Case Nos. 18-55367, 18-55805, 28-55806

In the United States Court of Appeals for the Ninth Circuit

HOMEAWAY.COM, INC. AND AIRBNB, INC.,

Plaintiffs–Appellants,

v.

CITY OF SANTA MONICA,

Defendant–Appellee.

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS AND CO-AUTHOR OF CDA SECTION 230, AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' PETITION FOR REHEARING OR REHEARING EN BANC

On Appeal from the United States District Court
for the Central District of California
Nos. 2:16-cv-6641, 2:16-cv-6645
Hon. Otis D. Wright II

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae* NetChoice states that it is a trade association which has no parent corporation, and further that no corporation owns 10% or more of its stock.

Dated: May 3, 2019

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INTERESTS OF *AMICI CURIAE*[1]

Chris Cox is a former United States Representative (R-CA) who is co-author of Section 230 of the Communications Decency Act, 47 U.S.C. § 230. Mr. Cox is thus able to speak authoritatively to the intent of Congress at the time of Section 230's enactment, and the importance of applying the law according to its plain meaning.[2]

NetChoice is a national trade association of e-commerce and online businesses who share the goal of promoting convenience, choice, and commerce on the Internet. For over a decade, NetChoice has worked to increase consumer access and options via the Internet, while minimizing burdens on small businesses that are making the Internet more accessible and useful.

Based on their background and experience with Section 230, *amici* can provide information that is important to the Court's consideration of how this federal statute applies to the ordinance at issue in the case.

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[1] This brief is submitted pursuant to Fed. R. App. P. 29(a) with the consent of all parties. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici* or their counsel contributed money intended to fund preparation or submission of this brief.

[2] When the Supreme Court has found a law's text to be clear, it has buttressed that finding with analysis of the legislative history. *See, e.g., Mohamad v. Palestinian Authority*, 566 U.S. 449, 458-60 (2012).

LEGISLATIVE HISTORY AND THE PLAIN MEANING OF SECTION 230

"The modern Internet in the United States is built on more than two decades of reliance on Section 230," writes cyberlaw professor Jeff Kosseff in his recently published history of the statute. Jeff Kosseff, *The Twenty-Six Words That Created the Internet* 8 (2019). The Panel opinion in this case upends the well-established meaning of the words of Section 230, and will have dramatic consequences by over-riding the intent of Congress.

A. Creating Section 230 and Its Goals

When U.S. Representative Chris Cox (R-CA) collaborated with his House colleague Ron Wyden (D-OR) to draft what would become Section 230, their purpose was to ensure that an Internet platform would not be held legally responsible for content generated by its users. This was not a gift to Internet platforms. It was recognition of the fact that requiring every platform to monitor the massive amount of user-generated content on their sites would significantly impede the functioning of the Internet, and all of its benefits. If platforms could be held responsible for user-generated content, the potential for millions of people to instantly interact and transact over the Internet would be lost. "Without Section 230," Professor Kosseff writes, "the mere prospect of such lawsuits would force websites and online service providers to reduce or entirely prohibit user-generated content." *Id.* at 4.

Even in 1995, this essential aspect of online activity was already clear: the high volume of information when millions of users instantaneously publish content on Internet platforms inevitably outstrips the ability of the platforms to read or monitor it. That created a problem. The law in the "analog" world held editors, who reviewed and curated informational content created by others, responsible for publishing that content. But Internet platforms, with so many users creating content that becomes accessible to the world instantaneously, cannot be expected to review and curate it. Requiring this would defeat the very purpose and functioning of the Internet. In this new paradigm, therefore, it would be unreasonable for the law to hold platforms liable for others' content.

Representatives Cox and Wyden proposed to change federal law so that Internet platforms would not be held responsible for monitoring user-generated content. Their bill, which became Section 230 of the CDA, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), earned overwhelming bipartisan support. This is reflected in the votes leading to the law's enactment: in the House, 420-4 (as a standalone measure) and 414-16 (on final passage in the Telecommunications Act); and in the Senate, 91-5 (on final passage). During floor debates, there was unanimous support for the aims of the bill as expressed by its authors. *See* Kosseff, *supra*, at 64 n.17, 70-73. Rarely is the "intent of Congress" so clear.

B. Facilitating User-Generated Content and e-Commerce

The volume of content that crosses Internet platforms has only grown since 1995. If, as Congress believed, it was unreasonable for the law to require websites to review and be held responsible for user-generated content in 1995, how much more so in 2019. Today, even the smallest e-commerce website can host millions of users, from all over the world, who generate their own content. As clearly stated in its preamble, Section 230 was meant to facilitate this very "interactive" potential of the Internet, which brings with it political, educational, and cultural benefits.

As a result, Section 230's protection of website operators from liability for content created by their users has become the foundation supporting sites like Yelp, eBay, Facebook, Wikipedia, Amazon, Twitter, and the entire Web 2.0 revolution whereby thousands of innovative platforms offer a range of useful services powered by user-generated content. From user-generated reviews, to educational videos, to online resources that help locate loved ones after natural disasters,[3] these e-commerce innovations—including Airbnb and HomeAway, the Appellants here—are at the center of what Section 230 was designed to facilitate.

[3] *See* Kimberlee Morrison, *Why Consumers Share User-Generated Content*, ADWEEK (May 17, 2016), http://www.adweek.com/digital/why-consumers-share-user-generated-content-infographic.

Indeed, when Section 230 was enacted, user-generated content was already ubiquitous on the Internet. Online shopping features such as CompuServe's "electronic mall" and Prodigy's mail-order stores were instantly popular. Web businesses such as CheckFree demonstrated as far back as 1996 that online bill payment was not only feasible but convenient. Prodigy, America Online, and the fledgling Microsoft Network included content-delivery features, each with a different payment system, including per-transaction fees.

Representatives Cox and Wyden, and their congressional colleagues, had all of these iterations of Internet commerce in mind when they passed Section 230. They knew that requiring Internet platforms to review and take legal responsibility for user-generated content would threaten "e-commerce interests on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003), *cert. denied* 541 U.S. 1085 (2004); *see* 141 Cong. Rec. H8468-72, H8478-79 (Aug. 4, 1995). The unique benefits the Internet provides are dependent upon platforms facilitating *instant* communications and transactions among vast numbers of people. Requiring Internet businesses to review each interaction or transaction individually would frustrate the very e-commerce benefits the drafters sought to promote. *See id.* at H8469.

C. Punishing the Guilty and Protecting the Innocent

Though as Representative Cox observed during debate, "[t]here are other ways to address th[e] problem" of how to assign responsibility for user-generated

content while facilitating the Internet's potential for e-commerce and other societal benefits, 141 Cong. Rec. H8470, Section 230 reflects the specific approach that Congress chose. It protects Internet platforms from liability for the legal transgressions of users who post content to their sites. If content created by a user violates state law, then the *user* must pay the penalty; the Internet platform hosting the content will not. *See id.*

Section 230 ensures the quintessentially interstate commerce on the Internet is governed by a uniform national policy that relieves platforms from responsibility for policing the content created by their users, and offers them protection from liability for any policing they choose to do. *See* 47 U.S.C. §§ 230(c), (e)(3). This protection of platforms is the means by which Congress decided to free the Internet from multiple and conflicting state and local regulations. Requiring Internet platforms to share their users' liability under state and local law for content the users create would defeat the congressional purpose.

ARGUMENT

I. The Panel Opinion Makes Airbnb and HomeAway Liable for User Postings on Their Websites, in Contravention of Section 230.

The fundamental purpose of Section 230 is to protect Internet platforms from liability arising from content posted by users of the platform. The record is clear that the users of Airbnb and HomeAway who list their rental properties on these sites (i.e., hosts) create all relevant content. In creating that content, the users represent that they have complied with all applicable laws and regulations. They also represent that they will not enable others to violate any applicable law, and that legal compliance is their sole responsibility. *See, e.g.*, ER503 (Furlong Decl. ¶¶ 10-11); ER389, ER399 (Owen Decl. ¶¶ 9-10).

The Panel opinion in this case acknowledges that Section 230 preempts any state or local law that would expressly impose on HomeAway or Airbnb liability for content created by users of their platforms. *See* 918 F.3d 676, 684. But the opinion asserts that "the Platforms face no liability for the *content* of the bookings; rather, any liability arises only from *unlicensed bookings*." *Id.* (emphases added). That is a nonsensical distinction. The only difference between a legal (licensed) booking and an illegal (unlicensed) booking is whether the user has registered the property with Santa Monica. It is the *user's* obligation to do this, not the platform's. And both the platform and renters reasonably rely on users' representations about com-

pliance with the laws, including Santa Monica Ordinance 2535CCS (the "Ordinance"). In the case of an illegal booking, the user's online listing necessarily breaches the user's representation that it will "abide by all laws, rules, ordinances, or regulations applicable to the listing of their rental property." ER-503 ¶ 10. The panel opinion, however, would hold the platform liable for that content, which is entirely created by the user and is solely the user's responsibility under Section 230.

To avoid confronting this logical flaw in its analysis, the Panel opinion simply passes over the third prong of Section 230's three-part test enunciated in *Barnes v. Yahoo!, Inc*., 570 F.3d 1096, 1100-01 (9th Cir. 2009). As summarized in the Panel opinion, the *Barnes* test requires "(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 content provider." 918 F.3d at 681. The Panel opinion states that only the second prong is relevant to its analysis. But the fact that the *user* provides the information concerning compliance with the Ordinance is central to this case. That information is *never* provided by the platform. By treating the platform as the publisher or speaker of information provided by its users, the panel opinion reaches the wrong conclusion on both the second and third prongs of the test.

Properly stated, the question in Section 230 preemption cases is whether the state or local law seeks to impose "liability for material posted on the website by

someone else." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016). In this case, the Panel imposed liability on HomeAway and Airbnb for material that is posted on their websites by someone else. Specifically, the district court determined that the *users* create the listings that must be registered with Santa Monica. *HomeAway.com v. City of Santa Monica*, Nos. 16-06641, 16-06645, 2018 WL 1281772, at *1 (C.D. Cal. Mar. 9, 2018). And it is the users' unregistered listings for which Internet platforms will be held liable by the Ordinance.

Because the Panel opinion makes Airbnb and HomeAway liable for false statements by users of their websites, in direct contravention of Section 230, this result must be reversed upon rehearing or rehearing en banc.

II. The Panel Opinion Requires Airbnb and HomeAway to Monitor User Postings on Their Websites, in Contravention of Section 230.

An important aspect of Section 230's broad immunity shielding Internet intermediaries from liability for content created by third parties, 47 U.S.C. § 230(c)(1), is that they may not be required to "monitor postings." *Internet Brands*, 824 F.3d at 851. Any state or local law inconsistent with this broad directive is expressly preempted. 47 U.S.C. § 230(e)(3).

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1173-76 (9th Cir. 2008) (en banc), this Court observed that it would "cut the heart out of section 230" to force a website to review user-generated content. This corresponds precisely with congressional intent. As Representative Rick White

observed during debate on Section 230: "There is no way that any [Internet platform] … can take the responsibility [for all of the] information that is going to be coming in to them from all manner of sources." 141 Cong. Rec. H8471. Yet in the Ordinance, Santa Monica does exactly what Section 230 forbids. The city does not accept as sufficient that users warrant their compliance with all local laws. Thus, there is *only one way* for these platforms to meet their obligations under the Ordinance. That is to monitor the user-generated content for compliance with the city's registration requirements. The platforms *must* do this, lest they inadvertently process a fee from a user who has failed to register with the city—leading to criminal liability for the platforms. Ordinance § 6.20.050(c).

Santa Monica admits that the Ordinance requires Internet platforms to cross-check user-generated content against the city's registry. ER617:23-25. That is monitoring, plain and simple. And the requirement to do so means the Ordinance is preempted by Section 230. *See Internet Brands*, 824 F.3d at 852 (Section 230 forbids liability based on "efforts, or lack thereof," to "monitor" user-generated content).

Internet Brands is an illustrative counterpoint. In that case, all elements of the legal claim against the platform were established without reference to any user-generated content whatsoever. The defendant's knowledge of illegal activity was established through its offline business dealings. Neither was there any allegation

that user-generated content on the defendant's website was illegal, or otherwise the basis for the claim. In no wise was the plaintiff's claim premised on the platform's duty to monitor user-generated content. 824 F.3d at 851.

The Panel opinion acknowledges that the Ordinance makes platforms responsible for monitoring "incoming requests to complete a booking" and cross-checking this user-generated content against the city's registry—though it insists on calling this "keeping track" rather than monitoring. 918 F.3d at 682-83. Moreover, the Panel opinion misses the obvious point that the platforms must monitor *the listings themselves* in order to compare them with the city's registry. "Keeping track" of the city's registry is plainly insufficient to comply with the law. Individual user content must be compared to the city's registry. There is no other way to identify listings for properties that do not appear in the registry.

The policy reason for Section 230's protection of Internet platforms from requirements to monitor user-generated content is well illustrated by this case. Airbnb and HomeAway exist to facilitate instantaneous connections among many users who are allowed to transact at once. Requiring that the platforms monitor individual listings prevents them from functioning as designed. Instead of instantaneous connections, the Ordinance mandates one-at-a-time processing of each rental. Creating bottlenecks of this kind is exactly what Section 230 sought to prevent. The Ordinance is preempted.

III. The Panel Opinion Upholds the Ordinance by Ignoring its Clear Practical Effects.

Section 230 preempts a state or local law that *in practice* requires an Internet platform to monitor or remove user-generated content. Santa Monica "may not evade the preemptive force of federal law by resorting to creative statutory interpretation or description at odds with the statute's intended operation and effect." *Wos v. E.M.A.*, 568 U.S. 627, 636 (2013). The practical effect of the Ordinance is to require platforms to monitor user-generated content.

The Panel opinion acknowledges that in order for Internet platforms to comply with the Ordinance, both monitoring and removing such content "would be the best option 'from a business standpoint'" and "may be the Platforms' most practical compliance option." 918 F.3d at 683. But the opinion then completely disregards these acknowledged consequences of the Ordinance for purposes of determining Section 230 preemption. "On its face," the Panel opinion observes, the Ordinance does not specifically require monitoring or removal of user-generated content or "discuss the content of the listings." *Id*. That logic elevates form over substance. What matters is whether the Ordinance *in operation* requires monitoring or removal.[4]

[4] Nor is it an accident that the requirement is implicit. The original version of the Ordinance gave the game away with more explicit language requiring Internet platforms to monitor their user-generated content for unregistered listings. As the district court explained, Santa Monica re-drafted the Ordinance, which now artfully

Rehearing is necessary to bring this case in line with controlling Supreme Court authority, which holds that state and local laws are preempted based on what the state or local law in question "in fact does." *Wos*, 568 U.S. at 637. Preemption "is not a matter of semantics." States and cities "may not evade the preemptive force of federal law by resorting to creative statutory interpretation or description." *Id.* Creative ordinance drafting, just like "creative pleading in an effort to work around § 230," cannot save a local ordinance that has the practical effect of requiring monitoring of individual user listings. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265-66 (9th Cir. 2016).

The Panel's conclusion that the Ordinance is not preempted because it does not *explicitly* command Section 230's forbidden result, then, was error. The Court was required to give weight to its intended or actual effects. If the effects would be preempted where they explicitly commanded, the "more creative and less candid" statute is likewise preempted. *Wos*, 568 U.S. at 637; *see also Engine Mfrs. v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 255 (2004) (state law facially regulating auto sales in effect regulated auto manufacturing, requiring preemption).

In an earlier case, *National Meat Ass'n v. Harris*, the Supreme Court applied this rule to a California law which, on its face, appeared not to violate federal law

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achieves the same result without expressly stating its requirement that Internet platforms monitor or remove user-generated content. *See HomeAway.com*, 2018 WL 1281772, at *1-2. Because the result is the same, the Ordinance is still preempted.

preempting state regulation of slaughterhouse operations. The state purported to regulate only the sale of meat, not slaughterhouse operations. But by banning the sale of meat slaughtered in a certain way, the law effectively required slaughterhouses to comply with California's preferred slaughtering techniques. This was tantamount to "a command to slaughterhouses [on how] to structure their operations." 565 U.S. 452, 464 (2012). Common sense dictated that a slaughterhouse would not operate in a way that would result in useless product that could not be sold. *Id.* To borrow the words of the Panel opinion in this case, compliance with the state-preferred rules would be the inevitable approach "from a business standpoint." 918 F.3d at 683.

Like the state laws in *National Meat Ass'n* and *Wos*, the Ordinance was drafted in an attempt to skirt federal preemption. On its face, it regulates only transactions. In operation, however, its clear effect—acknowledged by the Panel, *id*., and by the municipal *amici*, Br. at 20—is to require Internet platforms to monitor users' listings for compliance with the Ordinance. A local regulation that *in operation* requires Internet platforms to monitor user-generated content is preempted the same as one that explicitly does so. Santa Monica cannot avoid Section 230's prohibition on such regulation of Internet platforms "just by framing it as a ban on the sale" (i.e., rental) of unlicensed properties. That "would make a mockery of [Section 230's] preemption provision." *Nat'l Meat Ass'n*, 565 U.S. at 464.

Moreover, the Panel decision conflicts with other cases that have rejected efforts to parse "transactions" from other online content. In *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1106 (C.D. Cal. 2017), a landlord sought to hold Airbnb liable for the conduct of tenants who sublet their units through the platform in violation of their leases. The court noted that Section 230's protections are regularly applied to "websites that process payments and transactions in connection with third party listings," even when liability is purportedly based upon the transaction rather than the publication of the listing. *Id.* Because punishing platforms for allowing certain transactions effectively makes them responsible for content posted by third parties, Section 230 preempts such laws.[5]

As its final justification for overlooking the monitoring effectively required by the Ordinance, the Panel opinion explains that enforcing Section 230 preemption here would "risk exempting [Internet platforms] from most local regulations." 918 F.3d at 683. But that is exactly what "*no* liability may be imposed under *any* State or local law" means. Section 230(e)(3) (emphasis added). Congress intended to preempt not just "most," but *all* local regulations that require Internet platforms to

[5] *See also, e.g.*, *MDA City Apartments, LLC v. Airbnb, Inc.*, 2018 WL 910831, at *14 (Ill. Cir. Ct. Feb. 14, 2018) (Section 230 applies to Airbnb's "processing payments and transactions in connection with listings created by third parties"); *Inman v. Technicolor USA, Inc.*, 2011 WL 5829024, at *6-7 (W.D. Pa. Nov. 18, 2011) (Section 230 applied to law allegedly regulating eBay's facilitation of "business transactions").

monitor or remove user-generated content. While Congress specified that platforms remain subject to state or local laws that do not involve user-generated content, it expressed no solicitousness, as does the Panel opinion, for localities "struggling to manage the disruptions" from the Internet business models of "innovative startups such as [HomeAway and Airbnb]." 918 F.3d at 679. Congress's policy views, not the Panel's, should govern.

"There is no doubt," the Supreme Court stated in *Arizona v. United States*, "that Congress may withdraw specified powers from the States by enacting a statute containing an express preemption provision." 567 U.S. 387, 399 (2012). In Section 230, Congress has done so in the clearest terms. Subsection (c) provides that no Internet platform shall be liable for "any information" provided by users of the platform. Subsection (e)(3) states, "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with" this protection against liability. Because the Panel opinion recognized that the Ordinance will indeed "affect how [an Internet platform] publishes or monitors [user-generated] content," *Internet Brands*, 824 F.3d at 851, it should have held the Ordinance preempted.

IV. The Panel Opinion Disregards Congressional Intent to Protect e-Commerce, Subjecting Platforms Large and Small to the 'Difficulties of Complying with Numerous State and Local Regulations.'

In addition to conflicting with Supreme Court and other Ninth Circuit cases, the Panel opinion also unnecessarily limits "the protection Congress envisioned" for

Internet platforms in Section 230, claiming it does not extend to protecting e-commerce websites from "the administrative burdens of state and local regulations." 918 F.3d at 684. In fact, the authors of Section 230 had e-commerce squarely in mind when they crafted the statute's explicit preemption of over-burdensome regulation of Internet platforms. Congress intended to "promote the continued development of the Internet and other interactive computer services" and "preserve the vibrant and competitive free market" that the Internet had unleashed. 47 U.S.C. § 230(b)(1)-(2). Indeed, this Court has explicitly stated that Section 230 was meant to encourage the "development of e-commerce." *Batzel*, 333 F.3d at 1027.

Required monitoring necessarily will slow commerce on the Internet, increase costs for websites and consumers, and restrict the development of platform marketplaces. This is just what Congress meant to avoid. Moreover, given the unlimited geographic range of the Internet, the cumulative burden of state and local regulations on web platforms would be multiplied exponentially, were they not preempted by Section 230. While one monitoring requirement in one city might seem a tractable compliance burden, myriad similar regulations could easily damage or shut down Internet platforms. *See id.* at 1028.

If the Panel opinion is allowed to stand, any e-commerce platform that facilitates transactions among users will have to expend resources to ensure that every user post or listing complies with *all* applicable laws. That would undo the federal

policy meant to avoid multiple (and inevitably conflicting) regulatory burdens across thousands of state, county, and municipal jurisdictions. *See* 144 Cong. Rec. E1288-03 (June 23, 1998).

This multiplication of regulatory burdens would be especially harmful to smaller websites, which would have to monitor user content and take responsibility for third users' legal compliance despite limited resources. In effect, the law would discourage e-commerce models featuring user-generated content—the opposite of what Congress intended in Section 230. The Panel opinion acknowledges the burdens its ruling will place on Internet platforms who will have to comply with numerous state and local regulations. But it claims that applying Section 230 to alleviate such burdens would "expand its provisions beyond what Congress initially intended." 918 F.3d at 684. To the contrary, the Panel opinion is wholly antithetical to Congress's judgment that such platforms should be "unfettered by . . . regulation." 47 U.S.C. § 230(b)(2).

CONCLUSION

For the foregoing reasons, the en banc Court must grant rehearing and reverse.

Dated: May 3, 2019

Respectfully submitted,

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I hereby certify that I electronically filed the foregoing Brief of Chris Cox, Former Member of Congress and Co-Author of CDA Section 230, and NetChoice as *Amicus Curiae* in Support of Plaintiffs and Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2019.

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