No. 22-16514

IN THE
United States Court of Appeals for the Ninth Circuit

HADONA DIEP, et al.,

Plaintiffs-Appellants,

v.

APPLE INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 4:21-CV-10063-PJH (Hon. Phyllis J. Hamilton)

MOTION ON BEHALF OF CHAMBER OF PROGRESS, NETCHOICE, ELECTRONIC FRONTIER FOUNDATION, SOFTWARE & INFORMATION INDUSTRY ASSOCIATION, AND ACT | THE APP ASSOCIATION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE APPLE INC.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record states that, as nonprofit entities organized under §§ 501(c)(3) or 501(c)(6) of the Internal Revenue Code, amici curiae Chamber of Progress, NetChoice L.L.C., Software & Information Industry Association, Electronic Frontier Foundation, and ACT | The App Association have issued no stock. Consequently, no parent corporation nor any publicly held corporation could or does own 10% or more of their stock.

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Pursuant to Federal Rules of Appellate Procedure 27 and 29, and Circuit Rule 29-3, Chamber of Progress, NetChoice L.L.C. ("NetChoice"), the Electronic Frontier Foundation ("EFF"), the Software & Information Industry Association ("SIIA"), and ACT | The App Association ("ACT") (collectively, "Movants") respectfully move the Court for leave to file a brief in support of Defendant-Appellee Apple Inc. ("Apple") as amici curiae.

Pursuant to Circuit Rule 29-3, Movants state that they have requested written consent from counsel for all parties. Counsel for Apple consents to this motion. Counsel for Plaintiffs-Appellants stated that they do not consent on October 5 and 10, 2023.

Amici are organizations dedicated to ensuring that consumers can enjoy a healthy online environment where they can work, play, learn, shop, connect, and express themselves without harassment, disinformation, and incendiary content. To keep online services inclusive, useful, and safe, online providers require robust protections for their publishing third-party content and to discuss their publishing practices. Online providers understand that these actions are necessary to support the innovation economy and promote equitable access to the benefits of technological innovations.

The intended brief will discuss how, if Plaintiffs prevail in arguing that 47

U.S.C. § 230 ("Section 230") is inapplicable under the alleged facts, a massive gap in Section 230's protections would result and, as a practical matter, so would a less robust marketplace for third-party applications. Ultimately, it will be small developers, marginalized voices, and consumers who will be harmed if the Court agrees with Plaintiffs.

CONCLUSION

For all these reasons, Movants respectfully ask that the Court grant them leave to file an *amici curiae* brief in support of Defendant-Appellee.

Respectfully submitted,

Dated: October 10, 2023

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 270 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word for Office 365 in Times New Roman 14-point font.

Dated: October 10, 2023

s/ Sean Marotta
Sean Marotta

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2023. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

Dated: October 10, 2023

s/ Sean Marotta
Sean Marotta

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STATEMENT PURSUANT TO FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

AMICI'S IDENTITIES, INTERESTS, AND AUTHORITY TO FILE THIS BRIEF

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all people benefit from technological leaps. Chamber of Progress seeks to protect Internet freedom and free speech, promote innovation and economic growth, and empower technology customers and users. In keeping with that mission, Chamber of Progress believes that allowing a diverse range of app-store models and philosophies to flourish will benefit everyone—consumers, store owners, and application developers.

Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or veto over,

its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.[1]

NetChoice is a national trade association of online businesses that share the goal of promoting free enterprise and free expression on the Internet. NetChoice's members operate a variety of popular websites, apps, and online services, including Meta (formerly Facebook), YouTube, and Etsy.[2] NetChoice's guiding principles are (1) promoting consumer choice, (2) continuing the successful policy of "light-touch" Internet regulation, and (3) fostering online competition to provide consumers with an abundance of services.

The **Electronic Frontier Foundation** ("EFF") is a member-supported, nonprofit civil liberties organization that has worked for more than 30 years to protect free expression, privacy, and innovation in the digital world. On behalf of its more than 34,000 dues-paying members, EFF ensures that users' interests are represented in courts considering crucial online free speech issues. EFF believes that 47 U.S.C. § 230 ("Section 230") is a foundational law that broadly enables

[1] Chamber of Progress's partners include Airbnb, Amazon, Apple, Automattic, Chime, Circle, CLEAR, Coinbase, Creative Juice, Cruise, DoorDash, Earnin, Google, Grayscale, Grubhub, Heirloom Carbon, Instacart, itselectric, Lyft, Meta, Paradigm, Pindrop, Ripple, SmileDirectClub, StubHub, Turo, Uber, Waymo, Zillow, and Zoox.

[2] A list of NetChoice's members is available at https://netchoice.org/about.

Internet speech by protecting the intermediaries that host users' speech.[3] EFF thus regularly participates as *amicus curiae* in cases that seek to limit Section 230 because they jeopardize users' free speech. *See, e.g.*, *Gonzalez v. Google LLC*, 143 S. Ct. 1191 (2023).[4]

The **Software & Information Industry Association** ("SIIA") is the principal trade association for those in the business of information. SIIA's membership includes more than 380 software companies, platforms, data and analytics firms, and digital publishers that serve nearly every segment of society, including business, education, government, healthcare, and consumers. It is dedicated to creating a healthy environment for the creation, dissemination, and productive use of information.

ACT | The App Association ("ACT") is a global trade association for small- and medium-sized technology entrepreneurs, innovators, and independent developers that create software and hardware Internet of things (IoT) solutions.[5] The ecosystem that ACT represents is worth approximately $1.8 trillion and is responsible for 6.1 million American jobs. Realizing the potential of IoT requires a

[3] *See* EFF, *Section 230*, https://www.eff.org/issues/cda230.

[4] EFF *amicus* brief available at https://www.eff.org/document/gonzalez-v-google-amicus-brief.

[5] A list of ACT's sponsors is available at https://actonline.org/about.

fair and predictable legal environment. Thus, ACT has a strong interest in the Court's interpretation of Section 230 and the potential implications for the small tech developer community.

Plaintiffs have stated that they oppose the filing of this brief because Apple is "is a principal contributor to both of the proposed amici." But although Apple is a member of the Chamber of Progress and SIIA and a sponsor of ACT, Apple does not control the amici's position in this brief.

Amici are concerned about the disruption to the app markets that could result from this litigation, ultimately harming consumers and the creator economy that Apple supports. In particular, amici worry that reversing the District Court would effectively force app store providers to monitor millions of apps, likely leading to the removal of most or all third-party apps from app stores.

A Motion for Leave to File Brief of Amici Curiae has been filed with this brief. *See* Fed. R. App. P. 29(a); Circuit Advisory Committee Note to Rule 29-3.

INTRODUCTION

Litigants cannot circumvent Section 230's protections through "creative pleading." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016). Plaintiffs sought to recast Apple's publication activities through its App Store by interpreting a general statement about the safety of its service to be a legally binding guarantee that all third-party content published on the App Store is 100 percent safe. But, consistent

both with a large body of decisions in this and other circuits and a healthy dose of common sense, the District Court held that general statements do not constitute a legally binding assumption of all liability for all third-party content hosted on the App Store.

Plaintiffs are now doubling down in this appeal. They ask the Court to equate a statement that the App Store—as a whole—is "safe and trusted" to actually be a "clear and affirmative" claim about the "quality, useability, and safety of *all* of the applications in the App Store," creating a "duty . . . [to] review[] the code" of all applications before distributing them. Opening Br. at 17 (emphasis in original). But, as the Court has already explained, Section 230 preempts publication-related claims unless there is a "legal duty distinct from the [publisher] conduct at hand." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). Apple disclaimed any duties arising from third-party content, including the Toast Plus app, and Section 230 thus bars Plaintiffs' claims here. ER-40-41.

Recognizing this flaw, Plaintiffs contend that Apple's disclaimer is prohibited by law because it engaged in "fraud" by publishing the harmful app. What fraud did Apple commit? Plaintiffs provide no evidence beyond a claim that Apple did not ensure the "quality, useability, and safety" of the Toast Plus app. But again, Apple expressly disclaimed such assurances.

The real thrust of Plaintiffs' claims is that they were harmed by third-party content published on an app store. The only way Apple could have met its alleged duties would be to monitor and remove third-party content. Here, too, the Court has made clear that these legal obligations are preempted by Section 230. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 682 (9th Cir. 2019) ("We look . . . to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content.").

The Court should not permit plaintiffs to create a major gap in Section 230's protections by taking a claim otherwise focused on the publication of third-party content and then tacking on a very broad statement from the defendant that is far attenuated from the claim at issue. The only alternative would be for providers to either avoid making even general statements about the trust, safety, and security of their services or meticulously review every such statement for litigation risk. Permitting such claims to proceed to later, more costly stages of litigation would thwart Congress's goal of promoting a vibrant, innovative Internet and e-commerce ecosystem. *See Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); 47 U.S.C. § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet . . . .").

Consumers and other online users, app developers, and the broader Internet ecosystem will be harmed if providers of app stores and other digital distribution services are essentially forced by the threat of vexatious litigation to meticulously review all third-party content before distribution. The result would be fewer options, less competition in the digital marketplace, and disproportionate harm to marginalized voices that rely on app stores and third-party services to distribute content.

ARGUMENT

I. SECTION 230 PROTECTS APP STORES FROM LIABILITY ARISING FROM THE PUBLICATION OF THIRD-PARTY CONTENT UNLESS A LEGALLY COGNIZABLE DUTY IS IMPLICATED, AND NO SUCH DUTY EXISTS HERE.

Plaintiffs' theory of liability boils down to a single statement made on the App Store home page that it is a "safe and trusted place" to download apps. Opening Br. at 3-4. Plaintiffs argue that this statement renders Apple responsible for *all* third-party content hosted on the App Store. But this Court's case law—to say nothing of simple common sense—has already clarified that Section 230 protects the publication of third-party content unless the publisher legally binds itself to take certain editorial actions, something Apple did not do.[6]

[6] There are, of course, other exceptions to Section 230's protections not relevant here. 47 U.S.C. § 230(e).

In *Barnes*, the Court explained that Section 230 preempts claims that "derive liability from behavior that is identical to publishing or speaking." *Barnes*, 570 F.3d 1096 at 1107; *see also FTC v. LeadClick Media, LLC*, 838 F.3d 158, 175 (2d Cir. 2016) ("[C]ourts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'") (citing *Barnes* at 1102). Distinguishing promissory estoppel—that is, a contract-based liability theory—from publication-related torts, the Court clarified that "[p]romising is different because it is not synonymous with the performance of the action promised," even if the promise "happens to be [the] removal of material from publication." *Id.*; *see also Ginsberg v. Google Inc.*, 586 F. Supp. 3d 998, 1006 (N.D. Cal. 2022) ("Plaintiffs . . . do not allege the existence of a contract – or indeed any interaction – between themselves and Google. . . . Thus, the *Barnes* court's rationale for finding that Section 230 did not bar Barnes' promissory estoppel claim is not applicable here."). In other words, a legally cognizable duty independent from publishing could enable a plaintiff to hold a publisher liable as a contracting party even if Section 230 barred publisher-liability claims for the same underlying conduct.

Other circuits have agreed with the distinctions this Court drew in *Barnes*. The First Circuit, for example, held that a website's posting rules did not create a legally binding promise vis-a-vis the plaintiff. *Jane Doe No. 1 v. Backpage.com*,

LLC, 817 F.3d 12 (1st Cir. 2016) (citing *Barnes* at 1098-99, 1109). And this Court has clarified that the distinction is not limited to promissory estoppel claims. *See, e.g.*, *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (holding that Section 230 does not bar failure to warn claims).

But here, both Apple and the District Court point out that Apple's App Store terms expressly disclaimed liability arising from third-party apps. ER-40-41. Plaintiffs provide the Court with no reason why Apple's terms failed to "disclaim any intention to be bound." *Barnes* at 1108.

Rather than address this issue, Plaintiffs argue that disclaimers are irrelevant because Apple's conduct is at issue. Opening Br. at 22 ("Diep's claims are predicated on Apple's representations as to the fitness, useability, and safety of the applications . . . ."); *id.* (arguing that Cal. Civ. Code § 1668 invalidates the App Store terms due to Apple's "fraud"). But under Plaintiff's theory, Apple's representations are "fraudulent" because Apple had not disclaimed responsibility for third-party content. And therein lies the circular logic of Plaintiffs' claims. On top of being circular, the logic also rests on faulty factual underpinnings because Apple did disclaim liability in the App Store terms.

Even on its face, Plaintiffs' theory beggars belief by reading "safe and trusted" to mean a "clear and unequivocal statement[] about the quality, useability, and safety of all of the applications in the App Store," Opening Br. at 17 (emphasis in original),

that includes reviewing "any relevant source code" of every App Store app. First Amended Complaint ¶ 18. *See, e.g.*, *Howard v. Tanium, Inc.*, 2023 WL 2095908, at *4 (N.D. Cal. Feb. 17, 2023) ("Statements of value are typically considered 'opinion,' not fact.") (citing *Kahn v. Lischner*, 275 P.2d 539, 543 (1954)).

If this sort of pleading strategy were allowed to circumvent Section 230, it would be an exception that swallows the rule. Any time a website operator or online service provider made a statement about its trust and safety practices, it would run the risk of losing Section 230 protection, discouraging any interactive computer service from ever speaking about such issues or trying to improve the safety of its operations. This is precisely the misalignment in incentives Congress sought to address in enacting Section 230. *See, e.g.*, *Batzel*, 333 F.3d at 1029 (noting that "Congress adopted § 230(c) to overrule the decision of a New York state court in [*Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995)]," which "relied on the fact that Prodigy held itself out as a service that monitored its bulletin boards for offensive content and removed such content.").

Accepting Plaintiffs' wrongheaded theory risks wide-ranging effects for tort claims in California, in other jurisdictions within the Ninth Circuit, and throughout the nation. *Kimzey*, 836 F.3d at 1266 ("We decline to open the door to such artful skirting of the CDA's safe harbor provision. This case is, in some sense, a simple matter of a complaint that failed to allege facts sufficient to state a claim . . . . But it

is also more consequential than that, given congressional recognition that the Internet serves as a 'forum for a true diversity of . . . myriad avenues for intellectual activity' and 'ha[s] flourished . . . with a minimum of government regulation."). The Court should thus affirm the District Court by affirming that Section 230 forecloses such "creative pleading." *Id.* at 1265.

II. PLAINTIFFS' ACTUAL THEORY OF LIABILITY IS A CHALLENGE TO APPLE'S EDITORIAL DECISIONS AND WOULD REQUIRE ACTIVE MONITORING AND REMOVAL OF ALL APPS ON THE APP STORE.

At bottom, Plaintiffs ask the Court to second-guess Apple's content moderation decisions about the operation of the App Store. Opening Br. at 5 ("Apple knew or should have known of the fraudulent purpose of the Toast Plus application[] and failed to take remedial action."). These are the core activities that Section 230 is designed to protect, which is why Plaintiffs seek to work around them. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.").

The District Court recognized this theory for what it is: an attempt "to hold Apple liable for . . . reviewing and deciding whether to exclude the Toast Plus app—conduct that can only be described as publishing activity." ER-36. Obligations to monitor and review third-party content are typical publisher activities that Section

230 preempts. The Court has repeatedly held that "publication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102.

Internet Brands illustrates the line between legal obligations that do and do not conflict with Section 230. *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016). There, the Court distinguished between causes of action that require website providers to monitor third-party website content (from which websites are immune under Section 230) and those that do not require monitoring. *Internet Brands* turned on the fact that the alleged duty to warn under California law would not "affect" how the website "monitors . . . content." *Id.* at 851. The Court stressed that the website's "failure to monitor postings" was not "at issue" and held that "Doe's failure to warn claim has nothing to do with Internet Brands' efforts, or lack thereof, to edit, *monitor, or remove* user generated content." *Id.* at 852 (emphasis added). Put differently, the question under *Internet Brands* is whether "the underlying duty 'could have been satisfied without changes to content posted by the website's users.'" *HomeAway.com, Inc.*, 918 F.3d at 683 (quoting *Internet Brands*, 824 F.3d at 851).

Here, Apple is allegedly liable for its publication of the Toast Plus app and "fail[ure] to take remedial action"—that is, removing the app. Opening Br. at 5. Although Plaintiffs argue that their claims are based on "Apple's own

representations" independent from Apple's choices as a publisher, they fail to ever address how Apple would be liable under any of their claims if it had not published the Toast Plus app. Opening Br. at 7.

Further, under Plaintiffs' theory of liability, Apple would need to (1) monitor all apps for any code or statements that could be construed as "fraud" and (2) remove such apps. How else could Apple uphold a legal duty to ensure that no fraud occurs across the millions of apps available on the App Store? Apple could not rely on the purported descriptions provided by the app developers because the descriptions could be inaccurate and the apps (and their functionality) constantly evolve. Apple would need to test every app—including after every app update—to determine whether there is any potential for a user to be defrauded. What's more, it would also likely err on the side of removing or disabling third-party apps entirely rather than risk liability.

Section 230 prohibits imposing such duties, and thus Plaintiffs' claims are barred.

III. AFFIRMING SECTION 230'S ESSENTIAL PROTECTIONS FOR APP STORE PROVIDERS WILL BENEFIT INTERNET USERS AND APP DEVELOPERS, ESPECIALLY MARGINALIZED SPEAKERS AND AUDIENCES EXPRESSING DISSENT.

The Internet is so vital to our everyday lives because, in part, it bolsters the publication of third-party speech at scale, allowing anyone to reach broad audiences based on the strength of their ideas. But the Internet's potential to connect speakers

with such audiences is realized only if online services are freed from the obligation or incentive to vet all information that individual speakers provide. Section 230 supplies the necessary framework and protections for online platforms to publish third-party speech at their discretion. 47 U.S.C. § 230(c)(1); *see also* Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. 33 (2020); Jeff Kosseff, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET, at 1-10 (2019) (same).

This discretionary aspect of publishing embodied in content curation is what makes the Internet valuable to audiences and speakers. Eliminating Section 230 protections that Internet services, including app stores, rely on to curate content would drain the medium of so much of its utility, with particularly dire consequences for small app developers and for marginalized speakers who depend on the Internet to advocate, organize, find community, and make their voices heard.

A. Section 230's Protections Are Essential to the Basic Functioning of App Stores.

App store providers need flexibility to decide how to organize the speech that they publish. Given the volume of information on app stores, providers must rely on automated tools to curate content. *See, e.g.*, Eric Goldman, *Content Moderation Remedies*, 28 MICH. TECH. L. REV. 1, 31-36 (2021). But providers cannot continually monitor all apps (including their code) to ensure that no user is harmed

while still fostering an open app ecosystem in which anyone can participate. Below are some of the reasons why.

- ***Potential for Censorship*** – Overly strict monitoring and review processes could lead to censorship concerns. App store providers might be inclined to reject apps based on subjective criteria, potentially limiting freedom of expression and the diversity of ideas within the app ecosystem.
- ***Inhibiting Innovation*** – Requiring app store providers to comprehensively review every app, including minor updates and bug fixes, would introduce significant bottlenecks in the app approval process. It would create a backlog of apps waiting for review, making it challenging for app store providers to provide timely services to developers and users. This prolonged review timeline could stifle innovation by discouraging developers from creating new and experimental apps. Innovation often involves pushing boundaries, and a stringent review process could deter developers from taking risks.
- ***Creating Market Entry Barriers*** – Implementing mandatory monitoring and reviewing of all apps would disproportionately burden smaller developers and startups. These entities often lack the resources to meet strict review requirements, effectively creating market entry barriers. This would hinder competition and limit the diversity of apps available to users.

- ***Straining Resources*** – App stores host millions of apps, and manually reviewing each one would be a major burden. It would require a massive workforce, significant financial investments, and a lot of time. Such resources could be used more effectively to address other pressing issues, such as security and user privacy.
- ***Slowing App Releases*** – Mandatory app reviews for all submissions would result in slower app releases. Developers would have to wait for their apps to be reviewed, causing delays in getting new features and improvements to users. This can frustrate developers and users alike.
- ***Resource Allocation*** – App store providers should have the flexibility to allocate their resources where they see fit, such as focusing on addressing security vulnerabilities or improving the overall user experience. Forcing them to allocate a large portion of their resources to (additional) app reviews could divert their attention from critical tasks.
- ***False Sense of Security*** – Relying solely on app store reviews for security could create a false sense of security for users. Even with rigorous reviews, some malicious or low-quality apps may still slip through the cracks.

- ***Global Variability*** – App stores operate globally, and different regions have varying legal and cultural norms. Mandating strict app review policies globally could lead to conflicts with local laws and customs, making it challenging for app stores to navigate this complex landscape and continue to operate globally.

These are but a few of the reasons why Section 230 is vital for the functioning of app stores that enable a wide array of small and large developers to publish apps that can reach and benefit billions of users. If app store providers become responsible for every app that they distribute, they are likely going to either heavily reduce the number of apps or shut down entirely.

B. Withdrawing Section 230's Protections for App Stores Would Especially Harm Marginalized Speakers and Audiences.

Without Section 230's protections, app store providers would be discouraged from supporting vital informational tools. For example, app store providers could fear that promoting public health and safety information—including information about access to vaccines or the concerns about their use—could expose them to liability if plaintiffs could construe broad "safe and trusted" claims to be an assurance that all health and safety information mentioned on every app is 100 percent accurate. Conversely, providers would be more likely to remove apps that support controversial subject matter. For example, providers may be unwilling to promote apps that support certain unpopular political views or challenge mainstream

opinions for fear of litigation over the content posted on the apps. Or information about reproductive health services could become less available. *See* Letter from Chamber of Progress to Merrick B. Garland, U.S. Att'y Gen. at 2 (Nov. 21, 2022), https://bit.ly/3Ov68jf. Or platforms might exclude pro-Second Amendment apps from their stores to avoid liability for gun violence.

Providers would also be discouraged from downranking or hiding apps that host offensive speech, such as speech that attacks religious groups or LGBTQ+ people. This is no idle speculation. Without robust protections, providers would face liability for speech discrimination and censorship claims—a particularly acute risk in light of certain state laws. *See* Tex. Civ. Prac. & Rem. Code Ann. § 143A.002(a)(1) ("A social media platform may not censor a user . . . based on . . . the viewpoint of the user or another person . . . .").

Even when Section 230's protections were selectively withdrawn only as to some kinds of disfavored speech, online platforms reacted by shuttering entire portions of their websites to avoid the possibility of being held liable for even still-legal speech. Kendra Albert et al., *FOSTA in Legal Context*, 52 COLUM. HUM. RTS. L. REV. 1084 (2021). Withdrawing Section 230 protections any time an app store provider broadly discussed the safety and trustworthiness of the platform would have comparably harmful effects for a wide range of disfavored speech and speakers threatened by a patchwork of proscriptive state laws.

Without broad protection to host and curate a variety of views and content, some smaller platforms would cease to be economically viable. *See* Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, Cato Inst., at 1-8 (2022), https://bit.ly/47dQaS7; Eric Goldman & Jess Miers, *Online Account Terminations/Content Removals and the Benefits of Internet Services Enforcing Their House Rules*, 1 J. FREE SPEECH L. 191, 209-10 (2021). Because advertisers do not want their advertising to appear alongside spam or other undesired content, and because users do not want to use online services littered with that content, advertising dollars would dry up if platforms could not curate content without fear of incurring liability for doing so.

Section 230's protections provide essential scaffolding integral to the modern Internet. Eliminating those protections for app stores would deprive users of the massive value that app stores provide, disproportionately harming speakers on society's margins.

CONCLUSION

For the reasons stated above, the Court should affirm the District Court's grant of Apple's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,254 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word for Office 365 in Times New Roman 14-point font.

Dated: October 10, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2023. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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