Case No. 15-60205

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GOOGLE, INCORPORATED,

Plaintiff-Appellee,

v.

JAMES M. HOOD, III,
Attorney General of the State of Mississippi, in his official capacity,

Defendant-Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
IN CASE NO. 3:14-CV-00981-HTW- LRA
HONORABLE HENRY T. WINGATE

BRIEF OF *AMICI CURIAE* ELECTRONIC FRONTIER FOUNDATION, CENTER FOR DEMOCRACY & TECHNOLOGY, NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE, PUBLIC KNOWLEDGE, AND R STREET INSTITUTE IN SUPPORT OF APPELLEE GOOGLE, INC. AND AFFIRMANCE

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August 3, 2015

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to this Court's Rule 29.2, the undersigned counsel of record for *amici curiae* certifies that the following additional persons and entities have an interest in the outcome of this case.

1. Electronic Frontier Foundation, *amicus curiae.* Electronic Frontier Foundation is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

2. Center for Democracy & Technology, *amicus curiae*. Center for Democracy & Technology is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

3. New America's Open Technology Institute, *amicus curiae*. New America's Open Technology Institute is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

4. Public Knowledge, *amicus curiae*. Public Knowledge is a nonprofit organization recognized as tax exempt under Internal Revenue Code

§ 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

5. R Street Institute, *amicus curiae*. R Street Institute is a nonprofit organization recognized as tax exempt under Internal Revenue Code § 501(c)(3). It has no parent corporation and no publicly held corporation owns 10 percent or more of its stock.

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Dated: August 3, 2015

s/ Hanni Fakhoury
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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae are non-profit public interest organizations seeking to protect speech and innovation on the Internet.

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization that works to protect free speech, innovation, and privacy in the online world. With more than 22,000 dues-paying members, EFF represents the interests of technology users in both court cases and broader policy debates regarding the application of law in the digital age. EFF actively encourages and challenges industry and government to support free expression, innovation, privacy, and openness in the information society. EFF frequently participates, either as counsel of record or *amicus*, in cases involving both Section 230 of the Communications Decency Act and the First Amendment.

The Center for Democracy & Technology ("CDT") is a non-profit public interest and Internet policy organization. CDT represents the public's interest in an open, innovative, and decentralized Internet, reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT has

[1] Pursuant to Federal Rule of Appellate Procedure Rule 29(c), EFF certifies that no person or entity, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. Both Plaintiff-Appellee and Defendant-Appellant consent to the filing of this brief.

litigated or otherwise participated in a broad range of Internet free expression and intermediary liability cases.

New America's Open Technology Institute ("OTI") is a program dedicated to technology policy and technology development in support of digital rights, social justice, and universal access to open communications networks. OTI, though its unique blend of policy expertise, technical capacity, and field-level engagement, seeks to promote a stronger and more open Internet to support stronger and more open communities. New America is a non-profit civic enterprise dedicated to the renewal of American politics, prosperity, and purpose in the digital age through big ideas, technological innovation, next generation politics, and creative engagement with broad audiences.

Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for accessible and open means for public communication, without undue interference of or by intermediaries.

R Street Institute ("R Street") is a non-profit, non-partisan, public-policy research organization ("think tank"). R Street's mission is to engage in policy

research and educational outreach that promotes free markets, as well as limited yet effective government, including properly calibrated legal and regulatory frameworks that support Internet economic growth and individual liberty. R Street's particular focus on Internet law and policy is one of offering research and analysis that show the advantages of a more market-oriented society and of more effective, more efficient laws and regulations that protect freedom of expression and privacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici Curiae submit this brief because we are deeply concerned that Attorney General Hood's actions here, if replicated in other contexts, would have a detrimental impact on the Internet and online speech. The record suggests that the Attorney General intended his 79-page subpoena—which is remarkably broad and replete with speculative, non-specific allegations of conduct largely immunized by Section 230 of the Communications Decency Act ("Section 230")—was served in retaliation for Google's refusal to monitor, take down, or block disfavored third-party content. This use of law enforcement's investigative powers, if permitted, would set a dangerous precedent for other state officials, the service providers they may choose to target, and the users that depend on those services. Faced with similar pressure, smaller service providers—those without Google's resources and thus more vulnerable to such pressure tactics—would likely be forced to decide between censoring third-party content and going out of business. We fear that most would choose the former course, but either outcome would undermine lawful speech and innovation.

The Attorney General repeatedly characterizes the investigation that led to this case as "normal" or "typical," and stresses the public interest in allowing such state investigations to move forward without the interference of federal courts. But that investigation was far from typical, and its stakes are not limited to the burden

on a single online service provider[2] in responding to a particular investigatory subpoena. As the district court correctly noted, it is the particularly *unusual* circumstances underlying this case that made Google's decision to seek relief in federal court "predictable" and necessary. *See* Order, No. 3:14-cv-981-HTW-LRA, ECF No. 88, at 5.

This Court should uphold the district court's decision to grant that relief for three reasons.

First, the plain language of Section 230 of the Communications Decency Act prohibits the Attorney General's efforts to force Google to monitor, take down, or block disfavored third-party content. One of Congress's primary goals in passing Section 230 was to encourage the development of the Internet as a platform for speech by shielding intermediaries from not only liability, but also the heavy burden of complying with legal process related to third-party content. The district court thus correctly held that Google was likely to prevail on the merits of its Section 230 claim.

Second, the First Amendment prohibits the Attorney General's efforts to strong-arm Google into monitoring and censoring third-party content. Not only does the First Amendment protect interactive computer services against

[2] This brief uses the phrases "Internet service provider," "online service provider," "interactive computer service provider," and "interactive computer services" interchangeably.

unwarranted governmental intrusion into their editorial discretion concerning lawful third-party content, it also protects the public's right to access that content. The district court thus correctly held that Google was likely to prevail on the merits of its First Amendment claim.

Third, the injunction serves the public interest. While the public may have an interest in appropriate and lawful investigations, the public interest is not served by allowing a state official to abuse his authority. Moreover, the public has a strong interest in the continuing ability of service providers, large and small, to provide platforms for expression and innovation. Permitting state officials to pressure service providers into taking down or blocking third-party content would stifle innovation and chill online speech, undermining the economic and democratic benefits of the Internet we enjoy today.

This Court should affirm the district court's decision to enjoin the Attorney General from enforcing his unduly burdensome subpoena or bringing charges against Google for making third-party content accessible to Internet users.

ARGUMENT

I. SECTION 230 PRECLUDES A STATE OFFICIAL FROM SADDLING AN INTERNET SERVICE PROVIDER WITH BURDENSOME AND COSTLY DISCOVERY DIRECTED PRIMARILY AT THIRD-PARTY CONTENT.

The 79-page subpoena underlying this case is directed primarily at Google's alleged failure to take down or block certain objectionable third-party content—*i.e.*, Google's exercise of editorial control. *See* Decl. of Peter G. Neiman, No. 3:14-cv-981-HTW-LRA, ECF No. 17, Ex. 30 (administrative subpoena issued by Hood to Google on Oct. 21, 2014) (hereinafter, "Hood Subpoena").

As the statutory text and legislative history makes clear, Section 230 immunizes interactive computer services from liability for exercising such editorial control, even where the publication of third-party content is actionable under state law. This broad immunity protects service providers not only from liability, but also from the burden of costly discovery. In keeping with both the statutory text and Congress's intent, the kind of burden presented by this 79-page subpoena should be imposed *only* where the party seeking discovery can show specific, non-speculative allegations of conduct *not* immunized by Section 230. The Attorney General has not done so.

A. Section 230 Shields Internet Service Providers From Liability Based on Third-Party Content.

1. *Congress Intentionally Crafted Expansive Immunity Under Section 230 to Encourage Development of Innovative Technologies and Forums For Online Discourse.*

Section 230 of the Communications Decency Act provides that "[n]o provider or user of an interactive computer service[3] shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).[4] "By its plain language, [Section] 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Section 230 was designed to settle a range of legal uncertainties that Internet service providers faced in the early stages of the Internet. *See generally* Byron F. Marchant, *On-Line on the Internet: First Amendment and Intellectual Property Uncertainties in the On-Line World*, 39 How. L.J. 477, 478, 493 (1996) ("[I]nteractions on the Internet span a new world of legal issues involving nearly every aspect of the law[,]" including "when an Internet system provider or party

[3] "The term 'interactive computer service' means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

[4] Section 230 also immunizes service providers for the removal (as opposed to the hosting) of objectionable material. 47 U.S.C. § 230(c)(2).

sponsoring a site on the Internet should be liable for the content of a message posted on that service or that Website."). For example, service providers worried that they could potentially "be held liable for defamation even if [they were] not the author of the defamatory text, and . . . even if unaware of the statement." *Batzel v. Smith*, 333 F.3d 1018, 1026–27 (9th Cir. 2003) (citation omitted). They might also be subject to liability under any number of (often inconsistent) state tort regimes.

Congress recognized that the Internet would be a far more limited forum if Internet service providers were forced to second-guess decisions about managing and presenting content authored by third parties. *See, e.g.*, *Zeran*, 129 F.3d at 331 ("Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted."). Accordingly, Congress granted interactive computer service providers "broad immunity" from liability for content originally published by third parties. *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *see also Ben Ezra, Weinstein, & Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 985 n.3 (10th Cir. 2000). Congress intended such immunity "to promote the continued development of the Internet and other interactive computer services" and "to preserve the vibrant and competitive free market" online. *See* 47 U.S.C. § 230(b)(1)–(2). Congress made the policy choice that fostering the Internet as a

forum for unrestrained, robust communication was more important than deterring potentially harmful online speech by imposing liability on intermediaries "for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330–31.

Immunity is not conditioned on how an interactive computer service displays, selects, or channels information. Instead, Section 230 immunizes "any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online[.]" *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc). In other words, "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." *Zeran*, 129 F.3d at 330; *see also Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003) (same).

Since its enactment, Section 230 has served three central purposes.

First, it keeps to a minimum governmental interference with the "robust nature of Internet communication." *Id.* at 330; *see also Batzel*, 333 F.3d at 1027 (Section 230 was intended to encourage "the unfettered and unregulated development of free speech on the Internet[.]").

Second, it "protects against the 'heckler's veto' that would chill free speech." *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014). Without such immunity, those who dislike certain content could

pressure Internet service providers into removing content they found objectionable simply by threatening litigation—as is seemingly occurring in this case. *See id.*; *see also Zeran*, 129 F.3d at 331 ("The specter of tort liability in an area of such prolific speech would have an obvious chilling effect.").

Third, it allows service providers to self-regulate—*i.e.*, to police and monitor third-party content posted through their services—by reducing the risk involved in good-faith efforts. *See Jones*, 755 F.3d at 408; *Batzel*, 333 F.3d at 1028 (noting that one reason "for enacting § 230(c) was to encourage interactive computer services and users of such services to self-police the Internet for obscenity and other offensive material"); *see also* 141 Cong. Rec. H8469–70 (Statements of Representatives Cox, Wyden, and Barton). Without Section 230 immunity, service providers would have strong incentives to *avoid* good-faith efforts to monitor third-party content for fear of increased liability if those efforts failed.[5]

Courts have interpreted Section 230 immunity broadly, "recogniz[ing] as critical in applying the statute the concern that lawsuits could threaten the 'freedom

[5] This threat was underscored by the pre-Section 230 case of *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995). There, the court held that an Internet service provider could be held responsible for the defamatory words of one of its users where the provider had attempted—and failed—to filter objectionable content from its site. *Id.* at *4. In other words, the service provider could be held liable *because* it had voluntarily attempted to police third-party content. As the Sixth Circuit explained, "Section 230 set out to abrogate [the] precedent" set by *Stratton Oakmont* and thereby ensure that service providers were encouraged—not discouraged—from self-regulating content disseminated via their services. *Jones*, 755 F.3d at 408.

of speech in the new and burgeoning Internet medium.'" *Batzel*, 333 F.3d at 1027 (quoting *Zeran*, 129 F.3d at 330); *see also MySpace, Inc.*, 528 F.3d at 418 ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-generated content.") (collecting cases); *Roommates.com*, 521 F.3d at 1174–75; *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006); *Jones*, 755 F.3d at 408 ("The protection provided by § 230 has been understood to merit expansion."). For example, reviewing courts have "adopt[ed] a relatively expansive definition of 'interactive computer service' and a relatively restrictive definition of 'information content provider.'" *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003).

2. ***Section 230 Explicitly Preempts Inconsistent State Laws, Including State Consumer Protection and Intellectual Property Laws.***

Amici agree with Google that most of the potential claims to which the Attorney General alludes as potential outcomes of his investigation are based on conduct that, pursuant to the case law, is sheltered by Section 230. Br. for Pl.-Appellee at 13, 34, 39.

Attorney General Hood his and supporting *amici* attempt to sidestep the force of Section 230 by pointing to claims that might be under investigation based on laws, such as state criminal laws, that are not preempted by Section 230. But non-preempted claims are not at issue here. As Google made clear to the district

court, it does not claim immunity from *all* investigation. Rather, the company seeks "only what Section 230 already offers—protection from the Attorney General bringing a case against Google under the [Mississippi Consumer Protection Act ("MCPA")] for making accessible over the Internet content created by third parties, *i.e.*, immunized conduct." Google's Br. Opp. Mot. to Dismiss, No. 3:14-cv-981-HTW-LRA, ECF No. 53, at 21.

Moreover, most of the potential claims to which the Attorney General and *amici* allude are in fact foreclosed by Section 230, including a number of claims styled as violations of the MCPA and state intellectual property laws. *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) ("[W]hen Congress has unmistakably . . . ordained that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall.") (citations and internal quotation marks omitted).

State and federal courts across the country have found claims brought pursuant to state laws—including state consumer protection laws—to be preempted when they conflict with Section 230. *See, e.g.*, *Ascentive, LLC v. Opinion Corp.*, 842 F. Supp. 2d 450 (E.D.N.Y. 2011) (Section 230 precluded liability for owner of consumer-review website under state unfair trade practices

and consumer protection law based on, *inter alia*, negative postings by customers of mattress manufacturer and computer software developer); *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. 10-cv-01360 SVW PJWX, 2011 WL 2469822, at *7 (C.D. Cal. 2011) (plaintiff's cause of action for unfair business practices under California law barred by Section 230); *Almeida*, 456 F.3d at 1321 (Section 230 "preempts state law that is contrary to this subsection."); *Ben Ezra*, 206 F.3d at 984–85 (Section 230 "creates a federal immunity to any state law cause of action that would hold computer service providers liable for information originating with a third party.").

The Attorney General's subpoena also seeks information and documents regarding "stolen intellectual property" and Google's possible facilitation of copyright infringement under state laws. *See* Hood Subpoena at 71–76; Br. for Pl.-Appellee at 53 (citing ROA.878-883). Claims brought under state intellectual property laws, however, are also preempted when they conflict with Section 230. As the Ninth Circuit has explained, although Section 230 includes an exception for laws pertaining to intellectual property, 47 U.S.C. § 230(e)(2), the exception applies only to federal intellectual property claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1119 (9th Cir. 2007) (en banc) ("[W]e construe the term

'intellectual property' to mean 'federal intellectual property.'").[6] That limit makes perfect sense given the realities of the Internet and the vagaries of state laws: "[w]hile the scope of federal intellectual property law is relatively well-established, state laws protecting 'intellectual property,' however defined, are by no means uniform." *Id.* at 1118. As the court observed, "[b]ecause material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state's definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress's expressed goal of insulating the development of the Internet from the various state-law regimes." *Id.* Indeed, "[a]s a practical matter, [it] would fatally undermine the broad grant of immunity provided by [Section 230.]" *Id.* at 1119 n.5.

As the statutory text and legislative history make clear, Section 230 was intended to be a broad shield against liability based on third-party content, even in the face of conflicting state law. This statutory policy has been instrumental to the

[6] The Attorney General cites several cases that have reached the opposite conclusion. *See* Brief of Appellant, at 20–21. But the only circuit court opinions to which the Attorney General points are not instructive. As the Ninth Circuit explained in *Perfect 10*, 488 F.3d at 1119 n.5, *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007) is not in conflict with its decision, as neither party in *Universal* raised the question of whether Section 230's exemption for "intellectual property law" applies to state laws; the First Circuit simply assumed it did without actually considering the issue. And *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 670 (7th Cir. 2008) says nothing about state intellectual property laws. Neither case even mentions 47 U.S.C. § 230(e)(2), the intellectual property exception.

development of the modern Internet. This Court should not bless the Attorney General's efforts to manufacture theoretical legal claims to sidestep that policy.

B. Congress Intended to Protect Internet Service Providers Not Only From Liability, But Also From the Sort of Legal Burden Google Faces Here.

Congress did not intend Section 230 to be a mere grant of immunity from liability. Immunity that applied only at the later stages of litigation—permitting discovery without specific allegations of behavior not immunized by Section 230—would not address the chilling effects Congress sought to prevent. As the Fifth Circuit has recognized, "immunity means more than just immunity from liability; it means immunity from the burdens of defending a suit, *including the burdens of pretrial discovery*." *Wicks v. Miss. State Emp't Servs.*, 41 F.3d 991, 995 n.16 (5th Cir. 1995) (emphasis added); *see also Doe v. Bates*, 2006 WL 3813758, at *10 (E.D. Tex 2006) ("[D]elay in ruling on [Section 230 immunity] will defeat one of the fundamental purposes of the immunity, namely to insulate service providers not only from liability, but also from the burdens of litigation, *including those associated with discovery*") (emphasis added). Immunity "is effectively lost if a case is erroneously permitted to go to trial." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254–55 (4th Cir. 2009) (quoting *Brown v. Gilmore*, 278 F.3d 362, 366 n.2 (4th Cir. 2002)).

Congress therefore dictated that "*[n]o cause of action may be brought* <u>and</u> no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3) (emphasis added). Interpreting this language, numerous courts have found that Section 230 grants service providers "immunity from suit" *in addition to* immunity from liability. *See Carafano*, 339 F.3d at 1125; *Ben Ezra*, 206 F.3d at 983. But Section 230 must apply not only to the burden of going to trial, but also to the burden of responding to subpoenas directed at third-party content, such as the 79-page subpoena at issue in this case. Any other reading would gut the statute of the protections intended by Congress. *See id.*

Neither should Congress's intent be circumvented by a mere conclusory allegation that an interactive computer service provider is an "information content provider," nor by a party's desire to engage in discovery to determine whether or not the service provider did anything to fall outside Section 230's protections.[7] In

[7] Under the statutory scheme, an "interactive computer service" falls outside the protections of Section 230 *only if* it becomes an "information content provider" in its own right, and only then if it provides the specific content alleged to be actionable. *Carafano*, 339 F.3d at 1123. The creation of "neutral tools" that facilitate the creation of content by third parties does not transform a service provider into a content provider. *Id.* at 1124 (service provider's use of a questionnaire that facilitated expression of information by individual users did not render it an "information content provider"); *see also Roommates.com*, 521 F.3d at 1174 (allowing users to input information into blank text box did not make service provider an "information content provider"). Nor do any similar actions short of actually creating the actionable content void Section 230 immunity. *See, e.g.*, *Jones*, 755 F.3d at 409–10 (displaying or allowing access to content created by another is immunized); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill.

the context of motions to dismiss brought by service providers subject to claims arising out of third-party content, courts have held that a plaintiff must make *specific*, *non-speculative* allegations that a provider authored or developed the content in question, or the claim must be promptly dismissed. *See Klayman v. Zuckerberg*, 753 F.3d 1354, 1358 (D.C. Cir. 2014) (allegations that Facebook controlled, allowed, furthered, and failed to remove offending post, or had some contractual obligation to act, were insufficient to defeat Section 230 immunity); *Nemet*, 591 F.3d at 250, 254–56 (granting Section 230 immunity to consumer complaint website where complaint failed to "plead sufficient facts to allow a court, drawing on 'judicial experience and common sense,' to infer 'more than the mere possibility of misconduct'") (citations omitted); *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009) ("Plaintiff has not come close to substantiating the 'labels and conclusions' by which she attempts to evade the reach of [Section 230].").

This rule is consistent with the language of Section 230, furthers Congress's stated policy preference, and applies to the subpoena issued here. Unless a litigant—even an attorney general—can make plausible and specific factual

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2009) (categorizing third party content is immunized); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 832 (2002) (similar); *Roommates.com*, 521 F.3d at 1167 (operating search engine is immunized); *Ascentive*, 842 F. Supp. 2d at 476 (similar); *MySpace*, 528 F.3d at 420 (5th Cir. 2008) ("'monitoring, screening, and deletion of content'" are immunized) (citation omitted); *Carafano*, 339 F.3d at 1124 ("editing or selection process" is immunized).

allegations that would support a showing that an Internet service provider directly authored or developed content giving rise to a non-preempted violation of state law, the provider should be granted immunity from burdensome subpoenas directed at third-party content. Broad, non-specific compelled discovery to determine if a service provider did anything to fall outside the scope of Section 230 immunity—like the Attorney General's subpoena here—contravenes Congress's intent in enacting the statute. *See, e.g.*, Hood Subpoena, Document Request No. 23 ("Provide documents reflecting all communications between Google and websites or posters of videos on YouTube that are or appear to be promoting, facilitating, offering for sale, disseminating, or engaging in Dangerous or Illegal Content/Conduct, including communications with reference to Google Advertising Services.").[8]

[8] *See also* Hood Subpoena, Document Request No. 16 ("Provide all documents concerning the use of Google Advertising Services to promote or serve ads on websites or in conjunction with videos on YouTube that are or appear to be promoting, facilitating, offering for sale, disseminating, or engaging in Dangerous or Illegal Content/Conduct."), Document Request No. 23 ("Provide documents reflecting all communications between Google and websites or posters of videos on YouTube that are or appear to be promoting, facilitating, offering for sale, disseminating, or engaging in Dangerous or Illegal Content/Conduct, including communications with reference to Google Advertising Services."), Document Request No. 26 ("Provide all documents reflecting Google's review of or knowledge that advertisements placed by Google Advertising Services appear next to videos that violate YouTube's Community Guidelines, appear on websites that violate Google's policies with respect to advertising or appear in conjunction with videos or on websites that are or appear to be promoting, facilitating, disseminating, offering for sale or engaging in Dangerous or Illegal

Pursuant to the statute's plain language, legislative history, and the overwhelming weight of case law, Section 230 precludes the Attorney General's efforts to saddle Google with burdensome and costly discovery directed primarily at third-party content. The district court correctly found there to be a substantial likelihood that Google would prevail on the merits of its Section 230 claim, and this Court should affirm the district court's findings.

Content/Conduct."), Document Request No. 35 ("Provide all documents concerning advertisements placed by Google's advertising services on websites, alongside search results, or in connection with YouTube videos that violate Google's policies or that otherwise are or appear to be promoting, facilitating, offering for sale, disseminating, or engaging in Dangerous or Illegal Content/Conduct."), Document Request No. 37 ("Provide all board meeting minutes, notes or other communications that address or discuss, either directly, indirectly or tangentially, the promotion, facilitation, offer for sale, dissemination of, and/or engagement in Dangerous or Illegal Content/Conduct in connection with any of Google's services, including but not limited to Google Search, Google Advertising Services, and YouTube."), Document Request No. 40 ("Provide all records that relate to your decisions about how to comply with state civil and criminal laws. Include records that relate to complying with state civil and criminal laws when there are differences in those laws between states."), Document Request No. 46 ("Provide all communications with users who post, have posted, or attempted to post videos on YouTube that promote, disseminate, offer for sale, engage in or facilitate Dangerous or Unlawful Content/Conduct, including but not limited to, the sale of illicit drugs and pharmaceuticals."), Document Request No. 79 ("Provide all records that relate to the amount of revenue, consideration or benefit of any kind received by you from content or advertising that is related to content that is or appears to be promoting, facilitating, offering for sale, disseminating, or engaging in Dangerous or Illegal Content/Conduct."), Document Request No. 119 ("Provide all documents, including communications, concerning the use of Google Services to locate, obtain, or view material that infringes copyright, or to commit, promote, or facilitate copyright infringement.").

II. THE ATTORNEY GENERAL'S EFFORTS VIOLATE THE FIRST AMENDMENT RIGHTS OF BOTH GOOGLE AND ITS USERS.

As the district court correctly recognized, the Attorney General's efforts to interfere with Google's editorial judgment—via legal threats and an unduly burdensome subpoena—also run afoul of the First Amendment. Order, No. 3:14-cv-981-HTW-LRA, ECF No. 88, at 18–19.

Specifically, the Attorney General demanded that Google not only censor third-party content available through its search engine, YouTube, and advertising systems, but also that it alter rankings of third-party content in its search results (to promote favored content and demote disfavored content) and mark favored content with an icon and disfavored content with a warning. *See* Br. for Pl.-Appellee at 9 (citing ROA.644). But search results are a form of editorial judgment protected by the First Amendment. *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 438 (S.D.N.Y. 2014) ("[T]here is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation.") (citations omitted); *see also Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007); *Search King, Inc. v. Google Tech., Inc.*, No. 02–cv–1457–M, 2003 WL 21464568, at *4 (W.D. Okla. 2003); Eric Goldman, *Search Engine Bias and the Demise of Search Engine Utopianism*, 8 Yale J.L. & Tech. 188, 192 (2006) ("[S]earch engines make editorial judgments just like any other media company."). Indeed, "a private speaker does not forfeit

constitutional protection simply by combining multifarious voices, or by failing to . . . generate, as an original matter, each item featured in the communication." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 569–70 (1995). "[T]he First Amendment's protections apply whether or not a speaker articulates, or even has, a coherent or precise message, and whether or not the speaker generated the underlying content in the first place." *Jian Zhang*, 10 F. Supp. 3d at 437 (citing *Zalewska v. Cnty. of Sullivan, N.Y.*, 316 F.3d 314, 319 (2d Cir. 2003)).

The Attorney General's efforts to interfere with Google's search results are thus akin to the government interfering with the editorial discretion of a traditional print newspaper—conduct which the Supreme Court has explicitly condemned as violating the First Amendment. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (Florida statute requiring newspapers to provide political candidates with a right of reply to critical editorials violated the First Amendment). As the Supreme Court has made clear, although the Attorney General may find the targeted content objectionable, "[d]isapproval of a private speaker's statement"—whether justified or not—"does not legitimize use of the [government's] power to compel the speaker to alter the message by including one more acceptable to others." *Hurley*, 515 U.S. at 581.

Not only do the Attorney General's efforts violate Google's First Amendments rights, but they also violate the rights of the millions of individuals who rely on Google's search tool—specifically, their right to receive and engage with information online. The First Amendment not only "embraces the right to distribute literature," but it also "necessarily protects the right to receive it." *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (citation omitted); *accord Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom.") (emphasis in original); *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.").

The district court thus correctly held that Google was likely to prevail on the merits of its First Amendment claim against the Attorney General. Again, this Court should affirm the district court's findings.

III. THE PUBLIC INTEREST WEIGHS STRONGLY IN FAVOR OF THE PRELIMINARY INJUNCTION.

Finally, the public interest weighs strongly in favor of the preliminary injunction. If allowed to continue, the pressure tactics employed by the Attorney General here would send a dangerous message to large and small service providers, as well as the Internet users who rely on their platforms to communicate, learn, and organize online. That message would stifle innovation, chill online speech, and flout the public's First Amendment interest in an uncensored Internet.

A. Subjecting Internet Service Providers to Overbroad Discovery Subpoenas Directed at Third-Party Content Would Stifle Technological Innovation and Chill Online Speech.

As explained above, in passing Section 230, Congress struck a balance that ensured the "robust nature of Internet communication" would continue to flourish without undue government interference. *See Zeran*, 129 F.3d at 330. This balance protects not only large service providers like Google, but also small service providers and the users who rely on those platforms for online speech. It is in the public interest to ensure that this balance is not upset.

Requiring Internet service providers to either respond to subpoenas directed primarily at third-party conduct, or to engage in protracted and expensive litigation to challenge their propriety, would result in extraordinary costs for those providers and, by extension, their users. Even for service providers with the resources to shoulder such discovery burdens or undertake such litigation, the services they

offer would inevitably become more expensive for users, more restrictive, and, ultimately, less available for public speech. And service providers, faced with a constant threat of burdensome investigation requests for simply facilitating access to third-party content, may be discouraged from investing in or creating new Internet features providing for public participation. This would not only inhibit technological innovation, but also chill online speech of those who would have relied on those platforms to communicate and learn online.

Small service providers simply often do not have sufficient resources to undertake the effort of either responding to or litigating a burdensome subpoena like the one challenged here. If forced to do so, they would likely go bankrupt. Smaller providers would thus likely adopt restrictions on third-party content to avoid such burdens, or leave the business altogether—in either case depriving users of valuable platforms for speech and diminishing competition in the marketplace for such platforms. Either outcome would chill the speech of Internet users who communicate via these platforms online.

Reversal of the district court's decision would encourage both public and private actors with ample resources to use those resources to pressure small Internet service providers to review, remove, and/or block third-party content they find to be objectionable—and in some cases, to fundamentally alter their business practices—by threatening to serve them with burdensome discovery demands. *See*

Jones, 755 F.3d at 407. This would result in a chilled and censored Internet, hindering the "robust" Internet that Congress explicitly sought to protect in enacting Section 230. *See* 47 U.S.C. § 230(a)(3). That forty attorneys general of other states signed onto an *amicus* brief in support of Attorney General Hood only underscores the far-reaching implications of a ruling that grants state officials the power to induce service providers to change their business practices, or censor lawful third-party speech, via similarly burdensome subpoenas.

B. The Public Has a Strong First Amendment Interest in Largely Unfettered and Uncensored Access to the Online Content.

A ruling that permitted state officials to force Internet service providers to monitor, take down, or block disfavored third-party content would trample the public's long-recognized First Amendment interest in free and open public debate. As the district court recognized, the public has a strong First Amendment interest "in having largely-unfettered access to Internet mediums for the purpose of publishing and viewing content and information, as reflected by federal policy." Order, No. 3:14-cv-981-HTW-LRA, ECF No. 88, at 24. Indeed, in *Tornillo*, the Supreme Court noted the detrimental impact a state law requiring newspapers to provide political candidates with a right of reply to critical editorials would have on the press, stating that a government-enforced right of reply would "inescapably 'dampen[] the vigor and limit[] the variety of public debate.'" 418 U.S. at 257 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964)). So, too, would a

ruling that permits state officials to interfere with the editorial discretion of search engine providers, or any other Internet service providers, concerning the publication of lawful third-party content.

As the Supreme Court recognized almost twenty years ago, the Internet is a "dynamic, multifaceted category of communication" that "includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). The open nature of today's Internet allows lonely individuals to become pamphleteers, reaching far more individuals than they could from any soapbox. *See id.*; *see also* Yochai Benkler, *The Wealth of Networks* 212–72 (2006) (discussing the emergence of the Internet as a tool of political expression by private individuals). A ruling that permits state officials to pressure Internet service providers—via the threat of litigation or subpoena—to demote or censor disfavored third-party content, or promote favored content, would threaten these very qualities that make the Internet what it is today.

The injunction is thus in the public interest. Indeed, as the district court correctly recognized, "'[i]njunctions protecting First Amendment freedoms are always in the public interest.'" *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 298 (5th Cir. 2012) (quoting *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006)).

C. The Attorney General's Public Interest Analysis Is Fundamentally Flawed.

The Attorney General and his *amici* argue that the public interest is best served by permitting state investigations to move forward without the interference of federal courts. Their public interest analysis is flawed in two critical respects.

First, it is premised on an inappropriately narrow reading of the term "public interest"—a reading that defines the public interest solely in terms of a state's ability to prosecute and enforce state laws. As explained above, this case implicates other, equally powerful public considerations.

Second, it suggests that the investigation underlying this case is a run-of-the mill, authorized exercise of a state attorney general's powers. Although the public may have an interest in allowing a state attorney general to pursue legitimate claims and lawful investigations, that interest does not extend to saddling an Internet service provider with burdensome and costly discovery based primarily on the provider's refusal to monitor, take down, or block disfavored third-party content. Rather, as the district court correctly recognized, given the circumstances surrounding this case—not the hypothetical case presented in the Attorney General's briefs—the public interest clearly weighs in favor of the preliminary injunction granted below.

CONCLUSION

The issue before this Court has ramifications far beyond the parties to this case. If state attorneys general were permitted to saddle Internet service providers with burdensome and costly discovery based primarily on the provider's refusal to monitor, take down, or block disfavored third-party content—as Attorney General Hood has attempted here—the robust nature of the Internet would be threatened. This Court should affirm the district court's preliminary injunction order.

Dated: August 3, 2015

Respectfully submitted,

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I hereby certify as follows:

1. The foregoing Brief of *Amici Curiae* complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 6,621 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and with the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 2011 in 14-point Times New Roman font.

Dated: August 3, 2015

/s/ Hanni Fakhoury
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Fifth Circuit by using the appellate CM/ECF System on August 3, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 3, 2015

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