

No. 25-30524

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**In the United States Court of Appeals  
for the Fifth Circuit**

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BRET BODIN, BRAD NEWELL, DARIAN MORGAN, MICHAEL ROSAS, MID-CITY  
MIKE RENTALS, L.L.C., AIRBNB, INC.,  
*Plaintiffs-Appellants,*

*v.*

CITY OF NEW ORLEANS,  
*Defendant-Appellee.*

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On Appeal from the United States District Court for the Eastern District of  
Louisiana, No. 2:25-cv-329 (Zainey, J.)

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**BRIEF OF NETCHOICE, CHAMBER OF PROGRESS, AND  
THE PELICAN INSTITUTE FOR PUBLIC POLICY  
AS AMICI CURIAE IN SUPPORT OF APPELLANTS**

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities listed in Appellants' Certificate of Interested Persons, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. Undersigned counsel makes these representations to assist the Judges of this Court in evaluating possible disqualification.

### **Amici Curiae:**

**NetChoice.** NetChoice has no parent corporations. No publicly held corporations own 10% or more of NetChoice's stock.

**Chamber of Progress.** Chamber of Progress has no parent corporations. No publicly held corporations own 10% or more of Chamber of Progress's stock.

**Pelican Institute for Public Policy.** The Pelican Institute has no parent corporations. No publicly held corporations own 10% or more of the Pelican Institute's stock.

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## INTEREST OF AMICI CURIAE

Amici curiae have an interest in the proper interpretation and application of 47 U.S.C. § 230's protections for all online services.<sup>1</sup> Those protections have been critical to ensuring the free flow of information online and the vibrant free market that currently exists on the internet. Because the district court's reasoning threatens to upend those critical protections, this case is consequential to amici, their members, and online services and their users more generally.

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 two decades, 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.

Chamber of Progress is a tech-industry coalition devoted to a progressive society, economy, workforce, and consumer climate. Chamber of Progress backs public policies that will build a fairer, more inclusive country in which the tech industry operates responsibly and fairly, and in which all

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<sup>1</sup> No counsel for any party authored this brief in whole or in part, and no entity or person, aside from amici curiae, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E). Although Appellant Airbnb is a NetChoice member, Appellant Airbnb did not contribute money that was intended to fund preparing or submitting this brief.

people benefit from technological leaps. Chamber of Progress seeks to protect internet freedom and free speech, to promote innovation and economic growth, and to empower technology customers and users. Chamber of Progress's work is supported by its corporate partners, but its partners do not sit on its board of directors and do not have a vote on, or have veto power over, its positions. Chamber of Progress does not speak for individual partner companies, and it remains true to its stated principles even when its partners disagree.

The Pelican Institute for Public Policy is a non-profit, non-partisan research institute whose mission is to research and develop policy solutions that advance individual liberty, free enterprise, and opportunity for all Louisianans. Founded in 2008, the Pelican Institute believes that every Louisianan should have the opportunity to flourish in communities where good opportunities abound and economic prosperity is achievable through hard work and ingenuity. To that end, the Pelican Institute advocates for the removal of government barriers to economic mobility.

## INTRODUCTION

Twenty-six words “fundamentally altered the landscape of liability for publishing content online.” *A.B. v. Salesforce, Inc.*, 123 F.4th 788, 792 (5th Cir. 2024). Those twenty-six words in 47 U.S.C. § 230 (“Section 230”), helped the internet grow into what we know today. And those twenty-six words dictate the outcome of this case. Section 230 embodies a clear congressional mandate: Online services<sup>2</sup> cannot be held liable as publishers when disseminating content created by third parties, including their users. 47 U.S.C. § 230(c)(1). Nor can a website be made to “monitor[], screen[], [or] delet[e] content from its network.” *Salesforce*, 123 F.4th at 798 (citation omitted). Congress understood these protections were vital to preserve a free, innovative, and competitive internet. Yet the district court’s decision in this case would allow municipalities to evade Congress’s mandate by recasting publisher liability as regulating commercial transactions.

This Court should reject that. The district court erred in upholding New Orleans’s 2024 Short-Term Rental Ordinance (“the ordinance”), which requires websites like Airbnb to verify the legal compliance of every third-party listing, reverify those listings every 30 days, and monitor listings whenever Airbnb “knows or should know” that verification data has changed. *See* Code of the City New Orleans § 26-622(a)(4). These are

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<sup>2</sup> This Brief will refer to “interactive computer service[s],” 47 U.S.C. § 230(f)(3), as “services,” “websites,” or “platforms.”

quintessential publisher functions: monitoring, screening, and making decisions to retain or remove third-party content. *See Salesforce*, 123 F.4th at 795. The City frames these obligations as conditions on “facilitating booking transactions,” but that does not change their nature. This Court has rejected such semantic games by plaintiffs seeking to evade Section 230, looking instead to whether a claim functionally treats websites as publishers. *Id.* at 793. Municipalities attempting the same maneuver through regulatory drafting should be held to the same standard.

The district court nevertheless upheld the ordinance, concluding that it regulates Airbnb’s role as a “booking agent” rather than as a “publisher” of third-party listings. Dist. Ct. Op. at 46. The court thought that the ordinance does not expressly require Airbnb to remove noncompliant listings—but only prohibits collecting fees for facilitating bookings of such listings. The court therefore reasoned that the ordinance imposes no publisher liability. Dist. Ct. Op. at 46-47. This reasoning is fundamentally flawed. The district court failed to apply this Court’s functional test for Section 230 protections, instead crediting the City’s untenable distinction between “publishing” listings and “facilitating” transactions that arise from those listings. The court then assumed websites could avoid liability simply by refusing to facilitate bookings, disregarding both the ordinance’s *ongoing* monitoring requirements and the reality that such a “choice” would require websites to cease their core business operations.

The district court’s reasoning threatens to unravel Section 230. If municipalities can escape Section 230 preemption by tying content-monitoring requirements to ancillary services or fees, then virtually any online service—from e-commerce to app stores—becomes vulnerable to precisely the chilling patchwork of publisher liability that Congress sought to prevent.

This Court should apply its Section 230 precedent, close this playbook, and ensure Congress’s aim “to preserve the vibrant and competitive free market . . . for the Internet” remains “unfettered by [local] regulation.” 47 U.S.C. § 230(b)(2).

### ARGUMENT

Section 230 emerged from a specific problem: Common-law publisher liability was punishing online platforms for moderating content, imperiling the internet’s growth. Congress responded by enacting a national framework prohibiting governments from imposing liability for content generated by third parties and foreclosing demands for websites to monitor and screen content to those governments’ liking.

The district court failed to apply this Court’s functional test for Section 230 protections. The court instead credited an artificial dichotomy between platforms acting as “publishers” of listings versus platforms acting as “booking agents.” This ordinance clearly imposes ongoing monitoring obligations of third-party content—a quintessential publishing function. The court compounded its error by suggesting platforms could avoid liability simply by

refusing to collect fees for bookings, which is a false choice that would require platforms to abandon their core business operations for the privilege of publishing third-party speech. Finally, the district court's reasoning would have far-reaching effects, allowing municipalities to circumvent Section 230 by tying content-monitoring obligations to platform services or fees.

### **I. Congress enacted Section 230 to promote innovation on the internet.**

Congress enacted Section 230 to ensure that websites would remain free from the paralyzing effect of publisher and distributor liability and to promote future innovation on the internet. The statute emerged from a precise historical context: Early caselaw had applied common-law doctrines to new online intermediaries, threatening the growth of the internet by punishing websites that moderated harmful content. Section 230 reversed that dynamic. It solved the “moderator’s dilemma”—where removal of harmful content was discouraged—by providing immunity for moderation of third-party speech. It also declared a national policy of innovation “unfettered by Federal or State regulation,” and preempted any inconsistent state or local law. 47 U.S.C. § 230(a)(1), (b)(2), (e)(3). These protections have allowed websites to curate third-party offerings without fear of liability if they fail to moderate perfectly. As the internet has developed, these protections have given rise to innovative e-commerce services that have democratized entire markets.

**A. The text of Section 230 declares this broad purpose.**

The text of Section 230 is plain: It was intended “to promote the continued development of the internet,” “to preserve the vibrant and competitive free market” on the internet, “to encourage the development of technologies which maximize user control over what information is received by individuals” on the internet, and “to remove disincentives for” websites to develop “blocking and filtering technologies.” 47 U.S.C. § 230(b)(1)-(4). The statute’s findings emphasize the internet’s “rapidly developing” character and the “increasing[] . . . rel[iance]” of Americans on its services. *Id.* § 230(a)(1), (5).

The plain text of Section 230(c)(1) provides that no website may be “treated as the publisher or speaker of any *information* provided by *another* information content provider” —that is, speech created by someone other than the website itself. *Id.* § 230(c)(1) (emphases added). This protection turns on who “creat[ed] or develop[ed]” the challenged information. *See id.* § 230(f)(3). If the information was “creat[ed] or develop[ed]” by another party, the website is immune from publisher liability. In other words, Section 230 bars courts and regulators from holding a website legally responsible for the substance of third-party speech. That rule tracks the common-law understanding of what it means to “treat” someone “as the publisher” —to “hold them responsible for the content’s improper character.” *See Henderson v. Source for Pub. Data, L.P.*, 53 F.4th 110, 122 (4th Cir. 2022).

To effectuate these protections, Congress expressly preempted inconsistent state and local regulation, creating a national framework that allowed

the free market to spur the internet’s growth. Section 230(e)(3) bars imposing any liability “under any State or local law that is inconsistent with this section.” This preemption clause ensures uniform protection for websites nationwide, preventing the patchwork of local rules or perverse incentives of common law rules that had previously existed, *see infra* p.24, and would otherwise chill speech, innovation, and content moderation. The legislative design was comprehensive. Section 230 is drafted not as a narrow defense against particular claims but as a structural protection for an emerging digital economy.

**B. Section 230 replaced common-law publisher-liability rules with a national framework that incentivized innovation and responsible moderation.**

This plain language in the statutory text aligns with the backdrop of common-law publisher-liability rules it displaced. Section 230 did not arise in a vacuum. It was Congress’s direct response to the common-law doctrines that threatened the internet’s growth.

Before Section 230, courts applied traditional publisher-liability doctrines to online intermediaries, creating a perverse incentive against content moderation. At common law, publishers could be liable for negligently publishing defamatory material, while distributors—also known as “secondary publishers”—like bookstores were liable only if they knew the content was defamatory. *Compare* Restatement (Second) of Torts § 558 (1977) (publisher),

*with id.* § 581(1) cmts. e-f (distributor). In other words, the degree of editorial control determined liability.

This created what is now widely known as the “moderator’s dilemma.” In the digital age, a website could host more speech in one day than a traditional newspaper could print in a year. If a website tried to moderate this content, say by blocking profanity, but failed to remove defamatory material, courts applying common-law rules could treat that act of moderation as evidence of editorial control and impose publisher liability. This created a dilemma for websites: Either host everything including harmful or unlawful material, or risk full publisher liability for failing to moderate perfectly.

That rule produced absurd results, which two cases elucidate. In *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991), the court considered whether CompuServe—an early provider of chat, email, and online forums—should be treated as a publisher or a distributor of third-party content. The court held CompuServe should be treated as a distributor because “it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.” *Id.* at 140. By contrast, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), the court held that Prodigy, a similar “computer network” with several “bulletin boards,” *id.* at \*1, was a publisher because it removed offensive content from its message boards. *See id.* at \*2-4. That distinction punished Prodigy for trying to create a “family-oriented” space. *See id.* at \*5.

As the internet continued to grow and create new opportunities for knowledge sharing and commerce, Congress saw the “moderator’s dilemma” posed by the common-law approach. In particular, the more content online intermediaries had to review, the harder it was to moderate consistently. Congress viewed these state common-law rules as discouraging early investment in, and development of, technologies that could disseminate third-party information responsibly. *See* 104th Cong., 1st Sess., 141 Cong. Rec. Part 16, 22045 (Aug. 4, 1995). Accordingly, within months of the *Stratton Oakmont* decision, U.S. Representatives Cox and Wyden introduced the Internet Freedom and Family Empowerment Act—the bill that became Section 230—to replace the patchwork of state and common-law rules with a uniform national standard that encouraged both moderation and innovation. *See* H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.) (explaining that “the specific purposes of [Section 230] is to overrule *Stratton-Oakmont v. Prodigy*”); *see also* 104th Cong., 1st Sess., 141 Cong. Rec. Part 16, 22045 (Aug. 4, 1995). The intent of the bill, as reflected by its plain text, was to encourage websites to moderate responsibly and let individuals, through choice among services, decide what material to access, not the government.

Contemporaneous statements by the bill’s sponsors and other Representatives confirm these objectives. *See* 141 Cong. Rec. 22045-46 (Aug. 4, 1995). For example, in statements made during the House’s consideration of the bill, Representative Lofgren compared prior standards for content publishers on the internet to holding a “mailman” liable for the contents inside

“a plain brown envelope” he delivers. *See* 104th Cong., 1st Sess., 141 Cong. Rec. Part 16, 22046 (Aug. 4, 1995); *see also id.* (Representative Goodlatte’s speech noting that the internet will be “thousands of pages of information every day” and that internet providers or sites cannot be held liable for that). Representative Cox also discussed how the bill would give individuals, rather than the government, control over what they see on the internet, and how it would protect websites from liability for attempting to moderate third-party content. *See id.* at 22045; *see also* Christopher Cox, *The Origins and Original Intent of Section 230 of the Communications Decency Act*, Richmond J. of L. & Tech. (2020), <https://perma.cc/PVM2-S7FF>.

Even more, Congress intended these early internet regulations to promote e-commerce. The omnibus bill that included what would become Section 230 was passed as part of an explicitly pro-free-market agenda—“to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans.” 104th Cong., H.R. Conf. Rep. No. 104-458, at 1 (Jan. 31, 1996). And the name for the bill that would become Section 230, “the Internet Freedom and Family Empowerment Act,” conveys this intent. *See* Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (June 30, 1995) (“IFFEA”) (the official title as introduced was: “To encourage and protect *private sector initiatives* that improve user control over computer information services” (emphasis added)). Congress knew that, by unleashing the

information-sharing potential of the internet, it would facilitate free expression *and* economic growth and innovation. This legislative history reflects the plain text and Congress’s clear understanding that punishing websites for the speech of third-party contributors would stifle speech and commerce.

Section 230 has achieved—and continues to advance—the goals Congress envisioned. By protecting online intermediaries from liability for content contributed by third parties, the statute fostered a wave of online innovation that democratized participation in the digital economy. The statute made possible an online marketplace in which millions of small businesses and individual proprietors can advertise to, and engage with, customers nationwide through websites that host their listings. This is especially important for Louisiana’s economy, as 54.5% of Louisiana’s workforce is made up of small businesses.<sup>3</sup>

In addition to empowering small businesses and individuals to reach customers nationwide, Section’s 230’s protections have encouraged digital platforms to offer additional services, such as transaction processing and quality assurance controls, that increase platforms’ ability to meaningfully moderate content while preserving open participation. For example, by offering transaction processing services, platforms can better identify fraud,

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<sup>3</sup> U.S. Small Business Administration, *Small Business Profile: Louisiana* (2024), <https://perma.cc/QA6V-X8YJ>.

remove bad actors, and protect the integrity of the entire system. The result is a diverse, dynamic, and safer online economy that offers opportunities to millions of small proprietors to the ultimate benefit of the public. These benefits would not exist without Section 230's foundational protections.

## **II. The district court's reasoning would eviscerate Section 230's protections for websites.**

The district court's reasoning would eviscerate Section 230's carefully-crafted protections. The City artfully drafted the ordinance to avoid Section 230 scrutiny while still requiring short-term rental platforms to monitor the third-party speech of owners. *See* § 26-622(a)(4). The district court even acknowledged, in practice, the ordinance requires platforms to monitor third-party listings. *Dist. Ct. Op.* at 45. Yet the district court declined to apply Section 230's protection because the requirement purportedly operates against platforms only as "booking agents," not "publishers." The court reasoned that the ordinance does not technically *require* Airbnb to monitor or delete any listings from its website as long as no guests can *book* those listings. *See Dist. Ct. Op.* at 46-47.

That reasoning fails for at least three reasons. First, it fails to apply this Court's "functional" test for Section 230 protection by crediting labels over substance. Second, it ignores that short-term rental websites—like many e-commerce platforms—have no realistic option to stop "facilitating" transactions within the meaning of the ordinance. So the ordinance would effectively require them to provide their publishing services for free. Third, it

lacks a coherent limiting principle and effectively allows municipalities to circumvent Section 230.

**A. This Court applies Section 230’s protection if a regulation “functionally” treats a website as a publisher.**

Section 230 provides that “[n]o provider . . . 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). States may enforce laws which are “consistent with” Section 230, but “no liability may be imposed under any State or local law that is inconsistent with” it. *Id.* § 230(e)(3) (emphasis added). A local law is “inconsistent” with Section 230 when it treats a website “as the publisher or speaker of any information provided by another information content provider.” *Id.* § 230(c)(1).

This Court has explained that a law treats a website as a “publisher” of third-party content when the law imposes liability for “decisions relating to the monitoring, screening, and deletion of content.” *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (quotation omitted); see *Salesforce*, 123 F.4th at 795, 799 (“publication-related functions” include “screening, monitoring, or filtering content,” and “reviewing or analyzing third-party content”). This is because “monitoring” and “screening” are “actions quintessentially related to a publisher’s role.” *MySpace*, 528 F.3d at 420; see *Salesforce*, 123 F.4th at 795 (Section 230 applies when a claim or regulation “enforce[s] a duty traditionally associated with publication” on a website).

Numerous other courts have similarly recognized that laws requiring such content monitoring functions are preempted by Section 230. *See, e.g., NetChoice v. Bonta*, 790 F. Supp. 3d 798, 807-09 (N.D. Cal. 2025) (law that required digital marketplace platforms to “monitor listings” of third parties was likely preempted); *La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 993 (S.D. Tex. 2017) (“[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230.” (quoting *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170 (9th Cir. 2008))); *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 123-24 (D. Mass. 2019) (“*Airbnb Boston*”) (requirement that Airbnb “monitor and remove” listings likely violated Section 230).

In determining whether a regulation treats a website as a “publisher” of “user-generated content” under Section 230, courts, including this one, “have construed the immunity provisions in § 230 broadly.” *MySpace*, 528 F.3d at 418. This broad construction is necessary to prevent the eroding of Section 230’s protections by artful drafting. *See id.* at 419-22 (rejecting “disingenuous,” “artful” drafting of claim to disguise the reality that the claims were “directed toward [the website] in its publishing, editorial, and/or screening capacities” (citation omitted)); *Salesforce*, 123 F.4th at 795 (“a plaintiff cannot artfully plead around section 230 by casting their claims in terms of first-party conduct when they really seek to enforce a duty traditionally associated with publication”); *see also United States v. eBay Inc.*, 2024 WL

4350523, at \*10 (E.D.N.Y. Sept. 30, 2024) (rejecting argument that product compliance claims were “based on eBay’s *own* actions” facilitating transactions and holding eBay immune from liability for third-party listings (emphasis in original)).

Just as litigants cannot evade Section 230 by “artfully plead[ing] around section 230,” *Salesforce*, 123 F.4th at 795, governments cannot evade Section 230 by artfully drafting laws. See *Comput. & Commc’ns Indus. Ass’n v. Paxton*, 747 F. Supp. 3d 1011, 1042-43 (W.D. Tex. 2024) (explaining that artful drafting of a statute could “altogether nullify Section 230”). An ordinance that requires a website to “monitor[], screen[], and delet[e]” third-party content violates Section 230. *Salesforce*, 123 F.4th at 793-94 (citation omitted). That fact does not change simply because an ordinance tethers those mandates to a platform’s ability to earn money for its services. To prevent these “artful” drafting tactics, which often “cast[] claims in terms of first-party conduct when they really seek to enforce a duty traditionally associated with publication,” this Court, among others, has “rejected a mechanical approach to the publisher-or-speaker question.” *Id.* at 795.

Instead, this Court uses a “functional . . . approach to the question of whether a plaintiff’s claim treats a defendant as a publisher or speaker of third-party content.” *Id.* at 793. Applying this “functional” approach to the ordinance, this Court “can hypothesize what would happen” under the ordinance and consider the ordinance’s “implications” to determine what it functionally requires. *Id.* In other words, this Court looks not only to what

the ordinance *says*, but “look[s] to what the duty at issue *actually requires*: specifically, whether the duty would necessarily require an internet company to monitor, alter, or remove third-party content.” *Id.* (cleaned up) (emphasis added).

**B. The district court’s artificial distinction between a website’s role as a “publisher” and a “facilitator” violates this Court’s functional approach to Section 230.**

The district court here failed to apply this Court’s “functional” approach. In finding no Section 230 violation, the district court held that the ordinance does not operate against Airbnb as a “publisher of third-party . . . listings” but as a “booking agent between users and hosts.” Dist. Ct. Op. at 46. The court then rubberstamped quintessential “publisher liability” by recasting it in transactional terms. But that reasoning ignores that publishing functions frequently facilitate transactions—whether for an advertised good or service or for the published material itself. That is not enough to erase Section 230’s protections.

Short-term rental platforms publish “listings” authored by third-party “owner[s] relative to a short-term rental.” Ordinance § 26-614. The owner, not the platform, drives the content of those listings. *See, e.g.,* Amended Complaint at ¶ 111, *Bodin v. New Orleans*, No. 25-00329 (E.D. La. Apr. 22, 2025) (“[Owners], not Airbnb, are solely responsible for creating and populating their listings on Airbnb.”). Owners “and guests alone, not Airbnb, decide whether and on what terms to enter into transactions.” *Id.* And although

owners and guests use Airbnb’s services, their activities and booking transactions do not depend on any direct involvement of Airbnb. *See id.* ¶ 112.

Yet the ordinance requires platforms to continuously “monitor, screen, and delete” that third-party content. *MySpace*, 528 F.3d at 420. Subsection (a)(4)(i) of the provision defining platforms’ “[l]egal duties” specifically requires that “[a] platform must verify the legal eligibility” of third-party listings before any listed property is booked. § 26-622(a)(4). Subsections (a)(4)(ii)-(iv) require platforms to continuously reverify that information. And subsection (a)(1) prevents “collect[ing] a fee or anything of value” for “facilitating” any booking that arises from an unverified listing. § 26-622(a)(1). The City has even admitted it is using platforms to police third-party listings. *See, e.g.*, Jean-Paul Morrell, Remarks at the New Orleans City Council Meeting at 3:04:40-3:05:08 (Oct. 10, 2024), <https://perma.cc/WQ4B-CPX4> (the ordinance will “prevent” short-term rentals “from being listed” and “continually relist[ed]” on platforms).

The fact that the ordinance purports to tether a platform’s monitoring obligations on successful “bookings,” § 26-622(a)(1), (a)(4), does not change the analysis. The ordinance demands in substance that platforms monitor third-party listings to “verif[y]” the compliance of those listings. § 26-622(a)(1), (a)(4). If a platform determines a listing “is not in compliance with this article,” the platform must remove or disable that listing. § 26-622(a)(1). Otherwise, the platform is liable for “facilitat[ing]” a booking between a guest and a noncompliant owner even though Airbnb had no role in the

noncompliance. *Id.* These real world, “actual” “implications” of the ordinance, not its labels, drive the Section 230 analysis. *Salesforce*, 123 F.4th at 793; *see also eBay Inc.*, 751 F. Supp. 3d at 245 (rejecting the argument that liability was based on eBay’s alleged actions “control[ing] . . . the transaction” because those actions would not support liability unless “eBay fails to remove” a listing).

The evolution of the ordinance corroborates that its true aim is to regulate listings, not transactional services. The ordinance originally required websites to verify each listing “before the listing is published.” *See* Ordinance No. 30074 M.C.S. Sec. 26-622(a)(4)(i). The City “artful[ly]” altered that provision during the course of this litigation in an attempt to avoid Section 230 scrutiny, *Salesforce*, 123 F.4th at 795. But its mid-litigation shift changed nothing of substance. The ordinance continues to compel content monitoring and decisions about which third-party listings may remain accessible to users. The only difference is that now, for the privilege of retaining Section 230 immunity for these quintessentially *publisher* functions, short-term rental websites must either provide those services for free or abandon all other aspects of their service beyond “merely post[ing] advertisements.” § 26-614.

Separately, the district court ignored that, after a single initial “booking,” the ordinance compels platforms to continually monitor listings without any nexus to a particular booking. “Each listing must be reverified at least every 30 days of the prior verification,” regardless of whether the listing is booked in that time period. § 26-622(a)(4)(ii). And if the platform “knows or should

know” that an owner’s compliance data has changed, the platform must re-verify compliance—again, regardless of whether another booking has occurred. § 26-622(a)(4)(iii). These ongoing duties require platforms to indefinitely police third-party listings, in violation of Section 230. *See Salesforce*, 123 F.4th at 795; *MySpace*, 528 F.3d at 420. And they disprove the district court’s finding that the ordinance treats short term rental platforms *only* as “booking agent[s]” rather than as “publisher[s]” of listings. Dist Ct. Op. at 46.

The district court relied on two out-of-Circuit cases, but neither addressed a law that required ongoing “verification” like the ordinance here. *See* Dist. Ct. Op. at 46-47 (citing *Airbnb Boston*, 386 F. Supp. 3d at 120; *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019)). In *HomeAway.com, Inc. v. City of Santa Monica*, the Ninth Circuit held that Section 230 did not preempt an ordinance that prohibited platforms from completing “booking[s]” for properties not listed on the City’s registry when the platform received the booking fee. 918 F.3d at 680, 682; *see also* Santa Monica Mun. Code § 6.20.050 (“at the time the hosting platform receives a fee for the booking”). The ordinance in *Airbnb Boston* similarly prohibited platforms from “accept[ing] a fee for booking” a noncompliant unit. 386 F. Supp. 3d at 117. The fact that the ordinances did not require ongoing, mandatory verification was vital to those courts’ reasoning. In *HomeAway.com*, the Ninth Circuit emphasized that “the Ordinance *does not require the Platforms to monitor third-party content[.]*” 918 F.3d at 682 (emphasis added). And in *Airbnb Boston*, the court upheld the fee provision but invalidated a separate requirement

that platforms “monitor and remove third-party content.” 386 F. Supp. 3d at 117, 123-24. The ordinance here does just that.

Regardless, the formalistic approach of these decisions is incompatible with this Court’s precedents. In *HomeAway.com*, the Ninth Circuit only examined the ordinance “[o]n its face” and declined to apply Section 230’s protections despite acknowledging that “removal of the[] [unbookable] listings” would be the functional result of the ordinance. 918 F.3d at 683 (quotation omitted). The Massachusetts district court similarly found that the Boston ordinance “[o]n its face” did not require Airbnb to monitor and remove third-party listings, even though that was the “*practical effect*” of the ordinance. *Airbnb Boston*, 386 F. Supp. 3d at 120-21 (emphasis added). This Court, by contrast, applies a functional approach to Section 230 immunity and does not ignore the actual effects of a law. *See supra* Sec. II.A.

Moreover, the formalistic view of *HomeAway* and *Airbnb Boston* would reward cities for evading Section 230 through strategic drafting, which this Court does not allow. For instance, the Santa Monica ordinance, “[a]s originally enacted,” “prohibited hosting platforms from acting to ‘undertake, maintain, authorize, aid, facilitate or advertise any Home-Sharing activity’ that was not authorized by the city.” *HomeAway.com*, 918 F.3d at 680. After challengers brought a Section 230 preemption challenge, *see HomeAway.com, Inc. v. City of Santa Monica*, 2:16-cv-06641-ODW, Complaint, ECF 1 at 8 (C.D. Cal. Sept. 2, 2016), Santa Monica “amended its own ordinance” shifting the language to focus on “booking transaction[s]” for unlawful listings, but

achieving the same outcome. *HomeAway.com*, 918 F.3d at 680; *see also Airbnb, Inc. v. City & Cnty. of San Francisco*, 217 F. Supp. 3d 1066, 1070-71 (N.D. Cal. 2016) (after originally passing an ordinance requiring platforms to “actively monitor and verify content provided by third-party hosts before publication” and receiving Section 230 pushback, the city amended the ordinance to achieve the same outcome by tethering liability to “fee[s]” for “booking services”). As noted above, the same happened here. *See supra* p.19. This Court does not allow such maneuvers to strip Section 230’s protections. *Salesforce*, 123 F.4th at 793.

**C. The district court’s reasoning that platforms could refuse to monitor third-party content misunderstands how online platforms work and violates this Court’s functional approach.**

The district court failed to consider the functional obligations the ordinance imposes on websites like Airbnb. The court reasoned that Airbnb is not “require[d]” to “monitor and delete” listings, rather it is only precluded from “facilitat[ing]” transactions for unverified listings. Dist. Ct. Op. at 46-57. In other words, websites can avoid policing third-party listings so long as no guest can ever book the property. Of course, that is the entire point of publishing third-party listings.

As an initial matter, this reasoning ignores the ordinance’s requirement to continue monitoring and remove listings *even if* no subsequent booking takes place. Platforms that list rentals in the City “shall comply at all times,” § 26-622(a), with the obligation to reverify listing compliance “at least every

30 days of the prior verification” and “whenever a verifying entity knows or should know that any data . . . has changed.” § 26-622(a)(4)(ii)-(iii). A platform has no real “option” to ignore these requirements unless it forfeits the ability to facilitate *any* future booking for a listing. Ignoring reverification requirements would invite harsh penalties, including fines of “not less than \$1,000.00 for each offense,” for pure publishing functions that occur after an initial listing. § 26-629(a).

Even for those requirements tied to an initial “booking transaction,” the district court’s reasoning is incompatible with this Court’s functional approach to Section 230 immunity. The ordinance’s initial verification obligations are triggered if a platform “facilitate[s]” a booking transaction, § 26-622(a)(4)(i), which is defined as “collect[ing] any fee . . . directly or indirectly, for the *conduction* of booking transactions.” § 26-614 (emphasis added); *see also* § 26-622(a)(1) (similar). A “[b]ooking transaction,” in turn means “*any* contractual agreement between a guest and an owner relative to a short-term rental.” § 26-614 (emphasis added). In other words, the ordinance tethers liability to successful *listings*. Under its broad definitions, a platform’s content monitoring obligations would be triggered *any time* a platform earns money from a successful listing that culminates in a transaction. That is true even if the website plays no direct role in that transaction.

Given those expansive definitions, the district court assumed a false choice when it posited that a platform could avoid monitoring third-party listings so long as it does not receive fees when those listings result in

business. *See* Dist. Ct. Op. at 47. Exercising that choice would require Airbnb to either provide its services for free or cease providing them altogether. Section 230 would be gutted if every municipality could dismantle its protections by tethering regulation to affiliated “transactions” or fees. *Cf. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (holding that “speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement” or because it is “carried in a form that is ‘sold’ for profit”).

#### **D. The district court’s reasoning circumvents Section 230.**

If the ordinance survives Section 230 scrutiny under the district court’s reasoning, Congress’s aim “to preserve the vibrant and competitive free market that presently exists for the Internet” will be severely undermined. 47 U.S.C. § 230(b)(2). This aim cannot survive if States and municipalities can impose substantial liability on websites who do not adequately monitor and police third-party speech.

The district court here drew a false distinction between a platform as “publisher” and platform as “facilitator” of transactions. They are sides of the same coin. Just as a bookstore both distributes third-party-authored books and facilitates the sale of those books, Airbnb distributes third-party-authored listings and facilitates transactions that arise from those listings. Under the district court’s view, a bookstore would be protected from liability

when it shelves and displays books to customers, but the bookstore would lose protection once a customer brings the book to the counter for checkout.

In endorsing such an artificial distinction, the district court's reasoning would remove a host of digital businesses from the protections Congress intended to promote a flourishing digital market. E-commerce websites could be required to verify that every third-party seller has appropriate business licenses before allowing users to buy products. App stores could be forced to monitor third-party apps (and their developers) before listing the apps and charging for downloads. And online art marketplaces could be required to monitor copyright compliance of artists—all for the privilege of publishing third-party content without fear of liability. Under the district court's view, these websites could only avail themselves of Section 230's protection if they stop charging fees based on the transactions they facilitate or cease providing the services that have allowed the internet to democratize commerce.

This would have devastating impacts nationwide, and particularly in Louisiana. A large portion of Louisiana's substantial small business population, *see supra* p.12 & n.3, relies on online marketplaces like Etsy or eBay to sell their products and hiring boards to attract employees—all of which could have their business models jeopardized with an onslaught of publisher liability under the district court's reasoning. Similarly, Louisiana's substantial tourism industry relies on review forums like Yelp to attract

tourists. Undermining that business model could hinder the approximately \$25 billion economic impact tourism has on Louisiana.<sup>4</sup>

This result cannot be squared with the fact that Congress enacted Section 230 to ensure that online intermediaries could facilitate user interactions and transactions without being penalized for users' content and without the government controlling content on the internet.

\* \* \*

Section 230 establishes Congress's deliberate choice to enact a national policy protecting websites from liability for user content and to foster innovation and a vibrant competitive market on the internet. Contrary to that choice, the City is attempting to hold the digital "mailman" responsible for the contents of the "envelope[s]" he carries. *See supra* pp.10-11. In form, the ordinance purports to regulate "booking transactions," but in substance it forces Airbnb to monitor, verify, and police the content of third-party listings. This Court should correct the district court's misapplication of this Court's Section 230 precedent and ensure municipalities cannot draft around Section 230's protections.

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<sup>4</sup> Louisiana Travel Association, *Tourism Highlights*, <https://perma.cc/Q9DU-K8WA>.

## CONCLUSION

This Court should reverse and hold that the ordinance is preempted by Section 230.

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### CERTIFICATE OF SERVICE

I certify that on November 19, 2025, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

*/s/ Scott A. Keller*

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### CERTIFICATES OF COMPLIANCE

I certify that this brief: (1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,014 words, excluding the parts of the brief exempted by Rule 32(f); and (2) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Palatino Linotype) using Microsoft Word (the same program used to calculate the word count).

I further certify that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; and (2) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

*/s/ Scott A. Keller*

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### CERTIFICATE OF CONFERENCE

As stated in amici's motion for leave to file this brief, counsel for amici conferred with counsel for Appellants and Appellees. Appellants consent to the filing of this brief. Appellees do not consent to the filing of this brief.

*/s/ Scott A. Keller*

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