NetChoice *Promoting Convenience, Choice, and Commerce on The Net*

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Re: Opposition to the Unconstitutional and Discriminatory AB 3262

We ask you to **oppose AB 3262** because it:

- hurts California's small businesses;
- undercuts your constituents' privacy rights;
- discriminates against businesses—large and small—that sell online; and
- violates federal law.

AB 3262 boils down to a demand that online listings and marketplaces investigate and certify the safety and authenticity of every item sold by every seller. This is neither realistic, reasonable, nor necessary.

To see why, consider first that online marketplaces are merely digital versions of shopping malls. Indeed, despite that digital divide, the two marketplaces are similar in all relevant respects.

Like a mall with individual stores, an online marketplace connects individual sellers to individual consumers. In both marketplaces, consumers decide which sellers to visit and which products to buy. And when consumers buy products, they enter into a commercial relationship with individual sellers, not with the shopping mall or the online marketplace.

Now consider this bill. It transforms digital marketplaces into customs agents (checking for fraudulent goods), safety regulators (checking for safety), and insurance agents (assuming liability for bad products). It would be like requiring a shopping mall to verify the authenticity of every item Macy's sells.

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The bill's advocates say this is necessary to protect consumers from buying fraudulent or harmful products. But if that were a legitimate duty to force on digital marketplaces, then why exempt malls from the bill's coverage? After all, consumers at malls are at even greater risk of buying bad products—unlike their online-shopping peers, they don't have immediate access to

customer reviews or side-by-side product comparisons. And unlike some online marketplaces, malls at least have access to the physical products. But no one thinks malls should do that because the costs far outweigh any potential benefits.

So just as it makes no sense to force malls to investigate every product sold within them, it makes no sense to force digital marketplaces to do the same.

1. The bill imposes impossible requirements on digital marketplaces, small businesses, and even California residents.

If a neighbor sells a used computer on Nextdoor or Craislist, the platform would have to confirm the authenticity of every item listed, information that platforms like Nextdoor and Craigslist are unable to access easily (or even at all).

The upshot: California's small businesses and residents will be forced off digital marketplaces. Does anyone really believe that these marketplaces—like any rational person in the marketplaces' situation—won't try to protect themselves by requiring sellers to indemnify them or buy expensive liability insurance? Even if that doesn't happen, meritless litigation—between consumers and sellers; consumers and marketplaces; sellers and marketplaces—will occur. Only lawyers will benefit. Perhaps that is why plaintiffs' attorneys, not consumers, are so active in drafting and advocating for this legislation.

AB 3262's imposition of liability on online marketplaces also puts small businesses across California at a significant disadvantage against big box retailers that don't rely on online marketplaces to reach potential customers and that already dominate our retail landscape. Given these businesses' struggle to survive during coronavirus, let alone to turn a profit, it's hard to see how this cost could be justified.

2. The bill unfairly discriminates against businesses that sell their goods online and creates a moral hazard in the process.

California has one of the largest retail markets in the world. For that reason, it has often led the charge in protecting consumers from defective products. Indeed, if someone sells a defective or dangerous product in its market, California's law holds the manufacturer and those "integral" to the product's creation and marketing responsible. In other words, it holds those who, because of their position in the supply chain can inspect the product before it reaches consumers, liable. It does not hold those who merely facilitate the product's purchase liable.

AB 3262 keeps these principles for brick-and-mortar retailers. For online marketplaces, however, it holds them strictly liable regardless of their role in the product's creation and regardless of their knowledge of the product's defects.

This liability shift creates a dangerous moral hazard. If the digital marketplace is liable for the seller's product, then sellers have no incentive to inspect their products themselves. After all, if the platform will be held liable *at any point in time*, then why worry too much about doing the

inspection work yourself? After all, injured consumers will simply sue the platform. Perhaps that's seen as a benefit to some, but ***those who know the product best—its manufacturers and sellers—are in the best position to evaluate its safety***.

Passing the buck to online marketplaces means they'd have to become experts in all products from all industries. Again, maybe that's seen as a benefit to some. But it will surely work to hurt small startups and to drive small businesses offline. At a time when many state lawmakers worry about competition in the digital marketplace, passing this law would be a curious way of alleviating that worry, let alone fostering competition.

AB 3262 creates a disincentive for sellers to make safe and honest transactions because AB 3262 shifts primary responsibility to the marketplace.

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3. Despite statements to the contrary, AB 3262 directly impacts platforms like Craigslist, Esty, eBay, and the LA Times online classified section.

During the floor hearing on June 11, 2020, AB 3262's sponsors explicitly stated that neither Etsy nor eBay are impacted by AB 3262. But the language and effect of AB 3262 show otherwise.

While § 1714.46(b) appears to exempt "used" and "handmade" items, subsection (c) obliterates that exemption for platforms like Etsy, eBay, Craigslist, and LA Times online classified's section.

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§ 1714.46(c):

> Notwithstanding subdivision (b), an electronic retail marketplace shall be strictly liable for the sale of preowned, used, handmade, or auctioned defective products if the electronic retail marketplace… plays an active role in the marketing enterprise of the product,

Since even Craigslist and the classified sections are essentially marketing the product – the appearance of an exemption in (b) is anything but that, an appearance of an exemption.

4. AB 3262 is preempted by federal law.

As if all that were not bad enough, the bill also runs afoul of federal laws like the Communications Decency Act (CDA). Federal law states that "[n]o provider or user of an

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[1]

Moreover, "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 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)….

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."[2]

So even if this bill were passed, it would not withstand judicial review under the federal Constitution's Supremacy Clause.

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Although we recognize that AB 3262 seeks to remedy commercial problems, this bill serves only to make those problems worse—and adds even more (unintended) problems on top of those.

We ask that you **not support AB 3262**.

Sincerely,

Carl Szabo
Vice President and General Counsel, NetChoice
NetChoice is a trade association of businesses who share the goal of promoting free speech and free enterprise on the net. www.netchoice.org

[1] 47 USC § 230(c)(1).
[2] *La Park La Brea v. Airbnb*, 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, No. 18-55113 (9th Cir. 2018).

PART II. LEGAL ANALYSIS OF AB 3262

I. The Bill is Preempted by Section 230 of the Communications Decency Act.

Introduction. In the proposed bill AB 3262, California's state legislature "seeks to protect consumers from dangerous and defective products by holding electronic marketplaces, like traditional brick-and-mortar retailers and distributors, strictly liable for injuries caused by such products." The legislature also claims that, if passed, the bill "will level the playing field for all types of retailers and *distributors*, regardless of how their products are sold and delivered to consumers."

Although the legislature may generally tinker with and extend California's product liability principles as it sees fit, it may not do so in ways that conflict with federal law. By extending products liability—strict or otherwise—to "electronic marketplaces" for products sold by third-party sellers, the bill conflicts with Section 230 of the Communications Decency Act and is thus preempted.

Under that law, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." And "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

AB 3262's supporters will likely argue that products sold through online marketplaces are different from the "information provided by another" protected by Section 230. But that's a difference that makes no difference. This is so for three reasons:

1. First, Section 230's text distinguishes between content providers and treats them differently for liability purposes. AB 3262 collapses this distinction and treats all providers—up and down the supply chain—the same.

2. Second, given Congress's stated policy to keep the internet "unfettered by Federal or State regulation," 47 U.S.C. § 230(b)(2), the law prohibits all tort claims under state law that would hold online marketplaces liable for another's wrongdoing as a matter of first principles.

3. And third, court precedents reflect the fundamental distinction between permissible efforts to impose liability for a provider's own content and forbidden efforts to transfer that liability to someone else.

Section 230's Text. At its core, Section 230 is an instruction manual for courts: Do not hold online content providers responsible for a content creator's conduct. The law sweeps broadly, too. It declares: "*No* provider or user of an interactive computer service shall be treated as the publisher or speaker of *any* information provided by *another* information content provider." 47 U.S.C. § 230(c)(1)(emphasis added). So, in a single sentence, Congress made clear that:

- Providers and users of online content are legally distinct from those who create the content at issue; and
- That distinction protects the former from liability for the latter's content.

And it made clear that Section 230's liability rules are the standard anywhere in the country: Section (e)(3) states, "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

To be sure, the immunity is not absolute. Elsewhere in the law, Congress listed all laws that Section 230 does not apply to: (1) federal criminal laws; (2) intellectual property laws; (3) state laws "consistent" with Section 230; (4) communications privacy laws; and (5) sex trafficking laws. *Id.* at (e)(1)-(5).

Relevant here is category 3—state laws. That category raises a question: which are consistent with Section 230? Section (c)(1), recounted above, supplies the answer: Only those that do not hold content providers or users responsible for content creators' conduct.

AB 3262 eliminates the distinction between provider and creator entirely. It expands California's product liability law to hold everyone in a product's supply chain strictly liable for the product's harm. Because it would hold an online marketplace responsible for a third party's faulty product simply because it listed that product for purchase or facilitated its purchase, the law violates Section 230.

First Principles. The state may argue that this distinction is not required because the underlying claim is for products sold, not content hosted. But that is a difference that makes no difference. A simple hypothetical clinches this point. Imagine a bookstore sells an author's book that happens to contain defamatory content. Is that bookstore liable if someone buys the book? What if the customer doesn't buy it but instead reads the defamatory part while in the store? And what if the bookstore also sold the book through its website?

The answer to all three is no, the bookstore would not be liable. This is so even though the product—the book—contains something harmful—the defamatory speech. Why? Because the bookstore did not produce the defamatory content itself, it merely acted as an intermediary between the book's author (or publisher) and buyers. The same

principle applies online. When marketplaces list products for consumers to buy—even when they facilitate sales and even when they warehouse those products like bookstores do—they act only as intermediaries between the seller and buyer. In other words, they are not responsible for someone else's wrongdoing.

Nor is this principle limited just to defamation. At first glance, Section 230 (c)(1) seemingly has in mind torts like defamation because it uses the terms "publisher" and "speaker." But that language actually expands, rather than restricts, Section 230's shield. As the Ninth Circuit explained, those terms mean online platforms cannot 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).

And that protection applies regardless of whether a platform is merely a forum for discussion or is an online marketplace that connects sellers with buyers. Indeed, at the outset, the law declares that "[i]t is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* at (b)(2). In other words, the law is meant "to promote the development of e-commerce." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004); *see also* 141 Cong. Rec. H8468–72, H8478–79 (Aug. 4, 1995).

What the direct evidence says, indirect evidence buttresses. Consider that Congress could have easily limited the law's grant of immunity to defamation or similar torts by saying so. It chose not to. And if Congress had intended for the law to apply only to those types of suits, then it would not have clarified in Section (e) which laws lie outside Section 230's application.

Precedent. Interestingly enough, even California's products liability law—as it *currently* stands—basically accords with Section 230's logic, which underscores Section 230's enshrinement of sensible liability principles and this bill's radical department from them.

Section 230, for example, allows content creators to be held liable for the harms their content causes; California law likewise holds product manufacturers liable when their product "causes injury to a human being." *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62 (1963). And Section 230 holds content providers liable when they themselves create or help create content that violates the law, just as California law holds liable those who are "an integral part of the overall producing and marketing enterprise" for a defective product. *Arriago v. CitiCapital Commercial*, 167 Cal.App.4th 1527 (2008).

And although Section 230 uses different language than California law uses, both offer some grants of immunity. In federal law, content providers aren't held liable for

another provider's content. Under California law, businesses are not strictly liable for a product's harm when they do not alter, inspect, test, or operate the product. *Brejcha v. Wilson Machinary, Inc.*, 160 Cal.App.3d 630, 639-40. To be sure, Section 230's protections are far broader than that, but the principle rests on similar logic: liability should follow those who cause the harm.

In other words, like Section 230, California does not currently require businesses to monitor or inspect the products whose purchases they help facilitate. But like Section 230, it holds businesses responsible when they themselves help create the faulty product. Fittingly, this distinction was the crux of a Section 230 lawsuit that began in California and ended in the Ninth Circuit. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, an en banc decision, the Ninth Circuit held that Section 230 did not shield Roommates.com from liability under the Fair Housing Act because it created, and required users to complete, a questionnaire that unlawfully asked about gender and sexual orientation. 521 F.3d 1157 (9th Cir. 2008) (en banc). Because the questionnaire supplied choices for users to pick, Roommates.com was found to be the offending content's creator and thus outside Section 230's protection. By contrast, the court held that the website's "Additional Comments" section was immune because that section did not supply the content.

As the Ninth Circuit observed, it would "cut the heart out of Section 230" to require a website to look for unlawful content. *Id.* at 1174. Indeed, a website's posting of user-generated content is "precisely" what Section "230 was designed to provide immunity" for. *Id.* And, the court explained, this applies even to a website's e-commerce services—what it called "brokerage services"—because the basic question remains the same: Does the claim require the platform to monitor, review, or remove the content in order to avoid liability? If yes, then the claim is preempted under Section 230. *Id.* at 1174.

AB 3262 fails this test. To avoid liability under the bill, online marketplaces would have to monitor and review all third-party products they list or whose purchase they help broker. In fact, the only way to potentially escape that onerous requirement is by listing only the products they themselves make, which presumably go through product testing. But at that point, Section 230 doesn't apply anyway because the products listed are of the marketplace's own creation. Even if the platform required sellers to provide proof of their products' safety, for example, the platform would still be liable under AB 3262 if it turned out that the product was defective.

The legislature also claims that the bill is necessary to protect injured consumers because they are powerless to inspect the product before buying it. By shifting that burden to online marketplaces, the legislature is explicitly requiring them to inspect the product—something Section 230 explicitly prohibits.

Even if AB 3262 were to narrow the scope of liability—say, for instance, by applying only to products whose descriptions were edited or guided by the marketplace—that still would violate Section 230. In *Batzel v. Smith*, the Ninth Circuit held that Section 230 applied even when a content provider makes minor edits or tweaks another's content so long as that person intended to have his content distributed. 333 F.3d 1018, 1033 (9th Cir. 2003).

At bottom, California cannot subject online marketplaces to strict liability—or any liability, for that matter—for products made by third parties.

II. AB 3262 is Unconstitutional Under the U.S. Constitution's Fourteenth Amendment.

While text, first principles, and precedent all show that Section 230 preempts AB 3262, the bill is also vulnerable to constitutional attack under the Fourteenth Amendment's Equal Protection Clause. Courts review economic legislation—like this bill—under the "rational basis test." Legislation passes that test when it is "rationally related" to a "legitimate state interest." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949). Although highly deferential to a state's policy choices, it does not grant unlimited discretion.

For example, states cannot, under the guise of public safety, pass laws actually meant to favor some businesses at their competitor's expense. In *Merrified v. Lockyer*, the Ninth Circuit held as unconstitutional a California law that required pest control operators who didn't use pesticides to obtain licenses because the law's means did not fit its supposed end. 547 F.3d 978 (9th Cir. 2008). The court reached that conclusion after examining the state legislature's evidentiary record, including legislative history, as well as the law's exemptions. *Id.* at 981-82. It explained that although the licensure requirement was connected to the state's legitimate interest in public safety, it operated "to favor economically certain constituents at the expense of others similarly situated." *Id.* at 991. That was so because it singled out three types of vertebrate pests from all other vertebrate animals, which violated the Equal Protection Clause's guarantee of equal protection of the law. *Id.* Or, as the court succinctly put it, "economic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest." *Id.* at 992 n.15.

No one doubts that California has a legitimate interest in protecting the public from defective or harmful products. Even so, AB 3262's means do not fit that end. First, the bill singles out online marketplaces for strict product liability. Although the legislature's internal analysis says that doing so would merely level the playing field, the bill actually holds online marketplaces to a higher standard than California holds brick-and-mortar retailers. As discussed above, California's strict liability principles apply to (1) manufacturers and (2) those integral to producing and marketing the

product. It exempts businesses that do not inspect, review, test, or change the product. This bill abolishes that exemption for online marketplaces, while retaining it for brick-and-mortar stores.

The state argues that this is rational because online marketplaces "exert a tremendous amount of control over the third-party sellers with whom they contract, and are in the best position to influence safe manufacturing and distribution of consumer products." But those justifications don't hold up to common sense. Imagine a manufacturer of exercise equipment who sells its products both on Amazon.com and in Target's and Walmart's retail stores. If that equipment turns out to be defective, Amazon.com would be liable but not the retail stores. Why is Amazon.com better positioned to "influence safe manufacturing and distribution" of that product than Target and Walmart are? And how does Amazon.com exert more control over the equipment than Target or Walmart? To take but one similarity: If a consumer wants to return the product, he'd return it through Amazon.com, just as he'd return it to the Target or Retail store.

And if the unprecedent expansion of strict liability to online marketplaces is necessary to protect consumers, why does the bill exempt certain marketplaces and certain products? That is, if the bill is necessary to help injured consumers who are powerless to inspect the product that hurt them—as the bill claims they are—then that should apply to everyone who is allegedly in a position to inspect the product. And yet, the bill exempts (1) products that were previously owned, (2) marketplaces that do not receive any money from the sale, and (3) auction houses. None of these exemptions makes sense, which suggests they favor the legislature's preferred marketplaces and sellers.

Consider:

1. If the bill assumes that online marketplaces can inspect new products, then presumably it would assume they could inspect preowned products too. If the goal is to protect consumer safety, then that rationale must include all products, not just new ones. But because preowned products are presumably sold by individuals and not manufacturers, the legislature may have a soft spot for them.

2. Again, if the goal is to protect consumer safety, then it shouldn't matter whether the marketplace earns money. Indeed, it strains credulity to believe the legislature would include such an exemption if Amazon.com decided to facilitate transactions for free.

3. Exempting auction houses is especially curious because not only are they in a position to inspect products, they *already* do that as part of their routine services.

Like the unconstitutional law in *Merrified*, this bill favors certain marketplaces over others. In addition to exempting physical retailers, it also exempts certain online marketplaces that fit under the law's alleged purpose. Those exclusions suggest protectionism.

And what the text suggests, the bill's author confirms. In the author's words, "AB 3262 will help level the playing field for all types of distributors—something that is particularly important after the COVID-19 pandemic has pushed brick and mortar retailers and distributors to (and over) the edge of fiscal solvency." The bill doesn't level the playing field, at least not in terms of strict liability; instead it holds most online marketplaces—those most likely to compete with physical retailers—to a higher standard.

It's also unsurprising that California's major unions—backers of the state legislature's majority—support the law. As they put it and as the state legislature's own analysis approvingly cites: "The bill will ensure that California law does not continue, in practical effect, to subsidize online commerce," which is "particularly relevant and necessary in light of the Covid 19 crisis as most consumers are now purchasing most products online." The "subsidy" to which they refer is, of course, Section 230. But as discussed in the previous section, Section 230 is not a subsidy, it's merely an enshrinement of common-sense liability principles—broadly tracking California's current ones. What *is* a subsidy, however, is this bill; it burdens one set of retailers and not their similarly situated competitors.

To be clear, COVID-19 is a tragic harm that has hit retailers particularly hard. Service workers, essential personnel, and other Americans have stepped up and put themselves at risk to help others. Many of them also work for online marketplaces. But whereas the pandemic is an uncontrolled force of nature, this bill is an intentional effort to do to online marketplaces what the pandemic has done to retailers: inflict economic pain.

Under the guise of consumer safety, the bill seeks to protect brick-and-mortar retailers at the expense of their online competitors. That is unconstitutional.