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; and AIMCO VENEZIA, LLC,
Plaintiffs-Appellants,

v.

AIRBNB, INC.; and AIRBNB PAYMENTS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California,
No. 2:17-cv-04885-DMG-AS,
The Honorable Dolly M. Gee, United States District Judge

BRIEF OF AMICI CURIAE ENGINE ADVOCACY AND PROFESSOR ERIC GOLDMAN IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

Dated: September 27, 2018

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Pursuant to Fed. R. App. P. 26.1, Engine Advocacy discloses that it is a nonprofit corporation organized under the laws of the state of California, that it does not have any parent company, and that no publicly held corporation owns 10% or more of its stock.

Dated: September 27, 2018

s/ Mason A. Kortz

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STATEMENT OF INTERESTS OF AMICI CURIAE

Amicus curiae Engine Advocacy ("Engine") is a nonprofit technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. These startups are among the most innovative and fastest-growing companies in the country, fundamentally altering and challenging entrenched business models, ideas, and institutions across all industries. *Amicus* and its community of entrepreneurs have an interest in protecting the startup ecosystem that thrived under the immunity from liability arising from third-party content as guaranteed by Section 230 to providers and users of interactive Internet services. Engine believes that exposing the startup community to liability from claims that treat Internet platforms as publishers of information threatens their ability to develop, due to a higher cost to enter and stay in the market. *Amicus* submits this brief to emphasize the detrimental effects that narrowing the protection provided by Section 230 would have on startups.

Amicus curiae Eric Goldman is a Professor of Law at Santa Clara University School of Law. He has taught and written about Internet Law for over twenty years, and he has blogged extensively on rulings that interpret Section 230. He is interested in the advancement of Internet law generally, and Section 230 specifically, as a foundation to enable the growth of innovative new services, such as those in the startup community.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Fed. R. App. P. 29(a)(2), *amici curiae* certify that all parties have consented to the filing of this brief.

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

One of the stated purposes of 47 U.S.C. § 230 is to drive growth, innovation, and competition on the Internet. In this respect it has performed remarkably well; the most trafficked websites in the world rely on Section 230 for immunity. That does not, however, mean that Section 230 is no longer needed. It remains essential for startups, small businesses, and nonprofits seeking to enter the online realm. The protections it provides ensure that emerging platforms are not overwhelmed by legal liability and compliance costs, allowing those platforms to compete with large, established Internet actors. Without Section 230, competition would decrease and innovation would stagnate. To maintain a healthy Internet ecosystem, tomorrow's competitors need to have the same protections that enable their progenitors to succeed.

Aimco, in attempting to hold Airbnb liable, advances two theories that threaten to undermine the protections of Section 230. This court's jurisprudence does not support either argument. First, Aimco argues that Airbnb is liable for providing "brokerage services." This theory runs contrary to this and other courts' interpretation of Section 230. Airbnb's brokerage services are completely ancillary to and inseparable from its core service, which is publishing third-party content. Aimco also argues that Airbnb has developed content, including user-facing tools, that contributes to the unlawful offers posted on the website. However, Airbnb's content-generation, search, and anonymization tools can be used lawfully or unlawfully. Because Airbnb does not require or encourage its users to choose

unlawful conduct over lawful conduct, it is not liable as a content developer under Section 230.

Aimco's narrow reading of Section 230 is not only legally unsound, it also has negative consequences from a policy perspective: it would result in less competition and less innovation online, which will be detrimental not only to platform operators, but also to Internet users. Allowing plaintiffs to plead around Section 230 would create legal uncertainty, increase exposure to liability, and remove an important tool for early dismissal of meritless cases. These negative consequences for startups would, in turn, work to the advantage of large, incumbent platforms that are much more capable of absorbing large amounts of risk. Moreover, a narrow reading of Section 230 would result in increased compliance costs. While large established Internet businesses may be able to shoulder these costs, smaller businesses and startups cannot. The end result would be less competition and fewer choices for consumers. The court should take care not to undermine the protections of Section 230 and should affirm the District Court’s proper application of Section 230 to the facts of this case.

ARGUMENT

I. Section 230 promotes innovation on the Internet by allowing small businesses, startups, and nonprofits to compete with powerful incumbents.

It is no exaggeration to say that 47 U.S.C. § 230 ("Section 230") enabled the growth of the Internet into the most powerful medium for communication and commerce in history. Section 230 provides legal protection to websites that host user-generated content, and "virtually every successful online venture that emerged after 1996 – including all the usual suspects, viz. Google, Facebook, Tumblr, Twitter, Reddit, Craigslist, YouTube, Instagram, eBay, Amazon – relies in large part (or entirely) on content provided by their users." David Post, Volokh Conspiracy, *A Bit of Internet History, or How Two Members of Congress Helped Create a Trillion or So Dollars of Value*, Washington Post (Aug. 27, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value/. Section 230 undoubtedly remains of great importance to these companies. Indeed, in 2017, nine of the top ten most-trafficked websites relied on Section 230 immunity to host user-generated or third-party content. Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 Tul. J. Tech. & Intell. Prop. 1, 2 & n.8 (2017).

But large, well-established Internet incumbents are far from the only beneficiaries of Section 230. Section 230 is just as important, if not more so, to startups and small businesses. Every one of the Internet giants listed above was, at

one point, a fledgling venture that needed the protections of Section 230 to get off the ground. As Wikipedia's legal counsel explained in an interview with the Electronic Frontier Foundation, without Section 230,

> We probably wouldn't exist anymore. Simple as that. Lawsuits are costly when you win, but they are even more costly when you lose. If the Wikimedia Foundation could be held legally liable every time there was a good faith inaccuracy on its Projects, we would have most likely been sued out of existence pretty early on. *And we would have never had the chance to grow into what we've become, which is the largest repository of free knowledge in the world, accessible to all*.

CDA § 230 Success Case: Wikipedia, Electronic Frontier Foundation (last accessed Sept. 22, 2018), https://www.eff.org/deeplinks/2013/07/cda-230-success-cases-wikipedia (emphasis added). The next generation of startups, upstarts, challengers, and contenders still need Section 230 to thrive.

Section 230 is of utmost importance to business (and nonprofits, like Wikimedia, the operator of Wikipedia) trying to break into the realm of Internet services. It allows smaller entrants to compete without fear that they will be bankrupted by the actions of a third party acting in bad faith. Without Section 230, large Internet incumbents would have a significant advantage, and competition would diminish. *See The Top Ten Myths about SESTA's (S. 1693) Impact on Startups*, Engine (Sept. 18, 2017), http://www.engine.is/news/category/the-top-ten-myths-about-sestas-s-1693-impact-on-startups ("As the pace of innovation accelerates, Section 230 is needed more than ever to ensure that startups can succeed in a competitive marketplace."); *see also* Senator Ron Wyden, Press Release, *Wyden Issues Warning About SESTA* (Nov. 8, 2017), *available at*

https://www.wyden.senate.gov/news/press-releases/wyden-issues-warning-about-sesta ("Most innovation in the digital economy comes from the startups and small firms . . . .").

Section 230's importance to startups and small businesses is no coincidence. One of the primary purposes of Section 230 is to encourage innovation, competition, and commerce on the Internet. The language of Section 230 unambiguously reflects Congressional intent when it enacted the statute that begins by expressly noting, "it is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media," "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services," and to "remove disincentives for the development and utilization of blocking and filtering technologies." 47 U.S.C.A. § 230(b); *see* Mark D. Quist, *"Plumbing the Depths" of the CDA: Weighing the Competing Fourth and Seventh Circuit Standards of ISP Immunity Under Section 230 of the Communications Decency Act*, 20 Geo. Mason L. Rev. 275, 306 (2012) ("Section 230 . . . not only sought to enable responsible behavior, but to promote freedom from liability for the businesses that drive Internet innovation precisely because that freedom constitutes a social boon."). As one of the co-authors of Section 230, Senator Ron Wyden, recently remarked, "the fact is, CDA 230 was never about protecting incumbents . . . when I wrote this policy, I never envisioned a Facebook, but I did hope it would give the little guy's startup a chance to grow into something big." *Floor Remarks: CDA 230 and SESTA*, Medium (Mar. 21, 2018), https://medium.com/@RonWyden/floor-

remarks-cda-230-and-sesta-32355d669a6e. True to Senator Wyden's vision, Section 230 continues to be a key factor in promoting innovation and competition online. *See* Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 Colum. Sci. & Tech. L. Rev. 1, 37 (2016).

This court has affirmed that fostering competition and innovation are among the policy aims of Section 230. In *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003), this court commented that, "there is little doubt that [Section 230] sought to further First Amendment and e-commerce interests on the Internet." Later, in *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 (9th Cir. 2009), this court described Section 230's "express policy of relying on the market for the development of interactive computer services." Other courts have expressed similar sentiments. *See, e.g.*, *Doe ex rel. Roe v. Backpage.com, LLC*, 104 F. Supp. 3d 149, 155 (D. Mass. 2015), *aff'd sub nom. Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016) (describing "promoting the growth of the Internet" as "the principal policy" of Section 230); *GoDaddy.com, LLC v. Toups*, 429 S.W.3d 752, 760 (Tex. App. 2014) (quoting *Doe v. Bates*, No. 5:05-CV-91-DF-CMC, 2006 WL 3813758, at *3 (E.D. Tex. Dec. 27, 2006)) (describing Section 230's "clear Congressional policies to avoid disincentives to innovation").

In summary, while Section 230 is responsible for the development and continued existence of established Internet businesses, its original purpose—and, arguably, its most valuable role today—is as a pro-competition statute. Many of the most successful Internet businesses, such as Google, Facebook, and yes,

Airbnb, could not have gotten off the ground without Section 230 in place. Now, it is the startup competitors to those businesses that rely on Section 230 to survive and develop. As one commentator has observed, "[w]hen Congress passed [Section 230] in 1996, it was largely looking to future businesses and technologies. In today's age of powerful mega-platforms, the concern about competition is perhaps even more justified." Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, Knight First Amendment Institute (May 7, 2018), https://knightcolumbia.org/content/toward-clearer-conversation-about-platform-liability. In order to prevent stagnation on the Internet, it is essential that today's startups have the same degree of protection as their forebears.

II. Aimco's novel legal arguments threaten to undermine the protections of Section 230.

In the present case, Aimco seeks to hold Airbnb liable for the fact that Aimco's tenants are renting out their properties via Airbnb's eponymous interactive computer service.[1] Aimco advances two theories of liability, both of which attempts to short-circuit the protections of Section 230. First, it argues that Airbnb is liable for providing "brokerage services" that support the creation and use of third-party content. Second, it argues that Airbnb itself generates content, including user-facing tools, that contributes to the unlawful offers posted on the service. Neither argument is supported by the law of this Circuit.

[1] The parties agree that Airbnb is an interactive computer service. *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1103 n.5 (C.D. Cal. 2017).

Although the present case focuses on Airbnb, the consequences of Aimco's theories of liability would fall most heavily on the entities that rely most on Section 230: small businesses, startups, and nonprofits. As described above, Section 230 allowed Airbnb and other platforms to develop and become the established businesses they are today. Now, Section 230 enables new entrants to challenge these giants and become the next online leaders. This court should avoid adopting novel theories of law that could undermine Section 230 and damage the Internet startup ecosystem.

A. Holding Airbnb liable for providing "brokerage services" would provide a roadmap for circumventing Section 230.

Aimco alleges that it was injured by Airbnb, not because Airbnb publishes listings by which tenants unlawfully offer to rent their properties, but because Airbnb provides a number of ancillary "brokerage services" related to those listings. Appellant's Brief at 33-38. In doing so, they treat Airbnb's brokerage services as a proxy for third parties' unlawful use of those services, substituting the former for the latter in an attempt to get out from under the plain scope of Section 230. This argument provides a blueprint that can easily be applied against almost any platform, including small and vulnerable startups. A would-be plaintiff simply has to identify a feature of the platform that can be used in conjunction with unlawful third-party content and allege that the platform's failure to treat that content differently, rather than the content itself, is the source of the plaintiff's injury. This would effectively require the platform provider to police third-party content. For

an entity like Airbnb, this would be a costly burden. For a small startup trying to compete with Airbnb, it could be fatal.

Aimco bases its argument on two Ninth Circuit cases, *Barnes v. Yahoo!, Inc.* and *Doe v. Internet Brands, Inc.* Neither one encompasses the theory Aimco now advances. In *Barnes*, the only claim that survived a motion to dismiss was based on promissory estoppel. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009), *as amended* (Sept. 28, 2009). The plaintiff's claim was allowed to proceed against the defendant as a promisor, not a service provider. *See id.* at 1108. In *Internet Brands*, the court held that Section 230 did not bar the plaintiff's claim for failure to warn the plaintiff that lawfully posted third-party content was being used to target victims for unlawful and reprehensible conduct. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 848 (9th Cir. 2016). The plaintiff never claimed that any unlawful third-party content appeared on the defendants' website, let alone that the defendants' services induced or facilitated the creation or use of such content. *Id.* at 851. Neither case addresses the facts now before the court, where Aimco seeks to hold Airbnb liable for harms that only arise when a third party uses Airbnb's service to post unlawful content.

Other courts faced with similar claims have recognized the danger of providing an easy route around Section 230. *See Dyroff v. Ultimate Software Grp., Inc.*, No. 17-CV-05359-LB, 2017 WL 5665670, at *7 (N.D. Cal. Nov. 26, 2017) ("[C]ourts have rejected plaintiffs' attempts to plead around [Section 230] immunity by basing liability on a website's tools."). Courts have found Section 230 immunity applies to claims based on services similar to Airbnb's "brokerage

services," including product listing, *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 831 (2002), direct messaging, *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1127-29 (N.D. Cal. 2016), *aff'd on other grounds,* 881 F.3d 739 (9th Cir. 2018), account provisioning, *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 157-58 (E.D.N.Y. 2017), anonymization, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20-21 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017), matching users to each other, *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 588 (S.D.N.Y. 2018), advertising and promoting auctions, *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at *2 (Cal. Super. Ct. Nov. 1, 2000), and recommending content, *Dyroff*, 2017 WL 5665670 at *7. These cases stand for the principle that a plaintiff cannot evade Section 230 by simply pointing at a website feature and claiming that it, rather than the third-party content it supports, is the cause of an alleged injury.

Ultimately, Aimco's purported distinction between the publication of unlawful user-generated content and the services that "facilitate" the publication of such content is just too fine. *See Cohen*, 252 F. Supp. 3d at 157 (rejecting plaintiff's "attempt to draw a narrow distinction" between account provisioning service and website's publication activities). One of the reasons Section 230 is so valuable to startups is that it provides a way to quickly dispose of litigation, or to deter it from arising in the first place. Under Aimco's approach, websites would need to litigate the question of whether any given service that depends on third-party conduct constitutes publication or facilitating publication. For a small startup, the cost of doing so might bankrupt it even if it obtained a favorable outcome. The consequences of Aimco's reasoning thus reach far beyond the claims in this case.

B. Holding Airbnb liable for developing its website content or user-facing tools would greatly broaden the *Roommates.Com* exception to Section 230.

Aimco also argues that Airbnb is partly responsible for developing unlawful content that appears on the Airbnb service. In other words, Aimco seeks to treat Airbnb as an information content provider. *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (Section 230 immunity "applies only if the interactive computer service provider is not also an 'information content provider'"). Again, Aimco tries to get out from under the scope of Section 230 by pointing at one type of conduct—this time Airbnb's lawful provisioning of user-facing tools—when its real complaint is with another type of conduct—namely, third parties' unlawful use of those tools. Again, this theory of liability could be applied to any platform that provides tools that could potentially be misused.

The applicable standard for treating an interactive computer service provider, in particular a website, as an information content provider is clearly expressed in this court's *Roommates.Com* decision: "a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes *materially to the alleged illegality* of the conduct." *Roommates.Com*, 521 F.3d a 1168 (emphasis added). The operative question is not whether the website develops content, which could be used lawfully or unlawfully. Rather, the question is whether the website develops unlawful content in particular. *Id.* at 1175 ("The message to website operators is clear: If you don't encourage illegal content, or design your website to require users to input illegal content, you will be

immune."); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 408 (6th Cir. 2014) ("[I]f a website operator is in part responsible for the creation or development of content, then it is an information content provider as to that content . . . ."); *FTC v. Accusearch, Inc*., 570 F.3d 1187, 1198 (10th Cir. 2009) (asking whether the website "was . . . responsible for the development of the specific content that was the source of the alleged liability").

Aimco contends that Airbnb is an information content provider because it "creates and publishes listings for unauthorized rentals through a 'collaborative effort' with tenants." Appellant's Brief at 51 (quoting *Roommates.Com*, 521 F.3d at 1167). However, the information content Airbnb provides, such as a standardized layout and professional photography, does not directly contribute to the illegality of any listings. Because Airbnb's added content does not transform a lawful listing into an unlawful one, Airbnb is not liable for "affirmative acts" of editing as described in the *Roommates.Com* decision. *See id.* at 1169 n.24. Nor is Airbnb liable for categorizing user-generated information, for example designating some users as "superhosts" or properties as "rare finds." Appellant's Brief at 51-52. This court has made it abundantly clear that "classification of information" does not constitute development for Section 230 purposes unless it encourages unlawful use of the website. *Roommates.Com*, 521 F.3d at 1172.

Aimco's remaining arguments boil down to the contention that Airbnb is liable for providing user-facing tools, such as a pricing tool, a "booking box," and anonymous communication capabilities, that "induce and enable" users to create, find, and use lawful and unlawful user-generated content alike. Appellant's Brief at

27, 52. Under *Roommates.Com*, a website cannot be treated as a developer simply because it provides user-facing tools that can be used lawfully or unlawfully. *See Roommates.Com*, 521 F.3d at 1169. This includes tools, like Airbnb's, that can be used to create or interact with both lawful and unlawful content and do not—indeed, cannot—distinguish between the two. They are nothing more than a "framework that could be utilized for proper or improper purposes," and as such are immunized under this court's precedent.[2] *Id.* at 1172.

In summary, extending liability to website and apps that merely "enable" unlawful content, as opposed to encourage or require it, would be a significant diminution of the protections of Section 230. As with Aimco's first argument, the burden would fall disproportionately on startups, small businesses, and nonprofits without the resources to litigate whether a particular feature "enabled" misuse.

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[2] The fact that Airbnb's tools structure how users create and interact with content does not mean that it "materially contributes" to unlawful uses of those tools. For example, in *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121 (9th Cir. 2003), the defendant's website contained "a detailed questionnaire containing both multiple-choice and essay questions." This court held that the defendant was not liable for misuse of the questionnaire, because the questionnaire did not solicit unlawful information. *See Roommates.Com, LLC*, 521 F.3d at 1172 (citing *Carafano,* 339 F.3d at 1124). Other courts have similarly applied this standard to provide immunity for websites that elicit specific, but not specifically unlawful, content. *See, e.g.*, *Dirty World*, 755 F.3d at 416 (website that solicited "'who, what, when, where, why'" and provided labels for content was neutral); *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 257 (4th Cir. 2009) (defendant that "structured its website and its business operations to develop information related to class-action lawsuits" was immunized under CDA 230).

III. Adopting Aimco's arguments would have severe negative effects on startups, small businesses, and nonprofits on the Internet.

The arguments Aimco advances are not only legally unsound, they are also ill-advised from a policy perspective. Either argument, if accepted by this court, would make it trivial for other plaintiffs to circumvent the protections of Section 230. This would in turn expose small businesses and startups to back-breaking expenses, both in the form of increased liability and in the form of increased costs from protracted litigation. Moreover, as a practical matter, Aimco's theories would require platforms to police how third parties use their services, which would be an impossible financial burden for startups to bear. In combination, a ruling in Aimco's favor could make it prohibitively expensive for small businesses and startups to provide services that add value to third-party content.

These concerns about the narrowing of Section 230 may seem overly dramatic. In fact, this sort of encroachment on the protections of Section 230 would be like a hole in a dam—attracting litigation not only from those hurt by third-party content, but also from those hoping to bury sites with litigation costs. This could be extremely detrimental to startups. Section 230 has allowed the current generation of incumbents to dominate the Internet. *See* Post, *A Bit of Internet History* ("[I]t is not a coincidence . . . that [many major Internet services] are all U.S.-based, no 230-like immunity being provided in most other legal systems around the world."); Letter from Gary Shapiro, CEO, Consumer Technology Association, to Rob Portman and Richard Blumenthal, U.S. Senators (Aug. 2, 2017) *available at* http://www.cta.tech/CTA/media/policyImages/

policyPDFs/Stop-Enabling-Sex-Traffickers-Act.pdf ("The decision to enact Section 230 intermediary protections paid off spectacularly. America now dominates the online economy, and U.S. companies, such as those represented in CTA's Disruptive Innovation Council, are the central platform for the world's commerce, communications and entertainment."). Narrowing the protections of Section 230 now would deny the next generation of Internet challengers the same opportunity for growth by loading them down with increased legal and operational costs. *See* Elliot Harmon, *Google Will Survive SESTA. Your Startup May Not.*, TechDirt (Sept. 25, 2017), https://www.techdirt.com/articles/20170923/00572138275/google-will-survive-sesta-your-startup-might-not.shtml ("Without the strong protections that allowed today's large Internet players to rise to prominence, startups would have a strong disincentive to grow."). This would contravene one of the express purposes of Section 230: to encourage innovation on the Internet.

Ten years ago, this court cautioned against "cut[ting] the heart out of section 230 by forcing 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." *Roommates.Com*, 521 F.3d at 1174. Those concerns are just as acute today. Internet businesses rely on Section 230 to reduce liability for third-party conduct and to dismiss meritless cases early in litigation. As this court recognized, "[S]ection 230 must be interpreted to protect websites not merely from ultimate liability, but from having to fight costly and protracted legal battles." *Id.* at 1175. In both cases, smaller actors are less able to absorb the extra risk and cost

than large established industry actors. *See* Keller, *Toward a Clearer Conversation* ("When platform liability risks expand, wealthy incumbents can hire lawyers and armies of moderators to adapt to new standards. Startups and smaller companies can't."); Leighanna Mixter, Wikimedia Foundation, *Three Principles in CDA 230 That Make Wikipedia Possible* (Nov. 9, 2017), https://blog.wikimedia.org/2017/11/09/cda-230-principles-wikipedia/ ("Small internet companies, startups, and nonprofit websites . . . lack the resources to defend against a flood of lawsuits. Websites shouldn't be sued into the ground, or afraid to even launch, simply because of holes in Section 230's protections."). Increasing liability and legal costs would chill innovation before it even got started: "[i]f internet startups are no longer protected by Section 230 and they're exposed to the threat of near-constant litigation, it'll be a lot tougher for them to secure injections of funding and grow. Fewer VCs will be willing to risk their deep pockets if their early-round investments are swallowed up by legal fees instead of paying for coders." Wyden, *Floor Remarks*. Ironically, narrowing Section 230 would only reduce competition to the mega-platforms such as eBay, reddit, and Airbnb by stifling nascent Internet companies.

Liability and legal costs are not the only burden platforms would have to shoulder under Aimco's version of Section 230. They would also have to dedicate significantly more resources to policing third-party content. Despite Aimco's argument that a website's backend services can be distinguished from its publishing activities for the purposes of Section 230 immunity, the truth is that the two are inextricably linked. For example, consider what would happen if Airbnb

allowed users to post unlawful rental offers, but then refused to provide booking services for those offers. Not only would this be impractical—users would be constantly frustrated in their attempts to book rentals and would likely give up using the site—but it might be illegal under laws related to false advertising and deceptive business practices. *See* Eric Goldman, *Section 230 Ruling Against Airbnb Puts All Online Marketplaces At Risk–Airbnb v. San Francisco*, Technology & Marketing Law Blog (Nov. 14, 2016), https://blog.ericgoldman.org/archives/2016/11/section-230-ruling-against-airbnb-puts-all-online-marketplaces-at-risk-airbnb-v-san-francisco.html.

Platforms would face another practical problem under Aimco's version of Section 230: they would not have access to the information needed to validate transactions for which they could be held liable. For example, a short-term rental booking service like Airbnb does not know which listings violate the terms of their respective individual leases. To know this, the platform would have to take the impractical step of requiring each potential host to upload a copy of their lease, making the service much more cumbersome to use. Even if the platform had access to this information, disputes and disagreements would inevitably arise. If the platform wanted to avoid liability for providing booking services, it would have to interpret each listing's contract, and possibly even adjudicate contract disputes between landlords and tenants. This information gap poses practical obstacles for incumbents; consider, for example, how eBay could validate the title of each item to ensure the legality of a transaction. Once again, however, the harshest burden

would fall on startups, small businesses, and nonprofits, who have neither the resources nor the expertise to be engaging in fact-specific determinations.

Of course, this wouldn't just apply to short-term rentals. Any platform that provides services related to third-party conduct would have to choose policing third-party content or taking on liability. It may be tempting to see large, profitable companies such as Facebook as up to the task of policing their sites. Leaving aside what a monumental task that would be even for a large platform, they have resources that startups do not. Smaller players would really only have one choice: getting out of the game.

Ultimately, if this court accepts Aimco's narrow reading of Section 230, society can expect to see less competition and less innovation online. Such a decision would be detrimental not only to website operators but also to Internet users: they would have fewer options to choose from, since website operators would not have the right incentives to innovate and create new services. This is directly contrary to one of the primary purposes of Section 230. Fortunately, this court has the opportunity to avoid such an outcome.

CONCLUSION

For the reasons stated above, this court should avoid undermining the protections of Section 230 and AFFIRM the District Court's proper application of Section 230 to the facts of this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to the Fed. R. App. P. 32(a)(7)(C), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(b) and Ninth Circuit Rule 32-1(a) because it contains 4,977 words as calculated by the word count feature of Microsoft Office 365, exclusive of the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: September 27, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici* Curiae Engine Advocacy and Professor Eric Goldman in Support of Defendants-Appellees 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. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: September 27, 2018

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