No. 18-55367

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 AND REVERSAL

On Appeal from the United States District Court
for the Central District of California
Nos. 2:16-cv-6641, 2:16-cv-6645
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CORPORATE DISCLOSURE STATEMENT

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

Dated: April 25, 2018

/s/ David Salmons
David Salmons
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INTERESTS OF *AMICI CURIAE*[1]

Chris Cox is a former United States Representative (R-CA), who with current United States Senator Ron Wyden (D-OR) is the co-author of Section 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230 ("Section 230"). The Act provides that Internet platforms do not have a duty to monitor material posted by third parties. Mr. Cox has for many years been a leading participant in developments in the law under Section 230 and in congressional deliberations on these issues. He is thus able to bring to the attention of the Court relevant matters not already addressed by the parties.

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 the enactment and purposes of Section 230, *amici* are able to provide information that is important to the Court's

[1] This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure 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 curiae* or their counsel contributed money intended to fund preparation or submission of this brief.

consideration of how this federal statute applies to the municipal ordinance at issue in the case.

INTRODUCTION AND LEGISLATIVE HISTORY

A. Background

Section 230 was signed into law more than 20 years ago. When U.S. Representatives Chris Cox (R-CA) and Ron Wyden (D-OR) conceptualized the law in 1995, roughly 20 million American adults had access to the Internet, compared to the 4 billion users around the world today.

Even at this early stage in the Internet's development, this essential aspect of online activity was clear: many users converge through one portal. The difference between newspapers and magazines, on the one hand, and the World Wide Web, on the other hand, was striking. In the print world, editors reviewed and cataloged editorial content. On the Web, users themselves created content which became accessible to others immediately.

While the volume of users was only in the millions, not the billions as today, it was evident to almost every user of the Web even then that no group of human beings would ever be able to keep pace with the growth of user-generated content on the Web. For the Internet to function to its potential, Internet platforms could not be expected to monitor content created by website users. The legal rules of the analog world would have to be refashioned.

At the time, not all in Congress were users of or familiar with the Web. But some were, including Representatives Cox and Wyden. Their experience and their desire to ensure that this technology flourished led to Section 230 of the CDA, Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

B. The *Prodigy* and *CompuServe* Cases

In 1995, on a flight from California to Washington, DC during a regular session of Congress, Representative Cox read a *Wall Street Journal* article about a New York Superior Court case that troubled him deeply. *See* Milo Geyelin, *New York judge rules Prodigy responsible for on-line content*, WALL ST. J., May 26, 1995. The case involved a bulletin board post on the Prodigy web service by an unknown user. The post said disparaging things about an investment bank. The bank filed suit for libel but couldn't locate the individual who wrote the post. So instead, the bank sought damages from Prodigy, the site that hosted the bulletin board. *See Stratton Oakmont v. Prodigy Servs. Co*., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

Up until then, the courts had not permitted such claims for third party liability. In 1991, a federal district court in New York held that CompuServe was not liable in circumstances like the *Prodigy* case. The court reasoned that CompuServe "ha[d] no opportunity to review [the] contents" of the publication at issue before it was uploaded "into CompuServe's computer banks," and therefore was not subject to

publisher liability for the third party content. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 & n.1 (S.D.N.Y. 1991).

But in the 1995 New York Supreme Court case, the court distinguished the *CompuServe* precedent. The reason the court offered was that unlike CompuServe, Prodigy sought to impose general rules of civility on its message boards and in its forums. While Prodigy had even more users than CompuServe and thus even less ability to screen material on its system, the fact that it announced such rules and occasionally enforced them was the judge's basis for subjecting it to liability that CompuServe didn't face.

The perverse incentive this case established was clear: Internet platforms should avoid even modest efforts to police their sites. If the holding of the case didn't make this clear, the damage award did: Prodigy was held liable for $200 million. *Prodigy Servs.*, 1995 WL 323710.

Representative Cox immediately roughed out an outline for a bill to overturn the holding in the *Prodigy* case.

C. Creating Section 230 and Its Goals

The first person Representative Cox turned to as a legislative partner on his proposed bill was Representative Wyden. As this was a novel question of policy that had not hardened into partisan disagreement (as was too often the case with so

many other issues), they knew they could count on a fair consideration of the issues from their colleagues on both sides of the aisle.

For the better part of a year, the two lawmakers—one a Republican, the other a Democrat—conducted outreach and education on the challenging issues involved. In the process, they built not only overwhelming support, but also a much deeper understanding of the unique aspects of the Internet that require clear legal rules for it to function.

The rule established in the bill, which they called the Internet Freedom and Family Empowerment Act, H.R. 1978, 104 Cong. (1995), was crystal clear: the law will recognize that it would be unreasonable to require Internet platforms to monitor content created by website users. Correlatively, the law will impose full responsibility on the website users to comply with all laws, both civil and criminal, in connection with their user-generated content. It will not shift that responsibility to Internet platforms, because doing so would directly interfere with the essential functioning of the Internet.

The bill became law after the House added it as an amendment during floor consideration of the CDA in August 1995. Reflecting its enormous bipartisan support, the Cox-Wyden amendment passed the House by a vote of 420-4. The CDA,

including the Cox-Wyden amendment, was enacted the following year as part of the Telecommunications Act of 1996.[2]

If, in light of the volume of content that crossed Internet platforms in 1995, it would have been unreasonable for the law to require websites to monitor user-generated content, perforce that is the case in 2018. With every website accessible to billions of Internet users around the planet, and many websites hosting millions of users generating their own content, the fundamental principle of Section 230 that websites should not be liable for monitoring user-generated content is even more relevant today than ever.

So too is Section 230's corollary of this principle: its "Good Samaritan" provision. 47 U.S.C. § 230(c)(2)(A). If an Internet platform does review some of the content and restricts it because it is obscene or otherwise objectionable, then the platform does not thereby assume a duty to monitor all content. Obviously, this exception would not be needed if Congress had intended to subject Internet platforms to legal and regulatory requirements that they monitor user-generated content.

[2] Subsequently, the U.S. Supreme Court gutted the CDA's indecency provisions, which it found violated the First Amendment, leaving Section 230 as the enduring landmark of that legislation. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

D. The Importance of Section 230 for User-Generated Content

In simplest terms, Section 230 protects website operators that are not involved in content creation from liability for content created by third party users. That protection from liability has not only become the foundation supporting sites like Yelp, eBay, Facebook, Wikipedia, Amazon, Twitter, and other well-known web brands that provide user-generated content, but also the entire Web 2.0 revolution through which thousands of smaller innovative platforms have come to offer a range of socially useful services.

Without Section 230, social media platforms would be exposed to lawsuits for users' reviews of products, restaurants, books, and movies. Airbnb and HomeAway would be exposed to lawsuits for users' negative comments about a rented home. Any service that connects buyers and sellers, workers and employers, content creators and website visitors, or victims and victims' rights groups—or provides any other interactive engagement opportunity one can imagine—could not continue to function on the Internet displaying user-generated content.

Without user-generated content, many contending with hurricanes Maria, Irma, and Harvey could not have found their loved ones. Every day, millions of Americans watch user-generated "how to" and educational videos for everything from healthcare to home maintenance to lifelong learning. Over 85% of businesses

rely on user-generated content.[3] The vast majority of Americans feel more comfortable buying a product after researching user-generated reviews,[4] and over 80% of consumers find user-generated content helpful in making their purchasing decisions.[5] User-generated content is also vital to law enforcement and social services. Following the recent devastating Mexico earthquake, relief volunteers and rescue workers used online forums to match people with supplies and services to victims who needed life-saving help, directing them with real-time maps.

E. Rejecting the Policy of Requiring Platforms to Monitor Content

When Section 230 was enacted in 1996, user-generated content was already ubiquitous on the Internet. The creativity being demonstrated by websites and users alike made it clear that online shopping was an enormously consumer-friendly use of the new technology. Features such as CompuServe's "electronic mall" and Prodigy's mail-order stores were instantly popular. So too were messaging and email, which in Prodigy's case came with per-message transaction fees. Web businesses

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[3] Gaurav Kumar, *50 Stats About 9 Emerging Content Marketing Trends for 2016*, SEMRUSH BLOG (Dec. 29, 2015), https://www.semrush.com/blog/50-stats-about-9-emerging-content-marketing-trends-for-2016.

[4] Yin Wu, *What Are Some Interesting Statistics About Online Consumer Reviews?*, DR4WARD.COM (Mar. 26, 2013), http://www.dr4ward.com/dr4ward/2013/03/what-are-some-interesting-statistics-about-online-consumer-reviews-infographic.html.

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

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 features we know today as content delivery, each with a different payment system.

The congressional authors had all of these iterations of Internet commerce in mind in drafting and enacting what became Section 230. Representatives Cox and Wyden added the Internet Freedom and Family Empowerment Act, the future Section 230, as an amendment to the CDA out of concern that requiring advance monitoring of user-generated content would hinder "First Amendment and 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 (August 4, 1995).

Each of the commercial applications then flourishing on the web had an analog in the offline world, where each had its own attendant legal responsibilities. Newspapers could be liable for defamation. Banks and brokers could be held responsible for knowing their customers. Advertisers were responsible under the Federal Trade Commission Act and state consumer laws for ensuring their content was not deceptive and unfair. Merchandisers could be held liable for negligence, breach of warranty, and in some cases even subjected to strict liability for defective products. In Section 230, Congress decided that while these rules would continue to

apply on the Internet, they would not extend to making Internet platforms derivatively liable for user-generated content. Instead, the platforms would be protected from liability unless they create the content themselves. To ensure the quintessentially interstate commerce of the Internet would be governed by a uniform national policy, Section 230 outlawed all state and local requirements to the contrary: "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

"There are other ways to address this problem" than the one adopted in Section 230, Representative Cox acknowledged when explaining his legislation on the House floor. 141 Cong. Rec. H8470. Congress might have decided to treat what Section 230 calls a "provider of interactive computer service" as the business partner of the commercial users of its platform. This would have allowed the federal and state governments to look to Internet platforms as well as their users to enforce legal requirements applicable to the users of the online platforms. But viewing the Internet that way, Representative Cox said in his floor remarks, would "run head-on into our approach." *Id.*

The legislative history makes plain that Congress not only adopted a policy of regulatory immunity for online platforms, it affirmatively rejected the alternative policy of requiring platforms to monitor the legality of user-generated content.

"About [that approach] let me simply say that there is a well-known road paved with good intentions," Representative Cox remarked. "We all know where it leads." *Id.*

It is unquestionable that Congress fully endorsed Representative Cox's views. When the bill was debated, no member from either the Republican or Democratic side could be found to speak against it. The debate time was therefore shared between Democratic and Republican supporters of the bill, a highly unusual procedure for significant legislation. *Id.* at H8469.

Section 230 by its terms applies to legal responsibility of any type, whether under civil or criminal state statutes and municipal ordinances. But the fact that the legislation was included in the CDA, concerned with offenses including criminal pornography, is a measure of how serious Congress was about immunizing Internet platforms from state and local laws. Internet platforms were to be spared responsibility for monitoring third-party content even in these egregious cases.

A bipartisan supermajority of Congress did not support this policy because they wished to give online commerce an advantage over offline businesses. Rather, it is the inherent nature of Internet commerce that caused Congress to choose purposefully to make third parties and not Internet platforms responsible for compliance with laws generally applicable to those third parties. Platform liability for user-generated content would rob the technology of its vast interstate and indeed global capability, which Congress decided to "embrace" and "welcome" not only because of

its commercial potential but also "the opportunity for education and political discourse that it offers for all of us." *Id.* at H8470. All of the unique benefits the Internet provides are dependent upon platforms being able to facilitate communication among vast numbers of people without being required to review those communications individually. As Representative Cox observed during consideration of the bill, "there is just too much going on" over Internet platforms "for that to be effective." *Id.* at H8469. In Section 230, Congress very deliberately rejected the policy alternative of requiring platforms to monitor third party content.

F. Preempting State and Local Law

Throughout the history of the Internet, Congress has sought to strike the right balance between opportunity and responsibility. Section 230 is such a balance—holding content creators responsible for their own activity while protecting Internet platforms from legal responsibility in connection with content created by others.

The plain language of Section 230 makes clear its purpose of preempting state and local law. Why did Congress choose this course?

Most fundamentally, the essential purpose of Section 230 is to preempt state law in favor of a uniform federal policy, applicable across the Internet, that avoids results such as the state court decision in *Prodigy*. The Internet is the quintessential

vehicle of interstate, and indeed international, commerce. Its packet-switched architecture, which can route even local messages via servers in different states, makes it uniquely susceptible to multiple sources of conflicting state and local regulation.

Were every state and municipality free to adopt its own policy concerning when an Internet platform must assume duties in connection with content created by third party users, not only would compliance become oppressive, but the federal policy itself could quickly be undone. In drafting Section 230, Representative Cox sought to ensure that individual states and municipalities could not defeat the federal policy by placing platform liability laws in their criminal codes, thus making Section 230 a nullity. Even state criminal law is preempted. (Because Congress is the appropriate body for maintaining the uniform national policy, the entirety of federal criminal law enforcement is unaffected by Section 230.) Only state law that is consistent with the policy of Section 230 is unaffected by this broad preemption. 47 U.S.C. § 230(e)(3).

ARGUMENT

I. In Enacting Section 230, Congress Decided It Would Be Unreasonable for the Law to Require Internet Platforms to Monitor Third-Party Content.

Section 230's broad immunity shields Internet intermediaries from liability for content generated and posted by third parties. Intermediaries may not "be treated

as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). As a result, they may not be required to "monitor postings," "remove any user content," or change how they "publish[] or monitor[] content." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016). 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 third party content individually. This Court's analysis on this point corresponds precisely with congressional intent. As Representative Rick White observed during debate on Section 230, referring to Internet platforms: "There is no way that any of those entities, like Prodigy, 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; *see also id.* (Statement of Rep. Goodlatte) (emphasizing importance of not requiring platforms to review or edit third-party content, calling that imposition "wrong").

When the House voted to approve the future Section 230 by a near-unanimous vote, it was because of its policy determination to embrace and encourage the unique

character of Internet communications—a global, instantaneous, unfiltered conversation among millions of users—which would be disrupted if Internet platforms were required to monitor and review user-generated content.

The inevitable consequence of attaching platform liability to user-generated content is to force intermediaries to monitor everything posted on their sites. Congress understood that liability-driven monitoring would slow traffic on the Internet, discourage the development of Internet platforms based on third party content, and chill third-party speech as intermediaries attempt to avoid liability. *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Congress enacted Section 230 because the requirement to monitor and review user-generated content would degrade the vibrant online forum for speech and for e-commerce that Congress wished to embrace.

II. The Santa Monica Ordinance Requires Internet Platforms to Monitor Third-Party Content in Violation of Section 230.

While Section 230 accomplishes its purposes by freeing service providers from the responsibility of monitoring third-party content, this is the very responsibility that City of Santa Monica Ordinance 2535CCS (the "Ordinance") now impermissibly imposes on websites such as Airbnb and HomeAway.

The district court viewed the Ordinance as merely prohibiting Airbnb and HomeAway "from facilitating business transactions." Order at 10. But this prohibition is effected by making it illegal for websites to charge a fee when unlicensed

users succeed in finding a renter. Ordinance § 6.20.050(b). There is only one way for Airbnb or HomeAway to know whether a website user is licensed by the City of Santa Monica. They will have to inquire in each individual case. The City does not accept as sufficient that the website requires users to attest they have complied with all laws and ordinances applicable to them. The Ordinance itself makes this clear on its face. The plain effect of the Ordinance is to require websites to monitor and review all online listings to determine whether each user is registered with the city.

To this Defendant responds superciliously that Airbnb and HomeAway are "perfectly free to publish any listing they get . . . whether the unit is lawfully registered or not." Defendant's Opp. to Preliminary Injunction at 14. But the websites risk fines and jail if they do so. Without first monitoring and reviewing all online listings to determine whether each user is registered with the city, the websites will have no way of knowing that a booking fee comes from a user who has not registered with Santa Monica. If it does, it violates the Ordinance, triggering criminal penalties.

Santa Monica admits (because it must) that the requirement for websites to review each users' listings against the City's registry is specifically stated in the Ordinance. ER-617:23–25. Because complying with the Ordinance requires reviewing and monitoring third party listings on the Plaintiffs' sites, the Ordinance violates both the letter and purpose of Section 230. *See Internet Brands*, 824 F.3d

at 852 (describing Section 230 as forbidding liability based on "efforts, or lack thereof, to edit, *monitor*, or remove user generated content" (emphasis added)).

The policy reason behind Section 230's protection of websites from state and local requirements to monitor and review content is well illustrated by this case. Requiring that Airbnb and HomeAway monitor and review each third party advertisement creates an extraordinary bottleneck, obstructing and slowing down what is inherently the high-volume, geographically unlimited, instantaneous flow of information that is the Internet. This is why Congress, in Section 230, prohibited such state and local laws and ordinances.

One thing is certain. If a website has to individually screen each posting by every user, the purpose of Section 230 is defeated. Congress intended that the third party user, not the Internet platform, should be responsible for the legality of the information it posts online (in this case, compliance with municipal licensing requirements). Both the purpose and effect of the Ordinance are to require Airbnb and HomeAway to ensure that third parties using their websites are themselves complying with the law. This is effectively a transfer of each website user's legal responsibility to the Internet platform. It is the opposite of what Section 230 provides.

Santa Monica has gone to considerable lengths to characterize the Ordinance as "unrelated" to the essential fact that Airbnb and HomeAway are websites pro-

tected by Section 230 from having to monitor user-generated content. *See, e.g.*, Defendant's Opp. to Preliminary Injunction at 10. Instead, Defendant claims the Ordinance regulates Airbnb's and HomeAway's "conduct." This is casuistry. What might that conduct be? In Defendant's words, it is the act of "receiving a fee" from an unlicensed user of the website. *Id.* at 16. Since it would be legal to receive a fee from a licensed user, the question of legality or illegality hangs on whether the website user is itself in compliance or violation of the Ordinance. This Airbnb and HomeAway must determine on a case-by-case basis (if they desire to collect any revenue from booking rentals, the very purpose of their online business). What the Ordinance *actually does* is make the website responsible for third party users' compliance with the law.

If further proof were needed that the Ordinance requires a one-at-a-time review of every online listing, it may be found in the criminal sanctions for noncompliance. Not only are they harsh—the penalties for an Airbnb or HomeAway employee include half a year in jail—but they are specifically imposed on a per-violation basis. Ordinance § 6.20.100(a). Each rental by an unlicensed website user constitutes a separate violation and an additional six months in jail for one or more individuals at the website.

Not only must the websites constantly review each new posting on their platforms, but as a practical matter they must take down content posted by unlicensed

users. Otherwise, potential renters would quickly become frustrated with a website that cannot fulfill its purpose of providing rentals. Were Airbnb or HomeAway to wait until a website user chooses a property, and then check it against Santa Monica's registry, the users would discover only after the fact that the website cannot complete the transaction. So these websites literally will have to review each and every posting by users in advance of displaying it on the Internet. They will have to check it against the city's registry, and take down those they find have not complied with Santa Monica's requirements.

The Ordinance requires Internet platforms to monitor and review user generated content in this very direct way, in violation of Section 230.

III. The Santa Monica Ordinance Would Impose a 'Bulletin Board' Model on Websites, the Precise Holding Section 230 Overruled.

In reasoning that Section 230 isn't implicated by local laws that tie liability to booking transactions, the district court favored older Internet-publishing models such as Craigslist "which do not charge for booking services, and act solely as publishers of advertisements." Order at 4. This revives the discredited reasoning of the New York trial court in *Prodigy Services*, which Section 230 expressly overruled.

As the business models of Airbnb and HomeAway demonstrate, there are different ways for websites based on user-generated content to charge for their services. They may charge a fee only when users successfully connect and transactions take place, or they may charge a fee to publish on the site. Airbnb and HomeAway both

follow the first model; HomeAway also follows the second. From the standpoint of Section 230, the choice of model is irrelevant, since in neither case can a website be required to monitor and review third party content.

But from the standpoint of the Ordinance and the district court's reading of it, a platform's choice of payment model is enormously consequential. By banning payment from unregistered users, the Ordinance in effect requires monitoring of all user-generated content by holding the platform liable for content posted by third parties.

Many cases (all of them ignored by the district court) have held that this violates Section 230. This is because punishing platforms for allowing certain transactions on their sites makes them responsible for the content and conduct of third parties. 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 conduct of the transaction rather than the publication of the listing. *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1106 (C.D. Cal. 2017).

For example, in *Hill v. StubHub, Inc.*, StubHub was sued for facilitating an allegedly illegal sale of tickets. 727 S.E.2d 550, 562–63 (N.C. Ct. App. 2012). Just like Airbnb and HomeAway, StubHub charges a fee when a sale of tickets occurs.

Id. Applying Section 230, the court held the "website's payment processing responsibilities were 'irrelevant for purposes of determining the extent to which [StubHub] was entitled to immunity.'" *La Park*, 285 F. Supp. 3d at 1106 (quoting *Hill*, 727 S.E.2d at 562–63). The court emphasized that it was the user of the website who illegally sold the tickets above face value. He "had complete control over the *content* at issue." *Id.* (emphasis added).

Users of the Airbnb and HomeAway websites similarly have complete control over whether they are registered with Santa Monica, and users are responsible for the content of their listings including the description of their registration status. Requiring the websites to monitor all rental listings and independently investigate whether each third-party user is actually registered is a blatant attempt to treat the websites as publishers responsible for content created by others.

Likewise, eBay has been sued for facilitating allegedly illegal sales. *See Stoner v. eBay, Inc.*, 2000 WL 1705637, at *2 (Cal. Super. Ct. Nov. 1, 2000). Like HomeAway and Airbnb, eBay not only provides a platform that connects sellers and buyers, but also "provides . . . [facilitation] services for which it charges a fee." *Id.* at *2–3. On these facts, the court concluded Section 230 immunity applied. The court specifically rejected the distinction embraced by the district court in this case between websites "based on a sales model" (such as eBay or StubHub) and "services which are based on bulletin board models" (such as Craigslist). *Id.* at *3. Nothing

in Section 230 or the cases interpreting it, the court held, limits its application to mere bulletin board models. *Accord Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002).

In *Inman v. Technicolor USA, Inc.*, No. CIV.A. 11-666, 2011 WL 5829024, at *7 (W.D. Pa. Nov. 18, 2011), the court surveyed other cases and concluded that a website's failure "to prevent [third-party] conduct"—including conducting an illegal sale—"would run afoul of the immunity provisions of section 230." *Id.* The court specifically rejected the argument that eBay's facilitation of "business transactions" meant its liability would be based on its own conduct rather than users' content. Such liability is ultimately based on "information disseminated through a website" by third parties, and so it is preempted by Section 230. *Id.* at *6–7.

The district court also ignored cases that applied this logic directly to Airbnb. In *La Park*, the court held Airbnb itself is immune from liability even if the claim is based on its profiting from transactions rather than the listings themselves. 285 F. Supp. 3d at 1105–06. In *MDA City Apartments, LLC v. Airbnb, Inc.*, an Illinois court held that Airbnb's "processing payments and transactions in connection with listings created by third parties" does not remove Section 230 immunity. 2018 WL 910831, at *14 (Ill. Cir. Ct. Feb. 14, 2018). In *Donaher, III v. Vannini*, a Maine court held Airbnb's payment processing business does not strip it of immunity under Section 230. 2017 WL 4518378, at *3 (Me. Super. Ct. Aug. 18, 2017).

In improperly reasoning that Santa Monica can avoid Section 230 by tying liability to booking transactions, the district court favored older Internet models such as Craigslist (and CompuServe circa 1995). In this model, websites "do not charge for booking services, and act *solely* as publishers of advertisements." Order at 4 (emphasis added). But the very purpose of Section 230 was to obliterate any legal distinction between the CompuServe model (which lacked the e-commerce features of Prodigy and the then-emergent AOL) and more dynamically interactive platforms. *See* S. Rep. No. 104-230, at 194 (1996) (noting goal of overruling *Prodigy Services*); H.R. Conf. Rep. No. 104-458, at 194 (1996) (same); 141 Cong. Rec. at H8469–70 (same).

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). Forcing websites to a Compuserve or Craigslist model would be the antithesis of the congressional purpose to "encourage open, robust, and creative use of the internet," *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010), and the continued "development of e-commerce," *Batzel*, 333 F.3d at 1027. Instead, it will slow commerce on the Internet, increase costs for websites and consumers, and restrict the development of platform marketplaces. This is just what Congress hoped to avoid

through Section 230. *See* Nancy Scola, *Sen. Ron Wyden: Uber should be as unfettered as Facebook*, WASH. POST (July 10, 2014)[6] (Sen. Wyden stressing the need to encourage and not "stifle 21st century innovation").[7]

The district court, in essence, has revived the rule of the *Prodigy* case that Section 230 overturned. It has done so by condoning the selective transfer of liability from third parties to any website that provides a service beyond mere transmission of information. What the district court thought *saved* the Ordinance (that it leaves vacation rental listings on Craigslist and similar sites undisturbed while punishing the "transactions" on Airbnb and HomeAway) is actually what *condemns* the Ordinance under Section 230.

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[6] https://www.washingtonpost.com/news/the-switch/wp/2014/07/10/sen-ron-wyden-uber-should-be-as-unfettered-as-facebook.

[7] This sentiment from Section 230's authors has been echoed in the modern Internet era by President Barack Obama, who cited Airbnb as "a good example of the power of the Internet . . . . Airbnb is using social media and the Internet in order to create a buyer and a seller . . . . And so it's . . . a good example of the potential that could be unleashed." Remarks by President Obama at an Entrepreneurship and Opportunity Event, Havana, Cuba (Mar. 21, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/03/21/remarks-president-obama-entrepreneurship-and-opportunity-event-havana.

IV. Upholding the Santa Monica Ordinance Will Open the Door to Similar Requirements by Other Municipalities, Increasing the Burden of Monitoring Third-Party Content That Section 230 Prohibits.

The way will be clear for states, counties, and municipalities to avoid Section 230's preemption if the Ordinance is upheld. As the district court noted, San Francisco has already adopted a similar ordinance. Order at 10 (citing *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066, 1072 (N.D. Cal. 2016)). Santa Cruz, California, and Seattle, Washington, have also adopted similar ordinances. *See* Santa Cruz Ordinance No. 2017-18;[8] Ben Lane, *Seattle passes sweeping short-term rental laws, limits Airbnb hosts to two units: Hosts must also be licensed by city*, HOUSINGWIRE (Dec. 13, 2017).[9] Other state, county, and local governments would no doubt find that fining websites for their users' infractions is more convenient than fining each individual who violates local laws. Given the unlimited geographic range of the Internet, unbounded by state or local jurisdiction, the aggregate burden on an individual web platform would be multiplied exponentially. While one monitoring requirement in one city may seem a tractable compliance burden, myriad similar-but-not-identical regulations could easily damage or shut down Internet platforms. *See Batzel*, 333 F.3d at 1028.

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[8] Available at http://www.cityofsantacruz.com/home/showdocument?id=64619.

[9] https://www.housingwire.com/articles/42078-seattle-passes-sweeping-short-term-rental-laws-limits-airbnb-hosts-to-two-units.

If prohibiting a website from "facilitating business transactions" (Order at 10) succeeds in end-running Section 230 preemption, the same tactic could easily be applied to websites in other areas of e-commerce to require them to monitor users' compliance with local laws. Laws requiring eBay to monitor listings on its site for counterfeit recordings could be construed as prohibitions against "facilitating illegal sales." Laws requiring StubHub to review every ticket posted on its site for scalped tickets could be construed as prohibitions of illegal "business exchanges." Laws requiring Etsy to review all of its listings to ensure sellers are duly licensed could be construed as targeting Etsy's conduct rather than making Etsy liable for third-party postings.

Unleashing an indeterminate number of jurisdictions to carve away the protections of Section 230 would undermine the law's purpose much more effectively than any single city can. The likely multiplication of potential claims against websites is one reason this Court has held that close cases must be resolved "in favor of immunity" under Section 230, in order to prevent such a tide of Internet-hampering ordinances. *Roommates.com*, 521 F.3d at 1174 (noting the failure to apply Section 230 immunity as intended will "forc[e] websites to face death by ten thousand duck-bites, fighting off claims that they promoted or encouraged—or at least tacitly assented to—the illegality of third parties").

The accretion of burdens would be especially harmful to smaller websites. Future startups, facing massive exposure to potential liability if they do not monitor user content and take responsibility for third parties' legal compliance, would encounter significant obstacles to capital formation. Not unreasonably, some might abjure any business model reliant on third-party content.

Representatives Cox and Wyden pointed out, contemporaneously with the enactment of Section 230 and of companion Internet legislation they also co-authored, the Internet Tax Freedom Act, 47 U.S.C. § 151 note, that the decentralized, packet-switched architecture of the Internet has no precedent in U.S. or global commerce. While equally revolutionary when introduced, the telephone and telegraph are point-to-point communications. There is a point of origin and a terminus. A website, in contrast, has a unique point of origin that is immediately and uninterruptedly exposed to billions of Internet users in every U.S. jurisdiction and around the planet. This makes Internet commerce uniquely vulnerable to regulatory burdens in thousands of jurisdictions. So too does the fact that the Internet is utterly indifferent to state borders. These characteristics of the Internet, Congress recognized, would subject this quintessentially interstate commerce to a confusing and burdensome patchwork of regulations by thousands of state, county, and municipal jurisdictions, unless federal policy remedied the situation. *See* 144 Cong. Rec. E1288-03 (June 23, 1998). These fundamental characteristics of the Internet were also cited by the

White House under President Clinton as reasons for a preemptive national policy. "The Framework for Global Electronic Commerce," The White House, § I.1 (1998).

Today, some two decades after the enactment of Section 230, the essential nature of the Internet has not changed in these respects. To the contrary, the significant growth in volume of traffic on websites such as Airbnb and HomeAway has made the potential consequences of local regulation graver. Santa Monica's attempt to outsource its policing of third-party conduct to Internet services may make sense from the City's perspective, but the district court's approval of the Ordinance is wholly antithetical to Congress's judgment that such services should be "unfettered by . . . regulation." 47 U.S.C. § 230(b)(2).

This Court's reversal is necessary to apply Section 230 as intended by Congress, and to ensure that the way is not opened for other governments to impose requirements similar to Santa Monica's that would undermine Section 230 on a far greater scale.

CONCLUSION

For the foregoing reasons, the Court should reverse the Order of the district court, recognizing that because Section 230 preempts the Ordinance, Airbnb and HomeAway are likely to succeed on the merits.

Dated: April 25, 2018

Respectfully submitted,

/s/ David Salmons

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Signature of Attorney or Unrepresented Litigant: /s/ David Salmons

Date: Apr 25, 2018

("s/" plus typed name is acceptable for electronically-filed documents)

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CERTIFICATE OF SERVICE

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 *Amici 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 April 25, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 25, 2018

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