No. COA 11-685 EIGHTEENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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JEFFREY A. and LISA S. HILL, individually and on behalf of all others similarly situated, Plaintiffs,	)	
v.	)	From Guilford County 07 CVS 11310
StubHub, Inc. d/b/a "StubHub!" et al., Defendants.	)	

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MOTION OF CENTER FOR DEMOCRACY & TECHNOLOGY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CONSUMER ELECTRONICS ASSOCIATION, EBAY, INC., ELECTRONIC FRONTIER FOUNDATION, INTERNET COMMERCE COALITION, NETCHOICE, NETCOALITION, PUBLIC KNOWLEDGE, TECHAMERICA, AND TECHNET FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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July 13, 2011

Counsel for Amici Curiae

Amici curiae respectfully request the Court's permission to file the accompanying brief *amicus curiae* in support of Defendant-Appellant StubHub, Inc. In the brief, *amici curiae* urge the Court to rule in favor of StubHub, and to adhere to the prevailing interpretation of Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230. *Amici* are providers of interactive computer services and/or organizations that represent the interests of providers or users of such services, as well as the interests of the public at large, in promoting a diverse and dynamic Internet. Each of the *amici* has a substantial interest in the rules governing whether providers of interactive computer services may be subject to suits based on content generated by third parties and disseminated through their services.

Federal and state courts throughout the country have held that Section 230 broadly immunizes providers of interactive computer services, such as those offered by *amici*, or companies represented by *amici*, from liability for third-party content. The trial court's decision in this case is contrary to that established body of law and represents an unprecedented narrow construction of Section 230 immunity that cannot be squared with either the statutory text or Congress's purpose in enacting the provision. Because *amici* serve as platforms for the online communications of hundreds of millions of users (or represent such services), many of the *amici* (or companies whose interests *amici* represent) have been, and

likely will continue to be, parties to controversies in which they assert Section 230 immunity. The success and viability of online marketplaces and free speech on the Internet significantly depend on a robust Section 230 immunity. A ruling upholding the trial court's decision could create substantial uncertainty regarding the legal rules applicable to interactive computer services and imperil the future growth and development of online commerce. For these reasons, *amici* respectfully request that the Court grant leave to file the accompanying brief *amicus curiae* in support of Defendant-Appellant.

Amici are as follows:

Center for Democracy & Technology (CDT) is a non-profit public-interest Internet policy organization. CDT represents the public's interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy, and individual liberty. CDT is a leading organization advocating for intermediary protections, including limiting liability for user-generated content, which are vital to maintaining the Internet as a platform for free expression and innovation.

The **Computer & Communications Industry Association** (CCIA) is a non-profit trade association dedicated to "open markets, open systems and open networks." CCIA members participate in many sectors of the computer,

information technology and telecommunications industries and range in size from small entrepreneurial firms to the largest in the industry.

Consumer Electronics Association (CEA) is the preeminent trade association promoting growth in the U.S. consumer electronics industry. CEA members lead the consumer electronics industry in the development, manufacturing and distribution of audio, video, mobile electronics, communications, information technology, multimedia and accessory products, as well as related services, that are sold to consumers. Its more than 2,000 corporate members contribute more than $125 billion to the U.S. economy.

eBay, Inc. pioneered the online auction-style trading format, creating a forum in which today over 100 million users can sell goods directly to each other. In addition to the vast array of third-party content that comprises the eBay marketplace, eBay permits buyers and sellers to publish ratings and comments on their dealings with one another. eBay is the parent company of Defendant-Appellant StubHub, Inc. Over the past decade, eBay has joined numerous amicus briefs in cases addressing issues regarding the interpretation and application of Section 230.

Electronic Frontier Foundation (EFF) is a non-profit, member-supported civil liberties organization working to protect rights in the digital world. EFF actively encourages and challenges industry, government and the courts to support

free expression, privacy, and openness in the information society. Founded in 1990, EFF is based in San Francisco, California. EFF has members all over the United States and maintains one of the most linked-to websites (http://www.eff.org) in the world. Currently, EFF is supported by over 200 paying members in North Carolina. In addition, more than 900 North Carolina residents subscribe to EFF's weekly e-mail newsletter, EFFector.

Internet Commerce Coalition (ICC) is a trade association of leading broadband Internet service providers, ecommerce sites, and technology trade associations. Its mission is to achieve a legal environment that allows service providers, their customers, and other users to do business on the Internet under reasonable rules governing liability and the use of technology.

NetChoice is a coalition of online businesses and consumers who are united in promoting the increased choice and convenience enabled by e-commerce. NetChoice members have a direct interest in preventing obstacles to e-commerce, such as the threat of incurring liability for content provided by third parties.

NetCoalition serves as the public policy voice for some of the world's largest and most innovative Internet companies on key public policy matters affecting the online world. Its members are providers of search technology, hosting services, Internet service providers, and Web portal services.

Public Knowledge is a non-profit public interest organization devoted to protecting citizens' rights in the emerging digital culture. Public Knowledge seeks to guard the rights of consumers, innovators, and creators at all layers of our culture through legislative, administrative, grass-roots, and legal efforts, including regular participation in cases that threaten consumers, expression, and innovation.

Representing approximately 1,200 member companies of all sizes from the public and commercial sectors of the economy, **TechAmerica** is the technology industry's largest advocacy organization. Its members include manufacturers and suppliers of broadband networks and equipment, consumer electronics companies, software and application providers, Internet and ecommerce companies, and Internet service providers, among others.

TechNet is a national network of CEOs of technology companies in the fields of e-commerce, networking, information technology, biotechnology, and finance. TechNet is organized to promote the growth of the technology industry and to advance America's global leadership in innovation.

Respectfully submitted, this 13th day of July, 2011.

WILMER CUTLER PICKERING HALE & DORR LLP

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N.C. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had signed it.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of July, 2011, served the foregoing MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF DEFENDANT-APPELLANT, via first class U.S. Mail and email to counsel for Plaintiff-Appellees and Defendant-Appellant at the following addresses:

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ATTACHMENT 1

No. COA 11-685 EIGHTEENTH DISTRICT

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NORTH CAROLINA COURT OF APPEALS

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BRIEF OF *AMICI CURIAE* CENTER FOR DEMOCRACY & TECHNOLOGY, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, CONSUMER ELECTRONICS ASSOCIATION, EBAY, INC., ELECTRONIC FRONTIER FOUNDATION, INTERNET COMMERCE COALITION, NETCHOICE, NETCOALITION, PUBLIC KNOWLEDGE, TECHAMERICA, AND TECHNET IN SUPPORT OF DEFENDANT-APPELLANT

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Amici curiae file this brief to urge the Court to rule in favor of StubHub, Inc. and to adhere to the prevailing interpretation of Section 230 of the federal Communications Decency Act ("CDA"), 47 U.S.C. § 230. As detailed in the accompanying motion for leave to file, *amici* are providers of interactive computer services and organizations that represent the interests of providers or users of such services, as well as the interests of the public at large, in promoting a diverse and dynamic Internet. Each *amicus* has a substantial interest in the rules governing whether providers of interactive computer services may be held liable for online content generated by others.

Section 230 broadly immunizes online services from suits based on content provided by their users and other third parties. For fifteen years, federal and state courts across the country have consistently reaffirmed the breadth of that immunity, and have held that service providers do not lose their immunity unless the provider itself was "responsible, in whole or in part, for the creation or development" of the content at issue (§ 230(f)(3))—*i.e.*, unless the provider materially contributed to the specific unlawful content. Nevertheless, the court below held that StubHub lost its Section 230 immunity to a suit challenging a ticket price set by a third party, ostensibly because elements of StubHub's "business model" and certain general features of its site "encouraged" or

"influenced" the prices picked by sellers. SJ Ruling ¶¶ 9, 50. That decision was erroneous, and conflicts with established Section 230 law.

Permitting the trial court's interpretation of Section 230 to stand would severely undercut Congress's purposes in enacting Section 230 and threaten online marketplaces in North Carolina and elsewhere. The growth of these e-commerce marketplaces has brought vast benefits to consumers and businesses over the past decade. Their success and usefulness depends critically on site features and elements similar to those cited by the trial court as a basis for stripping StubHub of its immunity. The trial court's decision threatens online marketplaces with potentially serious liability based on the publication of pricing information and other content provided by third parties—precisely the result Congress sought to prevent by enacting Section 230.

I. SECTION 230 IMMUNIZES ONLINE MARKETPLACES FROM SUITS BASED ON CONTENT PROVIDED BY SELLERS

A. Section 230 Broadly Immunizes Service Providers from Suits Based on Third-Party Content

The plain language of Section 230 bars suits against web sites such as StubHub predicated on content that was "creat[ed] or develop[ed]" by third parties and not by the site. 47 U.S.C. § 230(f)(3). Under Section 230, "[s]tate-law plaintiffs may hold liable the person who creates or develops unlawful content, but not the interactive computer service provider who merely enables that content to be posted online." *Nemet Chevrolet Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009); *see also Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

Federal and state courts have repeatedly confirmed Section 230's broad grant of immunity from any suit seeking to hold providers responsible for unlawful third-party content. *See, e.g.*, *Johnson v. Arden*, 614 F.3d 785, 791-792 (8th Cir. 2010) ("The majority of federal circuits have interpreted the CDA to establish broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." (internal quotation marks omitted)); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018, 1027-1029 (9th Cir. 2003); *Ben Ezra, Weinstein &*

Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000); *Shiamili v. The Real Estate Group of New York*, 2011 N.Y. Slip Op. 05111, at *5 (N.Y. June 14, 2011); *Barrett v. Rosenthal*, 146 P.3d 510, 529 (Cal. 2006); *Doe v. America Online*, 783 So. 2d 1010, 1018 (Fla. 2001).

Moreover, Congress has twice ratified this body of law by enacting follow-on legislation extending the protections of Section 230. *See* 47 U.S.C. § 941 (extending Section 230 protections to new class of entities); 28 U.S.C. § 4102(c)(1) (providing that U.S. courts "shall not recognize or enforce" foreign defamation judgments that are inconsistent with Section 230); *see also* H.R. Rep. No. 107-449, at 13 (2002) ("[t]he courts have correctly interpreted section 230(c)," and "[t]he Committee intends these interpretations of section 230(c) to be equally applicable to [certain new] entities"); *Barrett*, 146 P.3d at 523 n.17 (statements in H.R. Rep. No. 107-449 "reflect the Committee's intent that the existing statutory construction ... be maintained in a new legislative context").

In order to vindicate Congress's stated policy of encouraging free speech on the Internet and "promot[ing] the development of e-commerce," *Batzel*, 333 F.3d at 1027, courts have consistently held that Section 230 immunity must be construed broadly in favor of service providers. *See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Courts have construed the immunity provisions in § 230 broadly in all cases arising from the publication of user-

generated content"). Because Section 230 protects providers not only from liability, but also from the burdens of having to defend against *any suit* based on third-party content, "close cases ... must be resolved in favor of immunity" to avoid "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." *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (en banc).

B. The Trial Court's Narrow Construction of Section 230 Immunity Is Erroneous and Contrary to Established Law

The trial court erroneously distilled this established body of Section 230 jurisprudence into a vague and narrow immunity that vanishes when a provider merely "encourage[s] illegal content" by "influenc[ing] the offending content in a way that promotes the violation of the law" or "elicit[ing] and mak[ing] aggressive use of the offending content in [its] business." SJ Ruling ¶¶ 9, 50. This unprecedented standard is inconsistent with the plain language of Section 230 and contrary to the case law. Under the correct standard, none of StubHub's activities warrants stripping StubHub of its immunity.

1. The trial court applied the wrong standard

The text of Section 230 deprives a service provider of immunity only where it is responsible "for *the creation or development*" of the alleged unlawful content—not where the provider merely "influence[s]" or "encourage[s]" content

provided by a third party, as the trial court held. 47 U.S.C. § 230(f)(3) (emphasis added). The trial court's standard would expand the meaning of "development" to the point of negating the very immunity that Congress intended to create. Virtually every website includes features that invite users to enter particular types of content and organize the presentation of that content. For example, online marketplaces generally include functions for a third-party seller to set a price for an item, to state whether the item is new or used, to categorize the nature or use of the item, and a variety of other information designed to help other users search for and find items in which they may be interested and to learn more about those items. Under the trial court's standard, however, the existence of these features could deprive a site of immunity merely because it "influence[s]" and "encourage[s]" (SJ Ruling ¶ 9) the content ultimately provided by users. That is not a reasonable interpretation of the terms "creation" or "development" in § 230(f)(3). Indeed, the Ninth Circuit specifically cautioned that "the broadest sense of the term 'develop' could include ... just about any function performed by a website," but that "to read the term so broadly would defeat the purposes of section 230 by swallowing up every bit of the immunity that the section otherwise provides." *Roommates*, 521 F.3d at 1167. The standard conjured by the trial court here would have exactly that effect.

In addition, the trial court's standard has no basis in Section 230 precedent. In the *Roommates* decision—on which the trial court purportedly relied—the Ninth

Circuit adopted a far narrower standard for what constitutes "creation or development" of user content. The *Roommates* court held that "development" refers "not merely to augmenting the content generally, but to *materially contributing to its alleged unlawfulness*." 521 F.3d at 1167-1168 (emphasis added). *Roommates* explained that a web site does not "materially contribute" to unlawful third-party content where it merely provides "neutral tools" that help users formulate and submit information—*i.e.*, tools that do not require the user to submit unlawful content but rather provide "a framework that could be utilized for proper or improper purposes" by the user. *Id.* at 1169, 1172 (distinguishing *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003), on the ground that it was the "user's decision" to provide unlawful content in response to site's questions); *see also Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1197-1198 (N.D. Cal. 2009) (site tools considered "neutral" so long as users ultimately determine what content to post).

The facts of *Roommates* further illustrate the type of role a service provider must play to forfeit immunity. In that case, as a condition for using an online roommate-finding service, each user seeking to offer living space had to create a profile describing his/her desired roommate and, in doing so, was "*require[d]* ... to disclose his sex, sexual orientation and whether he would bring children to a household" and to "describe his preferences in roommates with respect to the same

three criteria." 521 F.3d at 1161 (emphasis added). The site also designed its user search functions to "steer" users to listings based on users' answers to the discriminatory questions posed by the site. *Id.* at 1167. In those circumstances, the Ninth Circuit held that Roommates.com had "materially contributed" to the unlawful content because it "force[d]" users to answer "discriminatory questions" allegedly in violation of federal and state housing discrimination laws. *Id.* at 1166-1167. In other words, the specific unlawful content at issue was the direct and necessary result of the site's own discriminatory questions.[1]

Courts have consistently interpreted the *Roommates* decision as recognizing "only a narrow exception" to Section 230's broad grant of immunity, applicable only where the service provider materially contributed to the unlawful content by requiring the user to provide the specific unlawful content at issue. *Goddard*, 640 F. Supp. 2d at 1198. In *Nemet Chevrolet*, for example, the Fourth Circuit expressly distinguished *Roommates* on this ground, refusing to strip a provider of immunity based on a claim that the provider had "structured its website and its business

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[1] Analogous circumstances were at issue in *FTC v. Accusearch Inc.*, 570 F.3d 1187 (10th Cir. 2009), on which the court below also relied. In that case, the website offered to provide users with detailed telephone records for any phone number and then paid "researchers" to obtain those records. *Id.* at 1199. The court held the website was not entitled to immunity because acquisition of such confidential information would inevitably be unlawful (*e.g.*, because federal law prohibits telephone companies from disclosing such information). *Id.* at 1200. Once again, the site required the dissemination of content that was *necessarily* unlawful.

operations to develop information related to … a legal undertaking [*i.e.*, class-action lawsuits]"—even where the provider was alleged to have solicited and asked questions about the complaints and revised or redrafted user content. 591 F.3d at 257.

Other courts have held, following *Roommates*, that a search engine provider retains its immunity from a suit where the provider offers a tool that suggests keywords to potential advertisers—even when those keywords allegedly contribute to fraud—because the tool "does nothing more than provide options that advertisers may adopt or reject at their discretion." *Goddard*, 640 F. Supp. 2d at 1198; *see also Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (same); *Doe v. MySpace, Inc.*, 629 F. Supp. 2d 663, 665 (E.D. Tex. 2009) (holding *Roommates* "not applicable" because "users of MySpace.com are not *required* to provide any additional information to their profiles" (emphasis added)); *Atlantic Recording Corp. v. Project Playlist, Inc.*, 603 F. Supp. 2d 690, 701 (S.D.N.Y. 2009).

The trial court here failed to recognize the narrowness of the *Roommates* holding. Although the trial court referenced the "materially contribute" standard, it held that the standard could be satisfied if StubHub were shown merely to have "influence[d] the offending content in a way that promote[d] the violation of law that is represented by the offending content." SJ Ruling ¶ 9. That nebulous

standard appears nowhere in *Roommates*, or anywhere else in the case law, and is far removed from the "creat[e] or develop[]" standard in the text of Section 230.

2. StubHub is entitled to immunity under the correct standard

Under the correct Section 230 standard, the features of StubHub's site to which the court below pointed cannot deprive StubHub of immunity.

First, nothing like the activity at issue in *Roommates* occurred here: StubHub did not "materially contribute" to the unlawful content at issue because the site provided only a neutral "framework that could be utilized for proper or improper purposes" by third-party users. *Roommates*, 521 F.3d at 1172. Plaintiff seeks to impose liability on StubHub because a particular seller's ticket price exceeded the price permitted under North Carolina law. The trial court identified no evidence that StubHub did anything more with respect to the seller here than ask him to set his price—a "neutral" question that left the answer entirely to the seller's discretion. Unlike *Roommates*, where the site's questions were *themselves* alleged to be discriminatory and necessarily resulted in users providing unlawful responses, there obviously is nothing inherently unlawful about asking a user to set a price for his item. Had the seller provided a price that was below face value, there would have been no unlawful content and no possible liability on the part of StubHub; as it happens, the seller chose an unlawful price. But ultimately it fell to the third-party seller to provide a "proper or improper" price, *id.* at 1172, not

StubHub, and under Section 230, StubHub cannot be held responsible for that price.

Second, the trial court's analysis erroneously focused on general aspects of StubHub's "business model" (SJ Ruling ¶ 50) that have no bearing on the immunity question. In particular, the court noted StubHub's incentives for large sellers, its average and historical price information tools, its buyer and seller protections, and the fact that it derives revenues from a percentage portion of each sale. *See id.* ¶¶ 33-49. The court found that these features variously "encourage[] raising the price for all tickets" (*id.* ¶ 36) or "influence pricing" (*id.* ¶ 44) and were grounds to hold StubHub legally responsible for the price set by the seller.

But a court's role under Section 230 is not to evaluate the defendant's business model to determine whether it is worthy of protection under Section 230. Congress already has made that choice and, as discussed below, determined as a matter of federal policy to encourage diverse and vibrant online offerings. The only question is whether the service provider has materially contributed to the unlawful content at issue. *See Goddard*, 640 F. Supp. 2d at 1196 (website retains immunity unless it "contribute[s] 'materially . . . to [the] alleged unlawfulness'" of the user-provided content at issue (quoting *Roommates*, 521 F.3d at 1167-1168)); *Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 717 n.11 (Cal. Ct. App. 2002).

Furthermore, the fact that a site derives revenues through subscription fees or on a per-transaction basis from third-party sales has no bearing on whether the site is entitled to immunity under Section 230. *See, e.g.*, *Milgram v. Orbitz Worldwide*, 16 A.3d 1113 (N.J. Super. Ct. 2010) ("The fact that defendants charge 'service' or 'administrative' fees is irrelevant to the CDA analysis."). Indeed, virtually every commercial service on the Internet is intended to make money, whether through subscription or transaction fees, advertising, or some other method. And, in virtually all cases, the service will have strong incentives to encourage more users to visit its site and to engage in transactions. Relying on those facts to deprive an interactive service of immunity would render Section 230 inapplicable to whole swaths of the Internet.

Third, the trial court compounded its errors when it stripped StubHub of immunity on the ground that it was "consciously indifferent" and "willfully blind" to illegal prices posted by third parties and that unlawful ticket scalping "was a predictable consequence of its business model." SJ Ruling ¶ 50. That reasoning is flatly inconsistent with Section 230. As numerous courts have held, even *actual knowledge* of unlawful third-party content does not deprive a service provider of immunity. *See Zeran*, 129 F.3d at 333. That is *a fortiori* true of unlawful content that is alleged merely to have been foreseeable by a provider or the "predictable consequence" (SJ Ruling ¶ 50) of the provider's business practices. *See, e.g.*, *Dart*

v. Craigslist, Inc., 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009) (rejecting claim that site was liable for third-party content where it was "foreseeable" that unlawful content would be "a likely result" of site's practices); *see also Roommates*, 521 F.3d at 1169 n.24 (site operator generally entitled to immunity from suits based on operator's "passive acquiescence in the misconduct of its users ... even if the users committed their misconduct using electronic tools of general applicability provided by the website operator"). As courts have explained, any other rule would impose serious burdens on service providers and would inevitably shrink the range of beneficial services and content available on the Internet. *See Zeran*, 129 F.3d at 331.

II. THE DECISION BELOW WOULD UNDERMINE THE PURPOSES OF SECTION 230 AND THREATEN ONLINE COMMERCE

The trial court's "encouragement" or "influence" standard would erroneously blur the line between content provided by third parties and content provided or required by the service provider itself, opening the door to possible liability based merely on a site's "business model" or on its neutral features for third-party content submission. This result would severely undermine Congress's purpose in enacting Section 230 of promoting online commerce. It also would threaten to impair the growth and continued vitality of online marketplaces and exchanges that have brought enormous economic benefits to consumers and businesses.

Congress expressly enacted Section 230 both to protect free speech on the Internet and to foster the growth of online marketplaces and exchanges free from competing state regulations that threatened to cripple commerce on the Internet. *See* 47 U.S.C. § 230(b)(2) (noting that "[i]t is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation"); *Milgram*, 16 A.3d at 1122 ("[T]he plain language of § 230 was designed to promote the development of e-commerce, and more specifically, to prevent lawsuits from shutting down websites and other services on the Internet." (internal quotation marks omitted)). Courts have thus consistently held that e-commerce marketplaces and exchanges are entitled to Section 230 immunity for content provided by third-party buyers and sellers. *See, e.g.*, *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (site immune from suit concerning unlawful third-party advertising for the sale of a firearm); *Gentry*, 121 Cal. Rptr. 2d at 715 (eBay immune from liability for third parties' unlawful sales via its site).

Under the protection of Section 230—and consistent with Congress's purpose—online marketplaces and e-commerce exchanges that allow users to sell, purchase, or exchange goods and services have experienced tremendous growth in the last 15 years. Sites such as eBay, Amazon Marketplace, and craigslist host

billions of dollars in transactions among users annually. The growth of these secondary markets and exchanges has brought significant benefits to individuals and businesses. Among other things, they remove the barrier of physical distance between buyer and seller and provide a 24/7 platform for users to trade. This has had the effect of lowering or even eliminating a variety of transaction costs and has made it vastly easier for a willing seller to find a willing buyer. There are now vibrant secondary markets in used or niche goods that were nearly impossible to sell or purchase before the rise of these online exchanges. The result of this growth is greater competition, wider selection, lower prices, broader availability, more efficient and fairer markets, and numerous other benefits for consumers and the public interest generally.

Online marketplaces do not create themselves. Successful sites optimize the structure and operation of their marketplaces to promote fair and efficient exchanges between buyers and sellers. This includes providing tools and features that allow users to determine an appropriate price and to assess the reliability of the third-party buyer or seller on the other side of a potential transaction, especially where that information is generated by third parties and simply displayed by the provider of the website. Examples of such features include eBay's community rating system for buyers and sellers, transaction guarantees provided by Amazon or by affiliated entities such as PayPal (an eBay company), and shipping and payment

assistance. Online marketplaces also regularly provide users with comparative product and pricing information for items similar to the items in which a user has indicated an interest. Features such as these are critical to the successful and efficient functioning of online marketplaces. Yet it was precisely for such types of features that the court below deprived StubHub of immunity. Punishing service providers in this fashion would directly contravene Congress's purpose of promoting online commerce through Section 230.

Finally, the trial court's decision and its erroneous "encouragement" or "influence" standard represent a significant departure from Section 230 law applied elsewhere in the country and, unless corrected, would potentially disadvantage the use of e-commerce exchanges and secondary markets in North Carolina. The threat of provider liability in North Carolina for pricing information or other content provided by third parties could lead websites to be wary about making their services available in the State, to the disadvantage of North Carolina consumers and businesses that rely on online marketplaces to buy and sell goods and services.

CONCLUSION

For these reasons, the trial court's ruling should be reversed, and judgment should be entered in favor of StubHub.

Respectfully submitted, this 13th day of July, 2011.

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N.C. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Amici Curiae certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, and this certificate of compliance) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 13th day of July, 2011, served the foregoing BRIEF OF AMICI CURIAE, via first class U.S. Mail and email to counsel for Plaintiff-Appellees and Defendant-Appellant at the following addresses:

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