EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 22-2621

G.G. and DEANNA ROSE,

Plaintiffs-Appellants,

v.

SALESFORCE.COM, INC.,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the Northern District of Illinois
Case No. 1:20-CV-2335 | Hon. Andrea R. Wood

BRIEF OF NETCHOICE LLC AND CHAMBER OF PROGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT AND CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

NetChoice LLC, d/b/a NetChoice, is a nonprofit entity organized under Section 501(c) of the Internal Revenue Code created in and existing under the laws of the District of Columbia. No publicly held company owns 10 percent or more of NetChoice.

Chamber of Progress is a nonprofit entity organized under Section 501(c) of the Internal Revenue Code created in and existing under the laws of Virginia. No publicly held company owns 10 percent or more of Chamber of Progress.

Amici curiae have not appeared earlier in this case. *Amici* are represented by the law firm Davis Wright Tremaine LLP.

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-2621

Short Caption: G.G. v. Salesforce.com, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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NetChoice LLC, d/b/a NetChoice; Chamber of Progress

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Davis Wright Tremaine LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

Not applicable

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

No publicly held company has 10 percent or greater ownership in either NetChoice or Chamber of Progress.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

Not applicable

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Not applicable

Attorney's Signature: /s/ David M. Gossett Date: August 23, 2023

Attorney's Printed Name: David M. Gossett

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Not applicable

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Not applicable

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Attorney's Printed Name: Adam Sieff

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Not applicable

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INTEREST OF THE *AMICI*

Amici have a strong interest in cases, like this one, that would limit the exercise of free speech on the internet.

NetChoice is a national trade association of online businesses that works to protect free expression and promote free enterprise. Toward those ends, NetChoice is engaged in litigation, *amicus* work, and political advocacy to ensure the internet stays innovative and free. NetChoice is currently litigating five cases challenging state laws that chill free speech or stifle commerce online.

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 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, to promote innovation and economic growth, and to empower technology customers and users. [1]

[1] This brief is accompanied by a motion under FRAP 20(b)(2). No party or party's counsel authored the brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief, and no person–other than *amici*, their members, or their counsel–contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Rehearing is warranted because the panel's decision conflicts with Section 230 of the Communications Decency Act, 47 U.S.C. § 230, weakens the First Amendment protection against collateral censorship that Section 230 codified, creates a circuit split over the scope of Section 230 immunity, and threatens the viability of upstream businesses that supply services to online publishers.[2]

Section 230 immunizes online intermediaries from liability for the third-party speech they publish. The law extends beyond end-publishers to providers of software and other services that support publication, like payment processors, cloud services, and customer relationship management tools. Ignoring Section 230's text and purpose, the panel majority incorrectly concluded Section 230 does not apply to Salesforce, a service that provides online publishers that sort of software. This creates a circuit split with the Second and Ninth Circuits and invites lawsuits against upstream software providers—threatening the continued publication of third-party content online.

Rehearing is warranted.

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[2] *Amici* address only the Section 230 issue, which is case-dispositive.

ARGUMENT

I. Section 230 Extends to Services That Support Publication.

Section 230's protections apply to entities that support and enable publication of third-party content—both to achieve the statute's purpose to promote speech, and because it expressly applies to "access software providers" that provide "enabling tools," like "client or server software," allowing websites to "organize" "analyze" and "display" "content." 47 U.S.C. § 230(f)(4).

A. Section 230 Reinforces First Amendment Protections Against Collateral Censorship.

Long before the internet, the Supreme Court recognized that imposing liability on those who merely provide forums for speech also threatens the rights of speakers and readers who depend on those forums to share their messages. In *Smith v. California*, 361 U.S. 147 (1959), for example, the Court held invalid a law making booksellers strictly liable for selling "obscene" books because the law compelled bookstores to self-censor. The Court similarly rejected Rhode Island's bookseller-liability laws in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). And it sustained cable programmers' First Amendment challenge to laws requiring cable operators to segregate and block certain sexual content.

Denver Area Educ. Telecomms. Consortium v. F.C.C., 518 U.S. 727 (1996).

The laws invalidated in these cases enabled audiences to "censor[]" speech by threatening the intermediaries hosting it with a "heckler's veto," *Reno v. ACLU*, 521 U.S. 844, 880 (1997), a form of "collateral censorship." Because intermediaries must often respond to complaints by deleting speech or eliminating a forum, *id.*, collateral censorship from a heckler's veto silences *all* speakers who rely on intermediaries. "Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them." *McConnell v. F.E.C.*, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part). Censors from time immemorial have thus targeted intermediaries.

Such targeting also leads to self-censorship. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court stressed the risk that intermediary liability "would discourage" publishers "from carrying" controversial content and thus "shut off an important outlet for the

promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266.

B. Congress Enacted Section 230(c)(1) to Address the Aggravated Risks of Intermediary Liability Online.

Section 230 reinforces First Amendment values in the face of online intermediaries' particular susceptibility to collateral censorship by seeking to "promote rather than chill internet speech." *Bennett v. Google, LLC*, 882 F.3d 1163, 1166 (D.C. Cir. 2018). Stating "[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), the law "protects against the 'heckler's veto' that would chill free speech" online by enacting a prophylactic statutory "immunity" that "shields" intermediaries from having to either "remove the content" complained about "or face litigation costs and potential liability," *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 407-08 (6th Cir. 2014).

Because "fight[ing] costly and protracted legal battles" is enough to chill speech irrespective of "ultimate liability," *Fair Hous. Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc), most circuits hold that Section 230 provides "an

immunity from suit" intended to cut off litigation at the start, "rather than a mere defense to liability." *Jones*, 755 F.3d at 408, 417 (citing cases); *accord, e.g.*, *Force v. Facebook, Inc.*, 934 F.3d 53, 63 n.15 (2d Cir. 2019) (citing cases). As Judge Wilkinson explained in *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997), "Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect."

Section 230 thus bolsters First Amendment principles by establishing "incentives to protect lawful speech" from the unique vulnerability that internet intermediaries face. *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007).

C. Section 230's Protections Extend to Software Services That Support the Publication of Third-Party Content.

Section 230's protections would be toothless if intermediaries could be inhibited from publishing speech through the imposition of liability for that speech on their upstream service providers. Congress accordingly codified protection for back-end service providers, drafting Section 230 to protect not just the end-publishers that display content, but also "access software providers" that provide specified "enabling tools" for that display. 47 U.S.C. § 230(f)(4). The Second and Ninth Circuits recognized

this when they held, in *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 27-28 (2d Cir. 2015) and *Rigsby v. GoDaddy Inc.*, 59 F.4th 998, 1007-09 (9th Cir. 2023), that Section 230(c)(1) shielded the domain name registrar and web hosting company, GoDaddy, from suit based on content published by its website clients. *See also Jones*, 755 F.3d at 406 n.2 (upstream services like "broadband providers" and "hosting companies" may invoke Section 230's immunity).

Protection for upstream service providers guards against the collateral censorship Section 230 was enacted to prevent. Just as the First Amendment applies throughout the "speech process," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336-37 (2010)—barring, for instance, a tax on ink and paper, *see Minneapolis Star & Trib. Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983)—so does Section 230 apply to services that enable their customers to publish third-party content. *See* Jonathan Peters & Brett Johnson, *Conceptualizing Private Governance in a Networked Society*, 18 N.C. J. L. & TECH. 15, 43 (2016) ("upstream provider[s]" that "transfer data from [a] client to [a] server" present "chokepoint threats" for collateral censorship). In short, applying

Section 230 to back-end "access software providers" is supported by Section 230's text and purpose.

II. Section 230 Bars Plaintiffs' Claim Against Salesforce.

The panel erred by not affirming the district court's dismissal of plaintiffs' claims under Section 230(c)(1)—and in so doing, split with the Second and Ninth Circuits' decisions in *Ricci* and *Rigsby*.

Section 230 immunity expressly encompasses "access software providers" that provide "enabling tools" that aid the publication of content. 47 U.S.C. § 230(f)(4). The statute therefore bars lawsuits targeting software providers, even though they do not display the content that gives rise to the claim. *See, e.g.*, *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1175-76 (9th Cir. 2009) (rejecting contention that Section 230 protects a defendant "only if it enables people to access the Internet or access content found on the Internet"); *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, 2011 WL 900096, at *7 (D.N.J. Mar. 15, 2011) (Section 230 barred suit against Microsoft for providing filtering software allegedly used to remove third-party content).

Salesforce is an "access software provider" alleged to provide "client or server software" to websites to support their publication of speech,

47 U.S.C. § 230(f)(4). It therefore qualifies as an "interactive computer service," *Id.* § 230(f)(2), capable of invoking the immunity established in Section 230(c)(1). *See Does #1-50 v. Salesforce.com, Inc.*, 2021 WL 6143093, at *5-6 (Cal. Ct. App. Dec. 30, 2021) (applying Section 230 to bar identical suit against Salesforce).

The panel majority declined to assess this element of the Section 230 analysis, Op. 38-39, leading it to overlook that Section 230 applies not just to the end-publishers of third-party content, but also providers—like Salesforce—that supply software *to those publishers*. Contrary to the majority's conclusion, plaintiffs' claim treats Salesforce as a publisher of third-party content it did not create (personal ads on Backpage.com) by seeking to hold Salesforce liable for enabling its client to publish that content. Failing to recognize that a supplier like Salesforce qualifies as an "interactive computer service" under 47 U.S.C. § 230(f)(4), the majority interpreted the "publisher" element too narrowly as requiring Salesforce to have "published" or "spoken." Op. 39. The panel should have decided whether Salesforce is an interactive computer service despite supplying back-end software, *see Zango*, 568 F.3d at 1175-76, as that question bears on whether Salesforce is "treated" as a publisher.

"Treat[ing]" an entity as the publisher of content does not mean the entity must have actually displayed that content. *See Rigsby*, 59 F.4th at 1008 (Section 230 shielded webhost from "publisher liability" even though another party posted content); *Ricci*, 781 F.3d at 27-28 (same). What matters is "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (cleaned up). Here, Salesforce's alleged duty was to prevent Backpage from publishing ads by withholding services enabling Backpage to publish them. That duty implicates Salesforce's role in the publication process. *See, e.g.*, *Wiand v. ATC Brokers Ltd.*, 2022 WL 19336431, at *8-9 (M.D. Fla. Sept. 27, 2022) (Section 230(c)(1) barred suit against "software suite" provider that permitted clients to "perform back-office tasks" and "generate[]" the allegedly harmful content.).

The majority relies on *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016), stressing that "[p]ublishing activity was 'a but-for cause of just about everything' Backpage was involved in," suggesting that a ruling for Salesforce would foreclose virtually any secondary-liability claim against any defendant alleged to have provided services to an

intermediary. Op. 41. *Internet Brands*, however, did not hold Section 230 only bars claims targeting the final act of publication. Rather, the court held Section 230 inapplicable because the defendant had actual knowledge "from an outside source" that the "two individuals" who assaulted the plaintiff had "been criminally charged" for using its site to "lure" others into danger. 824 F.3d at 848-49. The court held Section 230 did not bar the plaintiff's claims because the website's alleged tort duty stemmed from its actual knowledge of a specific threat, not its duty to prevent or cause the publication of content. *Id.* at 850-51. It never held *only* end-publishers can claim Section 230's protections, and the Ninth Circuit's decisions in *Zango*, 568 F.3d at 1175-76, and *Rigsby*, 59 F.4th at 1008, make clear that is not the case.

In fact, contra the panel's concerns about unbounded immunity, Op. 41, applying Section 230 to bar claims against back-end providers like Salesforce *does not* foreclose relief against suppliers who provide services to internet publishers. Well-pled claims can still be pursued against providers for violating duties independent of any obligation to prevent or cause the publication of content, *Internet Brands*, 824 F.3d at 848-49, as well as providers who "assisted in the development of what made the

content unlawful." *F.T.C. v. LeadClick Media, LLC*, 838 F.3d 158, 174 (2d Cir. 2016). The statutory text further limits Section 230's upstream protections only to qualifying "access software providers," 47 U.S.C. § 230(f)(4), whose "development" of inputs for "interactive computer services and other interactive media" Congress declared important enough to "promote." 47 U.S.C. § 230(b)(1).

The panel decision undermines congressional policy, including the policy enacted by FOSTA's amendments to Section 230. *Cf.* Op. 40 n.24. Yielding to First Amendment protections for publication of third-party speech, FOSTA created a narrow exception: permitting 18 U.S.C. § 1595 claims *only if* they meet the heightened criminal scienter requirements of 18 U.S.C. § 1591. And the legislation, which originally would have exempted all Section 1595 claims, was amended to add a "knowing standard" to deter "a deluge of frivolous litigation targeting legitimate, law-abiding intermediaries." *Does 1-6 v. Reddit, Inc.*, 51 F.4th 1137, 1144 (9th Cir. 2022) (quoting legislative record).

The majority blows past that limitation. Its decision permits non-FOSTA Section 1595 claims (like plaintiffs') to lie against upstream service providers (like Salesforce) when their publisher-clients would

enjoy Section 230 protection against those same claims, generating the collateral censorial effects Congress sought to avert. *See id.* at 1145 (ordinary Section 1595 claim not exempt from Section 230); *Woodhull Freedom Found. v. United States*, 72 F.4th 1286, 1304 n.6 (D.C. Cir. 2023) (same). And the majority would permit these ordinary Section 1595 claims to proceed against a wide range of innocent providers Congress specifically amended FOSTA to protect.

III. Failure to Bar Plaintiffs' Claim Would Invite Collateral Censorship.

The panel decision would have far-reaching consequences for protected speech. Failing to apply Section 230's protections here would open the floodgates to lawsuits against services that provide inputs into online speech, inhibiting the publication of speech online through the very sort of collateral censorship Section 230 exists to prevent.

Salesforce provides software to hundreds of thousands of clients, including content-based platforms like Spotify, NBCUniversal, and the *Financial Times*. *See* www.salesforce.com/customer-success-stories/#stories. Exposing Salesforce to liability in lawsuits like this one would require the company to vet every entity they contract with, and may lead it to stop doing business with websites whose content could lead to

liability—even where the websites would be protected by Section 230 immunity. Multiplied by the countless software vendors and internet services that work with digital media platforms, these chilling effects would weaken the infrastructure digital media companies rely on to host content. "[U]pstream censorship can silence not only the targeted user but also hundreds or even thousands of uninvolved websites and users." *Free Speech, Upstream Providers*, Elec. Frontier Found., www.eff.org/free-speech-weak-link#upstream.

Congress enacted Section 230 to avoid this result. Allowing the panel's decision to stand would turn the statute on its head.

CONCLUSION

The Court should grant rehearing.

Respectfully submitted.

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August 24, 2023

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief of *amici curiae*:

Complies with the type volume limitation of Circuit Rule 29(b)(4) because it contains 2,592 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as calculated by the word-processing system used to prepare the brief; and

Complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it is proportionally spaced in Century Schoolbook 14-point type.

Dated: August 24, 2023

/s/ David M. Gossett
David M. Gossett

CERTIFICATE OF SERVICE

I certify that on August 24, 2023, I filed the foregoing brief with the Clerk of the Court of for the United States Court of Appeals for the Seventh Circuit through the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 24, 2023

/s/ David M. Gossett
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