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 ACT | THE APP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST[1]

Amicus curiae ACT | The App Association is a global trade association for small and medium-sized technology companies. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation, while providing resources that help them raise capital, create jobs, and continue to build incredible technology.

Today, the value of the ecosystem the App Association represents—which we call the app economy—is approximately $1.7 trillion, is responsible for 5.9 million American jobs, and serves as a key driver of the $8 trillion internet of things (IoT) revolution. ACT | The App Association, *State of the U.S. App Economy: 2020* (7th Edition) (Apr. 2020). The dynamic app ecosystem continues to produce innovative and efficient solutions that leverage mobile technologies to drive the global digital economy and support consumer interactions and experiences.

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties either provided blanket consent for *amicus* filings or received appropriate notice of and consented to the filing of this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

Driven by the small business technology community, the App Association represents new IoT innovations that will generate advancements in countless sectors of the economy including financial, agricultural, consumer entertainment, healthcare (and others), creating millions of American jobs. Realizing the potential of IoT, however, requires a fair and predictable legal environment, including with respect to civil liability that stems from content created by individual third parties. Thus, *amici* have a strong interest in the Court's interpretation of Section 230 of the Communications Decency Act (CDA) and the potential implications to the small tech developer community.

SUMMARY OF ARGUMENT

The internet has revolutionized society's ability to connect communities and share ideas. Roughly thirty years ago, forty million people used the internet with fewer than 300,000 websites available. Even in 1996, it was evident that the massive volume and rapid growth of internet usage would continue, making it virtually impossible for service providers to review every aspect of user speech. Congress recognized the importance of protecting platforms and services that enable user speech on a widespread level from unwarranted liability, reinforcing the notion that "when harmful speech takes place, it's the speaker that should be held responsible, not the service that hosts the speech. Thus, Congress enacted Section 230 of the CDA, prohibiting "provider[s] or user[s] of an interactive computer service [from being] treated as the publisher or speaker of any information provided by another information content provider." Today, the

use of algorithms to curate and recommend content generated by third parties are critical to operating any platform, particularly small business platforms, and are a function appropriately protected Section 230.

Section 230 has played an integral role creating an environment where digital economy small businesses, entrepreneurs, and innovators can thrive. For many years and across the circuits, well-reasoned decisions have reinforced the vital liability protections needed by small businesses and startups. A departure from the court of appeals' decision and decades of precedent would inappropriately depart from clear Congressional intent and severely disadvantage small businesses seeking to compete against large established firms across technology markets. Indeed, altering Section 230's protections would undermine the robust and ongoing debate underway in Congress today.

Consistent with congressional intent, well-reasoned precedent, and the realities of the digital economy, the court of appeals' judgment should be affirmed.

ARGUMENT

A. American Small Business Technology Firms Rely on Fair and Consistent Legal and Policy Frameworks to Innovate and Create American Jobs.

The app economy's success—and the growth of IoT—relies on continuous innovation and investment in connected devices, which in turn requires a strong and consistent legal framework to allow small business developers to attract venture capital, create

and maintain a competitive marketplace, and level the playing field with larger and more established companies/competitors.

The small business technology industry is a driving force behind the growth of the IoT revolution. IoT is an all-encompassing concept capturing how everyday consumer and enterprise products begin to use the internet to communicate data collected through sensors, and act on the data in a timely way, often with the aid of predictive algorithms. IoT will increasingly improve efficiencies in processes, products, and services across every sector of the economy. The limits are undefined and endless when it comes to how IoT devices will change all Americans' lives, with a predicted 25.2 billion connected devices deployed by 2025, almost every sector of the U.S. economy will be affected, from finance and health to gaming and the global digital ecosystem. *See* App Annie, *State of the App Economy 2020* (Jan. 2020). The App Association's members' ability to take part in the booming cross-sectoral IoT ecosystem, creating millions more American jobs in the process, heavily depends on the ability to rely on and plan according to legal and business norms and policymaking that appropriately balances creating a pro-innovation environment with the public interest. A core ignitor of the growth and ingenuity for small businesses in emerging IoT sectors is, and must continue to be, fair, reliable, and predictable legal frameworks, including with respect to third-party content.

Small businesses do, and will increasingly, rely on the anticipatory nature of algorithms in digital markets as they find ways to gain and maintain new

customers, leveraging customized content that allows users to interact with things most relevant to them. Simultaneously, it is essential that interactive computer service providers maintain a safe environment for all who engage with their software by developing and enforcing comprehensive codes of conduct for all consumers and creators of content. Any changes to the legal environment should be carefully considered to ensure that small businesses are not unduly burdened, and it is important to find a balance that holds online platforms accountable for having structures in place to better manage the content they host, while still allowing them to foster open discourse and innovation.

B. Eliminating or Reducing Section 230's Protections Would Damage the American Small Business Innovator Community's Ability to Compete in an Evolving Marketplace.

Today, more than five billion people utilize the internet, creating robust opportunities for small businesses to engage in a growing market that is otherwise inaccessible. Statista Research Department, *Worldwide digital population July 2022,* (Sep. 20, 2022). Often, these small businesses grow due to their ability to connect one user with another, whether for a social interaction, facilitating an exchange of ideas, or some other legal purpose through recommending content using algorithms. Section 230's ability to protect a "vibrant and competitive free market" is integral to the success of the small tech developer community, specifically, those whose software may "pick, choose, analyze, . . .

search, subset, organize, reorganize, or translate content" to compete and innovate. 47 U.S.C. § 230(b)(2); *Id*. § 230(f)(2), (4).

However, Section 230 does not provide blanket immunity, nor does it shield companies that break the law by creating illegal and harmful content. Indeed, Section 230 enables the United States government to "ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." *Id*. § 230(b)(5). A provider of an interactive computer service facing civil litigation can only invoke Section 230's protections under certain circumstances. First, the provider must utilize or operate "an interactive computer service," which includes a computer system that allows multiple users to access a server, such as an app or a website. 47 U.S.C. § 230(f)(2); *Kimzey v. Yelp! Inc.,* 836 F.3d1263, 1268 (9th Cir. 2016). Second, the claim brought against the provider must seek to treat the provider as "the publisher or speaker" of content. 47 U.S.C. § 230(c)(1). And third, the controversial content must have been generated by a different "information content provider" than the one facing litigation. *Id*. § 230(c)(1), (f)(3).

The exponential growth in data and content online, and the rapid speed that it is developed, have made it impractical to manually curate content. In creating new apps as they compete across market segments, which often involves organizing and sharing third party-generated content, small business developers must leverage algorithmic and automated tools or they stand no chance of competing. Such tools offer immense value to small business digital economy

innovators, and great benefit to the public, by most efficiently organizing data for a user using a variety of methods. Digital Regulation Cooperation Forum, *The benefits and harms of algorithms* (Sept. 23, 2022), https://www.gov.uk/government/publications/findings-from-the-drcf-algorithmic-processing-workstream-spring-2022/the-benefits-and-harms-of-algorithms-a-shared-perspective-from-the-four-digital-regulators. And these automated processes are not a means by which the platform selects or endorses content; they simply organize data and content in order to share what is most relevant to a particular user. The App Association strongly encourages the Court to differentiate between such organizational functions and recommendation functions.

While this case, and much of the public debate about Section 230, is focused on large technology companies' response to deleterious online speech, opening the door to liability by lessening Section 230's protections creates a life-or-death scenario for the small business innovator community we represent. Members of the App Association's community have more to lose than larger companies if Section 230's protections are diminished because the established liability framework has enabled small businesses the leeway to allocate their limited time and money towards creating the next great technological advancement due to the certainty that Section 230 provides them. Small business digital economy innovators are focused on building credibility with their customers by creating positive user experiences on their apps and prioritizing relevant and useful user-generated content, and take concerted good faith steps to moderate content consistent with their users'

expectations and needs. Small business digital economy innovators regularly outspend larger sized platforms on a per user basis. Ernst & Young LLP, *Understanding how platforms with video-sharing capabilities protect users from harmful content online* (Aug. 2021).

Notwithstanding best efforts, tech startups' ability to flawlessly manage and remove every piece of potentially harmful third-party speech is unrealistic. As the entrepreneurs who lead these small businesses face many obstacles in their day-to-day business operations, removing Section 230 protections creates an unreasonably high bar for them to reach, drastically increasing liability risks. Already, about forty-three percent of small-business owners reported having been threatened with or involved in a civil lawsuit. U.S. Chamber of Commerce Institute for Legal Reform, *International Comparisons of Litigation Costs: Canada, Europe, Japan, and the United States*. Roughly twenty percent of startups fail in the first year, largely due to scarcity in financial resources. Camberato, Joe, *2019 Small Business Failure Rate: Startup Statistics by Industry*, National Business Capital (Jan. 24, 2020). This makes even the threat of costly litigation a serious deterrent to smaller companies from being a host for user content at all. If the Court removes Section 230's liability protections, small businesses acting as good faith hosts of their users' speech will face insurmountable legal risk, impeding the development of future apps and websites in the IoT ecosystem. And the Court should recognize that reducing or removing Section 230's liability protections, in effect imposing a one-size-fits-all approach, will heavily benefit large and

established players in the technology space that have vast resources needed to engage in significantly expanded moderation activities and related litigation.

C. The Court Should Align With Bipartisan Congressional Consensus and More Than Two Decades of Case Law that Supports Shielding an Interactive Computer Service Provider From Liability When the Claim Targets the Provider's Display of Third-Party Content.

The App Association urges the Court to act consistent with the bipartisan congressional sentiment that led to Section 230's initial passage in 1996. Challenged shortly after enactment in the context of a gossip magazine, the D.C. District Court held that Section 230 was meant to immunize web hosts from liability where the host had zero involvement in creating or developing the defamatory content at issue. *Blumenthal v. Drudge*, 992 F. Supp 44 (D.D.C. 1998). Since then, ten circuit courts have reviewed Section 230's parameters and agreed that Section 230(c)(1) insulates websites and apps from liability in lawsuits that challenge decisions on "whether to publish, withdraw, postpone or alter content" of a third party, with the Seventh Circuit rejecting a claim that an online advertising site caused a discriminatory housing posting by simply providing the interactive web platform for it to be distributed. *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.,* 519 F.3d 666 (7th Cir. 2008). In case after case, federal courts (both district and circuit) have maintained a common perspective that also aligns with Congress: interactive computer service

providers, like websites and apps, should be shielded from liability when a claim based on content generated by a third party targets the provider's display of that content. See, e.g., *Zeran v. Am. Online*, 129 F.3d 327, 330 (4th Cir. 1997); see *Klayman v. Zuckerberg*, 753 F.3d 1359 (D.C. Cir. 2014); *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257 (N.D. Cal. 2006); *Barnes v. Yahoo!*, 570 F.3d 1096 (9th Cir. 2009); *Barrett v. Rosenthal*, 146 P.3d 510 (Cal. S.C. 2006); *Batzel v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. America Online Inc.*, 206 F.3d 980 (10th Cir. 2000). These are just a few of many court decisions made over the past two decades that indicate the judiciary's resolve in how it applies Section 230, paving a reliable framework on which American innovators depend.

Section 230 insulates interactive computer services from liability as the publisher of content that the services did not develop or create, 47 U.S.C. § 230(c)(1), and includes the "pick[ing], choos[ing], analyz[ing], … display[ing], forward[ing], cach[ing], search[ing], subset[ting], organiz[ing], reorganiz[ing], or translat[ing]" of content as actions that characterize an "interactive computer service" *Id.* § 230(f)(2), (4). Countless developers from across the small business innovator community that the App Association represents do exactly that with third party content to ensure that a user sees what is most relevant to them. Simply put, the fact pattern at issue offers no reason for the judiciary to diverge from well-established law regarding online liability for third-party content.

Ultimately, the App Association urges the Court to reflect that U.S. courts have widely been correct in their interpretation of Section 230 to date (including the court of appeals in this matter), which recognize the clear different between organizing content and endorsing content. Given the clear intent of Congress, the appropriate venue for changes to the Section 230 framework, at this point, is the U.S. Congress, where significant debate over Section 230 continues. We urge the Court to defer to the legislative process on this critical issue, which is the only route that can account for the disparate impact of alternations to Section 230 protections on American small business innovators, and, within the scope of the present matter, to appropriately reinforce the Section 230 framework for the small business innovator ecosystem moving forward.

CONCLUSION

A fair and predictable legal environment with respect to civil liability that stems from content created by individual third parties is vital for innovators across the IoT ecosystem. The court of appeals' judgment should be affirmed.

Respectfully submitted,

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