No. 18-55113

In the United States Court of Appeals for the Ninth Circuit

LA PARK LA BREA A LLC; LA PARK LA BREA B LLC; LA PARK LA BREA C LLC; AIMCO VENEZIA, LLC,

Plaintiffs–Appellants,

v.

AIRBNB, INC.; AIRBNB PAYMENTS, INC.,

Defendants–Appellees.

BRIEF OF CHRIS COX, FORMER MEMBER OF CONGRESS AND CO-AUTHOR OF CDA SECTION 230, AND NETCHOICE AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS AND AFFIRMANCE

On Appeal from the United States District Court
for the Central District of California
No. CV 17-4885 DMG (AS)
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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: September 27, 2018

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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"). 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, including the original intent of Section 230, not already addressed by the parties.

NetChoice is a national trade association of e-commerce and online businesses that 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 consideration of how this federal statute applies to state law causes of action like those at issue in this case.

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[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. NetChoice was entirely responsible for funding the preparation and submission of this brief.

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 that 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.

At the time, not all in Congress were familiar with the Web. But some were, including Representatives Cox and Wyden. Their experience and their desire to ensure that this new technology flourished led to Section 230 becoming law.

B. The *Prodigy* and *CompuServe* Cases

In 1995, on a flight from California to Washington, D.C. during a regular session of Congress, Representative Cox read a *Wall Street Journal* article about a New York Supreme 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 an unknown user's post on the Prodigy web service that said disparaging things about a securities investment banking firm. The investment company filed suit for libel but couldn't locate the author of the post. So instead, the investment company sought damages from Prodigy, the Internet platform on which the allegedly defamatory content was posted. *See Stratton Oakmont v. Prodigy Servs. Co.*, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995) (unpublished).

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 1995, the *Prodigy* court distinguished the *CompuServe* precedent. Unlike CompuServe, the court reasoned, 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 for third-party content that CompuServe didn't face. The perverse incentive this case established was clear: Internet platforms should avoid even modest efforts to police their sites.

Representative Cox immediately roughed out an outline for a bill to overturn *Prodigy*'s holding.

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, 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 bipartisan lawmakers 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: it would be unreasonable to hold Internet platforms liable for content created by website users. Correlatively, website users would retain the responsibility to comply with all laws, both civil and criminal, in connection with *their* user-generated content. The law would 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, Pub. L. No. 104-104, 110 Stat. 56 (1996).[2]

If, in light of the volume of content that crossed Internet platforms in 1995, it was unreasonable to hold websites liable for 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,

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

the fundamental principle of Section 230 that websites should not be liable for user-generated content is 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). Even if an Internet platform *does* review some of the content and restricts it because it is obscene or otherwise objectionable, the platform does not thereby assume a duty to monitor and remove all illegal content. This provision makes clear that Congress intended to protect Internet platforms from legal responsibility for user-generated content even though they might attempt to review some of it in the course of enforcing rules against "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable" content.

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 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 absent fear of liability for user-generated content.

Without user-generated content, the millions of victims contending with hurricanes Florence, Maria, Irma, and Harvey, or last year's devastating Mexico earthquake, could not have found their loved ones. In the wake of each of those disasters, 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. 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

[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.

helpful in making their purchasing decisions.[5] User-generated content is vital to law enforcement and social services.

E. Rejecting the Policy of Liability for User-Generated Content on e-Commerce Websites

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 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 Section 230 as an amendment to the CDA "to encourage the unfettered and unregulated development of free speech on the Internet, *and to promote the*

[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.

development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003) (emphasis added), *cert. denied*, 541 U.S. 1085 (2004); *see also* 141 CONG. REC. H8468–72, H8478–79 (Aug. 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. 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 and 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 be extended to make Internet platforms derivatively liable for user-generated content. Instead, the platforms would be protected from liability *unless they create the content themselves*. To ensure that 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 and private plaintiffs like Aimco to look to Internet platforms to enforce legal requirements applicable to the users of those 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 seek out and remove unlawful 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 spoke 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.

A bipartisan supermajority of Congress supported this policy of making third parties (not Internet providers) responsible for their own content, in order to preserve

the unique and beneficial nature of the Internet. Congress recognized that platform liability for user-generated content would rob the technology of its vast interstate and global capability, which Congress decided to "embrace" and "welcome" not only for its commercial potential but also for "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 individually monitor those communications for anything potentially illegal. 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 holding platforms liable for content produced by others.

F. Preempting State and Local Law

The plain language of Section 230 makes clear its purpose of preempting state law claims like those raised by Aimco. This preemption supports a uniform federal policy that avoids results such as the state court decision in *Prodigy*. Congress deliberately chose preemption because the Internet is the quintessential vehicle of interstate 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 private plaintiffs free to sue Internet platforms for user-generated content in every state and local jurisdiction, 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 holding platforms liable for user-generated content. 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

Section 230's broad immunity shields Internet intermediaries from liability for content generated and posted by third parties. An intermediary 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, intermediaries 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 liability 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, 1174 (9th Cir. 2008) (en banc), this Court observed that it would "cut the heart out of section 230" to require a website to monitor content created by others in order to discover unlawful material. A website's posting of user-generated

content is "precisely" the case for which "section 230 was designed to provide immunity," this Court held. *Id.* Moreover, the Court's opinion emphasized, the blow to Section 230 would be just as severe if an Internet platform's provision of services beyond posting information defeated its immunity. *See id.* at 1168, 1173–76. That conclusion holds even where a website's e-commerce activity comprises more than just the posting of user-generated content (*e.g.*, "brokerage services") because the basic question remains the same: Does the claim require the Internet platform to monitor, review, or remove user-generated content in order to avoid liability? If so, then the claim is preempted. *Id.* at 1174.

I. Aimco's Theory of Liability Would Impose a 'Bulletin Board' Model on Websites, the Precise Outcome Section 230 Was Meant to Avoid.

Aimco's position would deny Section 230 immunity to any e-commerce business that goes beyond merely posting information created by others. That is, any ancillary services beyond a Craigslist-style bulletin board would be disqualifying. But this is the opposite of what Section 230 intended to achieve. The 1995 New York Supreme Court decision in *Prodigy* favored Internet platforms that provide only bulletin-board publishing services. Platforms that do something more, the *Prodigy* court said, must face derivative liability for illegal content created by their users. *See* 1995 WL 323710, at *4–5. But Section 230 was specifically designed to remove liability for Internet platforms based on third-party content even when the platforms provide more than mere bulletin-board services.

From Aimco's standpoint, a platform's provision of transaction services makes the difference in defeating Section 230 immunity. But consistent with congressional intent in writing this statute, two decades of decisional law across the nation has held that Section 230 immunity is *not* removed because third-party users both post and engage in commercial transactions through an Internet platform. A number of these cases were discussed in depth by the district court. Nonetheless, Aimco dismisses them all in footnotes. Aimco Br. at 44–45 nn.35–37. But these cases are completely on point in rebutting Aimco's contention. The cases clearly establish not only that Section 230 provides immunity from liability which may otherwise be avoided only by monitoring and removing user-generated content, but also that this immunity is not removed if the website performs other transaction-related services.

The basis for these holdings is clear: the statute itself makes no such distinction between different e-commerce business models. It provides that no website may be held liable for the content and conduct of third parties. This is why, for example, 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 transactions rather than the publication of the listings. ER 9.

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, StubHub charges a fee when a sale of tickets occurs, and it facilitates the sale. *Id.* Applying Section 230, the court held that the website's processing of the payment was "irrelevant for purposes of determining the extent to which [StubHub] was entitled to immunity." *Id.* The court emphasized that the user of the website is the one who illegally sold the tickets above face value. The user made the decision to list the tickets for sale, and determined the price for which the tickets were listed. He "had complete control over" the content at issue—"the price at which he chose to resell" the tickets. *Id.* at 562.

Hosts who post on Airbnb similarly have complete control over whether they list and rent homes in a manner that violates the terms of their leases. If a user's lease bans assignment or subleasing, it is the user (the "host" in Airbnb's parlance) who violates the terms of her lease by posting on Airbnb's website and renting to interested renters. Aimco admitted this essential fact in its original complaint in this case. *See* ER 11 n.8. It is the host who decides whether she posts an advertisement for that property on the website. The host makes the decision whether she allows a sublessee to rent from her or to stay at that property. The host has "complete control over" the content at issue—in this case, an assignment or sublet of the property that violates her lease.

Airbnb has no control over this relevant content, just as StubHub has no control over the price at which sellers list their tickets. Neither can be held liable for illegal conduct by third-party content providers. The payment services provided by StubHub and Airbnb do not change the fact that the relevant *illegal content* is provided by the third-party user. *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1125 (9th Cir. 2003) (to defeat immunity, the website must have acted as an "information content provider with respect to the [specific] information that appellants claim is [unlawful]" (quoting *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833 n.11 (2002))).

Similarly, eBay has been held immune from liability for facilitating allegedly illegal sales. *See Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at *2 (Cal. Super. Ct. Nov. 1, 2000). Like 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. Still, Section 230 immunity applied. The court specifically rejected the distinction urged by Aimco 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 limits its application to mere bulletin board websites. *See id.*; *Gentry*, 99 Cal. App. 4th at 831.

In *Inman v. Technicolor USA, Inc.*, No. 11-666, 2011 WL 5829024, at *7 (W.D. Pa. Nov. 18, 2011), likewise, the court concluded holding a website liable for failing "to prevent [third-party] conduct"—including illegal sales—"would run afoul of the immunity provisions of section 230." *Id.* (surveying cases). 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. *Id.* at *6. 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.

Courts have (rightly) applied this logic not only to StubHub and eBay, but also to Airbnb itself. *MDA City Apartments, LLC v. Airbnb, Inc.* held that Airbnb's "processing payments and transactions in connection with listings created by third parties" does not remove Section 230 immunity. No. 17 CH 9980, 2018 WL 910831, at *14 (Ill. Cir. Ct. Feb. 14, 2018). That is because none of Airbnb's services includes "developing any of the information in the listing" that violates the leases. *Id.* at *13. In *Donaher, III v. Vannini*, too, Airbnb's payment processing business did not strip it of immunity under Section 230. No. CV-16-0213, 2017 WL 4518378, at *3 (Me. Super. Ct. Aug. 18, 2017); *id.* at *2 (explaining the "heart" of the plaintiff's complaint was that "Airbnb failed to take down [the tenant's] post offering plaintiffs' house for rent").

The distinction between these cases and the facts of *Internet Brands*—relied on heavily by Aimco (at 29–42)—is evident. In *Internet Brands*, this Court permitted a claim for liability based on tortious failure to warn, *i.e.*, failure to generate its own content to warn a user about a rape scheme about which it was aware. 824 F.3d at 852. It did *not* impose liability on Internet platforms merely because they provide financial services in addition to posting third-party content. Instead, it clarified that the failure-to-warn claim could only go forward because it "has *nothing* to do with Internet Brands' efforts, or lack thereof, to edit, monitor, or remove user-generated content." *Id.* (emphasis added). The opposite is true here. Aimco's claim against Airbnb has everything to do with Airbnb's lack of effort to monitor and remove user-generated content involving Aimco's leases.

If Aimco were to prevail on that claim, Airbnb could no longer exist in its current form. It would have to revert to a bulletin-board Craigslist model. As Aimco puts it, Airbnb could do "no more than display *advertisements for third-party listings like a newspaper* does." Aimco Br. at 52 (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 then-emergent AOL) and more dynamically interactive platforms. *See* S. REP. NO. 104-230, at 194 (1996) (noting goal of overruling *Prodigy*); H.R. REP. NO. 104-458, at 194 (1996) (Conf. Rep.) (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. It would 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 through Section 230. *See, e.g.*, Nancy Scola, *Sen. Ron Wyden: Uber should be as unfettered as Facebook*, WASH. POST (July 10, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/07/10/sen-ron-wyden-uber-should-be-as-unfettered-as-facebook (co-sponsor of Section 230 Senator Wyden stressing the need to encourage and not "stifle 21st century innovation").[6]

Aimco's argument would revive the rule of the *Prodigy* case that Section 230 overturned. It would do so by condoning the transfer of liability from third parties

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[6] While encouraging "Good Samaritan" filtering of third-party content by Internet platforms was certainly one goal of Section 230, as Aimco points out (at 39) and as discussed above (*supra*, Introduction and Legislative History, Section C), it was by no means the *only* goal of Section 230—as Aimco incorrectly asserts (at 47 n.39). Permitting the development of e-commerce was just as important to Section 230's drafters. *See Batzel*, 333 F.3d at 1027; *supra*, Introduction and Legislative History.

to any website that provides a service in conjunction with retransmission of content created by others. And it would do so in clear contravention of this Court's precedent forbidding liability based on mere third-party use of "neutral tools" that "provide a framework that could be utilized for proper or improper purposes." *Roommates.com*, 521 F.3d at 1172.

II. No Amount of Artful Pleading Can Overcome Section 230's Prohibition on Forcing Internet Platforms to Monitor and Remove Third-Party Content—the Result Aimco Seeks.

Aimco claims it seeks to hold Airbnb liable not for publishing third-party content (a basis of liability prohibited by Section 230), but for its "brokerage services" and the "online tools and information Airbnb provides that induce and enable tenants" to rent homes. Aimco Br. at 26–27. But this Circuit has forbidden such artful pleading to get around the substance of a claim rooted in failure to monitor and remove third-party hosts' listings. Plaintiffs cannot "plead around the CDA to advance the same basic argument that the statute plainly bars": that Airbnb "published user-generated speech that was harmful to [Aimco]." *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016).

As the district court noted, in this case the gamesmanship and artful pleading is obvious. Before Aimco "became aware of the CDA," its original complaint honestly disclosed Aimco viewed the "listings that appeared on Airbnb's platform" as the problem. ER 11 n.8 (quoting original complaint). Only after discovering

Section 230's prohibitions on holding websites liable for listing third-party content did Aimco "shift its focus to [Airbnb's] payment and transaction processing." *Id.* Notwithstanding the new window dressing, Aimco's fundamental argument remains that Airbnb should not have posted listings for Aimco units. Even if Aimco had devised this artful pleading for its original complaint, the irrelevance of "transaction processing" to the question of Section 230 immunity would remain obvious.

Under Aimco's theory, Airbnb becomes liable for "facilitating" Aimco's lessees' transactions *by allowing hosts to use Airbnb's neutral tools to list Aimco's properties and by allowing guests to view and rent those listings* despite the hosts' agreement with Aimco not to do so. Aimco Br. at 37; ER 246. Put in the negative, Aimco's argument is that Airbnb must not be allowed to post listings by any host involving an Aimco property. And Airbnb must not allow guests to view listings involving any Aimco property. The only way for Airbnb to meet this demand would be to monitor the content of each listing, and, once having investigated the circumstances of the individual posting, remove it—hopefully before Aimco files another claim that it has "facilitated" the violation of one of its leases. *See* Airbnb Br. at 13, 26–30. Even were this possible (and it is not), Airbnb would be unable to avoid all liability, as it is not privy to all users' leasing information. It is the third-party user who has that information and who, under Section 230, is solely responsible for not violating her lease.

Aimco claims that since it has put Airbnb on notice of the potential illegality of content posted on its website, Section 230 should no longer apply. This argument is specious. Avoiding liability would require Airbnb to monitor all postings for this particular potential illegality; then to investigate the facts and circumstances of each case when discovered; and finally to individually remove those it believes involve Aimco leases. The Ninth Circuit recently (and correctly) held that Section 230 forbids just this type of liability. Section 230's protection may not be vitiated based on "efforts, *or lack thereof*, to edit, *monitor*, or *remove* user generated content." *Internet Brands*, 824 F.3d at 852 (emphases added).

This holding is completely consistent with the intent of Congress. 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 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. This essential feature of the Internet would be disrupted if Internet platforms were required to individually monitor and review user-generated content.

The inevitable consequence of attaching platform liability to user-generated content is to force an Internet intermediary such as Airbnb to monitor everything posted on its site—for fear of being liable for an illegal transaction resulting from that content. Congress understood that liability-driven content monitoring and removal 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 review user-generated content and remove unlawful content would degrade the vibrant online forum for e-commerce that was the promise of the Internet.

The policy reason behind Section 230's protection of websites from state-law liability for not reviewing and removing content is well illustrated by this case. Reviewing each third-party advertisement in order to avoid liability for a potentially illegal listing would create an extraordinary bottleneck. It would obstruct and slow down the inherently high-volume, geographically unlimited, instantaneous flow of information that is essential to the functioning of Airbnb (and to thousands of other e-commerce websites that offer an endless variety of services employing user-generated content).

One thing is certain: requiring a website to individually screen each posting by every user in order to avoid liability defeats the purpose of Section 230. Adopting Aimco's position in this lawsuit would require Airbnb to independently investigate, on a case-by-case basis, whether every person posting on its website is in compliance with their lease agreements. Rather clearly, this would make the Internet platform liable for what under Section 230 is meant to be each website user's legal responsibility. It is the opposite of what Section 230 provides.

Aimco has gone to considerable lengths to re-characterize its claim in this case as one focused solely on "brokerage services," not on Airbnb's lack of effort to monitor or remove listings on its site. Aimco Br. at 39. But Airbnb would not be liable for providing its brokerage services to hosts who are not violating their lease agreements. It would only be liable if the website user is herself in violation of her own lease. Inevitably, Airbnb would have to evaluate every listing on a case-by-case basis to know whether this were so. It would have to review all underlying lease agreements, determine their legal effects, and take down those that appear noncompliant with those agreements (in the process, exposing Airbnb to potential claims for discrimination or wrongful termination of a valid listing). Such required monitoring and removal of user-generated content directly violates Section 230.

III. Accepting Aimco's Theory of Liability Would Open the Door for Thousands of Similar Lawsuits, Exponentially Increasing the Harm that Section 230 Is Meant to Prevent.

Stripping the protections of Section 230 from the thousands of e-commerce platforms such as Airbnb that provide features ancillary to the posting of user-generated content would dramatically alter the landscape of the Internet, and for the worse. As noted, millions of people rely on myriad platforms featuring user-generated content for an endless variety of commercial activity. If the legal responsibilities of those millions can be transferred to the websites on which they post information, who would bother to bring a lawsuit against the individuals who violated the law? A large landlord with many tenants can more easily sue a website like Airbnb than bring individual actions against each individual who violates his or her lease agreement. The same is true for every e-commerce platform with many users: each will become a target. Moreover, given the unlimited geographic range of the Internet, the lawsuits could come from every state and local jurisdiction. The aggregate burden on an individual web platform would be multiplied exponentially.

While defending one lawsuit from one large landlord may seem a tractable burden, becoming a magnet for many similar lawsuits could easily damage or shut down Internet platforms. *See Batzel*, 333 F.3d at 1027–28 (Section 230 addresses "the concern that lawsuits could threaten the 'freedom of speech in the new and

burgeoning Internet medium' ... [by] [m]aking interactive computer services … liable for the speech of third parties." (citations omitted)).

If a website's engaging in "non-publishing brokerage services" (Aimco Br. at 39, 45) is enough to cost it Section 230 protection, virtually every e-commerce website would fall victim to the same tactic. All would need to monitor every user's compliance with an endless variety of state and local laws, recede into mere bulletin board status, or simply fold. eBay's immunity would be defeated by lawsuits based on "facilitating illegal sales." StubHub's immunity from having to review every ticket posted on its site would be defeated by lawsuits based on "brokering of ticket sales." Etsy would face demands to review all of its listings to ensure that every seller is duly licensed. The result would be to undo the e-commerce benefits that were the intended result of Section 230 immunity.

The likely multiplication of potential claims against websites is one reason this Court has held that "close cases" should be resolved "in favor of immunity" under Section 230, in order to prevent such a tide of Internet-hampering lawsuits. *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"). Unleashing an onslaught of lawsuits to carve away the

protections of Section 230 would undermine the law's purpose much more effectively than any single lawsuit can.

The accretion of burdens would be especially harmful to smaller websites. Future startups, facing massive exposure to potential liability if they do not ensure *third parties'* compliance with the *third parties'* legal obligations, would encounter significant obstacles to capital formation. The concern is not merely that liability will increase some costs by making Internet business "marginally more expensive," as all liability does. Aimco Br. at 39 (quoting *Internet Brands*, 824 F.3d at 852). The point of Section 230 is to protect websites from this type of massive exposure for third-party conduct. Were it otherwise, some new websites could be expected to abjure any business model reliant on third-party content in order to avoid overwhelming potential liability—liability based not on their own actions, as in *Internet Brands*, but on the actions of third parties.

Representatives Cox and Wyden pointed out, contemporaneous 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 litigation and regulatory burdens in thousands of jurisdictions. So too does the fact that the Internet is utterly indifferent to state borders.

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 has made the potential consequences of publisher liability graver. Aimco's attempt to outsource its policing of the conduct of its lessees to Airbnb is wholly antithetical to Congress's judgment that websites should be free from liability for content posted on their sites.

This Court's affirmance is necessary to apply Section 230 as intended by Congress. Preserving the ruling in the district court is necessary to ensure that the way is not opened for litigation that would undermine Section 230 on a far greater scale.

CONCLUSION

For these reasons, the Court should affirm the Order of the district court dismissing Aimco's claims with prejudice.

Dated: September 27, 2018 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 *Amici Curiae* in Support of Defendants and Affirmance 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 September 27, 2018.

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