

No. 111127

IN THE SUPREME COURT OF ILLINOIS

CITY OF CHICAGO, ILLINOIS, PLAINTIFF-APPELLANT

v.

STUBHUB, INC., DEFENDANT-APPELLEE

On Certification Pursuant to Supreme Court Rule 20 from the United
States Court of Appeals for the Seventh Circuit, No. 09-3432

**BRIEF OF EBAY INC. AND THE NETCHOICE COALITION AS
AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE**

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STATEMENT OF INTEREST

Amicus curiae eBay Inc. is the world's leading Internet marketplace. *Amicus curiae* NetChoice Coalition is a coalition of trade associations, businesses, and individuals who seek to promote convenience, choice, and commerce on the Internet. Its members range from some of the most prominent online businesses in the world, to trade groups representing a variety of different industries, to individual users of e-commerce services, and include eBay and other companies whose online platforms bring together third parties from around the globe. See the site www.netchoice.org/about/.

In Illinois, Internet marketplaces like eBay are referred to in State legislation as "Internet Auction Listing Services" ("IALS"). IALSs are Internet marketplaces whose online technological platforms enable third-party buyers and sellers, who otherwise likely never would have had an opportunity to come together, to transact business with one another over the Internet. In particular, some of these web-based marketplaces like eBay provide users the opportunity to buy and sell tickets to sporting, entertainment, and other events in Illinois and throughout the world, including events that are otherwise sold out. According to the Illinois General Assembly, the benefit of IALS entities is that they provide consumers with a critical alternative to middlemen such as ticket brokers. Indeed, the availability of Internet Auction Listing Services makes many more outlets available for the purchase and sale of tickets. It also makes the market transparent. Before the advent of IALS sites, when all of the secondary-market tickets were in the hands of a limited number of ticket brokers, it was impossible to determine the "fair" market value of a particular ticket. Now, potential purchasers of secondary-market tickets may readily determine the true market price of tickets by

visiting several different Internet sites and monitoring the results of Internet sales. Accordingly, Illinois citizens benefit from greater competition, greater accessibility and greater transparency in the secondary ticket market because of the proliferation of these Internet marketplaces.

As providers of Internet marketplaces, eBay and many of NetChoice's members have a deep and abiding interest in ensuring that Illinois law addressing Internet Auction Listing Service providers continues to make it possible for eBay and others to provide competitive forums with consumer protections to the citizens of Illinois. And, in that regard, the *Amici* agree with the legal arguments set forth in the brief submitted to this Court by StubHub. The *Amici* offer this brief not to repeat the legal arguments StubHub is presenting, but to explain the serious practical consequences to eBay and other Internet marketplaces, and to the citizens of Illinois, of the City of Chicago's attempt to undermine the statutory framework established by the General Assembly.

The *Amici*'s interest in the issue before the Court is direct and tangible. Not only is one of the *Amici* (eBay) the parent of defendant StubHub, Inc., and itself the target of a separate but identical lawsuit seeking injunctive and compensatory relief, but eBay and other Internet marketplaces, including NetChoice members, will be directly and substantially affected by this Court's ruling.

That is because the City of Chicago is asking this Court to impose a duty on Internet Auction Listing Services to collect amusement taxes from their global customers – a duty that is contrary to the State laws upon which those marketplaces relied when structuring their business models. If the City's position were accepted, IALS entities would be put in the virtually impossible position of being required to

substantially change their entire electronic platforms. Currently, eBay, for example, provides only a forum where buyers and sellers come together to transact business with one another. Indeed, eBay never sees the ticket being offered by the seller. Rather, the seller merely sets forth the details of his ticket offer using eBay's platform, and the buyer purchases the ticket directly from the seller. While eBay earns a fee as a result of that transaction, the buyer pays the seller directly and the seller then ships the ticket directly to the buyer. And, if the event is taking place in Chicago, the seller is notified, in accordance with State law, that he may have an obligation to pay the City's Amusement Tax.

If, however, the City of Chicago prevailed in this action, many IALS entities would have to dramatically modify their business models. For example, front-end and back-end infrastructure would have to be changed to enable them to obtain additional information from sellers of Chicago-event tickets. They also would have to require ticket sellers to submit documentary proof to establish the amount the sellers paid for the tickets. They would have to hire new personnel to examine these documents and information, and to calculate, collect, and remit the amusement tax on each transaction. And, in many (if not all) cases, they still would be subject to the risk that verifications the City would require them to provide will be incorrect because they necessarily would rest on facts peculiarly within the knowledge of the sellers. And that would not end the matter. Undoubtedly, other home rule districts would seek to impose similar burdens on IALS entities and other Internet-based businesses, such as the members of NetChoice, thereby requiring these businesses to continually modify their systems to

ensure compliance with the tsunami of patchwork regulations that would arise if the City of Chicago succeeds here.

The practical result of the ruling the City seeks would be to make providing an Internet marketplace cost prohibitive. It would also vastly increase the cost to Illinois citizens seeking to sell and buy tickets and reduce the very competition the General Assembly sought to foster. The interest of the *Amici* thus goes well beyond the resale of event tickets. The imposition of new tax collection burdens on Internet-based businesses will directly and negatively affect the choice and competition that e-commerce businesses make available to consumers. That negative impact is magnified in this case, where the tax collection burden is not only new, but contrary to State statutes that formed the basis for the establishment of the Internet Auction Listing Service business model in Illinois. Interpreting the Chicago Ordinance as the City requests would override two Illinois statutes that expressly endorsed the business model adopted by *Amici* and would send the wrong message to high-tech companies and to businesses generally which seek to enter or expand their operations in Illinois.

In 2002 and 2005, eBay and the operators of other Internet Auction Listing Service sites negotiated with the General Assembly to obtain legislation which would enable Internet Auction Listing Services to operate in a way that would not impose burdensome regulatory and licensing (2002) and tax-collection (2005) obligations and would, at the same time, establish the services as a viable, competitive, and consumer-friendly alternative to the ticket broker monopolies. The General Assembly explicitly endorsed the Internet Auction Listing Service structure, put in place numerous

consumer-protection requirements, and excused these entities from certain onerous licensing and tax-collection obligations.

The ruling the City of Chicago seeks would nullify the protections granted to these entities by the 2002 and 2005 legislation, and would send a chilling message to other businesses – high-tech and others – which seek to do business in the State by operating pursuant to a seemingly clear, legislatively-approved charter or structure. If a local, city ordinance can override State legislation passed expressly to encourage a particular type of business utilizing a particular structure, then businesses which the State seeks to persuade to enter the Illinois market, or existing Illinois businesses which are currently relying on such legislative shields to protect them from crippling costs or regulations, will question whether efforts to enter or expand in Illinois are warranted. This is not the time to send that message to businesses bringing jobs and other benefits, economic and non-economic, to Illinois. Adopting the position the City of Chicago proposes would make it harder for Illinois to compete for business and even harder for its citizens to have the choice, transparency, and competition they deserve. These interests, too, underlie the *Amici*'s submission to this Court.

BACKGROUND

A. The Rise Of The Internet Marketplace.

In the late 1990s and early 2000s, eBay pioneered the business of offering a Web-based marketplace, or bazaar, in which individuals could sell goods or services over the Internet directly to those who wished to purchase those goods or services. These sites are typically available for use by anyone in the United States, and in many cases, across the globe, with access to the Internet. The sites typically provide a

uniform platform and request the same information from every seller who wishes to sell goods and services, regardless of where the seller lives.

Internet marketplaces such as eBay have been an economic boon to many individuals and families. By using such sites rather than selling through physical locations, individuals and small business do not need to buy or rent store locations to sell their products or services, they can keep inventory at a minimum, and they do not need to spend money setting up and maintaining websites of their own. For many sellers, the fees they pay to use an Internet marketplace site are far lower than what they would have to pay to buy or rent either an actual or virtual sales venue. Moreover, the platform and technology provided by eBay and other marketplaces allow these individuals and small businesses to reach out to, and do business directly with, a very broad range of buyers around the world with whom they could otherwise never come in contact. eBay and other Internet marketplaces thus provide a significant income source to hundreds of thousands of individuals and small businesses.

B. The 2002 Exception To The Illinois Auction License Act Endorses The Internet Auction Listing Service Business Model.

In an effort to ensure consumer protections, the State of Illinois in the early 2000s raised the issue whether these Internet sites should be deemed “auctioneers” and, therefore, subject to being licensed and otherwise regulated as auctioneers under the Illinois Auction License Act. That Act subjects auctioneers to licensing fees as well as numerous training and other requirements and restrictions. *See, e.g.*, 225 ILCS 407/10-50, 15-5, 15-10, 20-15.

Because Internet marketplaces do not themselves buy or sell, and, in most cases, do not even hold the goods, subjecting these marketplaces to “auctioneering”

regulations that require the Internet company to inspect the goods being sold did not make sense. Accordingly, to avoid these problems, representatives of the Illinois General Assembly and of eBay and others negotiated an exemption from the Auction License Act. That statutory exemption was enacted in August 2002 and provides that an IALS will not be deemed an auctioneer subject to the Act's requirements so long as the entity provides certain protections to the consumer, *and* so long as the IALS "does not . . . examine . . . the personal property or service to be offered . . ." 225 ILCS 407/10-27(a)(1); *see also id.*, § 407/10-1(d). The IALS must also certify that it "does not act as the agent of users who sell items on its website, and acts only as a venue for user transactions." *Id.*, § 407/10-27(c)(1). The consumer-protection provisions of the 2002 statute also require the IALS to, among other things, register with the Office of Banks and Real Estate so that users can identify, and seek redress or further information from, the entity, obtain and retain certain information about the users of its site, implement a mechanism to handle complaints and inquiries, and adopt a policy of suspending, in appropriate circumstances, those who engage in a pattern of fraud. 225 ILCS 407/10-27(c).

eBay is a registered IALS and has relied on this statutory exception since it was passed.

C. The Illinois Ticket Resale Market, And The Monopoly Power Of The Ticket Brokers.

Illinois long prohibited resales of event tickets for an amount in excess of the face amount of the tickets. In 1991, the Illinois General Assembly amended the Ticket Act to exempt ticket brokers from this prohibition. P.A. 87-383. That amendment permitted ticket brokers to sell tickets at whatever price they could obtain in the open

market, but required persons selling tickets to the brokers to sell the tickets at face value. As a result, ticket brokers essentially were guaranteed a monopoly over ticket resales – those selling tickets to the brokers were forced to sell at an artificially low price, while the ticket brokers were permitted to re-sell those same tickets for whatever price they desired. (*See* DA35-36, 43 (referencing the “monopoly” power of the ticket brokers).)¹

D. The 2005 Amendment To The Ticket Act Increases Competition And Adds Protections For Illinois Consumers.

To foster increased competition in secondary ticket sales, the General Assembly turned to the IALS exception found in the Auction License Act. Extensive negotiations over the course of six months between a number of Internet companies and the General Assembly resulted in the adoption in 2005 of an amendment to the Ticket Act which exempted sales on IALS sites from the prohibition against ticket resales at above face value. (DA28, 35, 45.) This amendment, for the first time, enabled Illinois citizens who owned event tickets to resell those tickets legally at a price above their face value. Indeed, the express purpose of the amendment was to encourage “a new secondary market option for the resale of tickets. . . .” (DA35; *see also* DA43.) Consistent with that pro-consumer purpose, the amendment contained numerous provisions designed to protect consumers (over and above those set forth in the 2002 Auction License Act amendment), including requiring the IALS entities to establish consumer protection guidelines. *See generally* 720 ILCS 375/1.5(c).

¹ The citations to “DA__” refer to the Legislative History Addendum which defendant-appellee StubHub filed with the Seventh Circuit Court of Appeals on February 5, 2010. The citations to “A__” refer to the Appendix which the City of Chicago filed with this Court on or about December 7, 2010.

A core provision of the 2005 statute was its exemption of IALS entities from having to collect and remit any amusement taxes. Specifically, the statute gave an IALS a choice – it could “either”:

“(A) compl[y] will all applicable requirements of the Retailers’ Occupation Tax Act and **collect[] and remit[] all applicable federal, State, and local taxes; or**

(B) publish[] a written notice on the website after the sale of one or more tickets that automatically informs the ticket reseller of the ticket reseller’s potential legal obligation to pay any applicable local amusement tax in connection with the reseller’s sale of tickets” and make certain disclosures to tax collectors or law enforcement personnel upon receiving a verified request relating to a criminal investigation.

Id., § 375/1.5(c)(6) (emphases added). In other words, so long as the IALS properly notified the ticket seller of his obligation to pay any applicable amusement tax, the IALS itself would not have to collect and remit the amusement tax to the local taxing authority.

The non-collection provision was critical to the statute. Indeed, had this provision not been included, the Internet auction listing service companies would not have supported the statute and the statutory exception likely would not have passed, and had it passed, few, if any, companies would have sought to use it. Aware of this, the ticket brokers lobbied for an amendment to the statute which would have required the IALS entities to collect and remit the tax so that the brokers could preserve their monopoly. (*See* DA33, 35, 36-37.) The General Assembly expressly rejected this attempt to “kill the bill” and to derail its effort to increase competition. (DA38, 38-45.)

The Senate passed the bill that excused IALS entities from having to collect taxes. That decision rested on, among other things, the inherent difference between the ticket broker, who actually purchases and then re-sells the ticket for his own profit, and

an IALS, which merely hosts a virtual marketplace that provides a technological platform that enables third parties to buy and sell tickets directly from one another. As the bill's sponsor in the Senate explained:

Now let me highlight the key difference, and that's the business model. A broker buys and sells tickets. eBay never buys, never sells, never owns, never holds, never even sees the ticket. They are merely a market place. Whoever rises in – opposition to this bill will likely tell you that there's an amendment in Rules that would mandate that eBay would collect the tax and make it a level playing field. We are not changing the law with respect to the amusement tax. The seller still has to remit the amusement tax, if there is an amusement tax applicable. This [proposed amendment that would have required an IALS to collect the tax] would be like saying that the landlord of the ticket broker is now responsible for collecting the amusement tax on behalf of the ticket broker.

(DA43-44.) The legislative debates also emphasized the “significant consumer protections” that the amendment provided for this “new secondary market.” (DA43; *see* DA28, 29, 30, 40.)

Notably, the City of Chicago did not oppose the legislation or seek to make the IALS entities responsible for collecting and remitting the amusement tax. In the words of the bill's sponsor in the Senate: “This bill is not opposed by the City of Chicago.” (DA43; *see* DA36.) Indeed, many Chicago-area legislators voted for the bill. (DA32, 46.)

Since the 2005 statute's enactment, the IALS entities which permit Chicago-event ticket resales on their sites have expressly relied on the legislation by conforming with the consumer-protection requirements, by providing the requisite notice to ticket sellers of their tax obligations, and by not themselves collecting the City of Chicago's amusement taxes.

E. The 2006 Chicago Ordinance.

Less than a year after not opposing the 2005 amendment to the Ticket Act, the City of Chicago enacted an ordinance which, according to the City, sought to reverse the 2005 amendment. (A56-61.) Specifically, the City amended its local amusement tax ordinance to require not only sellers and resellers of tickets to pay the tax, but to require a “reseller’s agent” to collect and remit the tax. Journal of the City Council at 76270-71 (May 24, 2006); Chi. Mun. Code § 4-156-010 (A57). The City of Chicago thereafter sought to compel eBay and StubHub, two of the largest IALS sites involved in providing an Internet marketplace for ticket sales, to collect and remit the amusement taxes under the new ordinance. When eBay and StubHub objected to the City’s attempt to circumvent State law, the City filed suits against them. These suits were removed to federal court, and two separate United States District Court Judges thereafter ruled in favor of StubHub and eBay and refused to enforce the City ordinance. After the City appealed both judgments, the Seventh Circuit certified the enforceability question to this Court.

ARGUMENT

I. REQUIRING IALS ENTITIES TO COLLECT AND REMIT AMUSEMENT TAXES ON RE-SOLD TICKETS WOULD IMPOSE A VIRTUALLY IMPOSSIBLE BURDEN ON THESE ENTITIES AND RISK DESTROYING THE CONSUMER BENEFITS THAT THE GENERAL ASSEMBLY SOUGHT TO PROVIDE TO THE CITIZENS OF ILLINOIS.

The City’s attempt to require IALS entities to collect its amusement taxes should be rejected because it would impose a virtually impossible burden on these companies, thereby destroying the consumer benefits the Illinois General Assembly sought to achieve in its 2005 amendment to the Ticket Act.

The ordinance Chicago seeks to apply to the IALS entities (the “Ordinance”) imposes strict verification requirements on entities that collect amusement taxes on the City’s behalf. The Ordinance requires that the collector of the taxes provide a “verified statement” with each tax remittance attesting to the correctness of the facts on which the remitted tax is based *and* requires that the collector “keep accurate books and records,” including “original source documents” of the “transaction that gave rise . . . to the tax liability.” Chi. Mun. Code, § 4-156-030A & B (A61-62). Failure to comply with these requirements can result in substantial penalties. *Id.*, § 4-156-140 (A65).

Complying with the Ordinance’s requirements would increase exponentially the costs and risks faced by eBay and other IALS entities. Under the present system – the system endorsed by the General Assembly – the IALS entities do not and cannot investigate the seller’s purchase of the ticket and do not examine the ticket itself. Rather, the entities simply provide the platform through which buyers and sellers can transact business among themselves.

If the City’s position were adopted, however, IALSs would have to thoroughly investigate what the seller paid for each ticket and obtain the “original source documents” to support that purchase price. This would entail a series of additional and costly steps. First, the IALS would have to obtain from the seller the actual ticket being sold, because that would be the only way to verify the price originally paid for the ticket. The IALS would then have to examine the ticket to ensure that it was authentic and to determine the face price.

That, however, would not end the process. A ticket seller may have purchased the ticket in the secondary market or obtained it in exchange for other property or

services. The IALS would thus have to ask the seller to describe the circumstances of the seller's purchase, state what the seller actually paid, or exchanged, for the ticket (including any service or shipping fees), and provide documents and/or written statements verifying the truth of the stated purchase price (or value of the property or services exchanged). Again, under Chicago's Ordinance, the re-seller's purchase price, if different than the face amount, must be established "with books, records or other documentary evidence." Chi. Mun. Code, § 4-156-030A (A61). This need for documentary evidence would be especially problematic where, as is often the case, the re-seller paid cash for the tickets and there is no documentary evidence of the price paid. In those situations, the IALS likely would have to obtain a sworn statement from the re-seller in order to prepare its own verified statement. And the system simply could not work in those frequent situations where, for any number of reasons, the seller decides to sell the ticket only a day or two before the event.

Even if the IALS were able to obtain the original ticket and purchase documentation and/or a sworn statement reflecting the price the re-seller actually paid for the ticket, the IALS would have to hire and train employees to: (a) examine the documents the seller provided to ensure that they were genuine and to obtain the face price therefrom; (b) determine and collect the appropriate tax; and (c) prepare and supply to the City of Chicago the required verified statements to accompany the tax payments. Implementing these tasks would require a costly sea change in the computer platforms as well as the back-end systems IALS companies use to run their operations. The need to obtain and examine each ticket and to return it to the re-seller would alone

be a logistical nightmare, given the many thousands, if not millions, of tickets sold each year on the Internet.

Moreover, even if the required system changes could somehow be implemented, that would not end the matter. A ruling that the City of Chicago may legally require IALS entities to collect its taxes would quickly reverberate throughout the nation and inspire the adoption of untold additional “local” tax-collection ordinances. As this Court well knows, virtually every local taxing district in the United States – and there are more than 7,000 of them – is scouring every corner searching for every possible means to reduce its costs. A ruling in the City’s favor will send a clear and persuasive message to these taxing districts that they may and should transfer their own tax-collection (and perhaps other) costs to IALS and other Internet entities, such as the members of NetChoice.

The result of the inevitable onslaught of additional municipal obligations would be devastating. By definition, the platforms created and used by Internet businesses are national (and, in many cases, international). As a result, these platforms would be required to encompass and conform to each and every applicable local ordinance. If the Court were to accept the City of Chicago’s position, IALS entities would have to modify their platforms and protocols to add the unique prompts required by the City’s tax-collection requirements, would have to modify their platforms again to add separate and unique prompts for the requirements that Los Angeles would impose, would have to modify their platforms again to add separate and unique prompts for the requirements that New York would impose, and so on. Because the ordinances and requirements of each locality will inevitably differ *and* be adopted and thereafter

modified at different times, IALS entities and other Internet businesses would have to continually revise their platforms to conform to the increasingly complex welter of conflicting local ordinances. They would also necessarily be constantly hiring and training, and re-training, personnel to collect and review and summarize tax-related documents, and to remit taxes. Of course, the users of these platforms would also be subjected to the bewildering, interminable, and constantly changing sets of tax-related prompts and inquiries. This “virtual welter of complicated [and conflicting] obligations,” which a ruling in favor of the City of Chicago would engender, would drag IALS entities and the e-commerce industry generally into an inescapable quagmire. *See Quill Corp. v. N. Dakota*, 504 U.S. 298, 313 n.6, 316 (1992) (quotation marks and citations omitted) (noting the burden imposed on the economy when a “virtual welter of complicated obligations” arises from a multiplicity of local taxes with “many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements,” and that freedom from such a multiplicity of conflicting local taxes “fosters investment by business” and leads to “dramatic growth” in sectors of the economy which operate across different taxing jurisdictions).

The City’s attempt to force eBay and other IALS entities to collect its taxes would also increase the burden on those seeking to re-sell their tickets. Instead of answering a few prompts about the nature of the event and the ticket location, the re-seller would have to mail or ship the ticket to the IALS and provide a description of his acquisition of the ticket. Further, if the re-seller himself had obtained the ticket on the secondary market, the re-seller would either have to obtain evidence of the price he paid (such as a receipt from the original seller or a cancelled check) or prepare and

have notarized a statement setting forth the price. These added costs of time and money would be magnified considerably in those situations in which the re-seller had been planning to attend the event and, just a day or two beforehand, unexpectedly had to sell the ticket.

In short, the City's position would vastly increase the costs and risks of offering Illinois ticket owners the opportunity to sell their tickets using an IALS and would substantially reduce competition in the marketplace for secondary sales of event tickets. The vastly increased burdens and risks imposed on the IALS would discourage companies from entering the market. It would also reduce the number of entities already in the market. A number of IALS entities are small companies with a few hundred employees or less; the relative cost to these smaller IALS entities of adding administrative and accounting personnel could well be fatal to their profitability. From the ticket seller's perspective, the need to provide the IALS with the ticket and other supporting documentation would push many customers to unregulated outlets lacking the consumer protections that the 2005 legislation ensured IALS entities would provide. This would deprive Illinois citizens who sell tickets of the economic benefits to which they are entitled, would reduce competition, and would expose both buyers and sellers to the risks of dealing with wholly unregulated entities. All of this, of course, is the opposite of what the General Assembly sought to accomplish when it passed the 2005 amendment to the Ticket Act. For these reasons alone, the Court should answer the certified questions in the negative and not permit the City of Chicago now to impose a local tax-collection duty on IALS entities.

II. IMPOSING A TAX-COLLECTION OBLIGATION ON IALS ENTITIES WOULD NULLIFY STATUTES ENACTED BY THE GENERAL ASSEMBLY TO FACILITATE THE OPERATIONS OF THOSE ENTITIES AND WOULD REQUIRE THAT THEY ACT INCONSISTENTLY WITH THEIR CHARTERS.

A. The Court Should Not Grant The City's Request To Nullify Heavily-Negotiated State Legislation On Which Numerous Companies Have Relied.

The City of Chicago is asking this Court to negate legislation that the General Assembly adopted after more than six months of intense negotiation and public debate. Doing so would not only be unfair to eBay and the other companies that have relied on the 2005 legislation, it would chill Internet companies seeking to enter the Illinois market and induce others to leave the State, and thereby reduce competition in that market.

The bill that eventually passed to become the 2005 legislation was the “culmination of about sixth months’ worth of negotiation” (DA28) and had been “heavily negotiated.” (DA35.) As the bill was nearing a vote, an amendment backed by the ticket broker lobby was proposed which would have required IALS entities to collect and remit amusement taxes by eliminating the option of giving notice to resellers of their amusement tax obligations in lieu of collecting and remitting the taxes. (DA33.) Although the proposed amendment never advanced out of committee, it was raised during the floor debate in the Illinois Senate (DA36-37, 38-39, 44-45), and the Senate voted to approve the bill without the amendment. (DA45, 46.) The debate makes clear that the provision granting IALS entities the option not to collect and remit amusement taxes was critical to the Internet companies that had negotiated with the representatives of the General Assembly. As the Senate sponsor stated: “The

amendment [which would have deleted that option] is a hostile amendment designed to kill the bill.” (DA38.)

A number of Internet companies have heavily relied on the 2005 legislation. Pursuant to the statute’s express option, they provide ticket re-sellers with notice that the re-sellers are required to pay any amusement taxes applicable to their sales, they do not obtain the documents and information necessary to calculate the amusement taxes on such sales, and they do not collect any taxes. The companies have also implemented, at substantial expense, the many consumer-protection directives adopted by the General Assembly. *See* 720 ILCS 375/1.5(c)(1)-(7).²

The City’s 2006 amendment to its amusement tax ordinance and its attempts through subpoena and litigation to apply the Ordinance to StubHub and eBay is a blatant effort to gut the 2005 State legislation. According to the City, its Ordinance would eliminate the IALS’s statutory option to provide written notice of a re-seller’s tax obligation, and would replace it with a requirement that the IALS collect the tax from the re-seller and remit it to the City. The City thus would have this Court turn the statute on its head: instead of the re-seller paying the tax directly, the IALS would have to collect and remit it; and instead of the IALS notifying the re-seller of his duty to pay the tax, the IALS would have to notify the re-seller that the IALS was collecting and paying that tax and that the re-seller should not pay the tax himself. In short, the City of Chicago – which did not object to the legislation during the lengthy

² In addition, eBay has provided information to the City of Chicago about various users of its site in response to the City’s requests for information pursuant to 720 ILCS 375/1.5(i)(6)(B). This is just one of the many requirements which the State statute mandates and with which eBay and other IALS entities have complied.

negotiations in 2005 – is now seeking to reverse the General Assembly’s state-wide mandate in order to make IALS entities its tax collectors.

If the City’s gambit were accepted by this Court, the ruling would have a devastating impact on Internet companies, and potentially on other companies seeking to do business in Illinois as well. The vastly increased cost and logistical nightmare that attempting to comply with the City’s proposed tax-collection duty would impose would inevitably dissuade new companies from entering the Illinois market, and would cause the exit of some already here. Given that nearly 75 percent of the entities currently registered with the State as IALS entities are Illinois-based companies, there could be significant job losses in the State from a ruling in the City’s favor. Beyond that, businesses that want to enter the Illinois market but need legislation to make their entry viable would be seriously deterred by a ruling that allows a local taxing district to overturn state legislation designed to facilitate the entry and expansion of an emerging industry. Any company contemplating entry into the State would necessarily be wary of negotiating with the General Assembly for regulatory, tax, or administrative protections in an environment in which a local governmental can override state legislation. That chill on new business in this State could well freeze Illinois’s attempt to restore its economic well-being.

B. The City’s Position Should Also Be Rejected Because It Would Potentially Preclude The *Amici* From Acting Consistently With Their Charters.

The 2002 amendment to the Illinois Auction License Act established a framework pursuant to which Internet Auction Listing Service companies could structure their operations so that they would not be required to be licensed as auctioneers under the Act. The City of Chicago’s Ordinance, if applied to IALS

entities, would preclude them from meeting the requirements of this licensing exemption. This Court should not sanction this attempt by a local government to effectively overturn not one, but two state-wide enactments through an amendment to a local tax ordinance.

In 2002, the General Assembly amended the Illinois Auction License Act by exempting IALS entities from the Act's licensing requirements where the entity registers as an IALS and complies with certain operational requirements, including "not examin[ing] . . . the personal property" being offered for sale. 225 ILCS 407/10-27(a)(1). IALS entities expressly structured their operations to comply with these requirements and also implemented the various consumer-protection requirements in the amendment. These entities thus ensured, among other things, that their Internet sites do not require users to send the IALS the property being offered for sale, and that the IALS does not "examine" any of that property.

Now, nearly a decade after the General Assembly expressly endorsed the IALS structure, the City of Chicago is asking this Court to force companies that adopted that structure to risk losing their statutory exemption from the auctioneer licensing requirements. As discussed above, the City's requirement that resellers of tickets verify the correctness of the tax they collect would require IALS companies to obtain and examine the ticket to verify prices. This need to examine the ticket would be directly contrary to the requirement in the 2002 amendment that the IALS *not* examine the property being sold. 225 ILCS 407/10-27(a)(1).

The City's position runs afoul of legal and equitable principles, as well as practical considerations. Regulation of the structure, mode, or charter pursuant to

which a company conducts its business operations is quintessentially a State function. The General Assembly thus controls what one must do to have a business qualify as, for example, a corporation, partnership, or limited liability company. See 805 ILCS 5/1.01, *et seq.* (Business Corporation Act); *id.*, § 206/100, *et seq.* (Uniform Partnership Act); *id.*, § 215/0.01, *et seq.* (Uniform Limited Partnership Act); *id.*, § 180/1-1, *et seq.* (Limited Liability Company Act). Allowing local governments such as a city to intrude on this role would lead to the impossible-to-follow and nonsensical requirement that entities must structure themselves differently, and conduct their operations differently, in different parts of the State. This requirement would be especially absurd and burdensome for a business such as an IALS which operates over the Internet, not on land.

Further, a business should be entitled to rely on State law when determining how to structure its operations. As this Court stated in a related context: an Illinois corporation's charter "is a contract . . . operative as between the corporation and the State [T]he contract in its entirety includes the statutory provisions in force when the charter is granted as though those statutory provisions were literally recited in the contract." *Teschner v. Chicago Title & Trust Co.*, 59 Ill. 2d 452, 457-58 (1974). The IALS entities that established or structured their operations to conform to the model created and refined by the General Assembly in 2002 and 2005 should not be forced to forfeit the benefits of that compliance as a result of a subsequent city tax ordinance. This would be akin to ordering an entity that structured itself as a limited liability company to act, based on a local ordinance, in a manner that subjected the entity to treatment as a general partnership. An entity that complies with State-mandated

requirements to obtain the benefits of a particular business structure should not be put at risk of losing those benefits because of a local ordinance.

The ruling the City requests would ultimately put Illinois in the economic backwaters. Commerce is shifting rapidly to an increasingly Internet-based platform. Internet and other high-tech companies will not venture into Illinois if they cannot rely on the exemptions and protections established by the General Assembly, and would instead risk being subjected to various and sundry inconsistent and conflicting local obligations. This Court should not endorse a position that, while it may reduce the tax-collection costs of certain Illinois cities, will deter companies from entering Illinois or expanding their operations in the State. Further, Illinois citizens deserve as much competition as possible in the ticket resale market – the express purpose of the 2005 legislation. The Court should not permit the City of Chicago to subvert State legislation addressing matters of State concern, to disrupt and punish IALS entities which have relied on those statutory protections, and to destroy the benefits to Illinois citizens provided by the increased competition that has resulted from that legislation. For these reasons, too, the questions posed to this Court should be answered in the negative.

CONCLUSION

This Court should answer the Seventh Circuit's certified questions in the negative and hold that Illinois municipalities may not require Internet Auction Listing Service operators to collect and remit local taxes.

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Respectfully submitted,

EBAY INC. and THE NETCHOICE
COALITION

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 23 pages.

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CERTIFICATE OF SERVICE

I, Bruce Braverman, hereby certify that, on February 15, 2011, three (3) true and correct copies of the foregoing BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE were served upon all counsel of record listed below by depositing same in the United States Mail at One South Dearborn St., Chicago, Illinois, with first-class postage fully prepaid, in properly-addressed envelopes.

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