CASE NOS. 18-55367, 18-55805, 18-55806

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.

Appeal from the United States District Court for the Central District of California,
Nos. 2:16-cv-6641, 2:16-cv-6645
The Honorable Otis D. Wright II, United States District Judge

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INTRODUCTION AND RULE 35(b) STATEMENT

The panel's decision conflicts with binding U.S. Supreme Court preemption decisions, as well as precedent from this and other circuits concerning the Communications Decency Act ("CDA"), 47 U.S.C. § 230. In holding that the CDA did not preempt Santa Monica's short-term rental Ordinance ("Ordinance"), the panel took a form-over-substance approach to preemption that provides localities a roadmap for circumventing the CDA. Further, the panel's decision raises issues of exceptional importance because, left undisturbed, it will substantially impair e-commerce throughout this Circuit—home to the world's most innovative Internet companies.

Congress adopted the CDA to "encourage the unfettered and unregulated development of free speech on the Internet, and to promote the development of e-commerce" by keeping "'government interference in the medium to a minimum.'" *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003). The CDA accomplishes these goals by providing websites like Airbnb, Inc. and HomeAway.com, Inc. ("Platforms") "broad 'federal immunity to any cause of action that would make [them] liable for information originating with a third-party user,'" *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007), and protecting websites against any duty to monitor or remove third-party content, *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1101-02 (9th Cir. 2009). The CDA has played an indispensable

role in the rise of Internet businesses that have transformed daily lives, as well as countless startups that may someday do the same. In particular, it has facilitated the development of online marketplaces like the Platforms, which operate websites where third parties can post short-term rental listings and guests can reserve listed properties.

The Ordinance—and the panel decision upholding it—strike at the heart of the CDA and the innovation it has spurred. The Ordinance penalizes the Platforms if they fail to screen third-party rental listings that are not registered and compliant with local law before guests "book" reservations for those listings. The panel acknowledged that the practical effect of the law will be to compel the Platforms to "remov[e] certain [third-party] listings" from their websites; indeed, the panel identified no other compliance option. Slip op. 15. If a Platform fails to do so, it faces liability every time someone "books" an unregistered listing.

Such a local requirement to police third-party listings is incompatible with the CDA. It makes no difference that the Ordinance does not *expressly* require content monitoring and removal; under settled Supreme Court and Ninth Circuit preemption authority, the Ordinance's undisputed practical effect is dispositive.

The Court should grant rehearing or rehearing en banc for four reasons:

First, the panel ignored Supreme Court precedent requiring courts to evaluate preemption by focusing on "what the state law in fact does" rather than on

its formally expressed requirements. *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013); *National Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012). This Court applied that reasoning when it rejected "creative" attempts to "circumvent the CDA's protections" in *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016). As the panel acknowledged, the Ordinance will have the practical effect of making the Platforms remove third-party listings. Slip op. 14-15. Even though the CDA plainly forbids the City from expressly requiring the Platforms to remove listings, the panel allowed the City to evade CDA preemption by ignoring what the Ordinance in fact does and focusing on the Ordinance's form, which technically penalizes the Platforms only for offering "booking" services. The Platforms briefed *National Meat*, *Wos*, and *Kimzey* at length. *See* Opening Brief at 1-3, 13, 24-28, 40-42; Reply at 1, 7-8, 11, 18. But the panel did not mention, much less follow, those decisions, and thereby created Supreme Court and intra-circuit conflicts.

Second, the panel's decision conflicts with First and Second Circuit decisions holding that the CDA protects "features that are part and parcel of the overall design and operation of [a] website," including the provision of payment services for transactions involving third-party content. *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20-21 (1st Cir. 2016) (CDA protects website's "anonymous payment" feature); *Herrick v. Grindr, LLC*, 2019 WL 1384092, at *3

(2d Cir. Mar. 27, 2019) (CDA protects "design and operation" of app). The panel rejected CDA protection for facially neutral website features like booking services, even when those features are inextricably tied to third-party content and central to the design of the Platforms' websites. The Ordinance would force the Platforms to redesign their websites or modify their operations, including with respect to how they provide booking services for listings, as well as by monitoring and removing unregistered listings. This split with the First and Second Circuits provides an independent basis for rehearing.

Third, the panel's decision creates a gaping exception to CDA immunity by holding that the CDA does not apply to requirements to monitor "internal" and "nonpublic" third-party content. Slip op. 14. The panel cited no authority for this proposition, and this holding, too, creates intra- and inter-circuit conflicts. It conflicts with this Circuit's decision in *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016), which recognized that Section 230 precludes liability for "failure to adequately … monitor *internal* communications" on websites. (Emphasis added.) And it conflicts with decisions from sister circuits, which hold that the CDA preempts laws that require monitoring of non-public third-party content. *Herrick*, 2019 WL 1384092, at *2 (CDA applies to "direct messages with other users"); *Backpage.com*, 817 F.3d at 21.

Fourth, in rejecting the Platforms' obstacle preemption arguments, the panel construed the CDA's purpose as *only* protecting websites that filter and screen offensive content. Slip op. 17. But this Circuit has long recognized that Section 230 also was designed "to promote the development of e-commerce." *Batzel*, 333 F.3d at 1027. The Ordinance is an obstacle to that purpose because, as the panel recognized, its ruling presents numerous online marketplaces (from the Platforms to eBay to TaskRabbit to startups) with the very choice the CDA was intended to prohibit: endure "the difficulties of complying with numerous state and local regulations" that compel specific types of content removal, or turn back the clock and adopt a Craigslist-type bulletin board model, abandoning the innovative e-commerce services that characterize the modern Internet. Slip op. 16, 21. By embracing this massive technological regression, jeopardizing the development of the Internet economy, and thus thwarting one of Section 230's central purposes, the panel's decision presents a question of extraordinary importance.

BACKGROUND

I. Airbnb and HomeAway

The Platforms provide online marketplaces that allow "hosts" to post listings advertising their homes for rental and enable guests and hosts to find each other online, where they can enter into direct agreements to reserve and book listings. ER-1836-37 ¶¶ 27–28; ER-1868-69 ¶¶ 16–18. The Platforms unite travelers'

increasing demand for overnight accommodations (often at a lower cost than a hotel, with the conveniences of home) with residents' desire to earn extra income. Hosts alone determine whether to post listings and what content to include in them, and set their own prices and lengths of stay. ER-1837 ¶¶ 30–31; ER-1869 ¶ 19. The Platforms inform hosts to be aware of and comply with local laws, and provide information about applicable regulations. ER-1839-40 ¶¶ 39–40; ER-1869-70 ¶ 23.

II. Santa Monica's Regulation of the Platforms

Santa Monica's regulation of the Platforms began in 2015, when it passed an ordinance regulating short-term rentals. That ordinance expressly targeted the Platforms' publication of third-party content, prohibiting them from "facilitat[ing]" or "advertis[ing]" short-term rental listings that failed to comply with City laws. ER-24. The Platforms sued, alleging CDA preemption.

The City amended the original ordinance. The amended law has the same effect and objective as the original: it coerces the Platforms into monitoring and policing third-party content on their websites. ER-95-96. Seeking to circumvent Section 230, the Ordinance refrains from overtly regulating website content. Instead, it requires that the Platforms "not complete any booking transaction for any residential property or unit unless" a listing is registered and complies with City law "at the time the hosting platform receives a fee for the booking

transaction." S.M. Mun. Code §§ 6.20.010(c); 6.20.050(c). Penalties include imprisonment for six months and a $500 fine. *Id*. § 6.20.100(a), (c).

The Platforms amended their complaint to challenge the Ordinance.

III. Decisions Below

The district court rejected the Platforms' CDA preemption claims and dismissed their complaints. The panel affirmed.

The panel first rejected the argument that the Ordinance required the Platforms to *monitor* third-party content. In the panel's view, "the only monitoring that appears necessary to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic." Slip op. 14.

The panel then rejected the Platforms' argument that the Ordinance was preempted because, as a practical matter, it would compel the Platforms to *remove* certain third-party content. As it must at the motion to dismiss stage, the panel "accept[ed] at face value the Platforms' assertion that they [would] choose to remove noncompliant third-party listings on their website as a consequence of the Ordinance," and acknowledged that was the "most practical compliance option." Slip op. 14-15. Nonetheless, it held that the CDA did not preempt the Ordinance because it did not *technically* require content removal. *Id*. at 15.

Finally, the panel held that the Ordinance is not obstacle preempted. In doing so, the panel isolated one of Congress's aims in passing the CDA: encouraging Internet companies voluntarily to filter objectionable third-party content. *Id.* at 16-17. Apparently concluding that this was Congress's only goal, the panel ruled the Ordinance did not stand as an obstacle to that one purpose. *Id.* at 17-18.

REASONS FOR GRANTING REHEARING

I. The Panel Decision Conflicts with Supreme Court, Ninth Circuit, and Other Circuits' Precedent by Ignoring the Ordinance's Practical Effect of Requiring Content-Removal.

The panel erred by refusing to give any legal significance to the Ordinance's overriding practical effect: requiring the Platforms to monitor and remove non-compliant third-party listings from their websites. "[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170-71 (9th Cir. 2008) (en banc). The panel acknowledged the CDA preempts any law requiring the Platforms to remove third-party content. Slip op. 12. The panel also accepted—as required at this stage—that the Platforms will "remove noncompliant third-party listings … as a consequence of the Ordinance." Slip op. 15; *see* ER-1848 ¶ 70; ER-1867 ¶ 9; ER-504 ¶ 13.

Nonetheless, the panel held that Section 230 does not preempt the Ordinance because it *technically* allows the Platforms to leave unregistered listings on their websites. In the panel's view, while removal of third-party listings would be the practical effect of the Ordinance, "[o]n its face" the Ordinance did not "mandate" their removal. Slip op. 15.

This formalistic preemption analysis conflicts with precedent of the Supreme Court, this Circuit, and other circuits. The Supreme Court has held that a "proper" preemption "analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Wos*, 568 U.S. at 637. Legislators may not "evade the pre-emptive force of federal law by resorting to ... description at odds with the statute's intended operation and effect." *Id.* at 636. Likewise, this Court has held, in the CDA context, that a party cannot use "creative" efforts to plead around and "circumvent the CDA's protections," *Kimzey*, 836 F.3d at 1266, a principle equally applicable to regulatory attempts to evade Section 230.

National Meat—which the panel did not cite, much less discuss—illustrates the point. There, the Supreme Court considered whether the Federal Meat Inspection Act ("FMIA") preempted a California law regulating meat sales. The FMIA regulates slaughterhouse operations and preempts state laws imposing overlapping requirements. California argued the FMIA did not preempt its law because it did not formally regulate slaughterhouse operations but, instead,

regulated only "the *last* stage of a slaughterhouse's business," *i.e.*, the "sale[]" of meat after it left the slaughterhouse. The Court rejected California's argument as making a "mockery" of preemption, reasoning that the operation and effect of a sales ban would be to regulate slaughterhouse activities that were subject to FMIA preemption. 565 U.S. at 463-64. "[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* The Court flatly rejected arguments that preemption analysis focuses on the formal requirements of the statute, rather than its practical consequences. *See* Brief for Non-State Respondents, *National Meat Ass'n v. Harris*, 2011 WL 4590839, at *48 (Oct. 3, 2011) (arguing "[t]he focus is always on what conduct the state law duty *directly* pertains to").

Here, as in *National Meat*, the Ordinance regulates only "the *last* stage of the [Platforms'] business," *i.e.*, the booking transaction. 565 U.S. at 463. But as in *National Meat*, the practical effect of the Ordinance, contrary to federal law, is to require the Platforms to review and remove listings or face liability. Thus, just as in *National Meat*, federal law preempts the Ordinance. The panel's preemption analysis conflicts with the Supreme Court's preemption framework.

For similar reasons, the panel's analysis conflicts with *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), which held that the

Employee Retirement Income Security Act ("ERISA") preempted a Maryland law requiring employers to pay the state if they did not "spend up to 8% of the total wages paid to employees in the State on health insurance costs." *Id*. at 184 (citation omitted). Although the law did not expressly regulate employee benefits, "[i]n effect, [employers'] only rational choice" was "to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold," and ERISA therefore preempted the state law. *Id*. at 193; *see also Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 93–96, 100 (S.D.N.Y. 2009), *aff'd*, 615 F.3d 152 (2d Cir. 2010) (local law preempted "if it indirectly regulates within a preempted field in such a way that effectively mandates a specific, preempted outcome"; city taxicab rules preempted because they "do not present viable options for Fleet Owners" to act in non-preempted manner).[1]

The panel's preemption analysis conflicts with these many authorities. It wrongly focuses on what the Ordinance requires "[o]n its face," without regard to its undisputed practical effect, *i.e.*, compelling the Platforms to remove third-party content—the very outcome the CDA seeks to protect against. Indeed, the panel *admitted* that "removing certain listings may be the Platforms' most practical

[1] This Court acknowledged *Fielder*'s preemption framework in *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 546 F.3d 639, 659-61 (9th Cir. 2008), but found the businesses challenging the allegedly preempted law had "realistic alternative[s]," thus avoiding an inter-circuit conflict.

compliance option," Slip op. 15, and did not identify *any* rational alternatives for compliance. As in *National Meat*, "if the [booking] ban were to avoid the [CDA's] preemption clause, then any State could impose any regulation on [third-party content] just by framing it as a ban on [transactions for] whatever [type of third-party content] the State disapproved." 565 U.S. at 463; *see Kimzey*, 836 F.3d at 1266 (parties may not "plead around the CDA to advance the same basic argument that the statute plainly bars"; rejecting "artful skirting of the CDA's safe harbor provision").

The panel decision piles conflict on top of conflict, and is incorrect as a matter of preemption law. This Court should grant rehearing.

II. The Panel's Opinion Conflicts with Other Circuits' Protection of Websites' "Design and Operation."

The panel held the CDA does not preempt the Ordinance because it purports to regulate only booking services rather than third-party listings. But booking services are integral to the Platforms' design and operation as publishers of third-party listings. Consequently, the panel's reading conflicts with First and Second Circuit decisions holding that the CDA preempts local laws that regulate "features that are part and parcel of the overall design and operation of [a] website." *Backpage.com*, 817 F.3d at 21; *Herrick*, 2019 WL 1384092, at *3 (same).

In *Backpage*, the First Circuit rejected a party's efforts to circumvent CDA immunity by predicating claims on ancillary services provided by the website. 817

F.3d at 20. The plaintiffs avoided *directly* challenging website content, instead attacking design features like the "acceptance of anonymous payments" and the "lack of phone number verification." *Id.* at 20-21. Although plaintiffs argued that claims based on those services did "not treat Backpage as a publisher or speaker of third-party content," *id*. at 20, the First Circuit disagreed. It held that a website's "decision[s] to provide such services ... are no less publisher choices, entitled to the protections [of the CDA]." *Id.* at 21.

Last month, the Second Circuit adopted the same approach, rejecting claims ostensibly "premised on [the] design and operation of [a web platform] rather than on its role as a publisher of third-party content." *Herrick*, 2019 WL 1384092, at *3. The plaintiff sought to hold a website liable for its alleged failure to implement various ancillary features or safeguards (such as a review of IP addresses or location verification) that would have prevented users from "impersonating" others by creating fake accounts. *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 585 (S.D.N.Y. 2018). The Second Circuit held that Section 230 barred these claims. *Herrick*, 2019 WL 1384092, at *3.

The panel's decision directly conflicts with *Backpage* and *Herrick*. Contrary to those decisions, the panel held that the Ordinance is not preempted—even though it directly targets the Platforms' decision to "structure and operat[e]" their websites to provide booking services for third-party listings. *See* ER-1849 ¶ 73

(describing how the Ordinance will compel Airbnb to "undertake a fundamental redesign" of its website); ER-1867 ¶ 9, ER-1873-74 ¶¶ 37-38. For CDA purposes, nothing differentiates the "anonymous payment" processes the First Circuit found protected in *Backpage* from the Platforms' booking services for third-party listings. Both deal with payment (without overtly addressing content), and both are integral to the "design and operation" of each website. This case would have a different result under the law in the First and Second Circuits—a "square conflict" that warrants rehearing. *See Groves v. Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990); Ninth Circuit Rule 35–1 (same).

III. The Panel's Exclusion of "Nonpublic" and "Internal" Third-Party Content from CDA Protection Conflicts with Ninth Circuit and Sister Circuit Precedent.

The panel agreed that the CDA preempts laws that "necessarily require an internet company to monitor third-party content." Slip op. 13; *see Internet Brands*, 824 F.3d at 852-54 (CDA provides immunity from requirements to "edit, monitor, or remove user generated content"). But the panel concluded that "the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic." Slip op. 14. In so doing, the panel trivialized the necessary monitoring as nothing more than "keeping track of the city's registry." *Id*. The panel thus concocted a distinction

between laws requiring the monitoring of public-facing third-party content (which the CDA preempts) and laws requiring monitoring of "internal, and nonpublic" third-party content (which, the panel says, the CDA does not preempt). *Id.*

That distinction has no support in the law and directly conflicts with decisions from this and other Circuits. To begin with, as a practical matter, the Platforms must remove non-compliant listings *before* guests make booking requests—a process requiring review and monitoring of third-party content. ER-1848 ¶ 70; ER-1867 ¶ 9; ER-395–96 ¶¶ 21–24, ER-504 ¶ 13. But even if the Platforms did not remove non-compliant listings, they still would be required to review hundreds of individual listings daily when fielding "incoming requests to complete a booking transaction": booking requests, standing alone, could not tell the Platforms whether they can lawfully proceed with a booking. *Id*. Rather, after receiving a request, a Platform must review the listing, check its content (and its address) against the City's registry, and determine whether to proceed. *Id.*

While this listing review may be "internal," it remains a protected publisher function. This Court in *Internet Brands*, for example, made clear that the CDA applies to an "alleged failure to adequately ... monitor *internal* communications." 824 F.3d at 853 (emphasis added). Other circuits have held that the CDA preempts claims based on monitoring internal content. *Herrick*, 2019 WL 1384092, at *2 (CDA applies to claims premised on users' "direct messages"); *Backpage*, 817

F.3d at 21 (same). Courts routinely have "applied the CDA to bar claims predicated" on "nonpublic [third-party content], and have done so without questioning whether the CDA applies in such circumstances." *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016), *aff'd*, 881 F.3d 739 (9th Cir. 2018) (collecting authorities).

The Ordinance requires the Platforms, before providing booking services, to review a third-party host's listing and determine whether the listed property is registered. This indisputably compels monitoring of third-party content, which even the panel acknowledged was a protected publisher function. The panel's opinion therefore creates a separate set of conflicts worthy of rehearing.

IV. The Panel's Obstacle Preemption Analysis Conflicts with this Circuit's Longstanding Interpretation of the CDA's Purposes.

The Ordinance stands as an "obstacle to the accomplishment" of Congress's objectives in passing Section 230. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000). In rejecting that argument, the panel recognized only one of several congressional purposes in passing the CDA—to encourage voluntary "self-monitoring of third-party content"—and found the Ordinance was no obstacle to that objective. Slip op. 16. But the panel erred in "wholly ignor[ing] other and equally important [c]ongressional objectives." *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137, 143 (2002). In particular, it ignored Congress's equally important interest in promoting "the vibrant and competitive free market that

presently exists for the Internet ... unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see Roommates.com*, 521 F.3d at 1176 (noting "robust development of the Internet that Congress envisioned" in enacting CDA) (McKeown, J., dissenting). Likewise, it ignored *Batzel*, 333 F.3d at 1027, where this Court acknowledged Congress's intent to promote "the *continued* development of the Internet," including "the development of e-commerce" (emphasis added).

The panel's incomplete understanding of Section 230's purposes, and the Ordinance's manifest impediment to achieving those purposes, requires rehearing.

V. The Panel's Approach Presents a Question of Exceptional Importance Because It Will Gravely Harm the Modern Internet Economy.

The panel's opinion substantially threatens e-commerce and the ongoing development of the Internet. If municipalities or plaintiffs can regulate third-party content simply by targeting online marketplaces' transaction processing, these businesses—from eBay and TaskRabbit to promising startups—will be left unprotected from a variety of content-related claims. It would allow any local regulation or private tort claim to circumvent the CDA so long as it technically rests on a website's enabling third-party transactions, even if those transactions are inextricably intertwined with the posting of third-party content. The panel itself acknowledged its ruling would create "difficulties of complying with numerous

state and local regulations" for the Platforms and other online marketplaces. Slip op. 16.[2]

At the same time, the panel held that the CDA *would* continue to protect outmoded bulletin board websites like Craigslist, *id*. at 20 ("Unlike the Platforms, [websites like Craigslist] would not be subject to the Ordinance"), simply because they have not integrated e-commerce functionality into their sites. But "[i]mmunity is not foreclosed simply because a website offers more than a 'bulletin board' service." *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1104 (C.D. Cal. 2017).

Thus, the panel gave the Platforms (and other marketplace websites) an impermissible choice: comply with potentially thousands of local laws across the country and at every level of government that may seek to compel content-monitoring and removal, or turn back the clock and adopt a Craigslist-type bulletin board, abandoning the innovative e-commerce services that customers desire. *See* ECF No. 23 (Brief of Amici Curiae eBay, et al.) at 8 ("Platforms that facilitate user

[2] The panel said that "the CDA does not provide internet companies with a one-size-fits-all body of law." Slip op. 16. Congress, however, intended the CDA "to establish a uniform national standard of content regulation," S. Conf. Rep. 104-230, at 191 (1996), while leaving the Platforms to comply with the many laws and regulations applicable to brick-and-mortar businesses that do *not* control content. *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1122 (9th Cir. 2003) (CDA treats "Internet publishers … differently from corresponding publishers in print, television and radio").

transactions could be forced to scale back services, and potential new entrants will be deterred from starting new businesses."). By endangering the ongoing development of the Internet economy, the panel's decision presents a question of exceptional importance.

CONCLUSION

Rehearing or rehearing en banc should be granted.

DATED: April 26, 2019

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FILER'S ATTESTATION

I, Donald B. Verrilli, Jr., certify that that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

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9th Cir. Case Number(s) 18-55367, 18-55805, 18-55806

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,192.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature /s/ Donald B. Verrilli, Jr. **Date** April 26, 2019

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Addendum A
Panel Opinion

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOMEAWAY.COM, INC.; AIRBNB INC., *Plaintiffs-Appellants*, v. CITY OF SANTA MONICA, *Defendant-Appellee*.	No. 18-55367 D.C. Nos. 2:16-cv-06641-ODW-AFM 2:16-cv-06645-ODW-AFM

HOMEAWAY.COM, INC., *Plaintiff-Appellant*, and AIRBNB INC., *Plaintiff*, v. CITY OF SANTA MONICA, *Defendant-Appellee*.	No. 18-55805 D.C. Nos. 2:16-cv-06641-ODW-AFM 2:16-cv-06645-ODW-AFM

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AIRBNB INC., *Plaintiff-Appellant*, v. CITY OF SANTA MONICA, *Defendant-Appellee.*	No. 18-55806 D.C. No. 2:16-cv-06645-ODW-AFM OPINION

Appeal from the United States District Court
for the Central District of California
Otis D. Wright II, District Judge, Presiding

Argued and Submitted October 12, 2018
Pasadena, California

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Before: Mary M. Schroeder and Jacqueline H. Nguyen, Circuit Judges, and Michael H. Simon,[*] District Judge.

Opinion by Judge Nguyen

[*] The Honorable Michael H. Simon, United States District Judge for the District of Oregon, sitting by designation.

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SUMMARY[**]

Civil Rights

The panel affirmed the district court's dismissal, for failure to state a claim, of a complaint brought by HomeAway.com and Airbnb Inc. challenging the City of Santa Monica's Ordinance 2535, which imposes various obligations on companies that host online platforms for short-term vacation rentals.

The Ordinance, as amended in 2017, imposes four obligations on hosting platforms: (1) collecting and remitting Transient Occupancy Taxes; (2) regularly disclosing listings and booking information to the City; (3) refraining from booking properties not licensed and listed on the City's registry; (4) and refraining from collecting a fee for ancillary services.

The panel rejected plaintiffs' assertion that the Ordinance violated the Communications Decency Act of 1996, 47 U.S.C. § 230 because it required them to monitor and remove third-party content, and therefore interfered with federal policy protecting internet companies from liability for posting third-party content. The panel stated that the Ordinance prohibits processing transactions for unregistered properties. It does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the panel noted that the only monitoring that appeared necessary in order to comply with the Ordinance

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

related to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, was distinct, internal, and nonpublic. The panel concluded that the Ordinance was not inconsistent with the Communications Decency Act, and therefore was not expressly preempted by its terms. The panel further concluded that the Ordinance would not pose an obstacle to Congress's aim to encourage self-monitoring of third-party content, and therefore obstacle preemption did not preclude Santa Monica from enforcing the Ordinance.

The panel held that the Ordinance did not implicate speech protected by the First Amendment, concluding that the Ordinance's prohibitions regulate nonexpressive conduct, specifically booking transactions, and do not single out those engaged in expressive activity.

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OPINION

NGUYEN, Circuit Judge:

Located on the coast of Southern California, the city of Santa Monica consists of only about eight square miles but serves 90,000 residents and as many as 500,000 visitors on weekends and holidays. Similar to other popular tourist destinations, Santa Monica is struggling to manage the disruptions brought about by the rise of short-term rentals facilitated by innovative startups such as Appellants HomeAway.com, Inc. and Airbnb Inc. (the "Platforms"). Websites like those operated by the Platforms are essentially online marketplaces that allow "guests" seeking accommodations and "hosts" offering accommodations to connect and enter into rental agreements with one another.[1] As of February 2018, Airbnb had approximately 1,400 listings in Santa Monica, of which about 30 percent are in

[1] The Platforms do not own, lease, or manage any of the properties listed on their websites, nor are they parties to the rental agreements. Instead, the content provided alongside the listings—such as description, price, and availability—are provided by the hosts. For their services, the Platforms collect a fee from each successful booking.

the "coastal zone" covered by the California Coastal Act, while HomeAway.com had approximately 300 live listings in Santa Monica, of which approximately 40 percent are in the coastal zone.

Santa Monica's council reported that the proliferation of short-term rentals had negatively impacted the quality and character of its neighborhoods by "bringing commercial activity and removing residential housing stock from the market" at a time when California is already suffering from severe housing shortages. In response, the city passed an ordinance regulating the short-term vacation rental market by authorizing licensed "home-sharing" (rentals where residents remain on-site with guests) but prohibiting all other short-term home rentals of 30 consecutive days or less.

The Platforms filed suit, alleging that the city ordinance is preempted by the Communications Decency Act and impermissibly infringes upon their First Amendment rights. The district court denied preliminary injunctive relief, and dismissed the Platforms' complaints for failure to state a claim under the Communications Decency Act and the First Amendment. We affirm.

BACKGROUND

In May 2015, Santa Monica passed its initial ordinance regulating the short-term vacation rental market by authorizing licensed "home-sharing" (rentals where residents remain on-site with guests) but prohibiting all other forms of short-term rentals for 30 consecutive days or less. Santa Monica Ordinance 2484 (May 12, 2015), *codified as amended*, Santa Monica Mun. Code §§ 6.20.010–6.20.100. The ordinance reflected the city's housing goals of "preserving its housing stock and preserving the quality and character of its existing single and multi-family residential

neighborhoods." *Id.* As originally enacted, the ordinance prohibited hosting platforms from acting to "undertake, maintain, authorize, aid, facilitate or advertise any Home-Sharing activity" that was not authorized by the city. Hosting platforms also were required to collect and remit taxes, and to regularly disclose listings and booking information to the city.

The Platforms each filed a complaint in the Central District of California challenging the initial ordinance, and the district court consolidated the cases for discovery and pretrial matters. On September 21, 2016, the parties stipulated to stay the case while the city considered amendments to the local ordinance. During the stay period, the district court for the Northern District of California denied a preliminary injunction requested by the plaintiffs in a separate case challenging a similar ordinance in San Francisco. *See Airbnb Inc. v. City & County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016). That case ended in a settlement in which the Platforms agreed to comply with an amended version of San Francisco's ordinance that prohibited booking unlawful transactions but provided a safe harbor wherein any platform that complies with the responsibilities set out in the Ordinance will be presumed to be in compliance with the law.

In January 2017, Santa Monica likewise amended its own ordinance. The version challenged here, Ordinance 2535 (the "Ordinance"), retains its prohibitions on most types of short-term rentals, with the exception of licensed home-shares. In addition, the Ordinance imposes four obligations on hosting platforms directly: (1) collecting and remitting "Transient Occupancy Taxes," (2) disclosing certain listing and booking information regularly, (3) refraining from completing any booking transaction for

properties not licensed and listed on the City's registry, and (4) refraining from collecting or receiving a fee for "facilitating or providing services ancillary to a vacation rental or unregistered home-share." If a housing platform operates in compliance with these obligations, the Ordinance provides a safe harbor by presuming the platform to be in compliance with the law. Otherwise, violations are punishable by a fine of up to $500 and/or imprisonment for up to six months.

After the district court lifted the stay, the Platforms amended their complaint to challenge the revised ordinance and moved for a preliminary injunction. Santa Monica moved to dismiss the amended complaint. The court denied the Platforms' motion for preliminary injunctive relief and subsequently granted Santa Monica's motion to dismiss on the ground that the Platforms failed to state a claim under federal law, including the Communications Decency Act of 1996 and the First Amendment. The district court also declined to exercise supplemental jurisdiction over their remaining state-law claims.[2] The Platforms timely appealed these decisions, and we consolidated the appeals.

[2] The Platforms do not appeal the district court's dismissal of other federal claims brought under the Fourth Amendment and the Stored Communications Act. Similarly, they do not challenge the court's decision not to exercise supplemental jurisdiction over the state-law claims under the California Coastal Act if we affirm the dismissal of their federal claims. Because we affirm the district court's dismissal, we need not consider the state-law claims. We deny Santa Monica's motion for judicial notice of its prior enforcement actions because the dispute as to its prior actions relates only to the state-law claims.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291. We review the district court's order of dismissal de novo, "accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party." *Yagman v. Garcetti*, 852 F.3d 859, 863 (2017) (quoting *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016)).

DISCUSSION

I. Communications Decency Act

The Communications Decency Act of 1996 ("CDA" or the "Act"), 47 U.S.C. § 230, provides internet companies with immunity from certain claims in furtherance of its stated policy "to promote the continued development of the Internet and other interactive computer services." *Id.* § 230(b)(1). Construing this immunity broadly, the Platforms argue that the Ordinance requires them to monitor and remove third-party content, and therefore violates the CDA by interfering with federal policy protecting internet companies from liability for posting third-party content. Santa Monica, on the other hand, argues that the Ordinance does not implicate the CDA because it imposes no obligation on the Platforms to monitor or edit any listings provided by hosts. Santa Monica contends that the Ordinance is simply an exercise of its right to enact regulations to preserve housing by curtailing "incentives for landlords to evade rent control laws, evict tenants, and convert residential units into *de facto* hotels."

We begin our analysis with the text of the CDA. *See BP America Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006). Section 230(c)(1) states that "[n]o provider or user of an

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interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* § 230(c)(1). The CDA explicitly preempts inconsistent state laws: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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." *Id.* § 230(e)(3).

We have construed these provisions to extend immunity to "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009). Only the second element is at issue here: whether the Ordinance treats the Platforms as a "publisher or speaker" in a manner that is barred by the CDA. Although the CDA does not define "publisher," we have defined "publication" in this context to "involve[] reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* at 1102 (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc)).

The Platforms offer two different theories as to how the Ordinance in fact reaches "publication" activities. First, the Platforms claim that the Ordinance is expressly preempted by the CDA because, as they argue, it implicitly requires them "to monitor the content of a third-party listing and compare it against the City's short-term rental registry before allowing any booking to proceed." Relying on *Doe v. Internet Brands*, 824 F.3d 846, 851 (9th Cir. 2016), the Platforms take the view that CDA immunity follows

whenever a legal duty "affects" how an internet company "monitors" a website.

However, the Platforms read *Internet Brands* too broadly. In that case, two individuals used the defendant's website to message and lure the plaintiff to sham auditions where she was drugged and raped. *Id.* at 848. We held that, where the website provider was alleged to have known independently of the ongoing scheme beforehand, the CDA did not bar an action under state law for failure to warn. *Id.* at 854. We observed that a duty to warn would not "otherwise affect how [the defendant] publishes or monitors" user content. *Id.* at 851. Though the defendant did, in its business, act as a publisher of third-party content, the underlying legal duty at issue did not seek to hold the defendant liable as a "publisher or speaker" of third-party content. *Id.* at 853; *see* 47 U.S.C. § 230(c)(1). We therefore declined to extend CDA immunity to the defendant for the plaintiff's failure-to-warn claim. *Internet Brands*, 824 F.3d at 854.

We do not read *Internet Brands* to suggest that CDA immunity attaches any time a legal duty might lead a company to respond with monitoring or other publication activities. It is not enough that third-party content is involved; *Internet Brands* rejected use of a "but-for" test that would provide immunity under the CDA solely because a cause of action would not otherwise have accrued but for the third-party content. *Id.* at 853. We look instead to what the duty at issue actually requires: specifically, whether the duty would necessarily require an internet company to monitor third-party content. *See id.* at 851, 853.

Here, the Ordinance does not require the Platforms to monitor third-party content and thus falls outside of the CDA's immunity. The Ordinance prohibits processing

transactions for unregistered properties. It does not require the Platforms to review the content provided by the hosts of listings on their websites. Rather, the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction—content that, while *resulting from* the third-party listings, is distinct, internal, and nonpublic. As in *Internet Brands*, it is not enough that the third-party listings are a "but-for" cause of such internal monitoring. *See* 824 F.3d at 853. The text of the CDA is "clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content." *Barnes*, 570 F.3d at 1100. To provide broad immunity "every time a website uses data initially obtained from third parties would eviscerate [the CDA]." *Barnes*, 570 F.3d at 1100 (quoting *Roommates.com*, 521 F.3d at 1171 (9th Cir. 2008) (en banc)). That is not the result that Congress intended.

Nor could a duty to cross-reference bookings against Santa Monica's property registry give rise to CDA immunity. While keeping track of the city's registry is "monitoring" third-party content in the most basic sense, such conduct cannot be fairly classified as "publication" of third-party content. The Platforms have *no* editorial control over the registry whatsoever. As with tax regulations or criminal statutes, the Ordinance can fairly charge parties with keeping abreast of the law without running afoul of the CDA.

Second, the Platforms argue that the Ordinance "in operation and effect . . . forces [them] to *remove* third-party content." Although it is clear that the Ordinance does not expressly mandate that they do so, the Platforms claim that "common sense explains" that they cannot "leave in place a website chock-full of un-bookable listings." For purposes of

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our review, we accept at face value the Platforms' assertion that they will choose to remove noncompliant third-party listings on their website as a consequence of the Ordinance.[3] Nonetheless, their choice to remove listings is insufficient to implicate the CDA.

On its face, the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites. *See* Santa Monica Mun. Code §§ 6.20.010–6.20.100. It requires only that transactions involve licensed properties. We acknowledge that, as the Platforms explain in Airbnb's complaint and in the briefing on appeal, removal of these listings would be the best option "from a business standpoint." But, as in *Internet Brands*, the underlying duty "could have been satisfied without changes to content posted by the website's users." *See* 824 F.3d at 851. Even assuming that removing certain listings may be the Platforms' most practical compliance option, allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would, as this court feared in *Roommates.com*, 521 F.3d at 1164, "create a lawless no-man's-land on the Internet." We hold that the Ordinance is not "inconsistent" with the CDA, and is therefore not expressly preempted by its terms. *See* 47 U.S.C. § 230(e)(3).

Finally, the Platforms argue that, even if the Ordinance is not expressly preempted by the CDA, the Ordinance imposes "an obstacle to the accomplishment and execution

[3] The Platforms argued below that the district court must accept as true their allegation that they would "have to" monitor and screen listings. As a matter of law, the Ordinance does not require them to do so. Courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

of the full purposes and objectives of Congress." *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000). Reading the CDA expansively, they argue that the Ordinance conflicts with the CDA's goal "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." *See* § 230(b)(2). We have consistently eschewed an expansive reading of the statute that would render unlawful conduct "magically . . . lawful when [conducted] online," and therefore "giv[ing] online businesses an unfair advantage over their real-world counterparts." *See Roommates.com*, 521 F.3d at 1164, 1164–65 n.15. For the same reasons, while we acknowledge the Platforms' concerns about the difficulties of complying with numerous state and local regulations, the CDA does not provide internet companies with a one-size-fits-all body of law. Like their brick-and-mortar counterparts, internet companies must also comply with any number of local regulations concerning, for example, employment, tax, or zoning. Because the Ordinance would not pose an obstacle to Congress's aim to encourage self-monitoring of third-party content, we hold that obstacle preemption does not preclude Santa Monica from enforcing the Ordinance.

Fundamentally, the parties dispute how broadly to construe the CDA so as to continue serving the purposes Congress envisioned while allowing state and local governments breathing room to address the pressing issues faced by their communities. We have previously acknowledged that the CDA's immunity reaches beyond the initial state court decision that sparked its enactment. *See Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc) (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, which held an internet company liable for defamation when it removed some, but

not all, harmful content from its public message boards, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpublished)). As the Platforms correctly note, the Act's policy statements broadly promote "the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State regulation." *See* 47 U.S.C. § 230(b)(2). "[A] law's scope often differs from its genesis," and we have repeatedly held the scope of immunity to reach beyond defamation cases. *Barnes*, 570 F.3d at 1101 (quoting *Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008), *as amended* (May 2, 2008)) (citing cases applying immunity for causes of action including discrimination, fraud, and negligence).

At the same time, our cases have hewn closely to the statutory language of the CDA and have limited the expansion of its immunity beyond the protection Congress envisioned. As we have observed, "the [relevant] section is titled 'Protection for "good Samaritan" blocking and screening of offensive material.'" *Roommates.com*, 521 F.3d at 1163–64 (quoting 47 U.S.C. § 230(c)); *see also Internet Brands*, 824 F.3d at 852. Congress intended to "spare interactive computer services [the] grim choice" between voluntarily filtering content and being subject to liability on the one hand, and "ignoring all problematic posts altogether [to] escape liability." *Roommates.com*, 521 F.3d at 1163–64. In contrast, the Platforms face no liability for the content of the bookings; rather, any liability arises only from unlicensed bookings. We do not discount the Platforms' concerns about the administrative burdens of state and local regulations, but we nonetheless disagree that § 230(c)(1) of the CDA may be read as broadly as they advocate, or that we may ourselves expand its provisions beyond what Congress initially intended.

In sum, neither express preemption nor obstacle preemption apply to the Ordinance. We therefore affirm the district court's dismissal for failure to state a claim under the CDA.

II. First Amendment

The Platforms also contend that the district court erred in dismissing their First Amendment claims. They argue that, even if the plain language of the Ordinance only reaches "conduct," *i.e.*, booking unlicensed properties, the law effectively imposes a "content-based financial burden" on commercial speech and is thus subject to First Amendment scrutiny. The district court concluded that the Ordinance "regulates conduct, not speech, and that the conduct banned . . . does not have such a 'significant expressive element' as to draw First Amendment protection." We agree.

That the Ordinance regulates "conduct" is not alone dispositive. The Supreme Court has previously applied First Amendment scrutiny when "'speech' and 'nonspeech' elements are combined in the same course of conduct." *See United States v. O'Brien*, 391 U.S. 367, 376 (1968). But "restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). While the former is entitled to protection, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.*

To determine whether the First Amendment applies, we must first ask the "threshold question [of] whether conduct with a 'significant expressive element' drew the legal remedy or the ordinance has the inevitable effect of 'singling out those engaged in expressive activity.'" *Int'l Franchise*

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Ass'n v. City of Seattle, 803 F.3d 389, 408 (9th Cir. 2015) (quoting *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986)). A court may consider the "inevitable effect of a statute on its face," as well as a statute's "stated purpose." *Sorrell*, 564 U.S. at 565. However, absent narrow circumstances, a court may not conduct an inquiry into legislative purpose or motive beyond what is stated within the statute itself. *See O'Brien*, 391 U.S. at 383 n.30. Because the conduct at issue—completing booking transactions for unlawful rentals—consists only of nonspeech, nonexpressive conduct, we hold that the Ordinance does not implicate the First Amendment.

First, the prohibitions here did not target conduct with "a significant expressive element." *See Arcara*, 478 U.S. at 706. Our decision in *International Franchise Ass'n* is analogous. There, the plaintiff challenged a minimum wage ordinance that would have accelerated the raising of the minimum wage to $15 per hour for franchise owners and other large employers. 803 F.3d at 389. In denying a preliminary injunction, the district court held that the plaintiffs were not likely to succeed on their First Amendment argument that the ordinance treated them differently based on their "speech and association" decisions to operate within a franchise relationship framework. *Id.* at 408–09. We agreed, concluding that the "business agreement or business dealings" were not conduct with a "significant expressive element." *Id.* at 408. Instead, "Seattle's minimum wage ordinance [was] plainly an economic regulation that [did] not target speech or expressive conduct." *Id.*

Similarly, here, the Ordinance is plainly a housing and rental regulation. The "inevitable effect of the [Ordinance] on its face" is to regulate nonexpressive conduct—namely,

booking transactions—not speech. *See Sorrell*, 564 U.S. at 565. As in *International Franchise Ass'n*, the "business agreement or business dealings" associated with processing a booking is not conduct with a "significant expressive element." *See* 803 F.3d at 408 (citation and quotation marks omitted). Contrary to the Platforms' claim, the Ordinance does not "require" that they monitor or screen advertisements. It instead leaves them to decide how best to comply with the prohibition on booking unlawful transactions.

Nor can the Platforms rely on the Ordinance's "stated purpose" to argue that it intends to regulate speech. The Ordinance itself makes clear that the City's "central and significant goal . . . is preservation of its housing stock and preserving the quality and nature of residential neighborhoods." As such, with respect to the Platforms, the only inevitable effect, and the stated purpose, of the Ordinance is to prohibit them from completing booking transactions for unlawful rentals.

As for the second prong of our inquiry, whether the Ordinance has the effect of "singling out those engaged in expressive activity," *Arcara*, 478 U.S. at 706–07, we conclude that it does not. As the Platforms point out, websites like Craigslist "advertise the very same properties," but do not process transactions. Unlike the Platforms, those websites would not be subject to the Ordinance, underscoring that the Ordinance does not target websites that post listings, but rather companies that engage in unlawful booking transactions.

Moreover, the incidental impacts on speech cited by the Platforms raise minimal concerns. The Platforms argue that the Ordinance chills commercial speech, namely, advertisements for third-party rentals. But even accepting

that the Platforms will need to engage in efforts to validate transactions before completing them, incidental burdens like these are not always sufficient to trigger First Amendment scrutiny. *See Int'l Franchise Ass'n*, 803 F.3d at 408 ("[S]ubjecting every incidental impact on speech to First Amendment scrutiny 'would lead to the absurd result that any government action that had some conceivable speech inhibiting consequences . . . would require analysis under the First Amendment.'" (quoting *Arcara*, 478 U.S. at 708 (O'Connor, J., concurring))). Furthermore, to the extent that the speech chilled advertises unlawful rentals, "[a]ny First Amendment interest . . . is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *See Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 389 (1973).

Finally, because the Ordinance does not implicate speech protected by the First Amendment, we similarly reject the Platforms' argument that the Ordinance is unconstitutional without a scienter requirement. In most cases, there is no "closed definition" on when a criminal statute must contain a scienter requirement. *See Morissette v. United States*, 342 U.S. 246, 260 (1952). However, the Supreme Court has drawn a bright line in certain contexts, such as holding that the First Amendment requires statutes imposing criminal liability for obscenity or child pornography to contain a scienter requirement. *See New York v. Ferber*, 458 U.S. 747, 765 (1982). Such a requirement prevents "a severe limitation on the public's access to constitutionally protected matter" as would result from inflexible laws criminalizing "bookshops and periodical stands." *Smith v. California*, 361 U.S. 147, 153 (1959).

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Here, even assuming that the Ordinance would lead the Platforms to voluntarily remove some advertisements for lawful rentals, there would not be a "severe limitation on the public's access" to lawful advertisements, especially considering the existence of alternative channels like Craigslist. *Id.* Such an incidental burden is far from "a substantial restriction on the freedom of speech" that would necessitate a scienter requirement. *Id.* at 150. Otherwise, "[t]here is no specific constitutional inhibition against making the distributors of good[s] the strictest censors of their merchandise." *Id.* at 152.

III. Remaining Claims

On appeal, the Platforms do not challenge dismissal of their other federal law claims "in light of the district court's interpretation of the Ordinance as only requiring disclosure of information pursuant to requests that comply with the Fourth Amendment and Stored Communications Act." Similarly, the parties specified that they would "not challenge the district court's decision to decline supplemental jurisdiction if all the Platforms' federal claims were properly dismissed." Accordingly, we need not consider the remaining claims.

* * *

Because the district court properly dismissed the Platforms' complaints for failure to state a claim, we dismiss as moot the appeals from the denial of preliminary injunctive relief.

AFFIRMED in part, DISMISSED in part.

Addendum B
Statutory Addendum

47 U.S.C. § 230.

Protection for private blocking and screening of offensive material.

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

[1] So in original. Likely should be "subparagraph (A)."

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. 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.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(5) No effect on sex trafficking law

Nothing in this section (other than subsection (c)(2)(A)) shall be construed to impair or limit—

(A) any claim in a civil action brought under section 1595 of title 18, United States Code, if the conduct underlying the claim constitutes a violation of section 1591 of that title;

(B) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 1591 of title 18, United States Code; or

(C) any charge in a criminal prosecution brought under State law if the conduct underlying the charge would constitute a violation of section 2421A of title 18, United States Code, and promotion or facilitation of prostitution is illegal in the jurisdiction where the defendant's promotion or facilitation of prostitution was targeted.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of

information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

> **(A)** filter, screen, allow, or disallow content;
>
> **(B)** pick, choose, analyze, or digest content; or
>
> **(C)** transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

City Council Meeting: January 24, 2017 Santa Monica, California

ORDINANCE NUMBER 2535 (CCS)
(City Council Series)

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF SANTA MONICA AMENDING AND REVISING CHAPTER 6.20 OF THE SANTA MONICA MUNICIPAL CODE REGULATING HOME-SHARING AND VACATION RENTALS

WHEREAS, a central and significant goal for the City is preservation of its housing stock and preserving the quality and character of residential neighborhoods. Santa Monica places a high value on cohesive and active residential neighborhoods and the diverse population which resides therein. The City must preserve its available housing stock and the character and charm which result, in part, from cultural, ethnic, and economic diversity of its resident population as a key factor in economic growth; and

WHEREAS, Santa Monica's natural beauty, its charming residential communities, its vibrant commercial quarters and its world class visitor serving amenities have drawn visitors from around the United States and around the world; and

WHEREAS, there is within the City a diverse array of short term rentals for visitors, including, hotels, motels, bed and breakfasts, vacation rentals and home sharing, not all of which are lawful; and

WHEREAS, operations of vacation rentals, where residents rent entire units to visitors and are not present during the visitors' stays, frequently disrupt the quietude and residential character of the neighborhoods and adversely impact the community; and

WHEREAS, on May 12, 2015, the City Council adopted Ordinance Number 2484 which preserved the City's prohibition on vacation rentals, but authorized "home-sharing," whereby residents host visitors in their homes for short periods of stay, for compensation, while the resident host remains present throughout the visitors' stay; and

WHEREAS, home-sharing does not create the same adverse impacts as unsupervised vacation rentals because, among other things, the resident hosts are present to introduce their guests to the City's neighborhoods and regulate their guests' behavior; and

WHEREAS, while the City recognizes that home-sharing activities can be conducted in harmony with surrounding uses, those activities must be regulated to ensure that the small number of home-sharers stay in safe structures and do not threaten or harm the public health or welfare; and

WHEREAS, any monetary compensation paid to the resident hosts for their hospitality and hosting efforts rightfully belong to such hosts and existing law authorizes the City to collect Transient Occupancy Taxes ("TOTs") for vacation rentals and home-sharing activities; and

WHEREAS, existing law obligates both the hosts and rental agencies or hosting platforms to collect and remit TOTs to the City; and

WHEREAS, enforcement of the City's regulations on home-sharing, and prohibition on vacation rentals, can be extremely difficult without the cooperation of internet companies which facilitate both legal and illegal short term rentals; and

WHEREAS, to the fullest extent permitted by law, the City must be able to hold internet companies which profit from facilitating short-term rental transactions accountable for enabling illegal conduct; and

WHEREAS, the City Council now wishes to clarify its regulations on short term rentals as they apply to hosting platforms which are internet companies that collect income by facilitating transactions between hosts and visitors in the short term rental marketplace; and

WHEREAS, the City wishes to regulate the conduct of hosting platforms, but does not intend to regulate hosting platforms' publication or removal of content provided by third parties; and

WHEREAS, the City does not intend to require hosting platforms to verify content provided by third parties or to ensure that short term rental hosts comply with the provisions of this Chapter.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF SANTA MONICA DOES HEREBY ORDAIN AS FOLLOWS:

SECTION 1. Santa Monica Municipal Code Chapter 6.20 is hereby amended to read as follows:

Chapter 6.20 HOME-SHARING AND VACATION RENTALS

6.20.010 Definitions.

For purposes of this Chapter, the following words or phrases shall have the following meanings:

(a) Home-Sharing. An activity whereby the residents host visitors in their homes, for compensation, for periods of thirty consecutive days or less, while at least one of the dwelling unit's primary residents lives on-site, in the dwelling unit, throughout the visitors' stay. (b) Host. Any person who is an owner, lessee, or sub-lessee of a residential property or unit offered for use as a vacation rental or home-share. Host also includes any person who offers, facilitates, or provides services to facilitate, a vacation rental or home-share, including but not limited to insurance, concierge services, catering, restaurant bookings, tours, guide services, entertainment, cleaning, property management, or maintenance of the residential property or unit regardless of whether the person is an owner, lessee, or sub-lessee of a residential property or unit offered for use as a vacation rental or home-share. Any person, other than an owner, lessee, or sub-lessee, who operates home-sharing or vacation rental activities exclusively on the Internet shall not be considered a Host.

(c) Hosting Platform. A person who participates in the home-sharing or vacation rental business by collecting or receiving a fee, directly or indirectly through an agent or intermediary, for conducting a booking transaction using any medium of facilitation.

(d) Booking Transaction. Any reservation or payment service provided by a person who facilitates a home-sharing or vacation rental transaction between a prospective transient user and a host.

(e) Person. Any natural person, joint venture, joint stock company, partnership, association, club, company, corporation, business trust, or organization of any kind.

(f) Vacation Rental. Rental of any dwelling unit, in whole or in part, within the City of Santa Monica, to any person(s) for exclusive transient use of thirty consecutive days or

less, whereby the unit is only approved for permanent residential occupancy and not approved for transient occupancy or home-sharing as authorized by this Chapter. Rental of units located within City approved hotels, motels and bed and breakfasts shall not be considered vacation rentals.

6.20.020 Home-sharing authorization.

(a) Notwithstanding any provision of this Code to the contrary, home-sharing shall be authorized in the City, provided that the host complies with each of the following requirements:

(1) Obtains and maintains at all times a City business license authorizing home-sharing activity.

(2) Operates the home-sharing activity in compliance with all business license permit conditions, which may be imposed by the City to effectuate the purpose of this Chapter.

(3) Collects and remits Transient Occupancy Tax ("TOT"), in coordination with any hosting platform if utilized, to the City and complies with all City TOT requirements as set forth in Chapter 6.68 of this Code.

(4) Takes responsibility for and actively prevents any nuisance activities that may take place as a result of home-sharing activities.

(5) Complies with all applicable laws, including all health, safety, building, fire protection, and rent control laws.

(6) Complies with the regulations promulgated pursuant to this Chapter.

(b) All hosts and their respective properties, authorized by the City for home-sharing purposes pursuant to this Section, shall be listed on a registry created by the City and updated periodically by the City. The City shall publish the registry, and a copy shall be sent electronically to any person upon request.

(c) If any provision of this Chapter conflicts with any provision of the Zoning Ordinance codified in Article IX of this Code, the terms of this Chapter shall prevail.

6.20.030 Prohibitions.

No host shall undertake, maintain, authorize, aid, facilitate or advertise any vacation rental activity or any home-sharing activity that does not comply with Section 6.20.020 of this Code.

6.20.050 Hosting platform responsibilities.

(a) Hosting platforms shall be responsible for collecting all applicable TOTs and remitting the same to the City. The hosting platform shall be considered an agent of the host for purposes of TOT collections and remittance responsibilities as set forth in Chapter 6.68 of this Code.

(b) Subject to applicable laws, Hosting platforms shall disclose to the City on a regular basis each home-sharing and vacation rental listing located in the City, the names of the persons responsible for each such listing, the address of each such listing, the length of stay for each such listing and the price paid for each stay.

(c) Hosting platforms shall not complete any booking transaction for any residential property or unit unless it is listed on the City's registry created under section 6.20.020

subsection (b), at the time the hosting platform receives a fee for the booking transaction.

(d) Hosting platforms shall not collect or receive a fee, directly or indirectly through an agent or intermediary, for facilitating or providing services ancillary to a vacation rental or unregistered home-share, including but not limited to insurance, concierge services, catering, restaurant bookings, tours, guide services, entertainment, cleaning, property management, or maintenance of the residential property or unit.

(e) Safe Harbor: A Hosting Platform operating exclusively on the Internet, which operates in compliance with subsections (a), (b), (c), and (d) above, shall be presumed to be in compliance with this Chapter, except that the Hosting Platform remains responsible for compliance with the administrative subpoena provisions of this Chapter.

(f) The provisions of this section shall be interpreted in accordance with otherwise applicable state and federal law(s) and will not apply if determined by the City to be in violation of, or preempted by, any such law(s).

6.20.080 Regulations.

The City Manager or his or her designee may promulgate regulations, which may include, but are not limited to, permit conditions, reporting requirements, inspection frequencies, enforcement procedures, advertising restrictions, disclosure requirements, administrative subpoena procedures or insurance requirements, to implement the provisions of this Chapter. No person shall fail to comply with any such regulation.

6.20.090 Fees.

The City Council may establish and set by resolution all fees and charges as may be necessary to effectuate the purpose of this Chapter.

6.20.100 Enforcement.

(a) Any host violating any provision of this Chapter, or hosting platform that violates its obligations under section 6.20.050, shall be guilty of an infraction, which shall be punishable by a fine not exceeding two hundred fifty dollars, or a misdemeanor, which shall be punishable by a fine not exceeding five hundred dollars, or by imprisonment in the County Jail for a period not exceeding six months or by both such fine and imprisonment.

(b) Any person convicted of violating any provision of this Chapter in a criminal case or found to be in violation of this Chapter in a civil or administrative case brought by a law enforcement agency shall be ordered to reimburse the City and other participating law enforcement agencies their full investigative costs, pay all back TOTs, and remit all illegally obtained rental revenue to the City so that it may be returned to the home-sharing visitors or used to compensate victims of illegal short term rental activities.

(c) Any host who violates any provision of this Chapter, or hosting platform that violates its obligations under section 6.20.050, shall be subject to administrative fines and administrative penalties pursuant to Chapter 1.09 and Chapter 1.10 of this Code.

(d) Any interested person may seek an injunction or other relief to prevent or remedy violations of this Chapter. The prevailing party in such an action shall be entitled to recover reasonable costs and attorney's fees.

(e) The City may issue and serve administrative subpoenas as necessary to obtain specific information regarding home-sharing and vacation rental listings located in the City, including but not limited to, the names of the persons responsible for each such listing, the address of each such listing, the length of stay for each such listing and the price paid for each stay, to determine whether the home-sharing and vacation rental listings comply with this Chapter. Any subpoena issued pursuant to this section shall not require the production of information sooner than 30 days from the date of service. A person that has been served with an administrative subpoena may seek judicial review during that 30 day period.

(f) The remedies provided in this Section are not exclusive, and nothing in this section shall preclude the use or application of any other remedies, penalties or procedures established by law.

SECTION 2. Any provision of the Santa Monica Municipal Code or appendices thereto inconsistent with the provisions of this Ordinance, to the extent of such inconsistencies and no further, is hereby repealed or modified to that extent necessary to effect the provisions of this Ordinance.

SECTION 3. If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each and every section, subsection, sentence, clause, or phrase not declared invalid or unconstitutional without regard to whether any portion of the ordinance would be subsequently declared invalid or unconstitutional.

SECTION 4. The Mayor shall sign and the City Clerk shall attest to the passage of this Ordinance. The City Clerk shall cause the same to be published once in the official newspaper within 15 days after its adoption. This Ordinance shall become effective 30 days from its adoption.

APPROVED AS TO FORM:

JOSEPH LAWRENCE
Interim City Attorney

Approved and adopted this 24th day of January, 2017.

Ted Winterer

Ted Winterer, Mayor

State of California)
County of Los Angeles) ss.
City of Santa Monica)

I, Denise Anderson-Warren, City Clerk of the City of Santa Monica, do hereby certify that the foregoing Ordinance No. 2535 (CCS) had its introduction on January 10, 2017, and was adopted at the Santa Monica City Council meeting held on January 24, 2017, by the following vote:

AYES: Councilmembers McKeown, O'Connor, O'Day, Vazquez, Mayor Pro Tem Davis, Mayor Winterer

NOES: None

ABSENT: Councilmember Himmelrich

ATTEST:

Denise Anderson-Warren

Denise Anderson-Warren, City Clerk

2/23/17

Date

A summary of Ordinance No. 2535 (CCS) was duly published pursuant to California Government Code Section 40806.

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2019, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

April 26, 2019

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.

Case No. 18-55367

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOMEAWAY, INC. and AIRBNB, INC.,
Plaintiffs-Appellants,

v.

CITY OF SANTA MONICA,
Defendant-Appellee.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF COLUMBUS, CITY OF OAKLAND, CITY OF SEATTLE, AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF 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
Honorable Otis D. Wright, II

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INTEREST OF AMICI CURIAE

Amici curiae the City and County of San Francisco, the District of Columbia, the Mayor and City Council of Baltimore, the City of Columbus, the City of Oakland, and the City of Seattle are cities and districts across the country striving to preserve and expand affordable housing for their residents.[1] *Amicus curiae* Public Rights Project is a nonpartisan nonprofit dedicated to supporting local and state government efforts to protect the rights of their communities. Nationally, the U.S. has a shortage of more than 7.2 million rental homes affordable and available to extremely low-income renters. National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes* at 4 (Mar. 2018), http://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf. This nationwide shortage in affordable housing presents significant challenges for all of the *amici's* communities.

Alongside and exacerbating these national housing trends, *amici* have also observed an increase in vacation rentals in their communities and an increased use of online hosting platforms. In California, for example, "the number of people sharing their homes on Airbnb soared 51 percent to 76,600 in 2016." Lori Weisberg, *Income from San Diego Airbnb hosts soars 74 percent*, The San Diego Union-Tribune (Mar. 1, 2017), http://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-hosts-

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amici* hereby certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submittal of this brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund the preparation or submittal of this brief. Pursuant to Rule 29(a), *amici* attest that all parties to this appeal have consented to the filing of this brief.

20170301-story.html. The proliferation of short-term rentals in *amici's* communities reduces the number of rental units otherwise available for permanent rental housing. In some cities, entire apartment buildings have effectively been transformed into *de facto* tourist hotels, with the direct result that these apartments become available for families seeking to make their homes in *amici's* communities. This has a material impact on the price and availability of housing in *amici's* communities, driving up rental prices across the board.[2]

Amici have all taken action or are considering taking action to address these issues in their communities. Some have passed legislation regulating short-term rentals.[3] Others are considering similar ordinances. While these ordinances and proposals contain a variety of policy solutions, each represent the *amici's* efforts to strike an appropriate balance between encouraging the innovation of the short-term rental market and preserving and increasing access to affordable housing.

Moreover, *amici's* interest in this matter extends beyond housing to the myriad aspects of local life that now take place online. Each recognizes that, to govern effectively and represent the interest of its constituents, it must be able to regulate commercial conduct—whether it takes place in a brick and mortar storefront or online. Indeed, as commercial transactions increasingly take place online, the need to regulate online companies has only increased. The overly-broad interpretation of the Communications Decency Act ("CDA") urged by

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[2] *See, e.g.*, Kyle Barron, Edward Kung & Davide Prosperio, *The Sharing Economy and Housing Affordability: Evidence from Airbnb* (Mar. 29, 2018), http://dx.doi.org/10.2139/ssrn.3006832 (finding that a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices for U.S. zipcodes with the median owner-occupancy rate).

[3] *See* SF Admin. Code § 41A.5(g)(4)(C); Seattle Mun. Code § 6.600 (2017).

Appellants could be invoked to prevent *amici* from imposing reasonable and necessary regulations on any online company.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1996, Congress enacted the Communications Decency Act ("CDA") to nurture the fledgling internet by protecting service providers from liability for content third parties posted on their websites. At the time, there were only 12 million Americans subscribed to internet services, and those with access spent fewer than 30 minutes a month online.

Over two decades later, the internet is no longer in its infancy. Today 290 million Americans are online every day engaging in commerce and activity that was unthinkable in 1996. If nascent internet startups needed broad protection from litigation to thrive, that cannot reasonably be argued now. Yet internet giants such as Airbnb—whose profits are projected to top $3 billion by 2020[4]—seek to use the CDA to shield themselves from liability for their own unlawful commercial conduct. Neither the text nor the intent of the statute supports such a sweeping application. *See* Parts I-II, *infra*.

Accordingly, Appellants and their *amici* fall back on far-reaching policy arguments—claiming that local regulations like Santa Monica's short-term rental ordinance ("Ordinance") will "dramatically set back" e-commerce and "render the modern Internet unrecognizable." Appellants' Opening Br. ("AOB") at 3, 35. But San Francisco's experience demonstrates that these doomsday prophecies are unfounded. San Francisco has implemented a law virtually identical to Santa Monica's Ordinance and the sky has not fallen. No terrible harm has

[4] Leigh Gallagher, *Airbnb's Profits to Top $3 Billion by 2020,* Fortune (Feb 15, 2017), http://fortune.com/2017/02/15/airbnb-profits/.

befallen Appellants or e-commerce more broadly. And, at the same time, San Francisco has been able to protect its local housing stock and abate significant public nuisances. *See* Part III, *infra*. Similar regulations that address critical issues in areas of traditional state and local concern should be encouraged—not struck down simply because they apply to companies that conduct their business online.

ARGUMENT

I. The Communications Decency Act Allows Local Regulation Of An Online Company's Own Commercial Activity.

Under Section 230 of the CDA, (1) an "interactive computer service" provider is not liable (2) as a "publisher or speaker" of information (3) if the information is "provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009), as amended (Sept. 28, 2009).

In an unbroken line of cases, the Ninth Circuit has interpreted and applied the "publisher or speaker" prong of the CDA test narrowly—carefully circumscribing when an online company will be considered to be acting as a "publisher," and allowing it to be held liable for actions undertaken outside of that role. Under these binding precedents, Santa Monica's Ordinance—and similar state or local laws that regulate an online company's own commercial activity—do not implicate the CDA because they do not seek to hold the companies liable as publishers of third-party content.

A. The Ninth Circuit Properly Interprets The "Publisher Or Speaker" Requirement To Permit Liability For An Online Company's Own Commercial Conduct.

Section 230 immunity only applies if the law or cause of action at issue seeks to hold an online company liable for its publishing conduct—*i.e.*, "as the

'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102. The critical question therefore is what constitutes publishing conduct. The Ninth Circuit has answered this question: Online companies may only seek shelter in Section 230's safe harbor when they are facing liability for reviewing, editing, deciding to publish, or removing content created—and therefore controlled—by third parties. *Id.* For an online company's own illegal acts outside of these publishing functions, the CDA provides no protection.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* ("*Roommates.com*"), 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc), this Court analyzed a discrimination claim against an online company whose that helped apartment dwellers find potential roommates. The company required its subscribers to create profiles before using the service, and the profiles required subscribers to divulge—by selecting a response from a list of answers provided by the website—their "sex, sexual orientation, and whether [they] would bring children to a household." *Id.* Fair housing councils alleged the website violated the federal Fair Housing Act. In an *en banc* decision, this Court held Roommates.com could ***not*** claim a defense under the CDA, and also made clear that a website may be held liable for its direct violation of the law. As the court succinctly explained, "a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online." *Id.* at 1164.

The following year, in *Barnes v. Yahoo!*, this Court confirmed its narrow interpretation of the "publisher or speaker" requirement and Section 230 immunity. 570 F.3d 1096. In *Barnes*, a woman brought an action against Yahoo for failing to

remove social media profiles posted by her former boyfriend that contained nude photographs of her. *Id.* at 1096. Yahoo promised to remove the profiles, but never did. The woman sued, alleging both negligent undertaking for Yahoo's failure to remove the photographs and promissory estoppel for breach of its promise to do so. *Id.* at 1099.

The Court first emphasized that an entity can only invoke Section 230's safe harbor if "the duty that the plaintiff allege[d] the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Id.* at 1102. It then provided guidance about what this requirement means in practice. The court explained that "a publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it." *Id.* at 1102; *see also id.* ("[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.") (citing *Roommates.com*, 521 F.3d at 1170-71).

Under this "publisher or speaker" test, the Court affirmed that the CDA barred the plaintiff's negligent undertaking claim, because it sought to impose liability on the basis of Yahoo's failure to remove content from its website, which "necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1103. The Court, however, reinstated the plaintiff's promissory estoppel claim, because "liability here would not come from Yahoo's publishing conduct," but from Yahoo's own breach of a promise. *Id.* at 1107. Because the legal duty Yahoo allegedly breached did not stem from its publishing activity, Yahoo could not invoke CDA immunity on this claim.

Similarly, in *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016), this Court held that the CDA did not bar a plaintiff's claim against a social networking website for conduct unrelated to publishing others' content. The plaintiff in

Internet Brands alleged that the site negligently failed to warn her and other users of the website that they were at risk of being victimized by individuals who used the website as part of a rape scheme. *Id.* at 848-49. As in *Barnes*, the case turned on whether the plaintiff's claim sought to impose liability on the website proprietor as a "publisher or speaker" of content a third party posted on the site. *Id.* at 851. The Court held that it did not because "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content." *Id.*

In sum, under Ninth Circuit case law, online companies are only immune from liability for reviewing, editing, deciding to publish, or removing content created—and therefore controlled—by third parties. The CDA is not implicated when a company faces liability for its own commercial activities. As explained in Part I(B) below, this conclusion is consistent with the views of other courts.

B. Other Courts Similarly Interpret The "Publisher Or Speaker" Requirement To Permit Liability For An Online Company's Own Conduct.

Appellants contend that the District Court in this case "ignored a well-developed body of case law" interpreting the CDA broadly. AOB 28. Not so.

In support of their assertion, Appellants cite only one circuit court case—*Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (cited at AOB 30-31)—but that case is inapposite. There, sex trafficking victims sued classified advertising website Backpage.com for selectively removing certain postings in the "Escorts" section and setting policies for advertisements that allegedly encouraged sex trafficking (*e.g.*, stripping metadata from photographs). *Id.* at 16-17. Contrasting the case to this Court's decision in *Barnes*, the First Circuit held that the plaintiffs' claims challenged

Backpage's editorial decisions about the content and form of advertisements on the website—"choices that fall within the purview of traditional publisher functions." *Id.* at 21-22.

All of the other authorities Appellants cite are district court or state court opinions—the majority of which are unpublished and/or out-of-circuit cases. *See* AOB 28-32.[5] These cases cannot and do not alter or trump the Ninth Circuit precedent discussed above establishing that where, as here, a law seeks to regulate an online company only in its role as a direct market participant, the CDA does not apply.

Nor are this Court's decisions imposing reasonable limitations on the scope of Section 230 immunity "outliers." AOB 39. Far from it.

1. This Court's Interpretation Of The CDA Is Consistent With Its Sister Circuits.

In *Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016), the Second Circuit interpreted the CDA in a similar manner. In that case, the FTC and the State of Connecticut brought an action against internet company LeadClick for participating in its affiliates' scheme to use fake websites

[5] Specifically, Appellants cite: *Force v. Facebook, Inc.*, 2018 WL 472807 (E.D.N.Y. Jan. 18, 2018); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014); *Evans v. Hewlett-Packard Co.*, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (unpublished); *Inman v. Technicolor USA, Inc.*, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (unpublished); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *MDA City Apartments, LLC v. Airbnb, Inc.*, 2018 WL 910831 (Ill. Cir. Ct. Feb. 14, 2018) (unpublished); *Donaher v. Vannini*, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017) (unpublished); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012); *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113 (N.J. Super. Ct. Law Div. 2010); *Stoner v. eBay, Inc.*, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000) (unpublished).

to advertise weight loss products. *Id.* at 162. Although LeadClick itself did not create the deceptive websites, it approved of its affiliates' use of such sites and occasionally provided affiliates' content for their fake sites. *Id.* at 164. The Second Circuit held that LeadClick could not claim Section 230 immunity. *Id.* at 172-73, 175. In reaching this decision, the court explained that the FTC and Connecticut did not seek to hold LeadClick liable as the publisher or speaker of third party content. *Id.* at 175. Instead, "LeadClick [was] being held accountable for its *own* deceptive acts or practices." *Id.* at 176. Consequently, Section 230 did not apply. *Id.* at 176-77.

The Seventh Circuit, too, has applied the "publisher or speaker" requirement carefully to narrow the scope of CDA immunity. In *City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), the City of Chicago brought an action against an Internet auction site that resold tickets to entertainment events, asserting that the Internet site was responsible for the city's amusement tax on tickets. *Id.* at 365. The defendant argued that it was immune under the CDA, but the Seventh Circuit disagreed. *Id.* at 366. The court held that the CDA does not create an "immunity" of any kind but rather limits who may be called the publisher of information that appears online. The court explained that while such information might matter to liability for defamation, obscenity, or copyright infringement, "Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'" *Id.* Accordingly, the court concluded that the CDA was "irrelevant." *Id.*

2. This Court's Interpretation Of The "Publisher Or Speaker" Requirement Has Proven Workable And Easily Applied By District Courts.

In *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 961 (N.D. Cal. 2016), a consumer filed suit under the Telephone Consumer Protection Act to stop Twitter from automatically sending unwanted text messages to her cell phone with "tweets" posted by Twitter users. Twitter attempted to raise Section 230 as a defense against the consumer's claim, but the court rejected this argument. *Id.* at 960. The court held that the CDA was inapplicable because the plaintiff's claim did not seek to impose liability on Twitter as the "publisher" of third-party content, as it did not depend on the content of tweets, or impose a responsibility to "review" or "edit" third parties' tweets. *Id.* at 967-68.

In *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006), the Northern District of California denied CDA immunity for tort claims against Yahoo's online dating service platforms. The plaintiff alleged that Yahoo created and distributed fake dating profiles, and that Yahoo circulated the profiles of "actual" former subscribers whose subscriptions had expired to give the misleading impression that these individuals were still available for dates. *Id.* at 1262-63. The court held that for the web platform's *own* tortious conduct manufacturing false profiles, Section 230—by its very terms—provided Yahoo no shield. *Id.* at 1263. Nor could the CDA immunize Yahoo for allegedly distributing profiles of former subscribers whose subscriptions at expired. *Id*. The court observed that while the profiles of former members were created by third parties, the CDA "only entitles Yahoo not to be the 'publisher or speaker' of the profiles. It does not absolve Yahoo from liability for any accompanying misrepresentations." *Id.* Because the user's claim was "that Yahoo!'s manner of presenting the profiles—not the underlying profiles themselves—constitute fraud, the CDA does not apply." *Id.*

3. District Courts Outside Of The Ninth Circuit Also Apply The CDA In Accordance With This Court's Interpretation.

In *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016), a consumer sued battery manufacturer LG Electronics USA and online retailer Amazon for injuries sustained when the LG battery he purchased on Amazon's website allegedly exploded and caught fire in his pocket. *Id.* at 535. The court concluded that the plaintiff's failure to warn claim was barred because the complaint failed to allege facts that Amazon had any knowledge that third-party sellers used the website to sell dangerous or defective goods. *Id.* at 539. In doing so, it rejected Amazon's Section 230 defense against the plaintiff's remaining negligence and breach of implied warranty claims because they targeted non-publishing conduct. "That is, to the extent that a plaintiff may prove that an interactive computer service played a *direct* role in tortious conduct—through its involvement in the sale or distribution of the defective product—Section 230 does not immunize defendants from all products liability claims." *Id.* at 537.

Similarly, in *800-JR-Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273 (D.N.J. 2006), the court held that the CDA provides no defense for websites' own tortious business conduct. There, plaintiff cigar retailer brought fraud and abuse claims against the advertising practices of search engine GoTo.com. *Id.* at 295. Clarifying that the CDA would only apply to third-party content displayed on GoTo.com's search results page, the court held that the website could not claim CDA immunity "because the alleged fraud is the use of the trademark name in the bidding process [for its advertisers], and not solely the information from third parties… It is not the purpose of the Act to shield entities from claims of fraud and abuse arising from their own pay-for-priority advertising business, rather than from the actions of third parties." *Id.*

C. As Properly Interpreted, The CDA Does Not Prohibit Local Regulations Like Santa Monica's Ordinance.

As the cases discussed above establish, CDA immunity is bounded. It does not provide blanket immunity to online companies. Acts that would otherwise be illegal do not "magically become lawful" simply because they occur online. *Roommates.com*, 521 F.3d at 1164. A company—whether operating online or at a brick and mortar storefront—acts as a publisher when it reviews and edits material and decides whether to publish it. *Barnes*, 570 F.3d at 1102. Even where a statute or ordinance relates to content originally created by third parties, if liability under such law does not turn on who publishes third-party content, CDA immunity cannot defeat governments' regulatory authority. *See City of Chicago*, 624 F.3d at 366; *Nunes*, 194 F. Supp. at 968; *Anthony*, 421 F. Supp. 2d at 1263. And if an online company—even one that primarily acts as a publisher and speaker of third-party content—engages in illegal conduct outside of that role, it cannot hold the CDA up as a shield. *See Internet Brands*, 821 F.3d at 851; *Barnes*, 570 F.3d at 1108-09; *Roommates.com*, 521 F.3d at 1164-65; *City of Chicago*, 624 F.3d at 366; *LeadClick*, 838 F.3d at 176. Such is the case here.

Santa Monica's Ordinance has no bearing whatsoever on Appellants' publishing activity. Hosting platforms like Airbnb and HomeAway typically perform two distinct functions. They post listings for rental units, and they provide booking services in connection with the rental of those units. Although Airbnb and HomeAway *do* act as publishers of third-party content when they post listings created by users seeking to list their residences for short-term rental, the Ordinance "cares not a whit about what is or is not featured on [hosting platforms'] websites." *Airbnb v. San Francisco*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016) (holding that Section 230 does not defeat San Francisco's virtually identical ordinance).

Compliance with the law would not require Airbnb and HomeAway to review or vet or remove any user content. It imposes no obligations on them to change how they review, edit, decide to publish, do publish, or remove from publication any third-party content. *See Internet Brands*, 824 F.3d at 851; *Barnes*, 570 F.3d at 1102. To the contrary, they can publish (and earn publishing fees from) whatever listings they want—both lawfully registered and unregistered short-term rental listings—without violating the Ordinance. They face potential liability *only* if and when they step outside their role as a publisher by completing a "Booking Transaction" for an unregistered unit in return for a fee. A "Booking Transaction" is defined as a "reservation or payment service provided by a person who facilitates a home-sharing or vacation rental transaction between a prospective transient user and a host." Excerpts of Record ("ER") at 32. Providing these services is not a publication function, and the fact third parties created the listings for those units "does not absolve [Appellants] from liability" for providing unlawful booking services. *Anthony*, 421 F. Supp. 2d at 1263.

It is true that Appellants may, at some point, have to determine if a unit is lawfully registered—but only if and when they want to provide booking services in connection with a short-term rental of the unit. No monitoring or screening is required before an account is created or a listing is posted. Indeed, even if a hosting platform determines that a listed unit is not registered, it is under no obligation to remove or alter the listing in any way. Simply put, hosting platforms do not need to monitor, verify, or screen third-party content. They only need to ensure that they themselves do not engage in an illegal booking transaction with an unregistered host.[6]

[6] Appellants protest that as a practical matter, the Ordinance compels them to review and remove unregistered third-party listings because, for their customers'

Thus, the Ordinance does not seek to impose liability on hosting platforms as the "publisher or speaker" of third-party content, as the Ninth Circuit has interpreted and applied that element of the CDA.

By way of analogy, assume that a city or state were to pass a law prohibiting travel agents from receiving a fee for booking clients into a hotel that lacked a proper certificate of occupancy. There is no argument that such a law would treat travel agents as publishers. The mere fact that hosting platforms provide this service online does not render their booking services "publishing activity" and does not make it "magically" lawful. Nor does the fact that these platforms provide separate publishing services immunize their discrete non-publishing activities. The CDA is equally inapplicable to both the hypothetical travel agent regulation and the Santa Monica Ordinance at issue here.

As this Court observed a decade ago, "[t]he Internet . . . has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to . . . give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Roommates.com*, 521 F.3d at 1164 n.15. The Court's remark rings all the more true now.

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sake, they "cannot leave in place a website chock-full of un-bookable listings." AOB at 23; *see also id.* at 21. But the Ordinance demands no such result. *Id.* at 23. It is *a* way for Appellants to comply by taking down unregistered listings—perhaps even the "easy" way—but not *the* way. *See* Brief of *Amici Curiae* Internet and Business Law Professors in Support of Defendant-Appellee at Part II(A). For example, Appellants could publish a disclaimer to accompany third-party listings. *See id.*; *Internet Brands*, 825 F.3d at 851.

II. Allowing Local Government To Regulate An Online Company's Own Commercial Conduct Is Consistent With The Intent And Goals Of The Communications Decency Act.

The legislative history of Section 230 demonstrates that Congress did not intend to broadly immunize all actions of online companies. Instead, Congress intended to accomplish two main goals: (1) to encourage blocking and filtering technologies that protect minors from objectionable material on the Internet, and (2) to protect the Internet from excessive government regulation. *See Batzel v. Smith*, 333 F.3d 1018, 1026-29 (9th Cir. 2003); 47 U.S.C. § 230(b).

Congress acted in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which ruled that an interactive computer service became liable as a publisher of defamatory material where the service deleted some objectionable posts but let others remain. As the House Conference Report states, "[o]ne of the specific purposes of [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." H.R. Conf. Rep. No. 104-458, 194 (1996); *see also* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 68 (1996) (stating that the only effect of Section 230 was to overrule *Stratton*).

Given this specific congressional intent, it does not make sense to interpret Section 230 to mean that a defendant is immune from any liability for their own commercial conduct. Indeed, even Chris Cox—co-author of Section 230—has expressed concern that "the judge-made law has drifted away from the original purpose of the statute," which was to "help clean up the Internet, not to facilitate people doing bad things on the Internet." Alina Selyukh, *Section 230: A Key Legal*

Shield For Facebook, Google Is About To Change, NPR.com (Mar. 21, 2018), http://wnpr.org/post/section-230-key-legal-shield-facebook-google-about-change.

Nor should this Court assume that Congress intended to allow an end-run around state and local government regulation in areas of traditional state and/or local control simply because business activities occur on the internet. Indeed, it would be improper to make such an assumption.

State and local regulation plays a critical role in fields of traditional state control, such as health and safety, housing, and employment. *See*, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (internal citations omitted)); *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 964 (9th Cir. 2016) (recognizing the "critical role of the state in regulating employment conditions").

Accordingly, the Supreme Court has held that when Congress intends to bar state action in these areas, it must do so clearly and unambiguously. *See*, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[W]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Certainly, section 230—which does not declare "a general immunity from liability deriving from third-party content" (*Barnes*, 570 F.3d at 1100), but rather immunizes online

companies only to the extent they act as "speakers or publishers"—does not state a clear and unambiguous intent to displace all such laws.

To the contrary, as this Court has emphasized, in enacting the CDA, Congress intended "to preserve the free-flowing nature of Internet speech and commerce *without unduly prejudicing the enforcement of other important state and federal laws*." *Roommates.com*, 521 F.3d at 1175 (emphasis added). Allowing local government to regulate an online company's own commercial conduct does just this: it presents no obstacle to internet speech or commerce, and allows state and local government to "exercise[] their police powers to protect the health and safety of their citizens." *Medtronic*, 518 U.S. at 475.

III. San Francisco's Experience Demonstrates That Local Government Regulation Of An Online Company's Own Commercial Conduct Does Not Adversely Impact The Internet Or Electronic Commerce.

Appellants assert that regulations such as Santa Monica's Ordinance will usher in a parade of horribles—that they will "dramatically set back" e-commerce and "render the modern Internet unrecognizable." AOB at 3, 35; *see also generally id.* at 35-39. Appellants' *amici* contend that such laws will harm thousands of companies and millions of users by forcing companies out of businesses and "thwart[ing] internet commerce." Brief of *Amici Curiae* eBay Inc., et al. in Support of Plaintiffs-Appellants ("eBay *Amicus* Br.") at 8-9, 20-23; *see also* Brief of *Amici Curiae* Chris Cox and NetChoice in Support of Plaintiffs and Reversal ("Cox *Amicus* Br.") at 19, 23-24 (claiming that such laws will impose a 1990s-era "bulletin board" model on websites, "slow commerce on the Internet,

increase costs for websites and consumers, and restrict the development of platform marketplaces").[7]

San Francisco's experience demonstrates that these fears are unfounded. In 2016, San Francisco enacted an ordinance ("SF Ordinance") virtually identical to the Santa Monica Ordinance at issue here. *See* SF Admin. Code § 41A.5(g)(4)(C). Airbnb and HomeAway filed a lawsuit alleging, *inter alia*, that the SF Ordinance was preempted by the CDA. *See Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016). After the District Court denied Airbnb and HomeAway's request for a preliminary injunction (*id.*), the parties settled the case in May 2017. ER 63-91. Pursuant to the terms of the settlement, Airbnb and HomeAway dismissed their lawsuit, and the SF Ordinance went into effect in June 2017.

Notably, even though the settlement left the SF Ordinance in place, Airbnb did *not* express any concern that e-commerce or the internet would suffer any negative consequences. To the contrary, at the time of the settlement, Chris Lehane, Airbnb's head of global policy and communications, "called the deal 'a proverbial "winner, winner chicken dinner."'" Hugo Martin, *Airbnb, HomeAway settle rental-registration lawsuit against San Francisco*, L.A. Times (May 1, 2017), available at http://www.latimes.com/business/la-fi-airbnb-san-francisco-

[7] Amici Chris Cox and NetChoice also devote substantial effort to detailing terrible consequences they claim would ensue in the absence of Section 230. They suggest that people contending with hurricanes would be unable to find their loved ones and victims of earthquakes would be unable to be matched with life-saving supplies and services. Cox *Amicus* Br. at 7-8. Even assuming, arguendo, that these consequences would actually flow from the elimination of CDA immunity, amici duel with a strawman. Neither the parties nor the district court suggest jettisoning Section 230—just that it be reasonably applied and interpreted in keeping with the text and intent of the statute.

20170501-story.html. He "said complying with laws and working with local governments would allow Airbnb to 'build the foundation' and make sure it was 'getting the basics right."' Katie Benner, *Airbnb Settles Lawsuit With Its Hometown, San Francisco*, NY Times (May 1, 2017), available at https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html.

And indeed, the SF Ordinance has been hugely successful—promoting both affordable housing and public safety in residential neighborhoods across the City. And none of the parade of horribles that Appellants and their *amici* foretell have come to pass. Instead, San Francisco's regulation represents a successful effort to advance key public policy goals for its residents while e-commerce platforms—many of which call this city their home—continue to thrive.

A. The SF Ordinance Has Successfully Addressed A Significant Local Concern.

Across the U.S., skyrocketing housing prices have left cities in crisis. And the short-term rentals that Airbnb and HomeAway facilitate drive up these costs.[8] Accordingly, San Francisco—like many other cities—regulates short-term rentals out of a crucial duty to maintain affordable housing stock for permanent residents, reduce evictions, and preserve neighborhood character. In 2015, to accommodate the internet-based "sharing economy," San Francisco created the Office of Short-Term Residential Rentals ("OSTR") and amended its Administrative Code to

[8] *See, e.g.*, Kyle Barron, Edward Kung & Davide Prosperio, *The Sharing Economy and Housing Affordability: Evidence from Airbnb* (Mar. 29, 2018), http://dx.doi.org/10.2139/ssrn.3006832 (finding that a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices for U.S. zipcodes with the median owner-occupancy rate).

require residents to register their homes with the city before making them available as short-term rentals.[9]

At first, compliance with the registration requirement fell disappointingly short. As of March 2016, only 1,647 people had registered with OSTR, while Airbnb listed 7,046 San Francisco hosts. *San Francisco*, 217 F. Supp. 3d at 1070. Implementation of the SF Ordinance has been a game-changer. Registrations quickly skyrocketed to nearly 2,500. And at the same time that hundreds of permanent residents registered legitimate short-term rentals, hundreds of illegal short-term rentals have been eliminated. Illegal short-term rentals wrest scarce rental units—including below market rate ("BMR") housing—away from the long-time residents and working-class families who need them most, and drive up evictions of long-term residents by property owners tempted to run high-volume short-term rentals and charge higher rates to tourists. Such illegal *de facto* hotels also wreak havoc on neighborhoods with excessive noise, raucous parties, illegal drug use, and overflowing garbage. But the Ordinance has helped turn the tide on these harms to public safety and health. Its enforcement has forced illegal listings off of rental platforms, which returns critically needed rent-controlled and subsidized BMR units to the permanent housing market. As the base of legitimate short-term rental hosts broadens, these hosts receive more bookings to more robustly supplement their incomes. And with properly registered short-term rentals, OSTR rarely receives complaints about noise, illicit drug use, and other interruption to the quality of life in neighborhoods. Indeed, complaints related to

[9] San Francisco also specified that only the primary resident of a unit may offer it as a short-term rental, that units may only be rented for a maximum of 90 nights per year, and that units designated as a below market rate or income-restricted residential unit may not be registered for short-term rental. *See* San Francisco Administrative Code Chapter 41A.

illegal short-term rental activity in San Francisco have been cut in half since implementation of the SF Ordinance. *See Complaints Related to Illegal Airbnb-Ing in S.F. Cut in Half*, SocketSite (May 15, 2018), available at http://www.socketsite.com/archives/2018/05/complaints-related-to-airbnb-ing-in-san-francisco-have-been-cut-in-half.html. In short, under San Francisco's Ordinance, illegal hotels have been rightfully restored to full-time homes and San Francisco has been able to abate significant nuisances that it previously struggled to address.

B. The SF Ordinance Did Not Break The Internet.

The SF Ordinance has been in effect since last year, and none of the "doom and gloom" (*Roommates.com*, 521 F.3d at 1175) Appellants and their *amici* portend has materialized.

Appellants contend that if the Santa Monica Ordinance is upheld and "direct regulation on e-commerce is allowed to stand," e-commerce generally will be undermined and "dramatically set back." AOB 35. But even with the SF Ordinance in full force and effect, e-commerce has continued to march forward apace. E-commerce platforms, which already generate billions of dollars of revenue, are still "expected to grow exponentially." AOB at 38. And Airbnb itself remains as robust as ever. A $30+ billion company with four million listings and over 200 million guest arrivals in ten years, Airbnb boasts that it "is Global and Growing." Press Release, Airbnb is Global and Growing, Airbnb (Aug. 10, 2017), https://press.atairbnb.com/airbnb-global-growing/.

Amici Chris Cox and NetChoice assert that upholding the Santa Monica Ordinance "will open the door to similar requirements by other municipalities." Cox *Amicus* Br. at 25. They point to Seattle's new short-term rental law as

evidence that this proliferation has already begun, and suggest that the emergence of such laws "could easily damage or shut down Internet platforms." *Id.* Airbnb, however, has "applaud[ed]" Seattle's new rules as "a landmark win for Airbnb hosts and guests." Ben Lane, *Seattle Passes Sweeping Short-term Rental Laws, Limits Airbnb Hosts to Two Units*, HousingWire (Dec. 13, 2017), www.housingwire.com/articles/42078-seattle-passes-sweeping-short-term-rental-laws-limits-airbnb-hosts-to-two-units. And Airbnb and HomeAway's ability to comply with laws like Seattle's and San Francisco's indicates that the burden imposed such laws is not, in fact, so onerous.

eBay and other tech companies writing as amici claim that the Santa Monica Ordinance will "have a chilling effect on speech," "deter innovation," and force platforms that facilitate user transactions to "scale back services." eBay *Amicus* Br. at 8. None of these things has happened since the SF Ordinance went into effect. Consumers can still buy goods on Amazon or eBay, request a car on Uber or Lyft, or book a stay in someone's home on Airbnb or HomeAway. Airbnb announced that it is investing $5 million in its "Experiences" program and will expand the initiative to include 200 cities in the United States this year,[10] rolled out new features for users with disabilities,[11] and debuted a new premium "Plus" program and new listing categories.[12] Uber introduced several new safety features

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[10] *Bringing Airbnb Experiences to 200 US cities in 2018* (Jan. 26, 2018), https://www.airbnbcitizen.com/bringing-airbnb-experiences-to-200-us-cities-in-2018/

[11] Shaun Heasley, *Airbnb Rolls Out New Features for Those With Disabilities*, DisabilityScoop (Mar. 20, 2018), https://www.disabilityscoop.com/2018/03/20/airbnb-new-features-disabilities/24877/.

[12] Khari Johnson, *Airbnb debuts premium Plus program and new listing categories*, VentureBeat (Feb. 22, 2018), https://venturebeat.com./2018/02/22/airbnb-debuts-premium-plus-program-and-new-listing-categories/

for its app.[13] And countless other online companies have made similar changes to their services. There is absolutely no indication that speech has been chilled, innovation has been deterred, or services have been scaled back among online companies.

Even if some negative impact were apparent, this Court has rejected the notion that such policy arguments justify an over-broad application of the CDA:

> It may be true that imposing any tort liability on [a website] for its role as an interactive computer service could be said to have a "chilling effect" on the internet, if only because such liability would make operating an internet business marginally more expensive. But such a broad policy argument does not persuade us that the CDA should bar [all claims]. . . . Congress has not provided an all purpose get-out-of-jail-free card for businesses that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.

Internet Brands, 824 F.3d at 852-53.

New areas of regulation are frequently met with doom and gloom prophesies by regulated entities. But just as Title VII, under which courts began to recognize claims for "sexually hostile work environments," did not in fact force employers to shut down workplaces or otherwise "ruin the camaraderie of workspaces." San Francisco's experience demonstrates that modest local regulation of short-term rental housing has not and will not "break the Internet." Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017).

[13] Dara Khosrowshahi, *Getting Serious About Safety*, Uber Newsroom (Apr. 12, 2018), https://www.uber.com/newsroom/getting-serious-safety/.

CONCLUSION

This Court should affirm the Order of the District Court.

Dated: May 23, 2018

Respectfully submitted,

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FILER'S ATTESTATION

I, Sara J. Eisenberg, certify that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

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STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32-1, I hereby certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(A)(7)(B) because according to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,764 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface.

I declare under penalty of perjury that this Certificate of Compliance is true and correct.

Dated: May 23, 2018

DENNIS J. HERRERA
San Francisco City Attorney
SARA J. EISENBERG
Deputy City Attorney

By: */s/ Sara J. Eisenberg*
SARA J. EISENBERG
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Attorneys for the CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF SERVICE

I, MARTINA HASSETT, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECFsystem on May 23, 2018.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF COLUMBUS, CITY OF OAKLAND, CITY OF SEATTLE, AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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.

Executed May 23, 2018, at San Francisco, California.

/s/ Martina Hassett
MARTINA HASSETT