

No. 21-1333

In the Supreme Court of the United States

REYNALDO GONZALEZ, ET AL., PETITIONERS,

v.

GOOGLE LLC

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF ECONOMISTS GINGER ZHE JIN,
STEVEN TADELIS, LIAD WAGMAN, AND JOSHUA
D. WRIGHT AS AMICI CURIAE IN SUPPORT OF
RESPONDENT**

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TABLE OF CONTENTS

	Page
Interest of Amici Curiae	1
Summary of Argument.....	2
Argument	5
I. The modern Internet has flourished because of many websites that disseminate third-party content.....	5
II. Weakening Section 230’s protections would significantly diminish the economic benefits that flow from websites fostering third-party creativity.	8
Conclusion	13

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997)	6, 8
Statutes	
47 U.S.C. § 230	1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12
Other Authorities	
Alan McQuinn & Daniel Castro, <i>The Costs of an Unnecessarily Stringent Federal Data Privacy Law</i> , Info. Tech. & Innovation Found. (Aug. 5, 2019), bit.ly/3XfLhT2	11
Alex Raskolnikov, <i>Probabilistic Compliance</i> , 34 Yale J. Reg. 491 (2017).....	10
Anupam Chander, <i>Internet Intermediaries as Platforms for Expression and Innovation</i> , Global Comm’n on Internet Governance (Nov. 2016), bit.ly/3ZBtpU3	7, 9, 10
Christopher S. Yoo, <i>Free Speech and the Myth of the Internet as an Unintermediated Experience</i> , 78 George Wash. L. Rev. 697 (2010)	6
<i>Section 230: Cost Report</i> , Engine, bit.ly/3CMEJmH	11

ECORYS, <i>An Economic Analysis of the Impact of Some Online Intermediaries on the Distribution Of Copyright Protected Content</i> (Feb. 2017), bit.ly/3H1SFfa	5, 6
Jian Jia, Ginger Zhe Jin, & Liad Wagman, <i>GDPR and the Localness of Venture Investment</i> (Jan. 21, 2020), bit.ly/3iAikCj	12
Jian Jia, Ginger Zhe Jin, & Liad Wagman, <i>The Short-Run Effects of the General Data Protection Regulation on Technology Venture Investment</i> , 40 <i>Marketing Sci.</i> 661 (Mar. 1, 2021)	12
John Deighton & Leora Kornfield, <i>The Economic Impact of the Market-Making Internet</i> , Interactive Advertising Bureau (Oct. 2021), bit.ly/3IQNJUV	6
Karin Perset, <i>The Economic and Social Role of Internet Intermediaries</i> , Organization for Economic Cooperation and Development (Apr. 2010), bit.ly/3Wa5rfO	5
Mark Boncheck & Sangeet Paul Choudary, <i>Three Elements of a Successful Platform Strategy</i> , <i>Harv. Bus. Rev.</i> (Jan. 31, 2013), bit.ly/3QFJ94y	7
Michael Masnick, <i>Don't Shoot the Message Board</i> , Copia Institute (June 2019), bit.ly/3GynTc8	12

Oxera Consulting, *The Economic Impact of Safe Harbours on Internet Intermediary Start-Ups* (Feb. 2015), bit.ly/3ZxPHWR 7, 10

Shielding the Messengers: Protecting Platforms for Expression and Innovation, Center for Democracy and Technology (Dec. 2012), bit.ly/3GzYRJQ..... 8, 9, 10, 11, 12

Steven Tadelis, *Reputation and Feedback Systems in Online Platform Markets* (Feb. 8, 2016), bit.ly/3GFFajY 10, 11

Steven Tadelis, *Two-Sided e-Commerce Marketplaces and the Future of Retailing* (Mar. 31, 2015), bit.ly/3kjbNfv 6

INTEREST OF AMICI CURIAE

Amici curiae are four accomplished scholars who write to provide the Court with economists' perspective on the economic function behind 47 U.S.C. § 230's ("Section 230") longstanding protections. There is a paucity of academic work on the economic analysis of Section 230. But we aim to provide the Court with some macroeconomic and microeconomic considerations to inform the Court's statutory interpretation of Section 230.¹

Ginger Zhe Jin is a Professor of Economics at the University of Maryland, College Park. Professor Jin's research focuses on information asymmetry among economic agents. She served as the Director of the Federal Trade Commission's Bureau of Economics from January 2016 to July 2017. Her research has been published in leading economics, management, and marketing journals, as well as major media outlets. Professor Jin has a Ph.D. in economics from the University of California, Los Angeles.

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¹ In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Section 230's liability provisions enable Internet companies that disseminate third-party content to focus on their core services, which produces wide-ranging economic and societal benefits. If this Court weakens the protections Congress established in Section 230, that would potentially harm online free expression, stifle Internet growth, and impair innovation.

I. The Internet today contains myriad websites, applications, and other online services (collectively referred to in this brief as “websites”), which offer the world a wide and still “rapidly developing array” of communities and services. 47 U.S.C. § 230(a)(1). Among the many services that websites offer is the opportunity for individuals, businesses, and organizations to interact with each other without traditional geographic barriers. The Internet allows people to collaborate, socialize, and create, thereby disrupting traditional markets in every realm of life.

Many have benefitted. Internet communication is low-cost and high-capacity, so the existing wide array of websites promotes free speech across the world. Websites stimulate innovation, too. They create a “vibrant and competitive” global network of entrepreneurs, workers, and consumers. *Id.* § 230(b)(2). This increases productivity, and it allows rapid development of new services and products. Because websites lower the barriers to do business online, they also help small and start-up businesses. That improves competition and increases employment.

II. Websites could not exist as we know them today if they were liable for third-party content they disseminate. Section 230’s plain text “preserve[s] the vibrant and competitive free market” by allowing the Internet to “flourish[] ... with a minimum of government regulation.” 47 U.S.C. § 230(a)(4), (b)(2). Section 230 dictates that “interactive computer service[s]” (including websites) generally cannot be “treated as the publisher or speaker of any information provided by another information content provider” for liability purposes. *Id.* § 230(c)(1). When a website decides whether to publish and how to “display” content created by others, *id.* § 230(f)(4), Section 230

protects it. Weakening those liability protections would endanger the benefits these websites provide.

For starters, the Internet would be less hospitable to free expression if Section 230's protections were limited. Just the threat of liability will create strong economic incentives for websites to err on the side of removing content that is even arguably objectionable. Thus, websites would inevitably engage in much greater content moderation. Lawful but controversial expression would be especially vulnerable, threatening free expression online. Websites might even respond to increased liability by dramatically limiting *who* can post content. Many websites might take the risk-averse option of allowing only known, trusted actors to create content, but that would make the Internet much less diverse and free.

Narrowing Section 230's protections would also harm the economy. These costs would arise in different ways. For instance, increased liability would discourage website innovation. Section 230 allows Internet companies to focus on new products and services, rather than navigate prohibitive legal standards. But if every new feature involving third parties increases websites' liability, basic microeconomics dictates that fewer will be developed.

More generally, weakening Section 230's protection would also make the Internet less competitive. The greater the risk of liability (and the higher the costs associated with avoiding it), the more difficult it becomes for start-up firms to enter the market. Start-ups often lack the capacity to survive even meritless lawsuits. Start-ups also might struggle to attract funding at all, as studies have shown that weakening liability protections chills investment in technology companies. These barriers to

entry would mean that larger websites and businesses would face less competition, with concomitant effects on innovation, quality, and price.

ARGUMENT

I. The modern Internet has flourished because of many websites that disseminate third-party content.

The Internet is full of a diverse array of websites—online services that are accessed through browsers and applications—that foster distinct communities and offer different services to their users “to the benefit of all Americans.” 47 U.S.C. § 230(a)(4). Although many websites merely provide their own authored content to the world at large, many other websites disseminate third-party content—such as user comments, reviews, posts, photos, or videos—which “enable[es] communications and transactions between third parties” in their “applications and services.” Karin Perset, *The Economic and Social Role of Internet Intermediaries* at 6, Organization for Economic Cooperation and Development (Apr. 2010), bit.ly/3Wa5rfO. Through these services, “every user [is] a potential content producer.” ECORYS, *An Economic Analysis of the Impact of Some Online Intermediaries on the Distribution Of Copyright Protected Content* at 17 (Feb. 2017), bit.ly/3H1SFfa.

At first, Internet consumption was largely “passive” and top-down. *Id.* The Internet involved “a small number of content producers” providing services for users. *Id.* There was little interaction. The barriers for users to develop and distribute their own content were high. And website functionality was limited. The Internet’s

potential to disrupt and innovate was immense, but largely untapped.

That all changed when new websites appeared, offering to disseminate content created by users. Today, bottom-up user “collaborat[ion], interact[ion],” and “content produc[tion]” has become the norm. *Id.*

This expansion of access to, and interaction with, the Internet has “disrupt[ed] ... traditional markets” every step of the way. *Id.* This disruption has produced immense “social and economic benefits.” Perset, *supra*, at 8. The Internet economy contributes more than \$2.45 trillion to the United States economy every year. John Deighton & Leora Kornfield, *The Economic Impact of the Market-Making Internet*, Interactive Advertising Bureau (Oct. 2021), bit.ly/3IQNJuv. “Search engines, portals” and social networks transformed access to information and “social interactions.” Perset, *supra*, at 4. And online marketplaces have “transformed” the retail sector, to the tune of trillions of dollars each year. Steven Tadelis, *Two-Sided e-Commerce Marketplaces and the Future of Retailing* at 4 (Mar. 31, 2015), bit.ly/3kjbNfv.

These websites enabling third-party communications offer their users and other businesses significant economic and social benefits. First, the Internet “represent[s] an extraordinary advance in the availability of educational and informational resources.” 47 U.S.C. § 230(a)(1). Its “relatively unlimited, low-cost capacity for communication of all kinds” has transformed free speech. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Websites allow individuals to easily communicate directly with the entire world, with few of the traditional barriers to mass communication. See Christopher S. Yoo, *Free*

Speech and the Myth of the Internet as an Unintermediated Experience, 78 *George Wash. L. Rev.* 697, 697 (2010). “[N]ever before have so many people introduced so many kinds of content, on such a broad scale, and potentially with such wide-ranging impacts.” Perset, *supra*, at 43. Websites are thus an “engine for free speech across the world.” Anupam Chander, *Internet Intermediaries as Platforms for Expression and Innovation* at 4, Global Comm’n on Internet Governance (Nov. 2016), bit.ly/3ZBtpU3 [hereinafter Chander, *Expression and Innovation*].

Websites drive innovation, too. Many websites allow “for new, faster, and cheaper communication technologies, for innovation and productivity gains, and for the provision of new products and services.” Perset, *supra*, at 4. When businesses engage with such websites, they can collaborate with third parties—“users or other firms”—to “‘co-create’ value.” Oxera Consulting, *The Economic Impact of Safe Harbours on Internet Intermediary Start-Ups* at 7 (Feb. 2015), bit.ly/3ZxPHWR [hereinafter *The Economic Impact of Safe Harbours*]. “The result is a globally accessible network of entrepreneurs, workers, and consumers who are available to create businesses, contribute content, and purchase goods and services.” Mark Boncheck & Sangeet Paul Choudary, *Three Elements of a Successful Platform Strategy*, *Harv. Bus. Rev.* (Jan. 31, 2013), bit.ly/3QFJ94y.

Websites also “stimulate employment and entrepreneurship by lowering the barriers to starting and operating small businesses.” Perset, *supra*, at 8. Websites with “user-generated content” “allow individuals with

little technical knowledge or money to create, disseminate, and access content in a range of formats and with a worldwide audience” *Shielding the Messengers: Protecting Platforms for Expression and Innovation* at 3, Center for Democracy and Technology (Dec. 2012), bit.ly/3GzYRJQ.

II. Weakening Section 230’s protections would significantly diminish the economic benefits that flow from websites fostering third-party creativity.

Section 230 generally protects websites from legal liability for publishing “any information provided by” a user, and this provides significant economic benefits for our country. 47 U.S.C. § 230(c)(1).

Section 230’s plain text furthers Congress’s design to “preserve the vibrant and competitive free market” that allowed the Internet to “flourish[] ... with a minimum of government regulation.” *Id.* § 230(a)(4), (b)(2). Websites “publish” speech by disseminating information. U.S. Br. 14; *Reno*, 521 U.S. at 853. Section 230, however, dictates that “interactive computer services” (including websites) generally cannot be “treated as the publisher or speaker of any information provided by another information content provider” for liability purposes. 47 U.S.C. § 230(c)(1); *see id.* § 230(e) (certain exclusions). Imposing legal liability on one who disseminates speech created by another treats that disseminating party “as the publisher or speaker.” U.S. Br. 16, 20. Thus, Section 230 provides specific protections for dissemination of third-party content: only the “information content provider”—the person “responsible, in whole or in part, for the creation or development of information provided through the Internet”—can be liable for the speech. 47 U.S.C.

§ 230(f)(3). Where a website decides whether to publish and how to “display” content created by others, *id.* § 230(f)(4), such third-party content is still “information provided by another entity.” *Id.* § 230(c)(1).

Congress’s design makes great economic sense in facilitating the growth of the Internet. Without Section 230, websites would face prohibitive liability for each piece of third-party content they disseminate. That would fundamentally change the Internet and harm the broader economy.

To begin with, weakening Section 230 would eliminate the incentives that have enabled American Internet companies to be the bastion of free expression on the Internet. This statute has “helped the country develop a vibrant and innovative Internet industry.” *Shielding the Messengers, supra*, at 5. American “companies ... serve as free-expression” havens “for the world” *because* of Section 230’s “hospitable legal framework.” Chander, *Expression and Innovation, supra*, at 4. Section 230 is, in other words, “a safe home base from which” websites can foster “global speech.” Anupam Chander, *Section 230 and the International Law of Facebook*, 24 Yale J. L. & Tech. 393, 393 (2022).

But if Section 230’s protections are limited, that will create strong incentives for over-moderation of content—*i.e.*, removal of more content. Lawsuits are expensive, so if websites “are liable for or obligated to police content created by others, they will carefully screen and limit user activity in an effort to protect themselves.” *Shielding the Messengers, supra*, at 20. Websites might even prevent anyone except known, trusted actors from creating content, which would make the Internet much less diverse

and free. That would effectively prohibit the useful third-party upload functions and services that define the modern Internet.

Even just “uncertainty” about the extent of liability protections imposes costs. *See generally* Alex Raskolnikov, *Probabilistic Compliance*, 34 *Yale J. Reg.* 491, 494 (2017). To ensure compliance with “ambigu[ous]” standards, websites would “over-compl[y],” which would create “considerable” and “[un]necessary” costs.” *The Economic Impact of Safe Harbours, supra*, at 10-11. These incentives would particularly threaten “lawful content” that “is controversial, likely to prompt complaints from powerful or litigious entities, or simply susceptible to being mistaken for unlawful material.” *Shielding the Messengers, supra*, at 20.

Weakening Section 230 would also produce a variety of economic harms. For example, greater “liability” would “discourage innovation” in the technology industry. *Id.* at 23. Section 230 is a significant reason why American companies have driven the Internet’s growth. The statute has been responsible for the “dramatic growth” of “interactive, user-generated content sites ... all over the world.” *Id.* at 5. Liability protections allow companies to “worry about improving and expanding features and attracting and retaining customers, rather than policing their services for fear of lawsuits.” Chandler, *Expression and Innovation, supra*, at 6.

If every new Internet service brought with it a risk of liability, investment in the development of new ... products and services” would be “deter[ed].” *Shielding the Messengers, supra*, at 23. Commercial websites, for instance, rely on “trust” between sellers and buyers “to

lubricate the[ese] online anonymous markets.” Steven Tadelis, *Reputation and Feedback Systems in Online Platform Markets* at 2-3 (Feb. 8, 2016), bit.ly/3GFFajY. Those marketplaces have solved that problem through review and feedback systems. *Id.* at 3. But if disseminating that third-party feedback had also exposed online marketplaces to greater liability, then those marketplaces might never have adopted those systems.

Increased liability would also make the Internet marketplace less competitive. Section 230 is “particularly important” for “early-stage companies, since the cost of defending even a frivolous claim can exceed a startup’s *valuation*.” *Section 230: Cost Report*, Engine, bit.ly/3CMEJmH (emphasis added). The more burdensome the “compliance costs” required to avoid liability, the greater the “cost” of “new regulations” for Internet companies. Alan McQuinn & Daniel Castro, *The Costs of an Unnecessarily Stringent Federal Data Privacy Law*, Info. Tech. & Innovation Found. (Aug. 5, 2019), bit.ly/3XfLhT2. Large, established internet companies might be able to absorb those costs, but “[s]mall companies and start-ups often cannot afford the expense of compliance staff and legal defense teams.” *Shielding the Messengers, supra*, at 23. Without Section 230, start-ups would thus be vulnerable to “ruinous legal costs” every time “a user [said] something potentially illegal online.” *Section 230: Cost Report, supra*.

The specter of regulatory costs and litigation risk might also prevent start-ups from raising enough funding to launch in the first place. Weakening liability protections deters investment in Internet companies. Specifically, a United States company protected by Section

230 is “5 times as likely to secure investment over \$10 million and nearly 10 times as likely to receive investments over \$100 million, as compared to internet companies in the [European Union],” which provides much less protection for websites. Michael Masnick, *Don’t Shoot the Message Board* at 5, 8, Copia Institute (June 2019), bit.ly/3GynTc8.

Indeed, some of us have noted that increased data regulation for digital services significantly deters comparative capital investment (and thus innovation). See Jian Jia, Ginger Zhe Jin, & Liad Wagman, *GDPR and the Localness of Venture Investment* at 3 (Jan. 21, 2020), bit.ly/3iAikCj (finding that new data protection regulations in the EU “had a negative effect on EU venture investment” in “technology ventures” as compared to their counterparts in the United States and the rest of the world); Jian Jia, Ginger Zhe Jin, & Liad Wagman, *The Short-Run Effects of the General Data Protection Regulation on Technology Venture Investment*, 40 *Marketing Sci.* 661 (Mar. 1, 2021) (same). Limiting Section 230 protections and thus raising litigation costs and liability risks could therefore “effectively close the market to [many] startups.” *Shielding the Messengers*, *supra*, at 23. Those start-ups might simply “choose to operate only in countries where ... [websites] are granted strong liability protections” simply to avoid the *chance* of a costly lawsuit. *Id.* All of this would “impede economic development and growth” in America. *Id.* at 23-24.

* * *

In short, any reduction in Section 230’s protections for websites would produce wide-ranging costs. Those harms would manifest at both the macroeconomic (lower

innovation, employment, and entrepreneurship) and microeconomic levels (over-moderation and lessened access to the Internet for the average person). The better path is to maintain robust liability protections for websites as Congress directed, which will allow them to continue to serve as engines of economic growth, free speech, and innovation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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