NO. 21-1333

In the
Supreme Court of the United States

REYNALDO GONZALEZ, *et al.*

Petitioners,

v.

GOOGLE LLC,

Respondent.

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

BRIEF FOR *AMICI CURIAE* MARKETPLACE INDUSTRY ASSOCIATION AND MATCH GROUP, LLC IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

The Marketplace Industry Association and Match Group, LLC submit this brief as *Amici Curiae* in support of Defendant-Respondent Google LLC.

The Marketplace Industry Trade Association (the "Association") is the first and only trade association representing technology-enabled marketplace platforms, also known as internet marketplaces, digital marketplaces, and app-based platforms. The mission of the Association is to represent, educate and advocate for the benefit of the digital marketplace industry, and to better serve those who exchange goods, services and property through such marketplaces. An important function of the Association is to represent the interests of its members in matters before courts and legislatures throughout the country. To that end, the Association files amicus briefs in cases that raise issues of concern to digital marketplace platforms operating in the United States.

The Association represents a wide variety of digital marketplaces and app-based platforms transacting for a multitude of goods and services, including rideshare and delivery services, home services, used goods, childcare (babysitters and nannies), senior care, information technology support, coaching, and tutoring, among many others. In all, the

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Association's members have facilitated transactions for more than 300 million customers and have provided economic opportunities for more than 60 million workers.

The Association's members are digital marketplaces whose platforms are made possible because of various technological innovations—including a range of features that could be swept into overbroad and poorly-defined terms such as "algorithms" and "recommendations." In addition, the Association includes companies who offer consumer-friendly services that require the ability to host, compile, present, and curate information generated, uploaded, or shared by third-party users. Notably, the Association's membership is not comprised of "social media" companies, and includes a wide range of small and mid-sized companies that could not be characterized as "big tech." Nonetheless, such companies rely on Section 230 and/or share a vested interest in preserving immunity against frivolous litigation that would stymie innovative technologies and harm the independent entrepreneurs and third-party users who have come to rely on these intermediary marketplaces. This, in turn, harms the countless consumers and users who benefit from—and in many cases, depend on—greater access to online services made possible by Section 230.

Match Group, LLC owns and operates online dating services, including Match (f/k/a as Match.com) and Tinder, that facilitate dating in the modern age, creating opportunities for singles to find compatible partners and form lasting unions. Section 230 is vital to this effort, allowing its dating platforms to provide

recommendations to its users for potential matches without having to fear overwhelming litigation.

Amici have a substantial interest in this appeal because Section 230 of the Communications Decency Act ("CDA") has allowed *amici* to grow innovative businesses that have transformed and diversified the American economy and American society. Because of the emergence of *amici* and other similar companies, individuals seeking goods and services online have more options than ever to connect with independent entrepreneurs and third-party users, and individuals seeking romantic connection can improve their chances at finding a compatible partner. If Petitioners' theory prevails and the current broad immunity conferred by Section 230 is narrowed, this could render a wide range of technologies inoperable and harm the robust internet commerce nurtured by Congress in passing Section 230. Accordingly, this brief will assist the Court by providing this broader context and identifying real-world harms from rolling back an important immunity that protects the ecosystem of independent entrepreneurs and third-party users who have come to rely on *amici* and other innovative companies.

SUMMARY OF THE ARGUMENT

In line with Congress's policies in enacting Section 230, online intermediaries like *amici* continue to fulfill the promise and potential of the internet. Section 230 has made possible an ecosystem where platforms support independent entrepreneurs and connect them with customers looking for their goods and services. Online intermediaries have revolutionized the American economy and become

household names associated with convenience, opportunity, and specialized solutions. The COVID-19 pandemic serves as a recent reminder about the importance of a robust internet economy—when users relied on online platforms to access a wide variety of critical goods and services, even while sheltering in place.

However, many online intermediaries would be driven out of business, or never able to launch in the first place, were it not for Section 230 protections. Section 230 immunity protects small technology companies from incurring extensive litigation costs for frivolous claims. These companies face lawsuits, often frivolous, filed by plaintiffs whose alleged injuries really stem from the content of third-parties, which the technology companies merely host and display. Section 230 immunity, which comes into play at the beginning of a lawsuit, can spare a technology company significant costs and give it the chance to realize its potential in the free market.

That protection could be rendered meaningless if a ruling from this Court precludes Section 230's application to "recommendations of third-party content" and "targeted recommendations" broadly. Much of the value that companies like *amici* provide consumers derives from their platform's algorithmic displays, which are user-friendly and catered to consumer needs. Many consumers would not use *amici*'s platforms without these algorithm-enabled features—features which do not create or develop new content but simply display third-party content in the form most useful for consumers. A broad range of algorithmically-powered features are necessary to cull

through millions of terabytes of practically *un-usable* information, and turn the internet "into a user-friendly environment with tools to search, filter, and organize third-party content." Respondent's Brief at 32. In other words, the development of tools to sort, display, and "recommend" content was an intended feature—not a bug—of Section 230.

A broad ruling from this Court that restricts Section 230's application to algorithmic displays could encourage plaintiffs to repackage frivolous claims that appropriately have been dismissed by courts for decades. That uncertain legal environment could have devastating effects on the future of online intermediaries, third party entrepreneurship, and e-commerce. Such consequences would be out of step with the protection that Congress intended online intermediaries to receive in all instances except where Congress has specially excepted.

ARGUMENT

I. Section 230 Enables Innovation and Growth by Smaller Technology Companies.

A. Startups and midsize technology companies need Section 230 to avoid frivolous litigation, even more than larger companies.

Not every technology company that benefits from Section 230 protection is a Fortune 500 company with a full-time litigation department, and certainly no technology company starts that way.

Startups typically begin with two or three people who have an innovative idea and a plan to bring it to

market. Growth requires funding, often from external investors, for whom Section 230 can play an influential role in their decision to invest and help launch some startups in the first place. Surveys of venture capitalists reveal that weak or unclear intermediary liability laws deter them from making an initial investment in startups. *See* Daphne Keller, Aegis Series Paper No. 1807, *Internet Platforms: Observations on Speech, Danger, and Money*, Hoover Inst. Nat'l Sec., Tech., & Law 1, 27 (June 28, 2018), https://www.hoover.org/research/internet-platforms-observations-speech-danger-and-money. And at annual Marketplace Risk conferences co-hosted by the undersigned trade association, Section 230 and its current scope is a frequent legal topic among member organizations attempting to assess litigation risk and financial viability.

Even after launch, the majority of technology startups (including members of the undersigned *amici*) do not have full-time legal counsel at inception, and certainly not litigation counsel from the outset. Early-stage marketplaces may lack even basic resources to fund and defend against complex litigation. Unlike in Europe, where the losing party in litigation pays the costs, including attorney's fees of the prevailing party, American companies are responsible for the entirety of their own attorney's costs, no matter how frivolous the suit that is brought against them. *See* George B. Shepherd*, The Impacts of the European Rule for Fee-Shifting on Litigation Behavior*, Balancing of Interests: Liber Amicorum Peter Hay Zum 70. Geburtstag 381, 381–86 (Emory Law & Econ. Rsch. Paper No. 06-06, 2005), https://ssrn.com/abstract=871248.

On average, filing a motion to dismiss costs at least $15,000 to $40,000, which could increase substantially depending on the jurisdiction and complexity of a dispute. *See Startups, Content Moderation & Section 230*, Engine (Dec. 9, 2021), https://www.engine.is/news/category/startups-content-moderation-and-section-230 (surveying content-hosting startups, midsize online service providers, and attorneys who work on 230-related cases). Meanwhile an average startup in its seed stage (*i.e.*, the first round of formal investing) operates on about $55,000 a month. *See* Engine, Charles Koch Inst., & Startup Genome, The State of the Startup Ecosystem 17 (2021), https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/60819983b7f8be1a2a99972d/1619106194054/The+State+of+the+Startup+Ecosystem.pdf.

In other words, defending even against an obviously meritless lawsuit can cause significant damage to a startup's operating reserves. And if the suit progresses beyond a motion to dismiss, small technology companies may face insurmountable costs of litigation, including those required to comply with e-discovery. *See, e.g.*, Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 Duke L.J. 765, 781 (2010) (empirical studies of discovery costs indicate that e-discovery accounts for 20 to 50 percent of all litigation expenses).

Section 230 spares emergent companies these costs by providing not merely a defense to liability but also from the costs of fighting legal battles. *See, e.g.*, *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) ("[Courts] aim to

resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from ultimate liability, but also from having to fight costly and protracted legal battles." (quotation marks omitted)). Indeed, in the experience of *amici*, the ability of startups to point to Section 230 and explain the currently broad scope of immunity is important *prophylactic* protection against threatened claims even before they are filed, which saves not only companies but also the overburdened court system from unnecessary or frivolous litigation.

By removing a costly barrier to entry, Section 230 allows technology businesses to realize the potential of their businesses. A nascent startup can eventually grow to become an industry leader (like Airbnb, OfferUp, Angie's List, or Sittercity) as long as its innovative business model is popular with consumers and it is not derailed by frivolous litigation.

Section 230 is important at any point in a company's growth trajectory. Many businesses that are industry leaders today benefitted from Section 230 during earlier points in their growth trajectory, receiving immunity from lawsuits where plaintiffs' claims boiled down to alleged injuries stemming from third-party content featured on their platforms. *See, e.g.*, *Chelsea Fine Custom Kitchens, Inc. v. Apartment Therapy LLC*, No. 0603554/2007, 2008 WL 2693129 (N.Y. Sup. Ct. June 27, 2008) (immunizing then up-and-coming lifestyle website from liability for third-party reviews about the quality of plaintiff's business); *Lee v. OfferUp, Inc.*, No. CV 17-1609, 2018 WL 4283371, at *4 (E.D. La. Sept. 7, 2018) (immunizing

online and mobile marketplace app from liability where third party used the app for criminal purposes).

Therefore, rather than benefitting only large corporations or established companies, Section 230 protection is essential for smaller and emergent companies who have much less ability to weather early and frivolous litigation.

B. Startups and midsize technology companies also rely on various forms of algorithmic display and curation to make third-party user content more accessible and usable to other third-party consumers.

Petitioners refer to "recommendations of third-party content" and "targeted recommendations" to loosely describe platform features whereby an algorithm considers data about a user (and users in general) to identify content most likely to interest users and then displays that information attractively. The Ninth Circuit below referred to these kinds of algorithms as "neutral tools" because they do not independently encourage unlawful content or contribute to the illegality of any such content, but merely deliver third-party content in response to user input. *See Gonzalez v. Google LLC*, 2 F.4th 871, 893–95 (9th Cir. 2021). For instance, Google "did not specify or prompt the type of content to be submitted, nor determine particular types of content its algorithms would promote" and "expressly prohibited the [unlawful] content" at issue. *Id.* at 895.

But a wide variety of neutral tools—including algorithmically-enabled features—are necessary to

host large amounts of information created and uploaded by third-party users; to process and sort that third-party information; and to present that third-party information in user-friendly displays that are usable by consumers who only seek relevant and curated content. Indeed, much of the "value-add" of platforms (including marketplaces represented by *amici*) derives from the relevance, convenience, and aesthetics of such displays.

Consider an online service that matches consumers with certain types of service providers—*e.g.*, an electrician on Angie's List or temporary caregivers on Sittercity. A customer looking to find a caregiver logs onto the platform and a geolocation algorithm—using data on the customer's current location or the zip code entered—displays prospective service providers in the desired area. Consider further that the first service provider the customer selects is unavailable for their desired date. The platform might then provide a display with other local providers sharing criteria with the one that the customer originally selected (*e.g.*, another caregiver in the same area who advertises Spanish fluency).

Such a user-friendly display is enabled by algorithms and is the reason that many customers engage with the platform at all. For example, parents seeking a handyperson in McLean, Virginia, would not use a matching platform that requires them to sift through handypersons offering services in Los Angeles. Such a platform would be similarly useless for the service providers who wish to offer their services only in their nearby area.

Or consider online dating, which is now the most popular way that U.S. couples meet. *See* Alex Shashkevich, *Meeting online has become the most popular way U.S. couples connect Stanford sociologist finds*, Stanford (Aug. 21, 2019), https://news.stanford.edu/2019/08/21/online-dating-popular-way-u-s-couples-meet/ ("39 percent of heterosexual couples reported meeting their partner online" and "the rate of gay couples meeting online is much higher" meaning that "[m]atchmaking is now done primarily by algorithms"). Online matchmaking is so common and successful largely because of algorithms, which connect individuals based on factors that will tend to lead to compatibility, such as location, interests, lifestyle, and personal preferences—which third-party users control based on their own personal settings and which they further refine by supplying their reactions to any potential options that are presented. As a result, singles are connected to other individuals whom they are more likely to be compatible with based on information provided by third-party customers themselves.

Indeed, basic algorithmic matching or curation can be the reason that users seek to engage with a platform at all. The displays and curation created by geolocation algorithms, provider-match algorithms, or other matching algorithms are why consumers are drawn to these platforms. But such displays do not constitute an implied endorsement of specific listings, or independent verification by the platform that the service provider speaks Spanish at an acceptable level of fluency, or that a person who claims to love dogs in his or her dating profile actually does love dogs. Notably, these examples demonstrate the broad

spectrum of marketplaces—none of which could be characterized under the loose term "social media"—that provide valuable services and goods and that rely on Section 230 protections.

Given increasing familiarity with digital marketplaces, the average consumer understands that curated lists include a wide variety of potential options; that they must vet and choose between options based on their own personal criteria and preferences; and that such lists may contain options that will not be good fits and can be rejected by the consumer.

Rather, algorithmic displays are simply a technologically advanced version of quintessential publisher activities: curation and display of content that attempt to capture and match with the consumer's own interests. *See Marshall's Locksmith Serv. Inc. v. Google, LLC*, 925 F.3d 1263, 1271 (D.C. Cir. 2019) (describing defendant's use of an algorithm to convert third-party indicia of location into pinpoints on a map as an "automated editorial act" (quotation marks omitted)). And these algorithmic displays add value to consumers looking for exposure to a wide variety of services and goods, but who need technological methods to efficiently organize and sort through the vast amounts of third-party generated information. Tools that sort, display, and prioritize are basic necessities for usable platforms, and the failure to immunize those publishing tools would substantially set back the very internet that Section 230 was meant to develop. *See, e.g.*, Respondent's Brief at 32 ("Without algorithmic sorting, Google Search would display an unordered, spam-filled list of

every website. Gmail would not be able to deprioritize spam. YouTube would play every video ever posted in one infinite sequence—the world's worst TV channel.").

While some may assume that only large companies engage in algorithmic displays (and therefore have the resources to invest more in content oversight), the Association's diverse membership prove otherwise. Algorithms are just as crucial for startups or midsize technology companies as they are for global companies. Indeed, smaller platforms may be more likely to depend on algorithmic displays, because their innovativeness often takes the form of being *more* consumer-friendly despite having *fewer* resources to hire large numbers of content moderators and web designers. To accomplish this, small companies (including members of undersigned-Association) rely on basic optimizing algorithms, such as geolocation-matching, prioritizing providers with higher user ratings, or connecting consumers with posts that have seen higher engagement from other similar users. Without the convenient and attractive formatting and presentation that such algorithms enable, many online marketplaces would be less valuable to consumers and third-party entrepreneurs.[2]

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[2] As prominent scholars have noted, there are also significant anticompetitive effects of treating Section 230 as though it only applies to a handful of the largest platforms. For instance, Daphne Keller, director of the Program on Platform Regulation at Stanford's Cyber Policy Center, testified that, to the extent disproportionate costs fall on smaller platforms, it "may have real competitive impact: deterring investment in new platforms,

This is another reason why Congress should have the opportunity to engage in its own factfinding on the value of Section 230 to a wide variety of companies—including smaller platforms—before determining what (if any) new limits to place on Section 230's scope.

C. Real world case examples from the past several decades illustrate the importance of Section 230 protection to technology companies, big and small.

Technology companies would be subject to a slew of state law contract, tort, and consumer protection claims for third-party content if existing protections under Section 230 were judicially scaled back. As numerous courts have held, Section 230 protection is not textually limited to defamation claims. *See generally* 47 U.S.C. § 230. Instead, Section 230 has broad application to both federal and state causes of action, and Congress has demonstrated its own ability to carve out narrow and specific exceptions when necessary. *See id.* § 230(e) (listing exceptions). Indeed, Congress recently modified Section 230 expressly to exempt certain kinds of trafficking-based claims. *Id.* § 230(e)(5).

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rendering smaller companies less able to attract users, or making them more willing to accept an acquisition offer from an incumbent more capable of meeting these obligations." *See Hearing on Platform Transparency: Understanding the Impact of Social Media Before the S. Comm. on the Judiciary & the Subcomm. on Privacy, Technology, and the Law*, 117th Cong. 8 (2022) (statement of Daphne Keller, Stanford Univ. Cyber Policy Ctr.), https://www.judiciary.senate.gov/imo/media/doc/Keller%20Testimony1.pdf.

Courts have therefore applied Section 230 to bar claims under many different theories and in many different contexts. *See, e.g.*, *Asia Econ. Inst. v. Xcentric Ventures LLC*, No. CV 10-01360, 2011 WL 2469822, at *7 (C.D. Cal. May 4, 2011) ("The broad reach of the CDA to bar a panoply of torts is supported by other courts that have considered the CDA's reach.") (applying Section 230 to immunize review website from plaintiff's claims of claims for defamation, false light, civil RICO, unfair business practices, deceit, fraud, and intentional and negligent interference with economic relations); *O'Kroley v. Fastcase, Inc.*, 831 F.3d 352, 354 (6th Cir. 2016) (applying Section 230 to immunize internet search engine against claims related to manner in which search results for plaintiff's name were displayed because, in short, "[Plaintiff] googled himself and did not like the results."); *Kabbaj v. Google Inc.*, 592 F. App'x 74, 74–75 (3d Cir. 2015) (per curiam) (affirming district court's dismissal under Section 230 claims against various content-hosting sites for defamation, tortious interference with contract, and negligent and intentional infliction of emotional distress); *Coppage v. U-Haul Int'l, Inc.*, No. 10 Civ. 8313, 2011 WL 519227, at *2 (S.D.N.Y. Feb. 15, 2011) (applying Section 230 protection to a moving services website and dismissing claims for negligence, intentional interference with a business contract, and breach of fiduciary duty); *Roca Labs, Inc. v. Consumer Op. Corp.*, 140 F. Supp. 3d 1311, 1318–25 (M.D. Fla. 2015) (applying Section 230 to immunize consumer review site from plaintiff's claims for defamation, tortious interference with a contractual relationship, tortious interference with a prospective economic relationship

and a violation of the Florida Deceptive and Unfair Trade Practices Act).

1. A broad limitation around "targeted" or "algorithmic recommendations" will invite artful pleading of frivolous claims.

A broad limitation of Section 230's application to algorithmic displays could have significant unintended consequences that would undercut *amici*'s businesses and reduce the services available to consumers on the internet. Enterprising plaintiffs' counsels would quickly learn just to insert a few key words in their pleadings to circumvent Section 230, even for suits that are indisputably about third-party user content. And these fears are not theoretical. Courts have relied on Section 230 to screen these sorts of meritless claims—running the gamut from RICO claims for a bad review to seeking to hold a booking platform liable for a guest's drunken hot tub slip-and-fall—for the past several decades.

***Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016)** is a representative case. Yelp! Inc. ("Yelp") is an online review website that "provide[s] a forum for members of the public—free of charge—to read and write reviews about local businesses, government services, and other entities." *Id.* at 1266 (quotation marks omitted). Douglas Kimzey owned a locksmith service in the Seattle metropolitan area, and one of his customers (Sarah K.) left a negative, one-star review of his business on Yelp. *Id.* Proceeding *pro* se, Kimzey sued Yelp for defamation as well as violations of RICO and the Washington Consumer Protection Act based on "Yelp's publication of Sarah K's statements and

[Yelp's] star rating" feature. *Id.* at 1268. Kimzey alleged that because Yelp designed and created its five-star rating feature, this transformed user reviews into Yelp's own content, beyond the scope of Section 230's protection. *Id.* at 1269.

The Ninth Circuit "decline[d] to open the door to such artful skirting of the CDA's safe harbor provision." *Id.* at 1266. Instead of holding that Yelp's rating system transformed every third-party review into a Yelp-authored review, the Court held that the rating system is "aggregate metric" from "user-generated data." *Id.* at 1270. In other words, it is a "'neutral tool'" that "did not amount to content development or creation." *Id.* (quoting *Fair Hous. Council v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008)).

But if a plaintiff could bypass Section 230 immunity simply by showing the ways in which a platform formatted third-party content or used neutral algorithms to make third-party content more accessible to users, this would "extend the concept of an 'information content provider' too far and would render the CDA's immunity provisions meaningless." *Id.* at 1269.

In ***Smith v. Airbnb, Inc.*, 504 P.3d 646 (Or. Ct. App. 2021)**, *review denied*, 508 P.3d 501 (Or. 2022) (Table), the plaintiff and her partner were guests at a rental property she found listed on Airbnb's website. Plaintiff sustained injuries while using the hot tub alone after a night of drinking. *Id.* at 381. In writing the listing, the rental property's owner had voluntarily checked a box in a drop-down menu to indicate that, among other amenities, the rental property had a hot

tub. *Id.* at 380. Plaintiff brought suit against the owner of the property and against Airbnb on the theory that Airbnb contributed to the alleged unlawfulness of the owner's listing by "creating a special search category" for hot tubs, "highlighting" those listings, "adding icons" of hot tubs to rental listings with hot tubs, and asking "targeted questions" encouraging property owners to specify whether their property had a hot tub. *Id.* at 382 (quotation marks omitted). The Oregon Court of Appeals disagreed, stating that "courts have repeatedly indicated that a service provider does not become a content provider, thereby losing immunity, 'merely [by] augmenting the content' at issue." *Id.* at 386 (quoting *Roommates.Com*, 521 F.3d at 1167–68).

In ***Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002)**, a California Court of Appeal applied Section 230 to immunize an online product marketplace. The court held that eBay was immune from liability for third party dealers' sales of fake autographed sports memorabilia via the website. *Id.* at 828–36. One of plaintiffs' theories as to why eBay was not entitled to immunity under Section 230 was that eBay purportedly created content by using a color-coded star system that both dealers and consumers on the site could use to identify whether other users had good or bad reputations on the site. *Id.* at 833–34. Rejecting plaintiffs' theory, the court found that the color-coded stars were simply a "compilation[]" and visual representation of information submitted by third parties and eBay remained immune under Section 230. *Id.* at 831.

Finally, in ***Marshall's Locksmith Service Inc. v. Google, LLC*, 925 F.3d 1263 (D.C. Cir. 2019)**, the D.C. Circuit affirmed dismissal of the false advertising claims brought by a group of locksmith companies. The plaintiffs alleged that Google, Microsoft, and Yahoo! had conspired to "flood the market" of online search results with information about so-called "scam" locksmiths by operating neutral map location services that listed locksmith companies based on where they purported to be located. *Id.* at 1265 (quotation marks omitted). Defendants used "automated algorithms to convert third-party indicia of location into pictorial form." *Id.* at 1271. According to plaintiffs, this "'enhanced'" and "augmented" the fraudulent content from third-parties. *Id.* at 1269. The D.C. Circuit rejected the theory, noting that the "underlying information is entirely provided by the third party, and the choice of presentation does not convert the search engine into an information content provider." *Id.* The court further held that if "this kind of information [were] not immunized, nothing would be" because "every representation by a search engine of another party's information requires the translation of a digital transmission into textual or pictorial form." *Id.*

Only in *Marshall's Locksmith Service Inc.* did the court use the word "algorithm," but all of these cases involved ways that platforms utilized tools to display third-party content. And all of these cases illustrate the careful and coherent ways courts have distinguished between third-party content and the platform features or displays that present that content to consumers in a user-friendly fashion.

Yelp without the star rating (or the algorithmic display that lists high ratings first) would be less valuable to consumers. Airbnb without a display of the features in a listing (or an ability to search by features) would be less useful to consumers looking for the right vacation rental. Yet these very features that make platforms accessible and attractive to users could open them up to frivolous claims repackaged as algorithmic injuries.

2. Section 230 ensures liability remains with culpable third parties.

The vast majority of third-party entrepreneurs who use online platforms to sell their goods or services are legitimate vendors. Similarly, most persons come to dating platforms with a genuine interest in meeting others and forming positive relationships. But there are always outliers and bad actors. In Section 230, Congress saw better than to let the future of the internet depend on the impeccable honesty and good character of all of its users.

By its text and as interpreted by the courts, Section 230 stands for the proposition that an online intermediary service or platform should not be held liable for the wrongdoing of rogue third parties who post unlawful content on the platform. *See Hassell v. Bird*, 420 P.3d 776, 791 (Cal. 2018) (Section 230 "conveys an intent to shield Internet intermediaries from the burdens associated with defending against state-law claims that treat them as the publisher or speaker of third party content[.]"). *See also, e.g.*, *Gentry*, 99 Cal. App. 4th at 821–26, 836 (immunizing eBay for liability stemming from a dealers' sale of forged sports memorabilia); *Hill v. StubHub, Inc.*, 727

S.E.2d 550, 561–64 (N.C. Ct. App. 2012) (immunizing online ticket exchange and resale company for liability stemming from third parties' failure to comply with North Carolina law restricting the sales of tickets for more than $3 over face value).

Without Section 230 immunity from liability for the unlawful content of rogue third parties, many technology companies would not be able to stay in operation and offer the services that so many Americans rely on. But with Section 230 in place, plaintiffs can find recourse by suing the individuals who actually caused them harm. "State-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet*, 591 F.3d at 254 (citing *Doe v. MySpace, Inc.*, 528 F.3d 413, 419 (5th Cir. 2008)). *See also Chi. Lawyers' Comm. for C.R. Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 672 (7th Cir. 2008), *as amended* (May 2, 2008) (noting that while Plaintiffs could *use the platform* to "identify many targets to investigate" and "assemble a list of names to send to the Attorney General for prosecution," Plaintiffs could not sue the platform itself); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997) ("Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages.").

II. Section 230's Policy Goals Include Facilitating Online Entrepreneurship and Connection.

Over the last three decades, Section 230 has succeeded in fostering innovation, diversification, and interpersonal connection through the internet.

With the protection of Section 230, online intermediaries have enabled an economy of third-party entrepreneurs who find customers through their platforms.

These 21st century artisans and service professionals include musicians, carpenters, graphic designers, technical writers, craft and fine artists, web and software developers, painters, construction workers, interpreters, photographers, and delivery drivers. *See, e.g.*, Elka Torpey & Andrew Hogan, *Working in a gig economy*, U.S. Bureau of Labor Statistics (May 2016), https://www.bls.gov/careeroutlook/2016/article/what-is-the-gig-economy.htm.

Some third-party entrepreneurs, including the tens of thousands of independent workers who offer services through marketplaces represented by the Association, offer their services full-time. Others work part-time as a side-hustle to supplement other sources of income, make use of an idle asset, or to offset historic levels of inflation. *See* Monica Anderson et al., *The State of Gig Work in 2021*, Pew Rsch. Ctr. (Dec. 8, 2021), https://www.pewresearch.org/internet/2021/12/08/americans-experiences-earning-money-through-online-gig-platforms/ ("Among the 9% of Americans who have earned money through gig platforms in the past year, about three-in-ten say it has been their main job

during this time."); Sharon Lam, *Inflation has gig economy perk: more side hustlers*, Reuters (Nov. 11, 2022), https://www.reuters.com/breakingviews/inflation-has-gig-economy-perk-more-side-hustlers-2022-11-11/ (noting increase of gig workers who cite rising inflation as a motivation); Cheryl Carleton, *Why are more people doing gig work? They like it*, The Conversation (Mar. 29, 2018), https://theconversation.com/why-are-more-people-doing-gig-work-they-like-it-93037 (summarizing academic surveys on job satisfaction and finding that individuals who are self-employed and have more control over their schedules reported higher levels of job satisfaction than peers holding regular salaried jobs with less control).

As their numbers have grown, these entrepreneurs have become key to the modern economy at large and to the microeconomy of the modern American family. *See The State of Gig Work in 2021*, Pew Rsch., *supra* (noting that 16% of U.S. adults report having ever earned money by doing jobs through online gig platforms, 9% in the previous twelve months). Individuals with significant caretaking obligations or other demands that make a traditional 9-5 job untenable use platform-enabled gig work to participate in the workforce and provide for their families. Indeed, the COVID-19 crisis underscored the critical role played by intermediary platforms and online marketplaces, which provided (1) much-needed options for millions of consumers who needed goods and services but were sheltering at home, and (2) new work opportunities for millions of workers who had been laid off or furloughed during

the crisis.[3] For example, the existence of online food-delivery and grocery platforms directly contributed to the safe flow of goods and services in the economy,[4] during the most restrictive phases of the pandemic.

The immense benefits that flow from this "gig" economy are part and parcel of Section 230. Even at the time of its enactment, legislators saw the revolutionary commercial opportunities made possible through the internet. One of Section 230's stated policies is "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). The section also includes congressional findings such as that "[i]ncreasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services" and that the internet and other interactive computer services offer "unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3), (5).

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[3] Press Release, U.S. Bureau of Labor Statistics, USDL-20-0815, *Employment Situation News Release* (May 8, 2020), https://www.bls.gov/news.release/archives/empsit_05082020.htm (noting tremendous upheaval in the labor market, which prompted mass layoffs and furloughs of more than 20.5 million workers).

[4] Faith Ricciardi, *How the Gig Economy Has Accelerated During the Coronavirus* MNI Targeted Media Inc. (2023), https://www.mni.com/blog/research/how-the-gig-economy-has-accelerated-during-coronavirus/ (noting that platforms such as Instacart, Uber Eats, and DoorDash saw a 78 percent surge in demand over 2017 levels).

Legislators further saw the importance of protecting the online intermediaries who enabled e-commerce and social contacts. Congress's goal of distinguishing intermediary liability from third party liability is inherent in Section 230's distinction between an "information content provider" who "creat[es] or develop[s]" content and the "interactive computer service" that hosts it. *See generally* 47 U.S.C. § 230. This distinction cleared the way for online intermediaries to develop, without fear of liability from the inability to control actions of bad-actor third parties.

Section 230 has enabled the internet to become more accessible to everyday citizens. *See* 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995) (testimony of Rep. Christopher Cox) ("We want to make sure that everyone in America has an open invitation and feels welcome to participate in the Internet.").

For consumers, online intermediaries (including members of the Association and Match.com) have played a significant role in that increased access, by providing platforms and marketplaces where consumers can find specialized and user-friendly solutions to many of life's most aggravating challenges—like finding a handyperson to renovate a house, or even the challenge of finding lasting companionship and love. *See* Jeryl Brunner, *Happy Anniversary Match.com—Meet Their First Success Story*, Parade (May 1, 2015), https://parade.com/394423/jerylbrunner/happy-anniversary-match-com-meet-their-first-success-story/ (celebrating Bill and Freddi Straus, who met on an early version of

Match.com in 1995 and have been married since 2000).

For entrepreneurs, individuals have been able to turn their passions into sustaining work, through increased opportunities and customers made possible by online platforms that rely on Section 230. *See, e.g.*, Alex Williams, *Can You Really Turn a Hobby Into a Career?* (Apr. 20, 2021), https://www.nytimes.com/2021/02/13/style/turn-hobby-into-career-pandemic.html (describing individuals who, with the help of gig platforms, switched from previous careers to pursue their passions).

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In short, Section 230 has created a commercial ecosystem that improves lives and fuels livelihoods. Its protection is as crucial to technology companies today as it was at the internet's advent.

Courts have deftly applied Section 230 immunity, focusing on the substance of allegations to determine whether a plaintiff seeks to hold an interactive computer service responsible for third-party content and excepting from immunity those claims that Congress has excepted. To the extent that more exceptions are necessary in today's society, Congress should have the opportunity to make those policy determinations.

CONCLUSION

For the foregoing reasons, this Court should affirm the Ninth Circuit's ruling and vindicate the broad immunity granted by Congress under Section 230.

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