NO. 18-55367

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOMEAWAY.COM, INC. AND AIRBNB, INC.,

PLAINTIFFS-APPELLANTS,

V.

CITY OF SANTA MONICA,

DEFENDANT-APPELLEE,

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

The Honorable Judge Otis D. Wright, II

BRIEF OF AMICUS CURIAE FLOOR64, INC. D/B/A THE COPIA INSTITUTE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION AND RULE 29 CERTIFICATES

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* Floor64, Inc. d/b/a/ The Copia Institute states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for undersigned counsel, has authored the brief in whole or in part, or contributed money towards the preparation of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), amicus curiae certifies that all parties in this case have consented to the filing of this brief.

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STATEMENT OF INTEREST

Floor64, Inc., d/b/a the Copia Institute, is a business that regularly advises and educates innovative technology startups on a variety of issues, including those relating to intermediary liability and the important free speech interests associated with their protection. Through the Copia Institute it works directly with innovators and entrepreneurs to better understand innovation and policy issues, while Floor64's online publication, Techdirt.com, has published over 60,000 posts commenting on these subjects. The site regularly receives more than two million views to its pages per month, and its posts have also attracted more than one million comments, third party speech that advances discovery and discussion around these topics. Floor64 depends on statutory protections for intermediaries, including that afforded by 47 U.S.C. Section 230 ("Section 230"), to both enable the robust public discourse found on its pages and for its own speech to be shared and read throughout the Internet.

Amicus submits this brief to the Court to explain how there is more at stake in this case than just Appellants' right and ability to maintain their Internet businesses without fear of undue sanction. If the district court's decision is upheld it will deny other platforms the critical statutory protection of Section 230 they depend on to intermediate online speech, thus chilling that speech and in doing so harm the interests Congress sought to protect when it codified this protection.

INTRODUCTION

Not every jurisdiction is a fan of businesses like the Appellants'. As cities like Santa Monica have argued, Appellants' online platforms can put pressure on a tight housing market, and thus reasonably prompt local government efforts to restrict the ability of people to engage in the short-term rentals of their homes. But it is important not to let antipathy towards Appellants blind anyone to the fact that this case, at its core, is a case about speech, and about an attempt to hold platforms liable for that speech.

The challenge to the Santa Monica ordinance is not about the underlying policy behind it. It is about the conflict this specific ordinance has with Section 230, a critically important federal statute that insulates Internet platforms from the imposition of liability arising from speech others have used their services to make. This conflict arises because the Santa Monica ordinance attempts to impose liability on platforms arising from speech others use their platforms to express. Section 230 bars local jurisdictions from imposing such liability. For the statute's protection to be meaningful, and to achieve the speech-enhancing objectives Congress sought to vindicate with it, its protection needs to be equally available to all platforms, no matter how topically specific the content they intermediate or how the platform monetizes that intermediation, and equally effective everywhere the platform reaches.

The Santa Monica ordinance, however, runs afoul of both requirements, and without any statutory basis. The district court ruling denying Appellants the protection of Section 230 and upholding the ordinance should therefore be reversed in order to ensure that platforms cannot be stripped of the critical statutory immunity they depend on to enable all that Section 230 is intended to foster.

ARGUMENT

I. Allowing the ordinance to stand would make Section 230 immunity conditional on the type of speech a platform intermediates and how it profits from that intermediation

As this Court has noted, Section 230 is not a "get out of jail free" card for any activity an Internet platform business might happen to engage in. *Doe 14 v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016). Section 230 provides no obstacle to imposing liability on activity that has nothing to do with a platform's intermediation of user speech. But what the district court in this case, as well as the district court in an earlier case about a similar ordinance from San Francisco, *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016), failed to recognize is that these ordinances are indeed targeting the intermediation of speech. The ordinance creates liability for certain types of expression, and then passes the liability onto the platform.

Or at least it would pass it on to some platforms. Per the opinion, a platform like Craigslist, which hosts many topics of user expression, would not run afoul of

the ordinance, while Appellants' platforms would. (Op. 4). But there is no legally significant way to differentiate the two kinds of platforms. Appellants' sites are exactly like Craigslist, with only two exceptions: the only speech a user can express on that platform is that they have a home to rent, and the platform subsidizes its speech intermediation services with a different monetization model than Craigslist has. But neither of these differences provide a basis for denying a platform the protection that Section 230 should otherwise provide their speech intermediating activity. The district court decision denying the injunction should therefore be reversed so that Section 230 protection does not become contingent these additional criteria that are not included in the statutory language.

A. Section 230 does not exempt from its protection platforms that only handle specific forms of expression.

Sites like Craigslist host all sorts of expression. Sites like Appellants', on the other hand, host little more than expression that essentially says, "I have a home to rent." But there is nothing about Appellants' specialization that should affect whether Section 230 applies to their platforms. The basic analysis is exactly the same as it would be for any other sort of platform content, particularly because there is nothing about expressing that one has a home to rent that is inherently wrongful. People in many jurisdictions can legally say that they have a home for rent, even if saying so may result in someone then renting their home. Of course, not so in Santa Monica, where such expression leading to that result may be legally wrongful.

But to the extent that such speech is wrongful it is the party speaking that imbues the speech with its wrongful quality, not the platform intermediating it. Just as defamatory speech gets its defamatory nature from the speaker speaking it, and not the platform intermediating it, *see, e.g.*, *Batzel v. Smith*, 333 F. 3d 1018, 1026-27 (9th Cir. 2003), speech on Appellants' platforms indicating the availability of homes to rent acquires its wrongful nature solely from the speakers speaking it and not the platforms intermediating it. The fact that it is not universally wrongful to say such things, and that the wrongful quality hinges on where the speaker is eliciting a result for their expression, as well as independent actions taken by the speaker (to potentially register the property), further shows how there is nothing about the particular speech at issue in this case to make it any different from any other potentially wrongful user speech that Section 230 would clearly apply to.

The only question that matters for determining whether Section 230 might not apply is who made the wrongful speech wrongful. The specialization of the speech is irrelevant to this inquiry. In *Fair Housing Council of San Fernando Valley v. Roommate.com* ("Roommates.com"), another case involving a site intermediating specialized content, this Court found that Section 230 was generally available with respect to how the platform enabled users to create content where it was left entirely to their discretion whether to include anything that might be illegally discriminatory expression. *Fair Housing Council of San Fernando Valley v. Roommate.com*, 521

F. 3d 1157, 1175 (9th Cir. 2008). In the instant case here, it is also up to the user whether to express something legally wrongful. Additionally, as in the *Roommates.com* case, there is nothing about the user-supplied content that is inherently wrongful. Roommate listings there may or may not include discriminatory content, just as listings on Appellants' platforms may or may not include illegally rented properties. Even in Santa Monica it is not always illegal to rent one's home.

The issue that arises with specialized sites is that the specialization can sometimes obscure the inquiry as to who created the wrongful content. For instance, in *Roommates.com* this Court did find Section 230 to be unavailable to the platform with respect to how it caused users to create expression that could not be anything but potentially illegal. *Id.* at 1166-67. This Court reached that conclusion by effectively deeming it the originator of the problematic expression and thus legally responsible for the consequences of it. *Id.* But as described above, there is nothing about the relevant expression targeted by the Santa Monica ordinance that makes it inherently wrongful. What would make the speech listing a property wrongful depends entirely on whether the property is in compliance with local regulations. But there is nothing about Appellants' sites that causes a property itself to be non-compliant, so it cannot be said that Appellants cause the expression listing it to be wrongful either.

In fact, if anything, *Roommates.com* provides cautionary guidance for why Section 230 protection should not be too quickly denied a platform, even if the platform might aid the creation of potentially wrongful expression. Several years after this Court originally denied that particular rental listing platform Section 230 protection for some of the expression it had intermediated, based on the assistance it had provided users in creating the potentially illegal aspects to the content, this same Court then ruled that the content was not actually illegal after all. *Fair Housing Council v. Roommate.com, LLC*, 666 F. 3d 1216, 1223 (9th Cir. 2012) ("Because precluding individuals from selecting roommates based on their sex, sexual orientation and familial status raises substantial constitutional concerns, we interpret the FHA and FEHA as not applying to the sharing of living units. Therefore, we hold that Roommate's prompting, sorting and publishing of information to facilitate roommate selection is not forbidden by the FHA or FEHA."). The defendant platform had been forced to litigate for years before being absolved of liability, which is a debilitating cost to inflict on a platform. Section 230 exists to remove the risk that platforms will be depleted by litigation costs arising from liability manifest in the expression they intermediate and thus cease intermediating any expression at all. Withholding the statute's protection too easily elevates that risk too easily too.

Specialized content can also potentially tempt too close a focus on the consequences arising from the speech in question. But Section 230 does not hinge

on the consequences of speech; speech always has consequences. The role of Section 230 is to ensure that liability for those consequences remains with the creator of the speech and not the platform who intermediated it.

The statute provides for only a few exceptions to this system of liability protection. These exceptions apply to situations when the intermediated speech implicates intellectual property-related claims, 47 U.S.C. § 230(e)(2), and when claims arise from violations of federal criminal law. 47 U.S.C. § 230(e)(1). A recent amendment has also added an exception for liability arising from violations of text trafficking law. 47 U.S.C. § 230(e)(5). None of these exceptions are contingent on whether a platform intermediates general or specific content, however, nor are any of these exceptions applicable to this case.

It is important to not cut these analytical corners because Appellants are not the only platforms that intermediate specialized content. This sort of specialization is consistent with Congress's original intent "to promote the continued development of the Internet and other interactive computer services and other interactive media," 47 U.S.C. § 230(b)(1). The specialization can help more effectively intermediate speech between the speakers with something to say and the audience needing to hear it by filtering out extraneous noise and presenting specific information in the way it may be best received. As with any speech, there may be consequences arising from this specialized expression, and those consequences may not always be good. But

that specialization cannot be a basis for denying a platform its Section 230 protection, or else it will deter platforms from building the services best tailored to their otherwise lawful purpose.

B. Section 230 does not exempt from its protection platforms that monetize by taxing consummated transactional speech.

Section 230 is silent as to how platforms might profit from intermediating user speech, except to the extent that it anticipates that vibrant businesses may result, and indeed encourages them. *See* 47 U.S.C. § 230(b)(2). Its protection is otherwise in no way contingent on a platform's monetization model. The district court ruling makes it conditional, however.

In finding Appellants' sites subject to the Santa Monica ordinance, but not sites with alternative monetization models, the district court effectively removes from Section 230's protective purview platforms that intermediate transactional speech if they in any way profit from the transaction consummating. The problem is that the ruling focuses on the revenue-taking as something separate from the platform's intermediation of the transactional speech. But it isn't separate: the profit is extracted as a result of having effectively intermediated speech. Section 230 should therefore apply to prevent the ordinance from reaching Appellants' platforms and imposing a sanction on them for running wrongful listings.

Should the ruling stand and Section 230 be found not to apply, it would invite several undesirable effects. At minimum it would deter platforms from effectively

intermediating transactional speech, because doing so successfully could jeopardize the statutory protection. If no transactions closed, or the platform charged per listing, indifferent to whether a transaction closed, the platform would not have to fear the loss of its Section 230 protection. Making Section 230's protection conditional on the profit model would disincentivize platform operators from developing the most effective platforms, which is inconsistent with what Congress intended when it enacted the law.

It would also force platforms to other monetization models, even if those models might be less effective or less appropriate for their businesses.[1] But none of these outcomes is consistent with the goal of the statute to promote more online services. Platforms need leeway to figure out how to sustain themselves if they are going to be able to remain available to intermediate others' speech, but if this ruling stands it will force platforms to choose between losing that discretion or losing the Section 230 protection entirely, even though there is no basis for this loss codified anywhere in the statute.

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[1] Some platforms support themselves by running ads alongside the user generated content they display, but ads come with their own set of issues that various jurisdictions, and even platforms themselves, are increasingly preferring to avoid. *See, e.g.*, Karl Bode, *Why Are People Using Ad Blockers? Ads Can Eat Up To 79% Of Mobile Data Allotments*, TECHDIRT.COM, Mar. 29, 2016, https://tdrt.io/frO (describing several problems with online ads). *See also Digital Advertisers Battle Over Online Privacy*, THE ECONOMIST, Nov. 5, 2016, https://www.economist.com/news/business/21709584-escalating-fight-over-users-data-and-targeted-ads-digital-advertisers-battle-over-online.

Forcing platforms to lose their protection is also not without consequence. The recent amendment to Section 230, which attempted to make clear that it would not provide protection to platforms intermediating content related to sex trafficking, has not solely affected platforms intermediating sex traffic-related speech. *See* Pub. L. 115–164, § 2, Apr. 11, 2018, 132 Stat. 1255. Instead it has begun to have enormous collateral effects on all sorts of protected speech. *See, e.g.*, Mike Masnick, *SESTA's First Victim: Craigslist Shuts Down Personals Section*, TECHDIRT.COM, Mar. 23, 2018, https://tdrt.io/gIw. When platforms are not free to be platforms, and instead must fear repercussions if they intermediate the wrong speech, it chills their ability to intermediate all the speech they could have otherwise carried, even speech that wasn't necessarily wrongful or otherwise exempted from Section 230's protection. *See also* https://www.craigslist.org/about/FOSTA (describing how the platform felt compelled to remove its personals section in the wake of the amendment narrowing Section 230's protection). Such chilling runs counter to the Congressional intent behind Section 230 and the rich online environment Congress had sought to foster. 47 U.S.C. § 230(a); 47 U.S.C. § 230(b)(1). This Court should reverse the district court ruling in order not to invite these collateral effects.

II. Allowing the district court ruling stand would enable individual local jurisdictions to set policy targeting speech for every jurisdiction nationwide.

In 1996 when Section 230 was codified Congress did not yet know what the Internet would become. In fact, at the time it was codified not every "interactive computer service provider" was even necessarily an Internet service provider as we would understand them today to be. *See, e.g.*, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995); *Prodigy (Online Service)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Prodigy_(online_service) (last accessed Apr. 25, 2018) (describing the history of Prodigy as a dial-up service). Congress had no crystal ball, so it drew Section 230 broadly and in accordance with a general policy principle: encouraging the most good online expression, and the least bad.

It achieved this policy value with a regulatory approach that was essentially carrot-based, rather than stick-based, creating a two-part immunity that both protected against liability in carrying speech, 47 U.S.C. § 230(c)(1), and protected against liability for removing it. 47 U.S.C. § 230(c)(2). By removing the threat of sanction, platforms would be able to intermediate the most beneficial speech and allocate their resources most efficiently to most effectively minimize the least desirable. Imposing liability on platforms distorts this balance and undermines both objectives. It co-opts resources that could be better spent optimizing their speech intermediation faculties and pressures sites to reject more content, even content that may be perfectly legitimate, as it may be prohibitively expensive, if not also

impractical or even impossible to weed out the acceptable content from the problematic. But this weeding is exactly what the Santa Monica ordinance would require of Appellants: filter out the wrongful listings, under pain of penalty for any failure to do so. Or, in other words, be liable for the wrongful content appearing on their platforms, which is exactly what Section 230 is supposed to prevent.

The problem is, if certain jurisdictions can distort the policy balance Section 230 was intended to achieve and pressure platforms not to intermediate certain speech that may be wrongful in those places, it will force platforms to stop intermediating the speech everywhere else too, including places where that speech may be perfectly lawful, and even desirable.

The pre-emption provision of Section 230 is supposed to forestall this result. 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."). It is an important result to avoid, because not every jurisdiction finds Appellants' services problematic; some even value them. *See*, *e.g.*, Erin Alberty, *Many Cities Fight Airbnb Rentals. This Remote Utah County is Proud its Listings Have Jumped from Zero and Wants More*, SALT LAKE TRIBUNE, Feb. 28, 2018, https://www.sltrib.com/news/business/2018/02/28/unlike-other-tourist-destinations-this-utah-county-considers-each-airbnb-rental-a-victory/. For some it is a difficult political decision to make. *See*, *e.g.*, Joshua Fechter, *San Antonio*

Wrestles with Regulating Airbnb, HomeAway Rentals, MYSANANTONIO.COM, Apr. 12, 2018, https://www.mysanantonio.com/business/local/article/San-Antonio-wrestles-with-how-to-regulate-12826947.php.

But if jurisdictions like Santa Monica can impose their preferred policy choices upon platforms to pressure them not to intermediate certain content, they will not get the chance to make these decisions. Instead jurisdictions like Santa Monica will end up imposing their policy choices on every jurisdiction the platform reaches, regardless of whether these other jurisdictions agree with the policy choice or not, if the platform is forced to change its intermediation practices to accommodate the more restrictive jurisdictions' laws.

When it comes to online speech, the only policy that is supposed to be favored is the one Congress originally chose, "to promote the continued development of the Internet and other interactive computer services and other interactive media," 47 U.S.C. § 230(b)(1), and all that these services offer. *See* 47 U.S.C. § 230(a) (enumerating the many of benefits of these services). The only way to give that policy choice the effect Congress sought is to ensure that local regulatory efforts cannot distort the careful balance Congress codified to achieve it. This Court should therefore overturn the district court ruling, which threatens it.

CONCLUSION

Because allowing the district court ruling to stand would require restricting Section 230's protection for platforms in a way that the statutory language does not allow, and conflicts with its pre-emption provision, this Court should overturn it in order to not to undermine the policy goals Congress intended to achieve with the statute.

Dated: April 25, 2018

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CERTIFICATE OF COMPLIANCE
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Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief of Amicus Floor64, Inc. d/b/a The Copia Institute In Support Of Plaintiffs-Appellants complies with the word limit of Fed. R. App. P. 29(c)(2) because this brief contains 3380 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, the word processing system used to prepare the brief, in 14 point font in Times New Roman font.

Dated: April 25, 2018

By: /s/ Catherine R. Gellis
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 25, 2018.

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

Dated: April 25, 2018

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