* indeed states that Section 230's "grant of immunity applies only if the interactive computer service provider is not also an information content provider, which is defined as someone who is responsible, in whole or in part, for the creation or development of the offending content." *Roommates.Com*, 521 F.3d at 1162 (quotations omitted).

52. *Gonzalez*, 2 F.4th at 894 ("The message board in *Dyroff* employed neutral tools similar to the ones challenged by the Gonzalez Plaintiffs. Though we accept as true the TAC's allegation that Google's algorithms recommend ISIS content to users, the algorithms do not treat ISIS-created content differently than any other third-party created content, and thus are entitled to § 230 immunity.").

53. *Id.* at 917 ("But I agree with the dissent and Judge Katzmann that recommendation and social connectivity algorithms—as distinct from the neutral search functions discussed in *Roommates*—provide a 'message' from the social media platforms to the user about what content they will be interested in and other people with whom they should connect. Transmitting these messages goes beyond the publishers' role insulated from liability by section 230.").

54. *See generally* Sang Ah Kim, *Social Media Algorithms: Why You See What You See*, 2 GEO. L. TECH. REV. 147 (2017); *See also* Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83 (2017) (claiming that machine-learning algorithms are no cause for concern and are not dangerous, though I am not sure if this is exactly true).

general, algorithms are typically "content-based" in that they use user information to match posts to user interests.[55] They may also be "collaborative" by finding content to connect users with other similar users (similar by interests, geography, etc.).[56] At issue in *Gonzalez* are "machine learning" algorithms which use computers to learn more about users and recommend content to them based on that information learned.[57] For the purposes of this note, "machine learning" algorithms will be referred to as "recommendation-based algorithms." YouTube is not the only interactive computer service to use such algorithms. Facebook, Instagram, Twitter and other platforms use similar algorithms to suggest content to users.[58] Some social media users, however, may remember when Twitter was organized by default chronologically[59] instead of based on algorithmic recommendations—perhaps a lack of protection of recommendation-based algorithms would create a resurgence of chronological feeds.

Briefly, it should be noted that not all algorithms have potentially nefarious uses. In fact, some recommendation-based algorithms are used to filter out and dispose of misinformation or content that does not comply with the platform's terms of service. Despite this, social media platforms cannot be excused for the harm that is caused by recommendation-based algorithms just because other methods are used to rightfully moderate and dispose of some potentially dangerous content.

E. Background Information About First Amendment Theory

Finally, it is important to know a bit about First Amendment law before proceeding. The "marketplace of ideas" is a central tenant of First

55. Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & THE JUST SOC'Y (Apr. 24, 2021), https://www.internetjustsociety.org/algorithms-in-social-media-platforms.

56. *Id.*

57. *Id.; see also Gonzalez*, 2 F.4th at 896; Petition for Writ of Certiorari at 3, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333) ("Those recommendations are implemented through automated algorithms, which select the specific material to be recommended to a particular user based on information about that user that is known to the interactive computer service.").

58. Hannah Trivette, *A Guide to Social Media Algorithms and SEO*, FORBES (Oct. 14, 2022), https://www.forbes.com/sites/forbesagencycouncil/2022/10/14/a-guide-to-social-media-algorithms-and-seo/?sh=59999dc452a0 [https://perma.cc/G8LL-W945.]

59. *See* Jay Peters, *Twitter makes it harder to choose the old reverse-chronological feed*, THE VERGE (Mar. 10, 2022), https://www.theverge.com/2022/3/10/22971307/twitter-home-timeline-algorithmic-reverse-chronological-feed [https://perma.cc/C7R6-N9BX] (detailing the difference between Twitter's current style of feed and its former chronological style feed).

Amendment law which asserts that the free flow of information is essential; that more speech is a good thing because the truth of ideas may be tested by their competition with other ideas. In *Abrams v. United States*, Justice Clarke famously stated the following:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[60]

The question now is how Section 230, and the potential stripping back of its protections, could impact the marketplace of ideas.[61] Could this cause social media platforms to chill their own "speech" by over-monitoring the content posted to their platforms?[62] Could reducing these protections actually cause the marketplace to flourish more by enabling the Internet to be a safer place for free discussion?[63] The marketplace of ideas and the First Amendment

60. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

61. Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 778-788 (1987) (suggesting that the marketplace caters to elites and those with financial resources; therefore, state regulation would "counteract the skew of public debate attributable to the market and thus preserve the essential conditions of democracy").

62. *See* Aaron Terr, *Why Repealing or Weakening Section 230 is a Very Bad Idea*, The Fire (Feb. 20, 2023), https://www.thefire.org/news/why-repealing-or-weakening-section-230-very-bad-idea [https://perma.cc/6G8J-JVGU.] (Without Section 230, "[s]urviving platforms would moderate content more aggressively and maybe even screen all content before it's posted. That isn't a recipe for a thriving, free-speech-friendly internet.").

63. Scholarly works on private speech suppression adequately outline the idea that more regulation of speech could allow for a more effective marketplace. *See generally* Morgan N. Wieland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition,* 69 STAN. L. REV. 1389, 1471 (2017) (challenging the civil libertarian belief "that to protect the First Amendment, we must be willing to countenance nearly *any* application of the speech right, even—and perhaps especially—if it cuts against our most deeply held beliefs."); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relation*, 53 UCLA L. REV. 1107, 1108-1109 (2006) ("At first glance, restraining deceptive communication furthers rather than disrupts enlightenment of the populace—by promoting truth. Moreover, other theories of the function of free expression—especially theories of autonomy—tend to support government restrictions on deception, at least when adopted to preserve the autonomy of those whom deceptive speakers otherwise might manipulate." (citation omitted)); Enrique Armijo, *Faint-Hearted First Amendment Lochnerism*, 100 B.U. L. REV. 1377, 1409 (2020) ("Using the concept of a marketplace of ideas to place limitations on

generally underly the policies the Court should have considered when deciding *Gonzalez.*

II. ANALYSIS AND PROPOSAL

A. Analysis of Protection of Recommendation Algorithms Under Section 230

Recommendation-based algorithms should not be protected under Section 230. The following analysis will explain why this is the case; but first, a brief proposal is detailed on how to institute this rule:

If recommendation-based algorithms are eventually held to be unprotected by Section 230, such a holding should be narrow and applicable only to recommendations that directly target users and *"transform"* the posted content into a unique message belonging to the platform. After determining whether the content has been transformed by the interactive computer service, courts should next ask whether, on its face, the algorithm serves a *moderative function*. Section 230's protections should still apply to algorithms that truly serve moderative functions, as failure to do so would impair the underlying purpose of Section 230. This is a common sense test that focuses on congressional intent for Section 230.

This proposal would mean that upvotes and downvotes on Reddit, for example, and which share similarities with moderative functions, would not be considered "recommendations" that would be unprotected by Section 230. *Gonzalez* is a perfect case to demonstrate the potential effectiveness of this proposal, as the algorithms in question unnecessarily targeted susceptible users when alternatives were available, using individualized criteria to target users on a user by user basis.[64] For example, YouTube could instead simply "recommend" content from the same creator that the user was watching without recommending content that would drive the user down a darker and darker hole of potentially harmful content.[65] This

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the context of compelled disclosures of commercial information only begs the questions of *which* marketplace and *whose* ideas are protected.").

64. Available alternatives are not part of this proposed solution. The presence of them merely makes *Gonzalez* a prime case for analysis.

65. Recommendations to watch other content of the same creator deserve immunity as they would not offend the purposes of Section 230. Such recommendations truly would be more like a search engine because they would be showing the user more of what they searched for themselves. *See*

compromise would alleviate the broader concerns of amici social media platforms while maintaining a common-sense view of the purpose of Section 230 and what it demands.[66]

From the perspective of *Gonzalez,* the primary critique of recommendation-based algorithms is that susceptible persons will be directed toward dangerous and inflammatory material, including material involving terrorism.[67] When this happens, social media platforms are likely totally immune from liability. Large social media platforms seemingly care more about advertisement-based profits that arise out of using these algorithms than they care about making sure that videos relating to dangerous topics like terrorism remain, at a minimum, obscure and difficult to find.

By using these algorithms, social media platforms are actually taking an active role in promoting terroristic activities. In connection with Google's assertion that it is a passive disseminator of information, recommendations of this type may instead be viewed as affirmative actions on the part of the platform. In other words, the platform is doing more than using "neutral tools" to achieve its ends, and Section 230 only protects platforms from liability when they are to be held liable for the publishing activities of *another* party.[68] Recommendation-based algorithms appear to be more than Google simply allowing the information to exist on its platform. Specifically, such recommendations are well outside the realm of traditional editorial functions and moderation. Judge Berzon put it best in *Gonzalez,* noting that "neither the text nor the history of Section 230 supports a reading of 'publisher' that extends so far as to reach targeted, affirmative recommendations of content or of contacts by social media

Gonzalez v. Google LLC, 2 F.4th 871, 895 (9th Cir. 2021).

66. *See generally* Haley Griffin, *Laws in Conversation: What the First Amendment Can Teach Us About Section 230,* 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 473, 517 (2022) (calling for similar limits on the breadth of Section 230's application based on what is truly a traditional editorial function).

67. *Gonzalez*, 2 F.4th at 941 (Berzon, J., concurring); *see also* Dick Lilly, *Social medial algorithms lead us down dark, divisive rabbit holes*, THE SEATTLE TIMES (Oct. 28, 2018), https://www.seattletimes.com/opinion/social-medias-algorithms-lead-us-down-dark-divisive-rabbit-holes/, [https://perma.cc/5F7Z-28VS].

68. 47 U.S. Code § 230(c)(1) (1996) ("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.") (emphasis added).

algorithms."[69]

In general, it defies common sense to construe recommendations as a traditional editorial function exercised by a publisher.[70] There is indeed a difference between publishing and recommending. As the *Gonzalez* Petition for Certiorari notes, no one would find that a bookstore recommending a novel is the publisher of that novel. Instead, a recommendation is content from the source itself.[71] Proponents of Section 230 protections over recommendation-based algorithms may argue that publishers often recommend material. Just because a publisher *may* do something does not mean it fits into the category of traditional editorial functions that are entitled to Section 230 protections.[72] Indeed, the Northern District of Texas determined that creating titles and headings could remove a platform from Section 230 protections.[73]

It seems that Section 230 is stretched too far when it is made to cover recommendations that don't appear to involve *moderating* (or other "traditional editorial functions"). One must only look to Section 230 itself to see that the purpose of the statute lies not in granting unbridled immunity to social media platforms but in encouraging those providers to *moderate* as they see fit and to ensure that the Internet is a reasonably safe place.[74] The majority of courts have endorsed the traditional editorial functions rule as being correct, though they have not necessarily addressed recommendation-based algorithms.[75] *Force* and *Dyroff* challenged this perspective on different grounds with both holding that recommendations are nonetheless protected under Section 230.[76] Recommendation-based algorithms such as those present in *Gonzalez* seem to make the social media platforms

69. *Gonzalez*, 2 F.4th at 915 (Berzon, J., concurring).

70. Griffin, *supra* note 66, at 513–14.

71. Petition for Writ of Certiorari at 28–29, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333).

72. *Id.* at 29.

73. MCW, Inc. v. Badbusinessbureau.com, L.L.C., 2004 WL 833595, *10 (N.D. Tex. 2004) ("Because the defendants are information content providers with respect to report titles [and] headings . . . posted on the websites, they cannot claim § 230 immunity under the CDA.").

74. 47 U.S.C. § 230(c)(2)(A) (1996); 47 U.S.C. § 230(c)(2)(B) (1996).

75. *See Online Activities Covered by Section 230*, DIGITAL MEDIA LAW PROJECT (Sept. 10, 2023), https://www.dmlp.org/legal-guide/online-activities-covered-section-230 [https://perma.cc/E72T-BSKE] ("Courts have consistently held that exercising traditional editorial functions over user-submitted content, such as deciding whether to publish, remove, or edit material, is immunized under Section 230.").

76. Dyroff v. Ultimate Software Grp., Inc., 934 F.3d 1093, 1098 (9th Cir. 2019); Force v. Facebook, Inc., 934 F.3d 53, 66–67 (2d Cir. 2019).

publishers of their own content rather than mere passive disseminators. Even if the platforms are not fully acting as "publishers," recommendation-based algorithms can scarcely be perceived as "moderation."[77] If this is true, such recommendations would fall outside of the protections granted by Section 230.

This proposal is based on the "transformative use test" that is often used in right of publicity (and copyright) cases in which the use of one's likeness is so transformed by another user that it creates an entirely new product which may be used without liability for appropriation.[78] Something is transformative when it creates a "new expression, meaning or message."[79] In some ways, when social media platforms recommend content by other users, although they do not create it themselves, they are transforming it in such as way so as to make it their own, unique message—a unique message that would not be subject to protection under Section 230. In other words, *Gonzalez* challenges us to ask whether Google had so "transformed" or altered the delivery of ISIS's content by subjecting it to a tailored delivery scheme—a recommendation-based algorithm. Might this be considered "development" of the content in some way?[80] This traditional form of the transformative use test, altered for Section 230 context, is useful in analyzing the issue in *Gonzalez.*

The majority *Gonzalez* opinion in the Ninth Circuit questions whether recommendation-based algorithms are comparable to traditional search engines whose functions are protected under Section 230.[81] The court even relies on this argument.[82] This argument is also weak because Section 230 explicitly only applies when a party seeks to treat an interactive service provider as a *publisher,* and likewise seems to stretch Section 230 beyond the meaning of its words. Regardless, Google, in the context of *Gonzalez*, is doing more than providing information as the result of targeted user inquiries. Unlike a search engine, Google is recommending content to users without them having to explicitly search for it (or something very closely

77. Recall that Section 230 does not apply if the information content provider, in whole *or in part*, is responsible for the creation or development of the content. Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008).

78. *See, e.g.,* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3d Cir. 2013).

79. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

80. Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 16 (2020).

81. Gonzalez v. Google LLC, 2 F.4th 871, 895 (9th Cir. 2021).

82. *Id.*

related to it). This is an intuitive distinction. Simply because some matching content with users may be covered under Section 230 does not mean that all forms of matching constitute protected activity, especially when the matching is not induced by direct user inquiry. Indeed, even the Ninth Circuit in *Gonzalez* admits that Google's algorithms at issue are more "sophisticated than a traditional search engine."[83] Again, some moderative functions that may look vaguely like recommendations (such as those used by Reddit) would remain protected under Section 230 if the above proposal is adopted, as it relies on the content being sufficiently transformative and moderative.

Congressional intent and the plain text of Section 230 are similarly instructive on this point. As previously stated, the policy of the statute can be found in § 230(b). Importantly, Congress wanted to protect children, promote the "continued development of the internet," and "ensure the vigorous enforcement of Federal criminal laws." It would make little sense to suppose that Congress intended to immunize social media platforms for all ills it may commit just because third party content is involved in some way.[84] Immunizing social media platforms from otherwise generally applicable laws would defy the statute's insistence that it has no impact on criminal law and that "[n]othing in [Section 230] shall be construed to impair the enforcement of . . . any other Federal criminal law." A different standard should not apply for civil law (like the ATA) when implications are so grave. If Google, without Section 230's protections, would be liable under the ATA, legislative intent dictates that Section 230 not stand in the way. When social media platforms are actively involved in "developing" or producing illegal content, they should be held liable for this. The goal of Section 230 is to allow removal of objectionable content, not to encourage its dissemination. Even the majority in *Gonzalez* admitted that "[t]here is no question that [Section 230] shelters more activity than Congress envisioned it would."[85] Although textualism shouldn't be the only force behind a decision to remove recommendations from the protections of Section 230, the language of the statute and how it informs analysis regarding

83. *Id.*

84. Petition for Writ of Certiorari at 2, Gonzalez v. Google LLC, 2 F.4th 871 (No. 21-1333) ("The wording of section 230, however, was sufficiently general to invite arguments that it preempted application of a wide range of state and federal non-criminal statutes.").

85. *Gonzalez*, 2 F.4th at 913.

congressional intent remains something to be considered. Moreover, public policy arguments further bolster this argument.

Social media companies have argued that using recommendation-based algorithms is really just a use of their own First Amendment rights.[86] If this is the case, it would seem logical to conclude that when social media companies are using algorithms for something more than a purely moderative purpose, they would themselves be the publisher and not immunized under Section 230. Basically, social media companies cannot expect to have their cake (immunity) and eat it too (claiming First Amendment rights in regard to the same content immunity may apply to). In other words, social media platforms should not have immunity for their actions subject to the First Amendment when other similarly situated actors do not, thereby providing them with two layers of protection. It is hard to believe that Congress intended for this tension to dictate the law. Pure moderation falls outside of First Amendment analysis; therefore, such actions are protected under Section 230. To be sure, social media companies may suggest that even if Section 230 does not protect them, the First Amendment does.[87]

Anything beyond moderation that crosses the line into pure speech or expression simply cannot be protected under Section 230, as it would create confusing contradiction in the law as well as unfair application of the First Amendment. Social media platforms, like everyone else, should rely on traditional First Amendment principles to argue for their ability to use recommendation-based algorithms, and this effort may or may not be successful.

B. Short Response to Opposing Views on the Issue of Recommendation-Based Algorithms

86. *See* Brief Amicus Curiae of M. Chris Riley, an Individual, et al. in Support of Respondent at 27, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (No. 21-1333) ("[T]he choices that he makes vindicate his own expressive interests. In his case, Riley has chosen to support users who are connected to the technology policy field. If Riley did not care about facilitating discussion about technology policy, he could make different choices. The First Amendment protects those expressive and associative choices.").

87. Social media platforms are corporations with speech rights, but there are good arguments based in the First Amendment for why corporations should not have First Amendment rights. *See* Wieland, *supra* note 63, at 1426.

Of course, it is important to be mindful of the potential implications of barring Section 230 protections for this type of non-moderative algorithm. Some commentators assert that recommendations are a traditional editorial function that should fall under Section 230. For example, amici (in support of Respondent) from Reddit, another social media platform which relies on a "community based approach" to moderation in which users act as moderators, fear that removal of Section 230 protections will implicate their moderators.[88] At the outset, it is arguable whether Reddit's moderators would be implicated by this decision at all.[89] After all, Section 230 fiercely protects efforts to moderate, and efforts to ensure it does not protect recommendations should not have any bearing on moderation. Additionally, users on Reddit choose to join certain groups. The moderators are not responsible for those choices.

Next, it is important to note that social media platforms *must* be able to moderate and regulate content without threat of liability if they are to maintain the Internet as a bearable and functional place. This means that unfounded allegations of "censorship" or "viewpoint discrimination" must be curtailed when social media platforms are merely trying to enforce their terms of service.[90] It, however, is infeasible to suppose that these platforms will be able to moderate, remove, and edit all that should be dealt with for the safety of users and society. This is why immunity from liability is needed for most *moderation* functions and posts that truly begin and end with third-parties. The question, rather, is whether the recommendations at issue in *Gonzalez* serve some kind of function to protect platform moderation.[91]

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88. *See* Brief for Reddit, Inc. and Reddit Moderators as Amici Curiae in Support of Respondent at *3–4, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (No. 21-1333); Brief for Meta Platforms, Inc. as Amicus Curiae in Support of Respondent at *3, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (No. 21-1333) (making similar arguments similar to that of Reddit by asserting that the difference between recommending and removing is "illusory.").

89. The amicus brief seems to think that Reddit's upvote/down feature counts as recommendations in the same sense as those of Google in *Gonzalez*. *See* Brief for Reddit, Inc. and Reddit Moderators as Amici Curiae in Support of Respondent at *11, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (No. 21-1333). That is not the case. Upvoting and downvoting resembles a feature of moderation in itself. On point of common sense, this feature is closer to a function of self-moderation than it is to recommendation.

90. NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1716 (2022).

91. It seems clear that recommending cannot be construed as a "traditional editorial function," so I will not entertain it further here. The above portions of this note argue that such recommendations go further than traditional editorial functions.

Furthermore, it is prudent to consider whether some First Amendment rights of platforms or general First Amendment principles would be violated by Google's potential liability in this case, especially when the law at issue is "viewpoint-neutral" and generally applicable.[92] In First Amendment law, generally, content-neutral laws are entitled to analysis under intermediate scrutiny, while content-based laws are entitled to analysis under strict scrutiny.[93] In this case, the Anti-Terrorism Act under which Plaintiffs aim to hold Google liable is generally applicable and potentially content-neutral.[94] Generally applicable laws typically do not offend the First Amendment, so if social media platforms are unprotected by Section 230 in this instance, there should be no issue with applying this Act to them.[95]

Additionally, the government should not be left without recourse to regulate when it needs to, especially when it comes to something as serious as terrorism. First Amendment jurisprudence may need to evolve to ensure that the government can regulate new dangers without the First Amendment acting as an insurmountable bar.[96] For the reasons outlined above, social media platforms would receive an unfair windfall if Section 230 immunized them for their own expressive conduct or speech. Regardless, the general applicability of the ATA and other statutes that may result in liability without Section 230's protections should apply with no issue.

For those types of algorithms that require the platform to act more affirmatively and without moderation in regards to content shown, Section 230 protection would be inappropriate. For those that better maintain the

92. Some commentators suggest that a platform's First Amendment rights may be limited by their potential status as "common carriers," though the argument that social media platforms are common carriers has been widely disputed. *See, e.g.,* Dawn Carla Nunziato, *Protecting Free Speech and Due Process Values on Dominant Social Media Platforms*, 73 HASTINGS L.J. 1255, 1302 (2022) ("Just as the Supreme Court weighed the free speech interests of members of the public over those of common carriers like telephone services, broadcasters, and cable network operators, so too should the courts scrutinizing the constitutionality of proposed platform regulations prioritize the free speech interests of social media users over those of the social media platforms."); *see also* Ashutosh Bhagwat, *Why Social Media Platforms Are Not Common Carriers*, 2 J. FREE SPEECH L. 127 (2022).

93. Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 155 (2015).

94. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (holding that generally applicable laws do not violate the First Amendment).

95. *See id.*

96. *See generally* Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 437–38 (2022) ("A fully realized social democratic theory of speech protection . . . safeguard[s] the health, safety, and general welfare of society. In other words, it aims to ensure that information flows 'cleanly as well as freely,' and in this way, it is fundamentally anti-Lochnerian.").

passivity of the platform, perhaps Section 230 protections should apply. For the reasons explained above, the algorithms at issue in *Gonzalez* fit into the first category. Despite the countervailing concerns outlined above, the Court in *Gonzalez* should have held that these recommendation-based algorithms are not protected under Section 230 and that Google is therefore liable under the ATA.

C. Public Policy Concerns Regarding Misinformation

On a point of public policy, it is pertinent to highlight the role of recommendation-based algorithms in spreading misinformation — especially political misinformation. These algorithms encourage "echo chambers" online and public opinion seems to recognize the role of algorithms in spreading misinformation.[97] This is exacerbated by the fact that Americans now spend so much of their time online, consuming information and news.[98] Indeed, many Americans now see a need for the government to control online misinformation.[99]

Google and other interactive computer services have received multiple complaints about the impact of their recommendations on terroristic activity. As a result, one could say that these platforms have been "on notice" that their recommendations result in deaths related to terrorism. Similarly, it is undisputed that social media platforms played a role in the organization of the January 6th insurrection.[100] It is a plausible argument that recommendations from social media platforms played a large role in

97. *See* Jim Fournier, *How algorithms are amplifying misinformation and driving a wedge between people*, THE HILL (Nov. 10, 2021), https://thehill.com/changing-america/opinion/581002-how-algorithms-are-amplifying-misinformation-and-driving-a-wedge/ [https://perma.cc/WHA9-AK5R].

98. *See* Pew Research Center, *About 281ere-in-ten U.S. adults say they are 'almost constantly' online* (Mar. 26, 2021), https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/; Pew Research Center, *More than eight-in-ten Americans get news from digital devices* (Jan. 12, 2021), https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/ [https://perma.cc/VF83-WH5X].

99. Pew Research Center, *More Americans now say government should take steps to restrict false information online than in 2018* (Aug. 18, 2021), https://www.pewresearch.org/fact-tank/2021/08/18/more-americans-now-say-government-should-take-steps-to-restrict-false-information-online-than-in-2018/ [https://perma.cc/S4X3-3TKK].

100. *See* Craig Timberg, Elizabeth Dwoskin & Reed Albergotti, *Inside Facebook, Jan. 6 violence fueled anger, regret over missed warning signs,* WASH. POST (Oct. 22, 2021), https://www.washingtonpost.com/technology/2021/10/22/jan-6-capitol-riot-facebook/ [https://perma.cc/FNN5-SSDM].

targeting those most susceptible to participating directly in the insurrection and encouraging them to do so, just like the events alleged in *Gonzalez*. Social media platforms enabled misinformation to spread to susceptible individuals about the election being "stolen."[101] This efficient spreading of misinformation arguably encouraged the ultimate result on January 6th.[102] Many people have described January 6th as an act of terrorism. Is it unimaginable that the estate of one of the deceased may sue social media platforms for allowing recommendations to affirmatively spread misinformation about the "stolen election," which led to the death of their loved one?

The spreading of misinformation via social media may be equated to the spreading of a virus. Just like how viruses mutate to target the most people possible, social media algorithms work to allow any given piece of content to reach those who would be most interested in it, thereby allowing the information to spread widely, quickly, and efficiently. While there is certainly First Amendment value in allowing content to be *freely posted*, [103] it is another thing to directly aid in this targeted spread.

Social media companies, if discouraged from using recommendation-based algorithms, will still be able to allow any and all information to be published on their sites without fear of liability (just as Section 230 intends). They will maintain the ability to moderate as they see fit with the understanding that they will not be able to catch every concerning instance of speech and will not be held liable for that. The only difference would be that the social media companies would not be *actively helping* nefarious organizations in their goals to reach people who would most like to see and engage with their content. In the name of preventing the spread of misinformation, it would be prudent to take action to pull people out of their echo chambers. Encouraging the divestment from social media platforms of recommendation-based algorithms may be a way to do this.

D. Basis in First Amendment Law

101. *Id.*

102. *Id.*; *see also* Musadiq Bidar, *Liberals to "Moscow Mitch," conservatives to Qanon: Facebook researchers saw how its algorithms led to misinformation*, CBS NEWS (Oct. 25, 2021), https://www.cbsnews.com/news/facebook-algorithm-news-feed-conservatives-liberals-india/ [https://perma.cc/KVG8-39D3].

103. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Finally, it is important to note how traditional First Amendment jurisprudence would be implicated by a decision to bar the protection of recommendations under Section 230. The "marketplace of ideas theory" of First Amendment law means that some false information must be tolerated in order to protect truthful information.[104] It is questionable whether this long-abided by concept still applies as steadfastly today where incredible harms are done (such as violence and domestic terrorism) when too much misinformation is allowed to flow freely.[105] Perhaps a narrowing of the marketplace of ideas is necessary in this modern world, or perhaps, sacrificing the strength of this doctrine is too high a price to pay for deterring misinformation and violence related to these recommendations. Regardless, a decision not to protect recommendations under Section 230 would not inhibit the content which may be posted to social media platforms—only the affirmative recommendations of that content. If the above proposal is adopted and reality reveals that barring Section 230 protections for recommendation-based algorithms leads to intolerable censorship by social media platforms, a new rule should certainly be considered.[106]

Further, algorithms necessarily cause judgments to be made about what content is desirable and what is not. This means that certain users may have their content "censored." As previously established, this is clearly within the moderative functions pondered and protected by Section 230. As a result, First Amendment concerns of this nature are not in question here, as algorithms that serve this function would remain protected.

Social media platforms argue that these judgments reflect the exercise of their own First Amendment rights. As suggested earlier, it is debatable how these recommendations should be viewed in the context of First Amendment law when the platforms advocate for insulation from liability for these same recommendations. Regardless, these recommendations seem

104. *See id.* ("[T]hat the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

105. *See* Wieland, *supra* note 63, at 1390 ("This insight cuts against the widespread belief that to protect speech we must be willing to countenance nearly any application of the right, even—and perhaps especially—if it goes against our most deeply held beliefs. That view is a myth; the speech right must have limits.")

106. *See* Brief for Meta Platforms, Inc. as Amicus Curiae in Support of Respondent at *32, Gonzalez v. Google LLC, 2 F.4th 871 (9th Cir. 2021) (No. 21-1333) (expressing fear that leaving recommendations uncovered from Section 230 will result in censorship).

to aid in the spread of misinformation. As a result, courts should make a judgment that these policy concerns outweigh those of the potential First Amendment rights of social media platforms.[107]

Sometimes First Amendment interests must bend to legitimate and compelling governmental interests.[108] It seems that barring recommendation-based algorithms from protection under Section 230 is of little consequence to social media platforms in comparison to the benefits to society that would result. Accordingly, recommendations are not properly covered under Section 230, as they are more analogous to the speech of the platforms which may be curbed by generally applicable laws or potentially because the harm of such recommendations outweighs the benefits.[109] If the *Gonzalez* court had reached this question, the current state of the law as articulated by *Roommates* may unfortunately dictate a contrary result.

Finally, outside of relevant First Amendment concerns, it is worth noting that potentially overturning precedent in this way poses risks to the Court as an institution and to society at large. Despite the previous discussion on this matter (from both a legal and policy perspective), if the current Court had decided to remove this protection for recommendations, it may have been viewed as another flagrant disregard for this country's long revered policies of *stare decisis*.[110] This is especially concerning because concurring justices in *Gonzalez* only reached their conclusion from a desire to adhere to the Circuit's precedent.[111] Perhaps this informed the

107. The current state of First Amendment law is quite protective of speech that is not commercial. The social media platforms may be exercising their First Amendment rights about all sorts of topics, namely political topics. This is something that the law holds in high regard, so it is unlikely that restraints would be put on its dissemination in the law's current state. *See e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that incitement is categorically unprotected speech; making a judgment that policy against allowing this kind of speech outweighs First Amendment interests).

108. Exceptions to the First Amendment include incitement (*Brandenburg*, 395 U.S. 444), defamation (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), and true threats (Virginia v. Black, 538 U.S. 343 (2003)). Perhaps dangerous speech or conduct like that exhibited by Google could be made into a similar exception to First Amendment principles.

109. *See generally* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (holding that generally applicable laws do not violate the First Amendment).

110. *See, e.g.,* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 387 (2022) (Breyer, J., dissenting) ("By overruling *Roe*, *Casey*, and more than 20 cases reaffirming or applying the constitutional right to abortion, the majority abandons *stare decisis*, a principle central to the rule of law.").

111. *See* Gonzalez v. Google LLC, 2 F.4th 871, 913 (9th Cir. 2021) (Berzon, J., concurring) ("I write separately to explain that, although we are bound by Ninth Circuit precedent compelling the outcome in this case, I join the growing chorus of voices calling for a more limited reading of the scope

Court's decision to avoid the Section 230 question, though the Court gave no indication that this was the case.[112]

CONCLUSION

Both legal and policy arguments involving misinformation militate in favor of excluding recommendations from Section 230 protections when those recommendations are targeted, transformative, and do not involve moderation. Recommendation-based algorithms go far beyond traditional editorial functions and moderation, at least when one honestly analyzes the meaning of those terms. Instead, recommendations seem to be the independent content of social media platforms, utilized for the purpose of spreading new messages tailored to users. Social media companies and other large platforms should not be immunized for all of the activity they do, especially when that activity often results in increased misinformation or illegal activity.

Immunity, per the plain language of Section 230, should only apply when platforms are sought to be treated as a publisher of third-party content or when parties try to impose liability for moderative activities. If recommendation-based algorithms, such as those used by Google in this case, are closer to speech of the platform itself, Section 230 protections should not apply. If these recommendations are speech, the Court should have allowed them to be permissibly curbed by generally applicable laws such as the ATA.

The Court, nonetheless, should have found some middle ground between limiting Section 230 too much and broadening it beyond recognition. Halting the protection of such recommendations may actually *help* the goal of Section 230 to moderate content. Preventing (or at least not encouraging) inflammatory material from getting into the wrong hands serves a similar function to moderation. Both seek to maintain the Internet

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of section 230 immunity."); *id.* at 936–37 (Gould, J., concurring in part) ("[T]o the extent any of our Ninth Circuit precedent stands in the way of a sensible resolution of claims like those presented on appeal here, where terrorist organizations like ISIS have obviously played Google and YouTube like a fiddle, then in my view we should take these or other related cases *en banc* to give a full review). It should be noted that if *Gonzalez* had been decided by *Dyroff*, however, the outcome of the Ninth Circuit's cases could have been different and likely would have denied immunity under Section 230 for recommendation-based algorithms.

112. Gonzalez v. Google LLC, 598 U.S. 617, 619–22 (2023).

as a bearable place, while still allowing for the free flow of information and a flourishing "marketplace of ideas." This seems to protect the spirit of Section 230.

Finally, it is vital for the Supreme Court to also continue to allow platforms to moderate as they see fit per Section 230's plain language, even if this results in what might be seen as "censorship" by some. This includes embracing the understanding that social media platforms cannot be expected to erase every post that violates their terms of service. Refusing protection to recommendation-based algorithms should not cast doubt on this important proposition.[113] Prevention of Section 230 from covering recommendation-based algorithms should not extend too far, as Section 230 purposes would then be frustrated on the opposite end.

113. The risk that social media platforms may find themselves unable to properly moderate in this way is now has made its way onto the Supreme Court's docket. *See* NetChoice, LLC v. Paxton, 144 S. Ct. 477 (2023) (granting cert in challenge to Texas law that would prevent viewpoint-discriminatory censorship of users' posts by social media platforms).