No. 18-1041

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HEATHER R. OBERDORF and
MICHAEL A. OBERDORF, her husband,
Plaintiffs-Appellants,

v.

AMAZON.COM, INC., a Washington Corporation,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
No. 4:16-cv-01127-MWB (Hon. Matthew W. Brann)

BRIEF OF AMICI CURIAE THE INTERNET ASSOCIATION, THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, AND TECHNET IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a) and Third Circuit Local Appellate Rule 26.1, Amici Curiae the Internet Association, the Computer & Communications Industry Association, and TechNet are not publicly held corporations and do not have parent corporations. No publicly traded corporation owns ten percent or more of their stock.

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STATEMENT OF AMICI CURIAE[1]

The Internet Association represents the interests of leading Internet and technology companies and their customers. Its members include companies such as Airbnb, eBay, Facebook, Google, LinkedIn, Microsoft, Snap, Twitter, and Uber.[2] It seeks to protect internet freedom, promote innovation and economic growth, and empower customers and users.

The Computer & Communications Industry Association ("CCIA") is an international non-profit trade association representing technology product and service providers of all sizes, including hardware and software, electronic commerce, telecommunications and Internet products and services—companies that collectively generate more than $500 billion in annual revenues.[3]

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes 83 dynamic American businesses ranging from startups to

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[1] No party, no counsel for a party, and no person other than Amici or their counsel authored this brief in whole or in part. Although Amazon is a member of each of the three Amici organizations, neither it nor its counsel, nor anyone other than Amici or another member of an Amicus made any monetary contribution intended to fund the preparation or submission of this brief.

[2] A list of Internet Association members is available at http://internet association.org/our-members/.

[3] A list of CCIA members is available at http://www.ccianet.org/members/.

the most iconic companies on the planet and represents over three million employees and countless customers in the fields of information technology, e-commerce, the sharing and gig economies, advanced energy, cybersecurity, venture capital, and finance.[4]

Amici and their members have a substantial interest in the legal rules governing whether providers of interactive computer services may be subjected to lawsuits for alleged harms resulting from online exchanges of information. Because Amici's members serve as platforms for communications and services among billions of users, their members have been, and will continue to be, parties to lawsuits in which they invoke immunity under Section 230 of the Communications Decency Act, 47 U.S.C. § 230(c)(1). The success of these online businesses—and the vitality of online media and online free speech generally—depends on their being shielded from the risks, burdens, and uncertainty of lawsuits that may hold them liable for hosting or facilitating online exchanges of third-party information and products.

Amici and their members rely on the settled interpretation of 47 U.S.C. § 230(c)(1) granting broad immunity to online intermediaries for harms arising from third-party content, including, in this case, listings posted by third-parties

[4] A list of TechNet members is available at http://technet.org/membership/members.

seeking to sell their products through an online marketplace. The robustness of this immunity has been recognized by courts across the country, but the panel's decision threatens to undermine this settled interpretation. If allowed to stand, the decision would contravene Congress's policy choices and introduce substantial uncertainty to a law that has been crucial to the growth and success of the internet industry, and has become a prerequisite for the provision of services upon which the public has come to rely.

SUMMARY OF ARGUMENT

Amici urge reconsideration of the panel's decision to the extent it denied Section 230 immunity to Amazon. Plaintiffs seek to impose liability on Amazon for an allegedly unsafe product that they purchased from a third-party seller through Amazon's online marketplace. Amazon did not manufacture, own, ship, possess, or even touch the product. But according to the panel majority, Amazon may be held liable because it did not remove the third-party listing for the product from its website. Op. 16, 18 & n.35. That holding conflicts with other decisions of this Circuit and elsewhere, which recognize that Section 230 protects against precisely such a claim: one that would impose liability on a website operator "for decisions relating to the monitoring, screening, and deletion of [third-party] content from its network." *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003).

The panel's novel and erroneous interpretation of Section 230 threatens to chill the creation and growth of innovative online services, open the door to litigation against online providers in a wide range of circumstances, undermine the development of e-commerce, and harm the U.S. economy. Amazon's rehearing petition should be granted.

ARGUMENT

I. THE PANEL INCORRECTLY INTERPRETED SECTION 230

In *Green v. America Online*, this Court held that Section 230 "precludes courts from entertaining claims that would place a computer service provider in a publisher's role." 318 F.3d 465, 471 (3d Cir. 2003) (citations omitted). Section 230 therefore bars claims that seek to impose liability on an online service provider, like Amazon, "'for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter [third-party] content.'" *Id.*

The theory of liability adopted by the panel majority would do exactly what *Green* forbids. Again and again, the majority opinion points to Amazon's editorial choices regarding third-party content to establish that Amazon is a "seller" under Pennsylvania law—including Amazon's decision to require third-party sellers to communicate with customers through the platform, Op. 14-15 & n.21, 23, and Amazon's collection and display of customer ratings about third-party products, *id.*

at 18, 23. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1271 (9th Cir. 2016) (applying Section 230 to platform's rating system); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 718 (Ct. App. 2002) (same).

Most fundamentally, the majority opinion repeatedly emphasizes that the manner in which Amazon can and should prevent third-parties from selling defective products is to monitor and refuse to publish their product listings. Op. 15-16, 18. The panel here correctly concluded that imposing liability on Amazon for inadequately warning customers about defective products would impermissibly intrude on "the publisher's function." *Id.* at 32-33; *see also id*. at 25 n.13 (Dissent Op.). But the majority's analysis of why Amazon should be deemed a "seller" of products that it did not manufacture, ship, or ever possess makes clear that its "seller" theory would likewise impose liability on Amazon for quintessential editorial decisions—those "relating to the monitoring, screening, and deletion of content from [Amazon's] network." *Green*, 318 F.3d at 471.

The panel sought to distinguish *Green* on the ground that Amazon's "involvement in transactions extends beyond a mere editorial function." Op. 32. But the activities that the panel identified do not strip Amazon of Section 230 immunity.

The first activity—"receiving customer shipping information"—is the kind of activity that online providers routinely perform without losing protection.

Dating websites, classified pages, housing sites, and social media platforms all solicit contact information from their users to connect them with other users. Indeed, gathering and retransmitting this sort of third-party information has long been recognized as protected publishing conduct. *See, e.g.*, *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

The only other set of activities that the panel highlighted all relate to payments that Amazon collects in connection with third-party listings. *See* Op. 32 ("processing customer payments, relaying funds and information to third-party vendors, and collecting the fees [Amazon] charges for providing these services"). But again, all manner of online platforms receive and/or disburse funds in connection with third-party content. Websites, for example, charge fees to run ads and classified listings, or for access to prospective job applicants and matchmaking services. And online platforms regularly pay third-parties to create or license content. *E.g.*, *Blumenthal v. Drudge*, 992 F. Supp. 44, 52 (D.D.C. 1998). Accepting or making such payments does not deprive a website of Section 230 immunity for publishing third-party content. *See Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1161, 1174-1175 (9th Cir. 2008) (en banc) (that defendant website derived "revenue from advertisers and subscribers" did not affect its immunity).

In sum, none of the activities identified by the panel are relevant to Amazon's Section 230 defense. At bottom, Plaintiffs' claims are premised on Amazon's alleged failure to remove third-party listings from its site and thus are barred by Section 230.

II. THE PANEL'S DECISION CONFLICTS WITH DECISIONS GRANTING IMMUNITY TO ONLINE MARKETPLACES

In rejecting Section 230 immunity, the panel broke with numerous other federal and state courts that have upheld immunity for websites that provide an online marketplace for third-party sellers.

In *Inman v. Technicolor USA, Inc.*, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011), for example, a district court in this Circuit dismissed claims nearly identical to those asserted here based on Section 230. The plaintiff in *Inman* asserted products liability and negligence claims against eBay based on allegations that he had suffered mercury poisoning from defective vacuum tubes purchased through the eBay site. *Id*. at *1. The plaintiff's allegations—like those here—established that eBay provided "an online forum where [third-party] sellers … may peddle their wares." *Id.* at *6. Relying on *Green*, the court held that Section 230 barred plaintiff's theory that "the alleged sale of vacuum tubes … was facilitated by communication" by a third-party seller through eBay's site—that is, the third-party's offer to sell defective vacuum tubes. *Id*. at *7.

The California Court of Appeal reached a similar conclusion in *Gentry*, 121 Cal. Rptr. 2d 703. The plaintiffs in *Gentry* sued eBay for failing to furnish a certificate of authenticity when they purchased fraudulently autographed sports collectibles from third-party sellers through eBay's site. eBay charged a "placement fee" when listing an item and "success fees" upon a sale. *Id.* at 708. Unlike the panel here, however, the court in *Gentry* held that Section 230 barred claims arising from third-party sales consummated through eBay's site. As *Gentry* explained, such claims must be dismissed because they "ultimately seek to hold eBay responsible for conduct falling within the reach of section 230, namely eBay's dissemination of representations made by [third-party sellers]" about their products. *Id.* at 715.

The North Carolina Court of Appeals likewise upheld Section 230 immunity in *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012). The plaintiff in *Hill* sued StubHub, the operator of an online ticket marketplace, for allegedly violating a state law regulating ticket prices. Much like Amazon, StubHub "serve[d] as an intermediary between buyers and [third-party] sellers in order to facilitate transactions," including by processing payments, helping to ship products, and charging fees for its services to both the buyer and seller. *Id.* at 552. Unlike the panel here, however, the *Hill* court barred the claims against StubHub under Section 230, recognizing that the claims were "predicated on the theory that

[StubHub] should be held responsible for content" that originated with third-party sellers (namely, the listing of a ticket price substantially above face value). *Id.* at 557.

The court reached much the same conclusion in *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097 (C.D. Cal. 2017), *appeal dismissed*, 2018 WL 7141208 (9th Cir. Dec. 17, 2018). In *La Park La Brea*, apartment owners and operators sued Airbnb, asserting state law claims based on allegations that tenants who used the Airbnb platform had violated their lease agreements by renting out the plaintiffs' properties. The plaintiffs sought to avoid Section 230 on the ground that Airbnb received payments for its services, required certain information to be included in listings, and offered other ancillary services. *Id.* at 1104. But "the mere fact that Airbnb's conduct 'includes more than posting listings' does not *per se* mean that section 230 immunity is unavailable." *Id.* Because the third-parties "who use Airbnb's website have complete control over the content at issue"—the "listing [of] rentals in violation of [plaintiff's] leases"—the court held that Section 230 barred plaintiffs' claims. *Id.* at 1107.

Numerous other courts have similarly invoked Section 230 immunity to bar claims that seek to impose liability against the operator of an online marketplace for facilitating third-party sales. *See Stiner v. Amazon.com, Inc.*, 2017 WL 9751163, at *14 (Ohio Com. Pl. Sept. 20, 2017) (dismissing products liability

claim against Amazon based on allegations that plaintiff's son had ingested a fatal dose of caffeine powder purchased from a third-party seller through Amazon), *aff'd*, 120 N.E.3d 885 (Ohio Ct. App. 2019); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 686-687 (S.D. Miss. 2014) (finding eBay immune for harms from a defective product because eBay did not originate the product and imposing liability would treat eBay as a publisher); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (dismissing claim by a plaintiff shot by a handgun sold on Craigslist because "Plaintiff seeks to hold Defendant liable for its alleged failure to block, screen, or otherwise prevent the dissemination of a third party's content"); *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 726 (Wis. 2019) (dismissing claims by the child of a firearms victim against an online firearms marketplace because the allegations were that "Armslist provided an online forum for third-party content and failed to adequately monitor that content[,] … [which] is precisely the type of claim that is prohibited by § 230(c)(1), no matter how artfully pled."); *Stoner v. eBay, Inc*., 2000 WL 1705637, at *1 (Cal. Super. Ct. Nov. 1, 2000) (finding eBay immune under Section 230 for claims concerning "bootleg" audio recordings sold by third-parties through the eBay site); *MDA City Apartments, LLC v. Airbnb, Inc.*, 2018 WL 910831, at *14 (Ill. Cir. Ct. Feb. 14, 2018) (Airbnb's "processing payments and transactions in connection with listings created by third parties" does not remove Section 230 immunity).

As the foregoing demonstrates, the panel's decision to deny Section 230 immunity in this case is out of step with decisions by both federal and state courts across the country.

III. THE PANEL DECISION WOULD HAVE FAR-REACHING NEGATIVE EFFECTS ON AMICI'S MEMBERS, OTHER PROVIDERS OF INTERACTIVE COMPUTER SERVICES, AND THE U.S. ECONOMY

In addition to conflicting with settled precedent, the panel's decision also conflicts with Congress' intent in passing Section 230 and, if left standing, would threaten serious harms not only for Amazon, but for myriad other internet companies, small businesses, consumers, and the U.S. economy. Among Congress's "primary reasons" for enacting Section 230 was "to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). Congress sought to encourage "the continued development of the Internet and other interactive computer services and other interactive media" and 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)(1)-(2). Congress feared that if such laws and regulations were applied to online intermediaries based upon the huge quantities of third-party content they host and transmit, it would cripple their growth. *See Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1163 (N.D. Cal. 2017) (Congress sought to further "e-commerce interests on the Internet[.]"); *Jurin v. Google Inc.*,

695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) ("The purpose of the CDA is to encourage open, robust, and creative use of the internet.").

Section 230's protections have spurred dramatic growth in the internet and e-commerce since 1996, just as Congress intended.[5] The wealth of opportunities unleashed by online platforms have driven down the cost of matching buyers and sellers.[6] Low barriers to entry have enabled small businesses and individuals from all walks of life to participate in new markets, without the need to raise or invest significant capital.[7] The benefits of these advances have been felt far and wide: As home to the largest technology companies in the world, the internet economy

[5] *See, e.g.*, Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, Washington Post (Aug. 27, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/ ("Virtually every successful online venture that emerged after 1996 … relies in large part (or entirely) on content provided by their users, who number in the hundreds of millions, or billions …. I fail to see how any of these companies, or the thousands more like them, would exist without Section 230 …. [I]t is impossible for me to imagine, say, an investor providing funds for any of these ventures in a world without Section 230.").

[6] *See* Organisation for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries* 6-8 (Apr. 2010), https://www.oecd.org/internet/ieconomy/44949023.pdf.

[7] *See* Skorup & Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation* 35, Mercatus Center (July 2019), https://www.mercatus.org/system/files/skorup-publisher-liability-mercatus-working-paper-v1.pdf.

has provided jobs and driven GDP growth in the United States.[8] Quite simply, "Section 230 has helped make the United States the center of the world for innovation in information technology."[9]

By misconstruing the scope of Section 230's protections, the panel's decision threatens to undermine these economic benefits. Faced with costly litigation and potential liability, service providers like Amazon would be pressed to simply stop allowing third-parties to offer products through their sites or otherwise reduce services. Innovative entrepreneurs, investors, and computer programmers would be deterred from founding companies and developing services that benefit the public. Indeed, a recent study found that weakening intermediary protections,

[8] *See* DePillis, *Technology helped America's economy way more than we thought*, CNN Business (Aug. 3, 2018), https://money.cnn.com/2018/08/03/news/economy/gdp-economic-growth-technology/index.html; National Telecommunications and Information Administration, *Initial Estimates Show Digital Economy Accounted for 6.5 Percent of GDP in 2016* (Mar. 15, 2018), https://www.ntia.doc.gov/blog/2018/initial-estimates-show-digital-economy-accounted-65-percent-gdp-2016 ("Goods and services that are primarily digital accounted for 6.5 percent of the U.S. economy, or $1.2 trillion, in 2016[.] … From 2006 to 2016, the digital economy grew at an average annual rate of 5.6 percent, outpacing overall U.S. economic growth of 1.5 percent per year. In 2016, the digital economy supported 5.9 million jobs, or 3.9 percent of total U.S. employment. Digital economy employees earned $114,275 in average annual compensation compared with $66,498 per worker for the total U.S. economy.").

[9] Skorup & Huddleston, *Should Big Tech be held more liable for the content on their platforms? An AEIdeas online symposium*, American Enterprise Institute (Mar. 20, 2018), http://www.aei.org/publication/should-big-tech-be-held-more-liable-an-aeideas-online-symposium/.

like Section 230, would significantly reduce economic activity, and cause the U.S. economy to lose 4.25 million jobs and $440 billion in GDP over 10 years.[10] Additionally, the threat of liability that the panel's novel decision would impose could force internet service providers and websites to block user-generated content to reduce risk, leading to a less open and collaborative internet.[11] The negative consequences from the decision would thus impose significant costs on individuals and the U.S. economy far beyond that parties to this litigation.

CONCLUSION

For the foregoing reasons, the Court should grant en banc rehearing.

Respectfully submitted,

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[10] Dippon, *Economic Value of Internet Intermediaries and the Role of Liability Protections* 2, NERA Economic Consulting (June 5, 2017), https://cdn1.internetassociation.org/wp-content/uploads/2017/06/Economic-Value-of-Internet-Intermediaries-the-Role-of-Liability-Protections.pdf.

[11] *Id*.

CERTIFICATE OF BAR MEMBERSHIP

In accordance with Local Rule of Appellate Procedure 28.3(d), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Patrick J. Carome
PATRICK J. CAROME

July 24, 2019

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and 32(a)(7)(B). The brief contains 2,580 words, excluding the parts of the brief exempted by the rules, as provided in Fed. R. App. P. 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in font size 14 Times New Roman.

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/s/ Patrick J. Carome
PATRICK J. CAROME

July 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2019, I electronically filed the foregoing with the Clerk using the appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Patrick J. Carome
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