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 OF *AMICUS CURIAE* PROGRESSIVE POLICY INSTITUTE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

INTEREST OF THE *AMICUS CURIAE*[1]

The Progressive Policy Institute (PPI), based in Washington, D.C., is a catalyst for policy innovation and political reform. Its mission is to create radically pragmatic ideas for moving America beyond ideological and partisan deadlock.

PPI believes that innovation by the technology companies that now permeate almost all aspects of life in America has had major beneficial effects on the U.S. economy. Though there are many areas in which regulatory clarity and improvement is needed for companies in the tech space, such regulation must be done in a way that is calibrated and targeted to particular harmful behaviors, rather than through a catch-all approach that runs the significant risk of unintended consequences. Additionally, regulation should account for the many benefits of tech innovation for smaller stakeholders, particularly low and middle-skill workers, startups, entrepreneurs, and artists.

Petitioners and their *amici*, including the United States, urge this Court instead to regulate in place of the Political Branches by reinterpreting a statute that Congress unquestionably intended—and lower courts have interpreted—as a robust liability shield. It would wreak havoc to impose unpredictability on America's vibrant tech sector through those means.

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[1] All parties have consented to the filing of this brief. No counsel for a party has written this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae* or its counsel, has made a monetary contribution to this brief's preparation or submission.

Respondent and other *amici* analyze the statute, using its text and other tools of statutory interpretation. *Amicus* endorses but does not replicate that analysis. Instead, consistent with PPI's mission and expertise, this brief focuses on the broad economic harms that would result from adopting Petitioners' position.

SUMMARY OF ARGUMENT

I. A. The digital economy is, today, the leading driver of job growth. Even as other industries have faltered, the digital economy continues to create jobs across the Nation and across education and skill levels. All that growth is owed to our vibrant, competitive online marketplace—a marketplace made possible and sustained by the protections of Section 230 of the Communications Decency Act.

B. Indeed, while the Covid pandemic and inflation have ravaged other industries, the digital economy has been a bulwark—continuing to create jobs in record numbers and counterbalancing inflationary pressures. That resilience is thanks to massive investment in these services and technologies—investment that depends on a stable, coherent legal regime and protection from limitless liability.

II. A. The algorithmic recommendations at the heart of this case are critical to our digital economy's strength and dynamism. Indeed, services that suggest our next great read or a good restaurant down the street, or that direct us to key pieces of user-generated information, are so ingrained in our lives that we hardly notice them.

B. Despite Petitioners' and the Solicitor General's best efforts, there is no limiting their theory to insulate search engines—or even content moderation itself. Perhaps we can do without YouTube (though we shouldn't have to); we can't do without tools for organizing online information.

III. A. Attempts at fine-tuning and improving the Section 230 regime should be left in the hands of elected and properly appointed policymakers

operating through the legislative process or administrative tools like notice-and-comment rulemaking—not this Court.

B. Anyone who would reform Section 230 must approach that task with the utmost care. Massive advances in Americans' standard of living and enormous economic gains can be laid at the feet of *our* digital economy and the protections it has enjoyed. That these protections sometimes enable ugliness amidst all those soaring gains may be reason to reform the digital economy with prudence and a view to the whole—not destroy it.

ARGUMENT

I. THE DIGITAL ECONOMY, FORTIFIED BY SECTION 230, IS CRITICAL TO THE AMERICAN ECONOMY.

The Internet as we know it grew up with robust Section 230 protection.[2] And that protection has returned dividends.

Section 230 expressly aimed to foster "the vibrant and competitive free market" for the Internet, 47 U.S.C. § 230(b)(2), but its framers could hardly have foreseen the indispensable role that the online economy generally, and interactive computer services in particular, would assume in American life. The tech sector is a leading force in American job creation and has proved resilient in the face of disruptions such as the unprecedented pandemic and fast-rising inflation.

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[2] Malena Dailey, *The Internet As We Know It Relies on Section 230*, Progressive Policy Institute (2023), https://perma.cc/83QD-JZ8B.

No sector today contributes more to the dynamism and competitiveness of the American economy.

Section 230 "applies to every one of the more than 200 million websites that host user-created content," providing vital protection not just to the familiar Big Tech incumbents but also "to small players, who * * * provide many other services, such as how-to videos; educational resources; product and service reviews; comment sections; restaurant recommendations; film, television, and book reviews; and online marketplaces for independent sellers."[3] From tech giants to startups to individuals selling bespoke ornaments on Etsy or rides on Uber, all rely on an online ecosystem that never would have existed without robust liability protections.

Consumers reap the benefit. It is difficult now to imagine a world without online search engines, the capacity to use music sites to find appealing new artists, and the ability to navigate the veritable mountains of user-generated content found on social networks. The protection provided by Section 230 "has facilitated innovative business models which give a platform to user-generated content, shaping a robust digital economy enjoyed by both consumers and entrepreneurs."[4]

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[3] Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, 922 Cato Policy Analysis at 4 (2022), https://perma.cc/PNK4-4UJ9.

[4] Dailey, *The Internet As We Know It Relies on Section 230*, *supra* n.2, https://perma.cc/83QD-JZ8B.

A. The Digital Economy Is A Key Driver Of Job Growth.

The technology sector, including interactive service providers like YouTube, has been a key driver of both job growth in recent years and of the country's current low unemployment rate. As of December, the United States enjoyed a 3.5% unemployment rate, the same as before the pandemic.[5] Much of the intervening job growth has been driven by the digital sector, which has accounted for more than 70% of net private-sector job gains since the start of the pandemic in February 2020.[6] In particular, the internet/content/broadband subsector, which includes most content creation and distribution, added 393,000 net new jobs between February 2020 and December 2022.[7] Over the same period, the e-commerce and retail subsector, which relies heavily on user-generated reviews and recommendations, accounted for 815,000 new jobs, on net.[8]

The "App Economy"—a phrase that would have been entirely foreign within most Americans' lifetimes—continues to boom. As of January 2022, *amicus* estimated that the U.S. App Economy included more than 2.5 million jobs, spread across

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[5] Michael Mandel, *The Economic Performance of the Digital Sector Since the Pandemic Started*, Progressive Policy Institute (2023), https://perma.cc/DX2J-HNMJ.
[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*

industries and States.[9] That represents a 14% increase since April 2019 and an 8% increase since February 2020.

The speed of tech-driven job growth is also striking. When we look at the number of company workers, "Google took 15 years to get to the 100,000 mark, and Amazon took 16 years." By contrast, old-economy giant "GE took 49 years, while Kodak took 63 years."[10]

The digital economy's strength has helped lift lower income, less educated Americans. (And, as discussed *infra*, it is smaller competitors of the largest tech companies that would lose most from gutting Section 230 protections.) Since the pandemic began, the digital sector accounted for 975,000 net new production and nonsupervisory jobs, which tend to be held by less-educated and lower-paid workers.[11] By contrast, the rest of the private sector lost more than 500,000 production and nonsupervisory jobs over the same period.

The very existence of those jobs is a good in itself, providing dignity, meaning, and social capital to workers. See generally American Enterprise

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[9] Michael Mandel & Jordan Shapiro, *U.S. App Economy Update, 2022*, Progressive Policy Institute at 3, 9 (2022), https://perma.cc/G6QG-S7RY.

[10] Michael Mandel, *Innovative Job Growth In the 21st Century: Has the Tech-Ecommerce Ecosystem Become the New Manufacturing?*, Progressive Policy Institute at 5 (2021), https://perma.cc/ZL79-G8FM.

[11] Mandel, *The Economic Performance of the Digital Sector Since the Pandemic Started*, *supra* n.5, https://perma.cc/DX2J-HNMJ.

Institute, *Human Dignity Project.*[12] But, in more material terms, those middle-skill jobs are higher-paying than those offered by, for example, the healthcare or manufacturing industries. Careful study of the data has shown that "tech and e-commerce companies pay 'middle-skill' Americans a better wage than they can get at other employers."[13]

As of 2019, average pay for digital economy workers "with some college (including an associate's degree) [was] roughly $59,000 compared to $41,000 for people with a similar education in the health care and social assistance sector."[14] A similar pay gap exists for digital workers with only a high school diploma—their average pay was around $42,000 "compared to $31,000 for people with a similar education in the health care and social assistance sector."[15] See also Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA, at 5 (June 5, 2017) ("those employed in [Internet companies] earned almost 30 percent more [than the U.S. average] on average in 2012"). The American middle class may be slowly recovering, in significant part thanks to the digital economy.

Like any public-policy regime, regulation of the Internet and the digital economy is not perfect. Work

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[12] Human Dignity Project | American Enterprise Institute, https://www.aei.org/centers/human-dignity-project/.
[13] Michael Mandel, *How Tech is Building a New Middle Class*, Progressive Policy Institute (2021), https://perma.cc/92YE-YTQ4.
[14] *Ibid.*
[15] *Ibid.*

remains to be done in areas like consumer privacy and competition. But this Court should be chary of working a dramatic change in Section 230's interpretation given the importance of the digital economy to American jobs.

B. The Digital Economy Has Proven More Resilient Than Other Major Sectors.

Inflation has exploded in the pandemic and post-pandemic period. Overall consumer price inflation accelerated by approximately 3 percentage points, from roughly 1.5% annually from 2012 to 2019 to roughly 4.5% annually from 2019 to 2022.[16] Consumers have been squeezed at the grocery store and the gas pump as pent-up demand meets supply-chain and other limits on supply.

But the story is different in the digital sector. "Prices for goods and services that are either entirely digital, like wireless phone service, internet services, and electronic information providers, or related hardware, like computers and smartphones, have either fallen or risen much less than prices in the economy overall."[17] For example, inflation in the internet/content/broadband subsector accelerated by a mere 0.3 percentage points between 2019 and 2022 when measured by producer prices, and 1.7

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[16] Mandel, *The Economic Performance of the Digital Sector Since the Pandemic Started*, *supra* n.5, https://perma.cc/DX2J-HNMJ.
[17] Marshall Reinsdorf, *Is Inflation Still Low in the Digital Economy?*, Innovation Frontier Project at 2 (2022), https://perma.cc/LL9A-3T7D.

percentage points when measured by consumer prices.[18]

The benefits for consumers are obvious. And, because the digital economy so rapidly develops new products and services, inflation models struggle to keep pace—with the result that "the *deflationary* influence of the digital economy has not been fully captured in official measures of inflation."[19]

Combating upward pressure on prices is not the only consumer benefit Americans enjoy from the tech economy. Consumers have seen significant benefits from "access to merchants outside their local area," "[p]eer-to-peer platforms for services such as ridesharing and short-term rentals," and other digital services that increase competition in myriad industries.[20]

Part of the digital economy's resilience can be chalked up to continuing, robust investment. Capital investment in the digital economy "has created enough capacity to hold down most price increases in the digital sector," while tepid investment in more traditional sectors like manufacturing has had the opposite effect.[21] And, even as this investment keeps prices down, it supports job creation. For example, "[o]ver the past four years, Amazon . . . has invested

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[18] Mandel, *The Economic Performance of the Digital Sector Since the Pandemic Started*, *supra* n.5, https://perma.cc/DX2J-HNMJ.
[19] Reinsdorf, *Is Inflation Still Low in the Digital Economy?*, *supra* n.17, at 8, https://perma.cc/LL9A-3T7D (emphasis added).
[20] *Id.* at 10.
[21] Michael Mandel & Jordan Shapiro, *Investment Heroes 2022: Fighting Inflation With Capital Investment*, Progressive Policy Institute at 2, 3-7 (2022), https://perma.cc/XQC3-48Q6.

more than $115 billion in the United States," powering unprecedented job creation.[22]

At bottom, digital companies' dynamism and investment, backstopped by the relative predictability of the existing legal regime, have helped those companies resist pressure to increase prices or reduce quality. Especially given the inflationary bias in today's economy, policymakers and courts should be wary of making changes that impose large new costs and uncertainties on digital companies.

C. Robust Protections For Interactive Service Providers Are Key To America's Global Competitiveness.

Besides benefiting lower-income Americans, the digital services enabled in part by Section 230 have driven America's dominance in the tech space and allowed millions of individuals to create small businesses, find an audience for their art, and connect with consumers eager for their services.

Indeed, entire industries that Americans have come to take for granted could never have existed without those protections. Many of those services rely on reviews from other consumers (which may be ordered, or "recommended" algorithmically). Curated reviews create the social trust necessary for many of these vital services: 85% of e-commerce buyers would decline to buy a product lacking reviews, and at least 40% would eschew "ridesharing, vacation rental, and

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[22] *Id*. at 3.

maintenance services" but for the sense of safety and reliability that reviews impart.[23]

The United States is the world leader in innovative, value-creating digital services. Europe's experience has been very different. There, greater uncertainty about the scope of safe harbors and regulations like the General Data Protection Regulation have squelched innovation in "Internet intermediary development."[24]

Not here. Liability protections and the predictability of a stable legal regime have allowed the American digital sector to flourish. And, as with tech's role in job creation, it's the little guy who stands to lose if that stability is shaken. The largest tech companies can shoulder huge compliance costs. Hardest hit: smaller businesses that would struggle to ditch innovation for compliance (it's hard to imagine a fledgling competitor fielding YouTube's army of extremist-content moderators, see Br. In Opp. 5); and consumers who would pay higher prices, have fewer choices, and use inferior services.

II. ALGORITHMIC RECOMMENDATION IS CRITICAL TO THE DIGITAL ECONOMY.

Most Americans interact with algorithmic recommendations every day. Finding a good bite to

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[23] Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, Information Technology & Innovation Foundation (2021), https://perma.cc/96LA-ES7Z.

[24] Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections*, NERA, at 4 (June 5, 2017).

eat; reconnecting with a long-lost friend; finding the next great podcast—all of those things are made much easier thanks to such recommendations.

Petitioners' and the Solicitor General's logic would gut even the search engines that have become indispensable to everyday life. The problems don't stop there—the condemnation of so-called "implicit recommendations" also condemns the good-faith content moderation at the core of Section 230 and, with it, the vibrant, diverse Internet we enjoy today.

A. Carving Out "Targeted Recommendations" Would Eviscerate The Internet Economy.

Subjecting algorithmic recommendation to liability would all but eliminate usable third-party hosting. The result would be an unrecognizable Internet, the disappearance of services and features millions of Americans cherish, and a massive hit to the U.S. economy.

Take social networks such as Facebook, Twitter, TikTok, and the like. Whatever one thinks of the problems with these social networks—and they have plenty—they also provide users with an enormous amount of value that is not picked up by conventional economic statistics.[25] Facebook, of course, algorithmically recommends friends, groups, events, and the like. Instagram, Twitter, and countless others make similar recommendations.

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[25] Erik Brynjolfsson et al., *GDP-B: Accounting For The Value Of New And Free Goods In The Digital Economy* at 29, NBER Working Papers (March 2019), https://perma.cc/S5SG-NAKE.

Similarly, the vast array of online music services suggest artists a listener may want to hear based on her revealed preferences. Those recommendations have enabled artists to reach audiences (and vice versa) without record-label support—revolutionizing the music industry and spurring a new kind of entrepreneurship. Consider, for example, the hip-hop artist from rural Georgia who, using Facebook, Instagram, and SoundCloud, "set a record for the longest running top song on Billboard's ranking while he, aged 19, was living with his sister and working minimum wage jobs."[26] Podcast-hosting services recommend new content to listeners based on their listening history and that of other users, exposing consumers to content they value but would never have found on their own.

Amazon and other online marketplaces suggest products from different sellers that might be appealing given a consumer's past purchases. That gives Americans more information, more choice, and the ability to find product offerings that better suit their interests and needs.

The list could go on. The digital ecosystem is massive, and all of that information and content generates "increased filtering costs—the cost of sorting this abundance of information to find the

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[26] John Deighton and Leora Kornfeld, *The Internet's Effects on Consumption: Useful, Harmful, Playful*, The Routledge Handbook of Digital Consumption at 531 (Jan. 2022) (discussing Lil Nas X's "Old Town Road").

content you desire."[27] The market has responded with a solution: algorithmic sorting.

Algorithmic recommendation isn't perfect. Better-informed consumers who know how to reject too much of a good thing are needed, as is some degree of regulation to prevent abuses. But at bottom algorithmic recommendation is a means "to reduce these filtering costs" and "get consumers what they want more efficiently."[28] That is a social good, and "[w]e should encourage, not discourage, companies like Google to experiment with new and better ways" to accomplish it.[29]

B. Petitioners Have No Limiting Principle That Would Preserve Core Internet Functionality.

Although there may be targeted reforms that would improve the Section 230 regime, Petitioners' argument that algorithms can be hived off—without destroying the digital economy as we know it—fails to consider how the technology behind these digital products actually works. There is no "default" way to order and present third-party content. A much simpler algorithm than that which is currently used by YouTube might simply list every video in the order in which it was uploaded. However, with 500 hours of

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[27] Daniel Lyons, *Section 230 Goes to the Supreme Court*, American Enterprise Institute (2022), https://www.aei.org/technology-and-innovation/section-230-goes-to-the-supreme-court/.
[28] *Ibid.*
[29] *Ibid.*

video uploaded to YouTube every minute,[30] the result of a simplified system of content sorting would be a significant disadvantage for users seeking out videos that fit their interests or needs.

Or YouTube's algorithmic recommendation could take a form similar to Google's—returning results based on search terms and eliminating "suggestions" (at least labeled as such). Petitioners and the Solicitor General are wise to try to carve search engines out of their rules; no one, Luddite or tech maven, can imagine a world without Google. But those attempts falter factually and logically.

Even a simple chronological or alphabetical ordering of third-party content uses an "algorithm"—just a very simple one. And, when Google returns search results, its algorithm crunches information including prior searches, the inputs of other searchers, and sometimes a user's location, in returning results.

To say that these are not "recommendations" because the user solicited them with search terms (e.g., U.S. Br. 27-28) misunderstands what a search engine does. A user asks a question, and the engine returns results using a variety of inputs, inputs both consciously provided by the user (the search terms) and not (such as the user's location and search history), to return results ranked to conform to the algorithm's belief about the user's preferred answers (recommended results). It strains credulity to suggest that a searcher has "ask[ed] to see" (U.S. Br. 27) the full list of results the engine returns. Most of the

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[30] Resp. Br. 11.

results past the second or third page are not useful. Instead, Google is "implicitly tell[ing]" (*ibid.*) the searcher that the answer to her query lies in the highest-ranked results.

Worse still, the "implicit suggestion" argument runs headlong into the core of Section 230 protection—content moderation. In the same vein that YouTube assertedly "implicitly suggests" some videos and not others, an online forum that removes some content and permits other content is implicitly suggesting that the latter is worth the user's time and the former is not. And the implicit suggestion becomes more and more direct as the audience narrows; a site hosting a birdwatching hobbyist forum implicitly directs its audience to posts about good areas to spot a cardinal, or about the best binoculars for outdoor use, by the very act of removing off-topic content. And so, along with a great many other services and features, a win for Petitioners could strike at Section 230's core purpose as stated in statutory text—the nurturing of a diverse and competitive online marketplace where people with many different interests can interact, learn, and engage in commerce. See 47 U.S.C. § 230(b)(2).

III. SECTION 230 REFORM IS WARRANTED, BUT THAT REFORM SHOULD BE THE RESULT OF CAREFUL, HOLISITIC POLICYMAKING.

"Law must be stable and yet it cannot stand still." Roscoe Pound, *Interpretations of Legal History* Lecture 1 (1923) (quoted in Shapiro, The New Yale Book of Quotations at 647 (2021)). Like any legal regime, Section 230 is not perfect. As the court of

appeals noted, "Congress may well decide that more regulation is needed" in this area. *Gonzalez* v. *Google LLC*, 2 F.4th 871, 897 (9th Cir. 2021). Indeed, Congress, the body to which Petitioners' concerns are properly addressed, is considering several such reforms now.

But stability and predictability are no less important than reform—especially in a still-young, ever-evolving, and economically critical sector like this one. As explained above, Petitioners' theory would upset not just investment-backed expectations but the very nature of Americans' Internet experience. That might have been palatable in the Internet's infancy; today, the Internet as we know it is woven into nearly every aspect of personal and professional life. The effects would thus reverberate across the entire American economy.

A. Congress, Not This Court, Should Craft Internet Policy Reforms.

Amicus does not disagree that reforms to Section 230 and other Internet regulations may be warranted. But, as Respondent explains, the statute expressly contemplates algorithmic recommendation. Resp. Br. 22. And, even if the statute were silent on the matter, the consequential policy questions about how—not whether—algorithms should be used are "constitutionally entrusted not to the courts to decide but to the policymakers in the political branches where those questions remain hotly contested." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1632 (2018). Cf. *W. Virginia* v. *EPA*, 142 S. Ct. 2587, 2609 (2022) ("We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'"

(quoting *United States Telecom Ass'n.* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc))).

B. Section 230 Reform Must Be Carefully Calibrated And Take Account Of The Entire Online Ecosystem.

In enacting Section 230, Congress set up a framework that epitomized the "light touch" approach to regulation, long advocated by the Progressive Policy Institute, that favors innovation and growth. At a 2015 PPI conference, then-FTC Commissioner Maureen K. Ohlhausen warned against "the human tendency to squeeze complicated things into simple boxes, to take complicated ideas, technologies, or people, and force them to fit our preconceived models."[31]

Amicus has no quarrel with the argument that Section 230 may need to be improved for the modern Internet. But, evaluated in the aggregate, Section 230 has worked and continues to work, counseling caution. That framework has supported our formidable digital economy since its inception; any institution that would alter it must take care to study the statutory regime, and the Internet it has nurtured, holistically and with an eye to each detail.

Given the vast economic benefits of the existing regime—for the Nation, for job-seekers, for

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[31] Maureen K. Ohlhausen, *Three Regulatory Principles to Promote Innovation*, speech at Innovation in a Rules-Bound World: How Regulatory Improvement Can Spur Growth, Progressive Policy Institute (March 2, 2015). https://perma.cc/YCA8-QNQF.

consumers, and for America's place in the world—removing the supporting framework is a fraught proposition. If Section 230's existing structure needs refreshing, policymakers should tend to that work carefully and systemically.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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