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* THE AMERICAN ACTION FORUM IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The American Action Forum (AAF) is an independent, nonpartisan, nonprofit 501(c)(3) organization, dedicated to educating the public about the complex policy choices facing the country, especially with respect to government regulations and the effect those regulations have on the prospect for future economic growth. AAF focuses more broadly on the indispensable role that economic freedom plays in promoting the development of small businesses. AAF is interested in ensuring that Section 230 continues to provide protections to businesses, especially small businesses, as they navigate the ever-evolving, continuously developing, and largely unregulated markets that have built up around the internet. AAF's staff regularly participates in legislative, administrative, and judicial proceedings on significant economic, legal, and policy questions.

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

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 230 of the Communications Decency Act bars claims seeking to hold providers of "interactive computer service[s]" liable "as the publisher or speaker" of content that the service did not create. 47 U.S.C. § 230(c)(1). This Court should confirm that such immunity covers damages claims against service providers based on the provider's display of third-party content of potential interest to individual users. Doing so will honor Congress's express deregulatory intent, give effect to every word of Section 230, safeguard a competitive marketplace, and promote innovation and competition in the technology sector. Taking the contrary approach would snub Congress's express policy objectives, ignore the statute's profound contribution to 25 years of economic growth, stifle the development of disruptive and innovative startups, and plunge internet businesses into a morass of legal uncertainty.

Section 230, the "twenty-six words that created the internet," Jeff Kosseff, *The Twenty-Six Words That Created The Internet* (2019), states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," 47 U.S.C. § 230(c)(1). Congress prefaced this broad grant of immunity with legislative findings and a declaration of policy, making clear that it was adopting a deregulatory regime to create space for internet companies, large and small, to flourish in a free and competitive marketplace, without an

onslaught of legal claims targeting third-party content shared on a provider's platform.

Section 230 has worked wonders, promoting wealth creation and economic expansion at a clip unrivaled in history. *Compare* Jessica R. Nicholson, *New Digital Economy Estimates* at 3, BUREAU OF ECONOMIC ANALYSIS (June 2020), bit.ly/3jY8la8 (noting that internet companies contributed $948 billion to the gross domestic product in 2005), *with* Lindsay Walters, *Study Finds Internet Economy Grew Seven Times Faster Than Total U.S. Economy, Created Over 7 Million Jobs in the Last Four Years*, IAB (Oct. 18, 2021), bit.ly/3XegNQR (noting that internet companies contributed roughly $2.5 trillion to the gross domestic product in 2020).

In the legislative findings accompanying Section 230, Congress recognized that "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." 47 U.S.C. § 230(a)(5) (emphasis added). The declaration of policy echoes the findings, stating that Congress desired to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." *Id.* § 230(b)(2) (emphasis added). Section 230's broadly worded text bears out that legislative choice. The statute's sweeping immunity comfortably applies to service providers when they point users in the direction of information provided by *another* content provider.

Congress's decision to immunize service providers from claims arising from a provider's recommendation

of third-party content has spurred widespread economic progress, generated millions of good-paying jobs, and allowed small businesses to flourish and compete against big tech companies. Indeed, in that last setting, Congress's legislative policy has undeniably succeeded. Section 230's immunity provision ensures that upstart companies do not buckle under the weight of exorbitant litigation costs, lowers the barriers to entry, and fosters an entrepreneurial and competitive marketplace. Small companies proliferate on the internet, providing many "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." Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry* at 4, CATO POLICY ANALYSIS (Jan. 31, 2022), bit.ly/3GKeAr7.

Rather than risk stifling that growth, this Court should read Section 230, consistent with the statute's text, to hold that the provision immunizes service providers from claims that target the providers' display of third-party content of potential interest to individual users.

ARGUMENT

To further Congress's express deregulatory aims, this Court should interpret Section 230 to immunize internet companies where a claim targets that company's display of third-party content of potential interest to individual users. The legislative findings and declaration of policy that preface Section 230's immunity provision show that Congress enacted a deregulatory statute to the great benefit of small and mid-sized businesses. A cramped, pro-regulatory reading of Section 230 would stifle business, undermine the plain text of the statute, dampen economic growth, jeopardize the employment of millions of Americans, and force small businesses to confront future legal uncertainty.

I. Congress Enacted Section 230 As A Deregulatory Measure.

The principal question in this case concerns the meaning of Section 230's operative text, but to the extent there is any ambiguity, this Court may properly look to Congressional intent as reflected in the purpose provisions of the statute. "This is not a situation in which a court must divine congressional intent from legislative history and presidential signing statements; rather, Congress inscribed its findings and declaration of policy on the face of the statute." *New York v. U.S. Dep't of Labor*, 363 F. Supp. 3d 109, 129 (D.D.C. 2019). Here, the statute's prefatory text supports reading Section 230 to immunize internet service providers where a claim targets a provider's display of third-party content of potential interest to individual users.

Start with the legislative findings.[2] Congress recognized that the "Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*." 47 U.S.C. § 230(a)(5) (emphasis added). Congress explained that internet "technology develops" and will continue "rapidly developing" in a manner that could not easily be predicted. *Id.* §§ 230(a)(1)–(2). To promote growth into the twenty-first century, Congress sought *minimal government*

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[2] Those findings include:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.
> (2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.
> (3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.
> (5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

47 U.S.C. § 230(a)(1)–(5).

interference, including from litigation, when it came to the use of the internet as a platform. *See* Jennifer Huddleston, *Section 230 as a Pro-Competition Policy*, AMERICAN ACTION FORUM INSIGHT (Oct. 27, 2020), bit.ly/3ikIPLV.

Section 230 thus encapsulates an "essential framework for a vibrant, innovative market of dynamic competition." Douglas Holtz-Eakin, *The Section 230 Chronicles, Act I*, AMERICAN ACTION FORUM INSIGHT (Oct. 29, 2020), bit.ly/3GQ5QQ0. Although Congress in 1996 may not have addressed the potential for service providers to assist users in navigating the internet by recommending third-party content, Congress knew that technology would develop and wanted to promote that development uninhibited by the constant threat of litigation.

Congress expressly recognized that internet services provided "users a great degree of control over the information that they receive" and anticipated "the potential for even greater control in the future as technology develops." 47 U.S.C. § 230(a)(2). The kind of algorithmic-based recommendations at issue in this case are precisely the kind of mechanisms needed to allow users to effectively navigate the vast amounts of information now available on the web. Indeed, Congress defined "access software provider" to include "enabling tools" like "filter[ing]" and "screen[ing]" functions that "transmit . . . content," which shows that Congress understood the need to safeguard mechanisms that support navigating digital content. *Id.* § 230(f)(4). If service providers could not rely on neutral algorithms to help users navigate their ecosystems, centralized gatekeepers would step in,

resulting in far less control and far less choice available to individual users.

Congress's declaration of policy stands to the same effect.[3] Section 230 sought to "promote the continued development of the Internet and other interactive computer services." *Id.* § 230(b)(1). Again, a service provider's ability to recommend third-party content, based on neutral algorithms, improves user experience and streamlines search functions, and that is precisely the kind of development Congress sought

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[3] Those policies include:

> (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
> (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
> (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
> (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
> (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

47 U.S.C. § 230(b)(1)–(5).

to promote. Indeed, internet companies' algorithms enable "new content creators to reach a larger audience" and help consumers "find content that they wish to see." Jeffrey Westling, *Lawmakers' Misguided Approach to Social Media Content Moderation*, AMERICAN ACTION FORUM INSIGHT (May 5, 2022), bit.ly/3GqogWr.

In Section 230's declaration of policy, Congress further stated that it adopted the statute to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Recommendation algorithms, which work based on the aggregation of choices by individual users, are a byproduct of the vibrant free market that Congress, through Section 230, has nurtured and protected. Placing that development outside Section 230's protection would stop positive development in its tracks and thwart similar efforts to improve user experience and permit effective navigation across huge volumes of information. It would also threaten to put a sizeable dent in a digital economy that accounts for the bulk of America's best-paying jobs. *See* Nicholson, *New Digital Economy Estimates*, *supra* at 3. Indeed, internet workers receive "an earnings premium of about 30 percent over the average compensation of all U.S. workers." Christian M. Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* at 8, NERA (June 5, 2017), bit.ly/3IDd0J2.

This Court would ignore the will of Congress were it to overlook the statute's stated findings and declared purpose when interpreting Section 230's

operative immunity provision, which states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1); *id.* § 230(f)(2), (4) (defining "interactive computer service," to include "software . . . or enabling tools" that "pick, choose, analyze, . . . search, subset, organize, reorganize, or translate content").

Legislative findings and congressional statements of policy "set forth the assumed facts and the purposes that the majority of the enacting legislature of the parties to a private instrument had in mind, and these shed light on the meaning of the operative provisions that follow." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 218 (2012). As a result, "a preamble, purpose clause, or recital is a permissible indicator of meaning." *Id.* at 217. In fact, since the earliest days of the Republic, this Court has recognized that the "preamble of a statute is said to be a key to unlock its meaning." *Wilson v. Mason*, 5 U.S. (1 Cranch) 45, 76 (1801); *see also* Joseph Story, 1 *Commentaries on the Constitution of the United States* § 459 at 326 (Little, Brown 3d ed. 1858) (remarking that "the preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute").

Moreover, ignoring Congress's stated findings and its declared policy would violate the cardinal rule that courts must give effect "to every clause and word of a statute," *Montclair v. Ramsdell*, 107 U.S. 147, 152

(1883), so that "no part will be inoperative or superfluous," *Corley v. United States*, 556 US 303, 314 (2009) (citations omitted). Although a "prefatory clause does not limit or expand the scope of the operative clause," prefatory language represents an important tool to ensure the "reading of the operative clause is consistent with the announced purpose." *District of Columbia v. Heller*, 554 U.S. 570, 578 (2008).

Based on the statute's stated findings and declared policy, it should come as no surprise that entrepreneurs have relied on Section 230's "simple and intuitive" operative language to grow businesses uninhibited by oppressive regulation and the threat of legal claims. Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, THE ATLANTIC (Sept. 12, 2013), bit.ly/3imNpcv; Dippon, *Economic Value of Internet Intermediaries*, *supra* at 3 (noting that the "bright-line rule has allowed user-generated Internet services like YouTube, Yelp, Reddit, and Facebook to flourish by facilitating consumer access").

Indeed, the internet economy today contributes $2.45 trillion to the United States' annual gross domestic product of $21.2 trillion and employs 17 million Americans. *See* Walters, *Study Finds Internet Economy Grew*. The internet economy's contribution to the U.S. gross domestic product grew 22 percent between 2016 and 2020 (as compared to a national economy that grew 2 to 3 percent per year). Those figures represent exponential growth since the turn of the millennium—a pace and magnitude of wealth creation without antecedents. Without Section 230's

broad protections, it is estimated that the "U.S. gross domestic product would decrease by $44 billion annually," and that a narrow reading of the immunity provision "would eliminate over 425,000 jobs." Dippon, *Economic Value of Internet Intermediaries*, *supra* at 1.

Although the internet has grown far beyond any reasonable anticipation in 1996, fostering the conditions for the radical expansion of the internet economy was Congress's intent. Section 230 underscores the legislative belief that the statute's immunity provision was necessary to protect service providers from claims relating to third-party content. *Cf. Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (relying on the Religious Freedom Restoration Act's stated findings to conclude that the statute supported potential exemptions from the Affordable Care Act's contraceptive mandate).

The statute, read as a whole, thus shows that the imposition of "liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (Wilkinson, C.J.). Congress had an "avowed desire to permit the continued development of the internet with minimal regulatory interference," freeing businesses, large and small, from regulation and the threat of protracted litigation. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016). Congress adopted a broad immunity blanket for service providers not for its own sake, but because Congress wanted "to foster internet commerce more broadly." Julio Sharp-Wasserman &

Evan Mascagni, *A Federal Anti-SLAPP Law Would Make Section 230(c)(1) of the Communications Decency Act More Effective*, 17 FIRST AMEND. L. REV. 367, 374 (2019).

This Court should give effect to the full text of Section 230 and reject Petitioners' narrow view because a broad construction of Section 230's immunity draws support "from the statute's stated aims." Cecilia Ziniti, Note, *The Optimal Liability System for Online Service Providers: How* Zeran v. America Online *Got It Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 605–06 (2008).

II. Section 230's Deregulatory Policy Benefits Small and Mid-Sized Businesses the Most.

A. Small Businesses Have Flourished Under Section 230's Deregulatory Policy.

Although big tech companies undoubtedly benefit from Section 230's immunity protections, "start-ups and small companies also gain an advantage from" Congress's generous grant of immunity. Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451, 463 (2021). Indeed, new market entrants have the most to lose from a restrictive interpretation of Section 230. While established big tech companies can afford to pay legions of lawyers and to bear the associated regulatory costs, such barriers to entry would thwart the very competition that has enabled the internet to flourish. *See* Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. 639, 642 (2014)

(remarking that "Silicon Valley's success in the Internet era has been due to key substantive reforms . . . [like Section 230] that dramatically reduced the risks faced by Silicon Valley's new breed of global traders"). In essence, "Section 230 provides a low barrier of entry for internet startups, as it eliminates the liability risk associated with hosting user-generated content." Juan Londoño, *Content Moderation Using Notice and Takedown Systems: A Paradigm Shift in Internet Governance*, AMERICAN ACTION FORUM INSIGHT (Nov. 8, 2021), bit.ly/3VX9gEW. As a result, applying Section 230's immunity protections in line with Congress's deregulatory purpose fosters the entrepreneurial and competitive marketplace that Congress designed Section 230 to protect.

The litigation costs of defending even a single "protracted lawsuit may be financially ruinous" for "smaller Internet services." Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 40 (2019). Startups are often cash strapped and resource constrained, and thus limited in their ability to defend against lawsuits. *See* Elizabeth Banker, *Understanding Section 230 & the Impact of Litigation on Small Providers* at 4, CHAMBER OF PROGRESS (2022), bit.ly/3IHT9Zf. Indeed, "the cost of defending even a frivolous claim can exceed a startup's valuation." *Section 230: Cost Report* at 1, ENGINE, bit.ly/3WWRoeL. By contrast, big businesses are "more likely to be able to attract the funding and legal resources necessary to defend themselves against lawsuits over third-party content." Huddleston, *Competition and Content Moderation*, *supra* at 6.

Section 230's broad protections offer these businesses confidence that potential litigation will not put them out of business. *See* Chander, *How Law Made Silicon Valley*, 63 EMORY L.J. at 642 ("[L]egal innovations in the 1990s that reduced liability concerns for Internet intermediaries, coupled with low privacy protections, created a legal ecosystem that proved fertile for the new enterprises."). The statute permits defendants to defeat quickly meritless lawsuits that would otherwise bog businesses down in threatening, risky, and expensive litigation. Huddleston, *Competition and Content Moderation*, *supra* at 6. The protections also guard against "collateral damage to protected expression" that businesses are willing to justify to avoid even the remote chance of liability. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 29–30 (2006).

Narrowing Section 230's current protection "would stymie innovation, threaten smaller companies, and ultimately limit the options for speech online." Jennifer Huddleston, *Does Content Moderation Need Changes to Section 230?*, AMERICAN ACTION FORUM INSIGHT (June 18, 2020), bit.ly/3VOpKiQ. In addition to mitigating the existential threat of expensive litigation, Section 230's immunity provision has generated "remarkably low barriers to entry" for companies to launch internet businesses. Bruce P. Smith, *Cybersmearing and the Problem of Anonymous Online Speech*, 18 COMM. LAW. 3, 3 (2000). It takes few resources to launch an online business because the "'procedural fast lane' offered under Section 230 [ ] protects small platforms by limiting the money,

resources, and time they are forced to divert from business operations onto lawsuits." Ife Ogunleye, *Section 230: Good For Competition Online*, MEDIUM (July 5, 2022), bit.ly/3Iu9ctf. Small businesses need not allocate immense resources to shoring up their legal strategy and defenses, but instead can focus their precious capital on developing a user-friendly and useful product.

That precious capital includes the development of the kinds of recommendation engines that are necessary to a user's experience on the internet. The abundance of information available online has dramatically increased the need for recommendation engines that intelligently and efficiently connect users with third-party content. These recommendation engines have become increasingly ubiquitous across a variety of e-commerce functions, which include searching, shopping, and all forms of media and social-media programing.

Recommendation engines benefit businesses and consumers alike. Businesses benefit by connecting their consumers with the services they seek and by better understanding their consumers' purchasing habits, allowing micro-targeting of customers and investments in particular products of interest. *See* Graham Charlton, *How online retailers can use algorithms to grow their business*, KNOWLEDGE, bit.ly/3jZffMq. Consumers benefit from a "better shopping experience" because they need not browse endlessly to find a product that fits their needs. *Id.* Recommendation algorithms and the protections afforded by Section 230 thus generate efficiency and stimulate economic activity. *See* Matthew Schruers,

Note, *The History and Economics of ISP Liability for Third Party Content*, 88 VA. L. REV. 205, 206–08 (2002).

Section 230 also promotes successful innovation and entrepreneurship, and it "encourage[s] the next generation of start-up businesses aspiring to disrupt the current Internet incumbents." Letter From Forty-Six Academics to Members of Cong. (Mar. 9, 2020), bit.ly/3GKgjN7. Section 230 thus does not insulate big tech, but rather serves as a key pathway toward increasing competition. Small businesses rely on the immunity provision "to adopt content moderation policies tailored to their specific business model, their advertisers, and their target customer base," which allows "platforms to please internet users." Huddleston, *Competition and Content Moderation*, *supra* at 4. Under a narrower view of Section 230, a service provider would be able to "provide its users only the simplest possible tools for the creation of content as to avoid being labeled a 'developer' and thereby risk liability for the users' published content." Adam Weintraub, Note, *"Landlords Needed, Tolerance Preferred": A Clash of Fairness and Freedom in Fair Housing Council v. Roommates.com*, 54 VILL. L. REV. 337, 368 n.143 (2009).

B. A Narrow Reading of Section 230 Will Stifle Economic Growth.

Limiting Section 230's immunity protections would decimate small companies and grant big tech companies an advantage over potential competitors. Naturally, "big platforms have the resources to pay for all the screeners to take stuff down before they get sued, but startups don't. A few nasty lawsuits could

kill them." Tim Wu, *Liberals and Conservatives Are Both Totally Wrong About Platform Immunity*, MEDIUM (Dec. 3, 2020), bit.ly/3XdLExc. A ruling narrowing Section 230's immunity would, in turn, deter venture capitalists and individual investors from backing small companies that might face litigation for directing their users to third-party content. *See* Dippon, *Economic Value of Internet Intermediaries*, *supra* at 2 (narrowing Section 230 "will reduce the formation of Internet intermediary startups, as well as decrease investment in the Internet more generally").

Moreover, the compliance costs under that regime would drain small companies of precious resources. Small companies, unlike big ones, lack the capacity to review and moderate all content on their platforms. Consequently, those companies "simply could not make [the] adjustments" that would be necessary if the Court were to reverse the decision below and to expose providers to potential liability for recommending third-party content. Ziniti, *The Optimal Liability System*, 23 BERKELEY TECH. L.J. at 589.

If anything, that dynamic would only accelerate the market dominance of big tech companies: "Compared to startups and medium-sized tech companies, Big Tech has access to substantially larger volumes of data that may make artificial intelligence-enabled content moderation more feasible." Ryan Nabil, *Why Repealing Section 230 Will Hurt Startups and Medium-Sized Online Businesses*, COMPETITIVE ENTERPRISE INSTITUTE (Feb. 1, 2021), bit.ly/3WR4XMV. Thus, a reversal here "would

enhance the market power of today's largest incumbents" and "[i]t would deter new competitors from entering the market, further concentrating revenue and users among a few large firms." Huddleston, *Competition and Content Moderation*, *supra* at 2.

Further, investors naturally favor businesses with lower litigation exposure. "Research has shown a strong correlation between protection against liability for digital and online intermediaries and the success rate of startups, with investors more likely to provide significantly higher investments in companies protected from liability." Ogunleye, *Section 230: Good For Competition Online*. Under the current regime, in which Section 230 provides "certainty around legal exposure and protecting platforms from open-ended liability for wrongs committed by others," the immunity provision "helps new services that are seeking to attract investors and to operate at a smaller scale." Huddleston, *Competition and Content Moderation*, *supra* at 5.

In addition, by eliminating competition from startups and entrenching the dominant firms, a restrictive interpretation of Section 230 would disincentivize larger firms from developing new products and services. Currently, large firms facing competitive pressures from new rivals are constantly developing innovative products and services to stay ahead and retain their existing user base. Section 230 not only allows these firms to implement new features and services without major fear that doing so would lead to litigation, but without competition from rivals, these firms would have less of an incentive to improve

their products since their existing network of users will have fewer options. Congress designed Section 230 as a deregulatory statute because it understood that competition at all levels would promote significant consumer and economic benefits.

C. A Restrictive Interpretation Of Section 230 Would Thrust Small Businesses Into An Uncertain Legal Future.

The litigation woes that would beset small businesses if this Court embraces a restrictive interpretation of Section 230 would be legion. Consider a duck decoy artisan in Maine who advertises his decoys on the internet through a mom-and-pop online retailer. *See* Tr. at 39 in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.* (Roberts, C.J., argued Oct. 7, 2020), bit.ly/3IxNNQa. Under a restrictive interpretation of Section 230, that artisan may be one click away from subjecting all sorts of small businesses to widespread legal exposure.

Start with negligent misrepresentation. An online retailer sells the artisan's duck decoys to consumers under the retailer's wood products tab. Could a consumer sue the small business retailer because it turns out that despite the artisan's claims the decoy is made of lead rather than wood? *See Beckman v. Match.com, LLC*, 668 F. App'x 759, 759 (9th Cir. 2016) ("The district court properly concluded that the Communications Decency Act ('CDA'), 47 U.S.C. § 230, barred Beckman's claims for negligent misrepresentation."). Move next to tortious interference with a business contract. What if the artisan unbeknownst to the small business online retailer is interfering with a business contract by

producing the duck decoys. Could the infringed-upon business sue the online retailer for fostering the contract interference? *See Illoominate Media, Inc. v. CAIR Found.*, 2019 WL 13168767, at *3 (S.D. Fla. Nov. 19, 2019) (concluding that Section 230 insulates internet providers from claims for tortious interference with a business relationship). Consider, too, false advertising. Assume that the artisan claims that his decoy will attract doves as well as ducks. Would an online retailer face potential false advertising liability for selling the artisan's duck decoys when it turns out that the decoy in fact scares away doves? *See Enigma Software Grp. USA, LLC v. Malwarebytes, Inc.*, 946 F.3d 1040, 1053 (9th Cir. 2019) (holding that Section 230 preempts false advertising claims).

This Court should hesitate before narrowing the scope of Section 230's immunity protections because doing so will plunge startups into legal uncertainty. Small businesses will otherwise lose the immunity protections that have allowed them to thrive and that has made "it easier for new platforms to start up." Holtz-Eakin, *The Section 230 Chronicles, Act I.* A contrary result circumvents the will of Congress, as the "goal of Congress's decision in enacting section 230 was that Internet companies would be encouraged to develop platforms that relied almost entirely on user-generated content without fear of liability for the content users posted." Brown, *Regulatory Goldilocks*, 8 TEX. A&M L. REV. at 462.

CONCLUSION

For these reasons, this Court should affirm the decision of the Court of Appeals that Section 230's immunity provision immunizes interactive service providers when the claim targets the provider's display of third-party content of potential interest to individual users.

Respectfully submitted,

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