Nos. 22-16914 & 22-16916

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: APPLE INC. APP STORE SIMULATED CASINO-STYLE GAMES LITIGATION

FRANK CUSTODERO et al.,
Plaintiffs-Appellees/Cross-Appellants,

v.

APPLE INC.,
Defendant-Appellant/Cross-Appellee.

On Cross-Appeals from the United States District Court
for the Northern District of California, D.C. No. 5:21-md-02985-EJD
Edward J. Davila, District Judge, Presiding

Brief of Amici Curiae Software & Information Industry Association and Marketplace Industry Association in Support of Apple Inc., Urging Reversal-in-Part and Affirmance-in-Part

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Rule 26.1 Disclosure

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* disclose the following:

Software & Information Industry Association has no parent corporation, and no publicly held company owns 10% or more of its stock.

Marketplace Industry Association has no parent corporation, and no publicly held company owns 10% or more of its stock.

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Interest of Amici Curiae

The Software & Information Industry Association ("SIIA") is the principal trade association for those in the business of information. SIIA's membership includes more than 500 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.

The Marketplace Industry Association (the "Association") is the first and only trade association representing technology-enabled marketplace platforms, also known as internet marketplaces, digital marketplaces, and app-based platforms. The mission of the Association is to represent, educate and advocate for the benefit of the digital marketplace industry, and to better serve those who exchange goods, services and property through such marketplaces. The Association represents a wide variety of digital marketplaces and app-based platforms transacting for a multitude of goods and services, including rideshare and delivery services, home services, used goods, childcare (babysitters and nannies), senior care, information technology support, coaching, and tutoring, among many others. In all, the Association's members have facilitated transactions for more than 300 million

customers and have provided economic opportunities for more than 60 million workers.

Amici have a substantial interest in these cross-appeals[1] because section 230 of the Communications Act of 1934[2], commonly called section 230 of the Communications Decency Act of 1996[3] (hereinafter, Section 230) has allowed *amici's* members to grow innovative businesses that have transformed and diversified the United States economy and society. They are concerned that Plaintiffs' theories of liability and the district court's narrowing of the broad immunity conferred by Section 230 would disrupt a wide range of technologies and harm the robust online commerce that Congress intended to protect and nurture by enacting Section 230. By this brief, *amici* seek to assist the Court by providing a broader context for understanding the real-world harms from rolling back an important immunity that protects the ecosystem of independent entrepreneurs and individuals.

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[1] This brief is being filed in three cross-appeals from district court proceedings where the defendants are, respectively, Meta Platforms, Inc., Apple Inc., and Google LLC. *See* Cross-Appeal Nos. 22-16888 & 22-16889, 22-16914 & 22-16916, 22-16921 & 22-16923. In Nos. 22-16888 & 22-16889, the docket identifies Meta Platforms by its former name, Facebook, Inc. In Nos. 22-16921 & 22-16923, Google Payment Corp. is also an appellant/cross-appellee.

[2] Pub. L. No. 104-104, tit. V, § 509, 110 Stat. 133, 137–39.

[3] *E.g., Gonzalez v. Google LLC,* 598 U.S. 617, 621 (2023) (preliminary print).

All parties have consented to the filing of this brief.

Statement

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. No person other than *amici,* its members, and its counsel contributed money that was intended to fund preparing or submitting this brief.[4]

Argument

1. The district court erred in failing to recognize that Section 230 precludes Plaintiffs' theory of liability based on payment processing, but correctly rejected Plaintiffs' other two theories of liability.

On the merits, *amici* agree with the legal positions advanced by the platforms.[5] In a single order addressing all three proceedings, the district court recognized that Section 230 "protects certain internet-based actors from certain kinds of lawsuits." Order 7 (quoting *Barnes v. Yahoo!, Inc.,* 570 F.3d 1096, 1099

[4] Counsel for *amici* understands "party's counsel" in Rule 29 to mean a party's counsel in the appeal, just as Rule 30's requirement of service on "counsel for each party" requires service on counsel in the appeal. *See* FED. R. APP. P. 29(c) & 30(a)(3). Rather than burden the Court with a motion for leave, however, in exchange for Plaintiffs' consent to the filing of this brief counsel for *amici* discloses that, in unrelated matters other than the cross-appeals and the proceedings below, it is counsel to Google, which is an appellant/cross-appellee in Nos. 22-16921 & 22-16923.

[5] *Amici* use the term "platforms" to refer collectively to Meta, Apple, and Google.

(9th Cir. 2009)).[6] *Barnes* provides a three-prong test for Section 230 immunity, requiring that the party seeking immunity be "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Id.* at 1100–01 (footnote omitted). The district court distilled three theories of liability from Plaintiffs' filings, based on (i) promoting social casino apps in the platforms' app stores; (ii) processing payments for the sale of virtual chips for those apps; and (iii) aiding social casino app makers in their efforts to increase user engagement and drive revenue. *See* Order 31–32.

The district court rejected the first theory of liability, based on promotion of the social casino apps. Order 32. The district court held that "the promotions of the social casino apps" by the platforms could not meaningfully be distinguished from the "recommendations and notifications" at issue in *Dyroff v. Ultimate Software Grp., Inc.,* 934 F.3d 1093 (9th Cir. 2019). Order 32. In *Dyroff,* this Court held that those recommendation and notification functions "helped facilitate" communications between users but "did not materially contribute . . . to the alleged unlawfulness of the content." 934 F.3d at 1099. *Amici* agree with the platforms that the

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[6] The district court's order appears in each platform's excerpts of record. Meta 1ER 2–38; Apple ER 3–39; Google 1ER 2–38. *Amici* cite the order using the district court's pagination.

district court correctly held that Section 230 precludes Plaintiffs from suing the platforms based on their promotion of social casino apps. Apple Br. 31–36; Google Br. 22–23.

The district court also rejected the third theory, based on aiding social casino app makers who sought to increase user engagement and drive revenue. Order 34–35. The district court held that the platforms at most acted as editors who "provid[e] edits or suggestions to a writer." *Id.* But "merely editing" content does not make a platform a content provider. *See Batzel v. Smith,* 333 F.3d 1018, 1031 (9th Cir. 2003). *Amici* agree with the platforms that this ruling, too, was correct. Apple Br. 37–39; Google Br. 23–24.

But the district court also concluded that Section 230 does not bar Plaintiffs' second theory of liability, based on the platforms' processing of payments for virtual chips that could be used in social casino apps. The district court reasoned that, with respect to this theory, "the requested relief is grounded in the Platforms' own bad acts, not in the content of the social casino apps that the Platforms display on their websites." Order 33.

In so holding, the district court relied on *HomeAway.com, Inc. v. City of Santa Monica,* 918 F.3d 676 (9th Cir. 2019). In *HomeAway*, this Court considered a Santa Monica municipal ordinance that prohibits rental hosting platforms from processing booking transactions for Santa Monica properties that are not listed as

licensed on a public city registry. *Id.* at 680. The Court held that the ordinance does not implicate Section 230's prohibition against treating a platform as the publisher of third-party information, because the ordinance does not require that the rental hosting platforms review any third-party information. *Id.* at 682. Instead, the rental hosting platforms need only review the address in a *request to complete a booking transaction* and compare that address to the *city registry,* which is not information that the rental hosting platforms host; reviewing the registry could not treat the rental hosting platforms as publishers because they have no "editorial control over the registry whatsoever." *Id.* at 683. The Court held that courts should examine "what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content." *Id.* at 682.

The presence of the governmental registry in *HomeAway* introduces an important real-world limiting principle to the carve-out from Section 230's immunity by conditioning intermediary liability on the presence of information that is unconnected to the platform. Unlike in *HomeAway,* where the rental hosting platforms could review a city registry to decide whether to process a given payment, here the platforms would need to review the social casino apps themselves—the platforms would need to monitor the *third-party information* that they host. Here, in contrast, there is no governmental registry that the platforms

can review to decide whether virtual chips are lawful. Here, under Plaintiff's legal theories, the legality of the virtual chips depends on the social casino apps.

The virtual chips are unlawful, if at all, only if the *social casino apps* are unlawful. Unlike in *HomeAway,* then, the legality of the conduct for which Plaintiffs seek to hold the platforms liable is derivative of third-party information that the platforms host. Necessarily, then, Plaintiffs seek to treat each platform as the "publisher" of "information provided by another information content provider." 47 U.S.C. § 230(c)(1). *Amici* agree with the platforms that the district court thus erred in rejecting the platforms' Section 230 defense with respect to payment processing. Meta Br. 45–56; Apple Br. 39–61; Google Br. 25–35. The sale of virtual chips is impossible to disentangle from the social casino apps themselves, and those apps are third-party content. Section 230 prohibits Plaintiffs' payment-processing theory of liability.

2. For online commerce, the ramifications of the district court's error are serious.

Were this Court to condone Plaintiffs' payment-processing theory of liability, the national market for information and software that its drafters envisioned would quickly fracture. Congress's intent in enacting Section 230 was to "preserve the vibrant and competitive free market" that already was beginning to flourish online. *See* 47 U.S.C. § 230(b)(2). The Communications Decency Act of

1996 was itself part of the Telecommunications Act of 1996, which was enacted to:

> provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . .

S. Rep. No. 104-230, at 1 (1996). Congress's plan worked; last year, online commerce in the United States crossed the $1 trillion mark. *US ecommerce in 2022 tops $1 trillion for the first time,* Digital Commerce 360 (Feb. 17, 2023), https://www.digitalcommerce360.com/article/us-ecommerce-sales/.

Section 230's protections are crucial to protecting online commerce because that commerce relies on many online intermediaries. Section 230's protections are designed to ensure that those intermediaries do not become all-purpose defendants in lawsuits based on alleged wrongdoing by third parties. All internet communications travel as "data packets" that flow through hardware "routers" operated by intermediaries that power the "backbone" of the internet. *See* David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act,* 43 LOY. L.A. L. REV. 373, 385–87 (2010). Routing that traffic itself implicates other intermediaries. For example, human-friendly domain names, like www.ca9.uscourts.gov, must be converted by a "domain name system" server (operated by another service provider) into numeric addresses like 18.239.199.24. *See id.* at 385–86. And much

of the information that users access online is stored on servers operated by content hosts—including the platforms here, but also including many others—acting on behalf of third parties that author and provide that information. *See id.* at 386. Along the way, information can be handed off from one intermediary to another, like a "bucket-brigade partnership in which network neighbors pass along each other's packets for perhaps ten, twenty, or even thirty hops between two points." JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 33 (2008). And payment processors are yet another example of intermediaries needed to power ecommerce. *See Perfect 10, Inc. v. Visa Int'l Serv. Ass'n,* 494 F.3d 788, 794 (9th Cir. 2007) (discussing "financial institutions that process certain credit card payments" for websites); *see also id.* at 798 (holding that payment processing is not a material contribution for purposes of contributory copyright infringement).

Online commerce depends on all these online intermediaries—which means that any of them can block the flow of information that is crucial to ecommerce. *See* Ardia, 43 LOY. L.A. L. REV. at 389–92. If they could be held liable for third-party information, these intermediaries could become attractive defendants because allegedly tortious behavior of many third parties could be aggregated in a single lawsuit, which means an intermediary would risk becoming a one-stop-shopping defendant for the alleged ills of all the third parties whose online existence depend on that intermediary. If that were the legal regime applicable to the online world,

anyone wanting to post content on the internet would need to convince intermediaries that hosting, transmitting, and indexing that content would be worth the risk of being sued over it. And in the context of copyright claims—which are outside the ambit of Section 230, 47 U.S.C. § 230(e)(2)—researchers have reported that most intermediaries act "conservatively in order to avoid liability, opting to take down content even when they are uncertain about the strength of the underlying claim," and that they "uniformly described their conservatism as a result of necessarily prioritizing avoiding liability over taking risks that might protect expression." Jennifer M. Urban, Joe Karaganis & Briana L. Schofield, *Notice and Takedown in Everyday Practice* 41 (U.C. Berkeley Pub. L. Rsrch. Paper No. 2755628 v.2, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2755628. Individuals and small businesses would be particularly hard hit, because they would have little leverage to convince intermediaries that allowing their speech would be worth the associated risks.

Congress made a different choice. Congress recognized the "extraordinary advance" of "[t]he rapidly developing array of Internet and other interactive computer services available to individual Americans . . . ." 47 U.S.C. § 230(a)(1). Congress realized that online intermediaries "offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Id.* § 230(a)(3). And Congress found that "a

minimum of government regulation" was crucial to allow these services to flourish. *Id.* § 230(a)(4). Section 230 thus reflects the policy of the United States "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).

If Plaintiffs are correct that the social casino apps are unlawful, Section 230 makes the app makers the proper defendants—not the intermediaries that provide the same neutral tools not just to the social casino app makers, but also to millions of other app makers. And if virtual chips are unlawful, that is only because of the social casino apps in which those chips can be used. The legality or illegality of those chips thus is inextricably intertwined with third-party information. Section 230 does not allow the platforms to be treated as the publishers of the social casino apps—and neither does it allow them to be treated as the publishers of virtual chips[7] that allegedly are unlawful because of how those chips can be used in the social casino apps. *See id.* § 230(c)(1).

This Court's decision in *HomeAway* recognized that regulation of a platform in a way that is, at most, tenuously connected to third-party information does not necessarily treat the platform as the publisher of the third-party information. If the

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[7] The virtual chips are themselves third-party information. *See* Meta Br. 31; Apple Br. 43; Google Br. 29.

legality of a platform's conduct is wholly independent of the legality of third-party information, *HomeAway* holds that Section 230 does not apply. The district court, however, failed to recognize that Plaintiffs have not alleged that payment processing for the virtual chips is unlawful in some manner *independent from the third-party social casino apps.*

The district court's payment processing ruling thus misapplied *HomeAway* and threatens to upend Congress's careful policy decisions, as reflected in Section 230. On that issue, its holding should be reversed. Section 230 bars Plaintiffs' claims in their entirety.

Conclusion

Amici urge the Court to *reverse* the district court to the extent that it denied dismissal of Plaintiffs' claims, to *affirm* to the extent that it dismissed them, and to direct the district court to dismiss Plaintiffs' complaints.

Respectfully submitted,

July 31, 2023

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FOR THE NINTH CIRCUIT

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