Case No. 18-55113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA PARK LA BREA A LLC, *et al.*,

Plaintiffs-Appellants,

v.

AIRBNB, INC., *et al.*,

Defendants-Appellees.

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

OPENING BRIEF OF APPELLANTS LA PARK LA BREA A LLC, LA PARK LA BREA B LLC, LA PARK LA BREA C LLC, AND AIMCO VENEZIA, LLC

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CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1(a), Plaintiffs-Appellants submit the following corporate disclosure statement:

Plaintiffs-Appellants LA Park La Brea A LLC, LA Park La Brea B LLC, LA Park La Brea C LLC, and Aimco Venezia, LLC are majority-owned, indirect subsidiaries of Apartment Investment and Management Company ("Aimco"). Aimco has no parent corporation. The following publicly held corporation owns 10% or more of Aimco's stock: Cohen & Steers, Inc.

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INTRODUCTION

This case concerns whether a provision of the Communications Decency Act ("CDA" or "Act"), 47 U.S.C. § 230, immunizes an online business from liability for conduct that would unquestionably subject that business to liability (and government regulation) if conducted outside the Internet. Appellant Aimco, an owner of residential apartment communities, brought this suit to stop Appellee Airbnb from interfering with leases that Aimco has with its tenants. Those tenants contract with Airbnb to rent out Aimco's properties to transient visitors, without Aimco's authorization and in violation of Aimco's leases with the tenants. Airbnb's conduct is actionable under a range of theories, and a brick-and-mortar real estate broker engaged in comparable conduct would have no federal preemption defense. Airbnb persuaded the district court on a motion to dismiss, however, that the CDA preempts Aimco's state-law claims.

The district court's judgment should be reversed. Congress enacted the CDA in 1996 to address the problem of readily available pornography on the nascent Internet. The Act aimed to encourage websites to monitor and remove offensive content. It accomplished that objective by preempting state-law claims that "treat[ ]" a website operator "as the publisher" of information posted by third parties, 47 U.S.C. § 230(c)(1), thereby enabling operators to remove harmful

content without becoming liable as the publishers of everything appearing on their sites.

As interpreted by this Court, § 230 preempts only those causes of action that "'inherently require[] the court to treat'" the defendant "'as a publisher'" of "material posted on the website by someone else." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016) (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)). Claims that "derive liability" from conduct other than publishing are not preempted, *Barnes*, 570 F.3d at 1107, even if a website's publishing conduct is also "a 'but-for' cause of [the plaintiff's] injuries," *Internet Brands*, 824 F.3d at 853. In addition, § 230's preemption provision does not apply if the website operator "is 'responsible, in whole or in part, for the creation or development of' the offending content" appearing on its website. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) ("*Roommates*") (quoting 47 U.S.C. § 230(f)(3)).

The district court's decision in this case disregards those governing principles and establishes a rule of decision that goes far beyond what Congress envisioned. The operative complaint alleges that the online property rental behemoth Airbnb knowingly brokers short-term rentals in Aimco's properties that violate Aimco's leases with tenants. Aimco's complaint premises liability on the suite of rental brokerage and other customer-support services that Airbnb provides

directly to its customers, as well as content that Airbnb creates. It does not premise liability on the display of user-created content on Airbnb's website and expressly disclaims such a theory.

The district court nevertheless deemed Aimco's complaint as "tak[ing] issue" with Airbnb's "publication" of user content. ER 11 (Minute Order Granting Defs.' Mot. to Dismiss (Dec. 29, 2017), ECF No. 55 ("Order")). In doing so, it erroneously treated the test for § 230 preemption as one of but-for causation, despite this Court's rejection of that standard in *Internet Brands*.

The district court also erroneously held that § 230 preempts claims based on Airbnb's own content "because no [listing] has any content until a user actively creates it." ER 8 (*Id.*) (quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003)) (alteration in original). In reaching that conclusion, the court incorrectly relied on language in *Carafano* that the en banc Court in *Roommates* abrogated as "unduly broad." *Roommates*, 521 F.3d at 1171. As the *Roommates* Court explained, "[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate" the statutory language subjecting website operators to liability "for 'develop[ing]' unlawful content 'in whole or in part.'" *Id.* (quoting 47 U.S.C. § 230(f)(3)).

In short, the district court's decision erroneously treated § 230 as precisely what this Court has repeatedly held that it is not: "a general immunity from liability deriving from third-party content." *Barnes*, 570 F.3d at 1100.

JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1332(d)(2). On December 29, 2017, the court granted Airbnb's motion to dismiss all claims with prejudice under Federal Rule of Civil Procedure 12(b)(6). ER 1-13 (Order). Aimco timely filed a notice of appeal on January 26, 2018. ER 14-16 (Notice of Appeal, ECF No. 56); *see* Fed. R. App. P. 4(a)(7)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that 47 U.S.C. § 230(c)(1), which applies only to claims that "treat[]" websites "as the publisher" of information provided by users, preempts Aimco's claims based on the non-publishing services that Airbnb provides to induce and enable Aimco's tenants to rent their apartments to trespassing strangers in violation of the tenants' leases.

2. Whether the district court erred in concluding that 47 U.S.C. § 230, which does not apply to claims based on content a website is "responsible" for "creat[ing] or develop[ing]" even "in part," *id.* § 230(f)(3), preempts Aimco's

claims alleging that Airbnb creates and develops content that allows Airbnb's customers to book and pay for property rentals in violation of Aimco's leases.

3. Whether the district court erred in dismissing Aimco's complaint with prejudice where Aimco requested leave to amend and the district court gave no reason for denying it.

STATUTE

47 U.S.C. § 230 is reproduced in an addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Context

In 1996, the Internet was an "absolutely brand-new technology," a "literal computer library" full of "potential . . . in terms of education and political discourse." 141 Cong. Rec. H8468-69 (Aug. 4, 1995) (statement of Rep. Cox). But that library was also plagued with obscene and "offensive material . . . that our children ought not to see," *id.* at H8469 — material that threatened the Internet's potential as a "forum" for "political discourse," "cultural development," and "intellectual activity," 47 U.S.C. § 230(a)(3). Congress considered various measures to address the "problem of . . . keeping pornography" and "offensive material away from our kids" so that "everyone in America" would "feel[ ] welcome" online. 141 Cong. Rec. H8469-70 (statement of Rep. Cox).

One concern was the "massive disincentive" in the "existing legal system" for online providers to police content on their platforms. *Id.* at H8469. Two court decisions exemplified the problem. *See id.* One held that an online provider that passively allowed users to post defamatory material was akin to a library, which generally cannot be held liable for the contents of publications that it innocently distributes. *See id.* (discussing *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139-40 (S.D.N.Y. 1991)). The other held that an online network that monitored and removed offensive content so as to offer "family-friendly" web-surfing was akin to a newspaper publisher and subject to defamation liability for material that it did not remove. *See id.* at H8469-70 (discussing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995)). Members of Congress thought that it was "backward," *id.* at H8470, to hold platforms that tried to remove obscene content liable for posts that they missed, while giving those that "bur[ied] their heads in the sand" a free pass, *Roommates*, 521 F.3d at 1163.

The provision that became § 230 was proposed to "overrule *Stratton-Oakmont*," H.R. Conf. Rep. No. 104-458, at 194 (1996), and to allow online platforms to "perform some editing on user-generated content without thereby becoming liable for all defamatory or otherwise unlawful messages that they didn't edit or delete," *Roommates*, 521 F.3d at 1163. The Conference Report described

the proposed provision as creating "'Good Samaritan' protections from civil liability for providers or users of an interactive computer service for actions [taken] to restrict or to enable restriction of access to objectionable online material." H.R. Conf. Rep. No. 104-458, at 194. Although the Conference Report referred to preempting liability for providers that edit user-generated content as "[o]ne of the specific purposes" of the provision, *id.*, this Court has recognized that overruling *Stratton Oakmont* "seems to be the principal or perhaps the only purpose," because the Report does not describe any other purposes "beyond supporting 'the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services,'" *Roommates*, 521 F.3d at 1163 & n.12 (quoting H.R. Conf. Rep. No. 104-458, at 194).

The proposed "Good Samaritan" provision was ultimately enacted as part of the CDA and codified at 47 U.S.C. § 230.[1] Section 230(c), the provision at issue in this case, is titled "Protection for 'Good Samaritan' blocking and screening of

[1] The CDA was one portion (Title V) of the much larger Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 133-43. The Supreme Court has observed that, whereas most of the Telecommunications Act was "the product of extensive committee hearings" and congressional reports, the CDA "contains provisions that were either added in executive committee after the hearings were concluded or as amendments offered during floor debate on the legislation." *Reno v. ACLU*, 521 U.S. 844, 858 & n.24 (1997); *see also* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Commc'ns L.J. 51, 67-69, 91-92 (1996).

offensive material." 47 U.S.C. § 230(c). It states in pertinent part: "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." *Id.* § 230(c)(1).[2]

This Court applies a three-part test for determining whether § 230 preempts a state-law cause of action: "subsection (c)(1) precludes liability for '(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.'" *Internet Brands*, 824 F.3d at 850 (quoting *Barnes*, 570 F.3d at 1100-01). With respect to the first element, this Court has interpreted the statutory definition of "interactive computer service," 47 U.S.C. § 230(f)(2), to include "websites," *see Roommates*, 521 F.3d at 1162 n.6. The second and third elements are at issue in this appeal.

[2] Section 230 also contains a savings clause and an express preemption provision. The savings clause provides that "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section." 47 U.S.C. § 230(e)(3). The express preemption provision states that "[n]o 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.*

B. Factual Background

1. Airbnb's brokerage services

Airbnb is "in the business of providing rental brokerage and booking services for short-term rental transactions between owners or renters of property and prospective tourists or transient users of property."[3] Its estimated value exceeds $30 billion,[4] and it projects that its annual profits will top $3 billion by 2020.[5] As of December 2017, Airbnb's website offered more than 4 million properties for rent; during 2017, Airbnb brokered "[m]ore than 1.3 million guest arrivals" in Los Angeles alone.[6]

Airbnb provides a full range of brokerage services to facilitate, promote, and support short-term rentals — transactions that are often prohibited by property

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[3] ER 226 (First Am. Compl. ¶ 10 (June 6, 2017), Ex. A to Notice of Removal (filed July 3, 2017), ECF No. 01-01 ("Compl.")).

The Court assumes the truth of Aimco's factual allegations. *See*, *e.g.*, *Barnes*, 570 F.3d at 1098 n.1. For additional context, and in support of its argument that the district court erred in dismissing the complaint with prejudice, this section also refers to factual materials submitted in connection with Aimco's motion for a preliminary injunction, as well as publicly available information regarding Airbnb's business.

[4] *See* Greg Bensinger, *Airbnb Valued at $31 Billion After New Funding Round*, Wall St. J. (Mar. 9, 2017), https://www.wsj.com/articles/airbnb-valued-at-31-billion-after-new-funding-round-1489086240.

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

[6] *See* ER 47 (Decl. of Airbnb Executive Alex Ward in Supp. of Defs.' Opp'n to Pls.' Mot. for a Prelim. Inj. ¶ 5 (Dec. 8, 2017), ECF No. 50 ("Ward Decl.")).

owners and local laws. *See*, *e.g.*, ER 226-230, 232, 241 (Compl. ¶¶ 10-23, 27, 35, 70). As described below, tenants wishing to rent their apartments need only provide basic information about a property, and Airbnb handles the rest, including scheduling and confirming reservations; sending the property address to the traveler after a reservation is paid for; accepting, holding, and delivering payment to tenants; calculating, collecting, and remitting applicable taxes; mediating and deciding disputes; providing insurance; paying for property damage; and allowing tenants and travelers to communicate without sharing personal information. Airbnb has characterized those "booking, calendaring, and payment processing services" as "fundamental" aspects of its "business model," emphasizing that it provides those services "in connection with *all* of the listings on its platform." ER 49 (Ward Decl. ¶ 33).

Airbnb's brokerage services include the following:

Listing Services. Airbnb solicits information from Aimco's tenants to create listings for their properties. ER 226-227 (Compl. ¶ 12). Airbnb assures tenants that its "content strategy team" is "there every step of the way" to help tenants offer "the kind of hospitality our guests look for."[7] A tenant who wants to list a

[7] ER 72 (Decl. of Michael T. Williams (Oct. 18, 2017), ECF No. 23-17 ("Williams Decl.")); ER 103-104 (Ex. N to Williams Decl., ECF No. 23-31).

property on Airbnb begins by filling out a series of forms on Airbnb's website with check boxes for property features and amenities, such as the number of bathrooms and the availability of a hair dryer, pool, or gym.[8] The tenant must also upload a photo of the property. ER 226-227 (Compl. ¶ 12). Airbnb offers to connect tenants with professional photographers, ER 227 (*Id.* ¶ 17); ER 108-111 (Williams Decl. Ex. O, ECF No. 23-32); it will "pay for that photography" in some markets, ER 113 (Williams Decl. Ex. V, ECF No. 23-39) (quoting Airbnb's website); and it displays photos taken by Airbnb-provided photographers as "[v]erified," ER 56 (Airbnb's Terms of Service ¶ 5.6, Ward Decl. Ex. A, ECF No. 50-01 ("TOS")). Airbnb also enables tenants to feature their properties as suitable for business travelers[9] or as properties that Airbnb has "[v]erified for quality" — such as offering "excellent bath products" and "[p]lenty of towels and fluffy pillows" — according to a "100+ point quality inspection."[10]

[8] ER 175-176 (Decl. of Anthony Tanner ¶¶ 51-53 (Oct. 18, 2017), ECF No. 23-8 ("Tanner Decl.")); ER 179-206 (Tanner Decl. Ex. E, ECF No. 23-13). Airbnb also offers to connect new hosts with a "mentor." ER 210 (Tanner Decl. Ex. G, ECF No. 23-15).

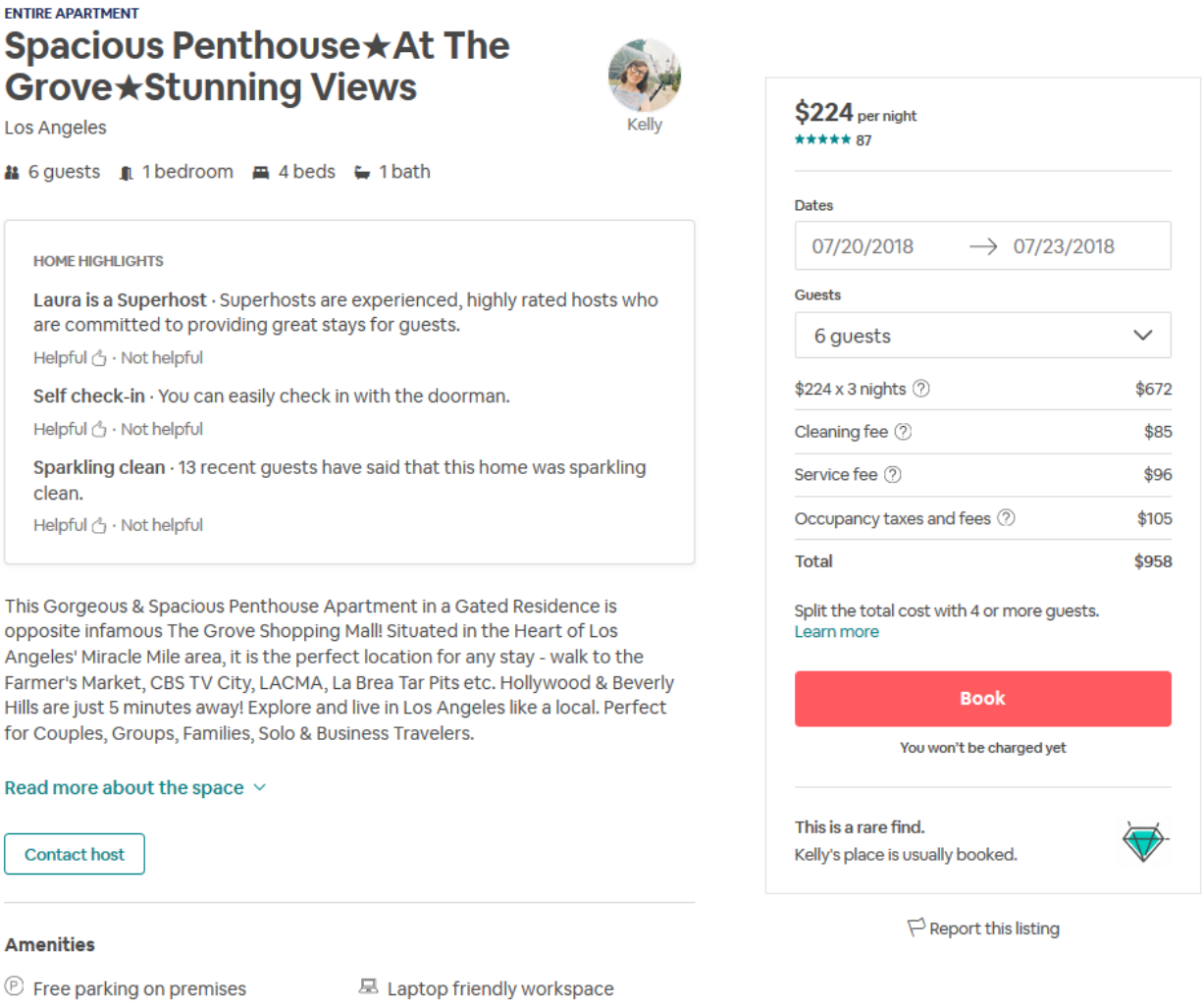
[9] *See* Homes For Work Trips, https://bit.ly/2sNZiLB (shortened URL for Airbnb website, last accessed June 22, 2018).

[10] Airbnb Plus Homepage, https://www.airbnb.com/plus (last accessed June 22, 2018).

Using the information solicited from the tenant, Airbnb creates a "listing" for advertisement on Airbnb's website. ER 226-227 (Compl. ¶ 12). The "listing" is not a passive display of the tenant's description of the property, akin to a newspaper advertisement for an apartment to rent. Rather, Airbnb incorporates the tenant's property description into a series of pages in a standard format that also displays Airbnb's content,[11] such as its booking, payment, and messaging tools, as shown in the following listing[12]:

[11] ER 55 (TOS § 5.1) (defining "Member Content," "Airbnb Content," and "Collective Content").

[12] *See* Spacious Penthouse At The Grove Stunning Views, https://bit.ly/2l5lIna (shortened URL for Airbnb website, last accessed June 14, 2018). Aimco's counsel entered the number of guests and the desired dates into the booking box on the right. According to the listing, "Kelly" is the property manager of "Laura's place."



Airbnb does not charge fees for creating and displaying rental listings on its website. ER 227 (Compl. ¶ 13). Instead, like a traditional rental broker, Airbnb collects percentage commissions from tenants and travelers, ER 227 (*id.* ¶ 14), which are 3-5% for hosts and up to 15% for guests, ER 100 (Williams Decl. Ex. M, ECF No. 23-30).

Booking Services. Airbnb books short-term rentals. The tenant enters the dates on which the property is available to rent into Airbnb's "calendaring service." ER 47, 49 (Ward Decl. ¶¶ 8, 33). The tenant also chooses either a set

price (Airbnb suggests one based on its market data) or a range of prices, in which case Airbnb's "Smart Pricing" tool will automatically drop the price in low-demand times and increase the price when rooms are scarce. ER 227 (Compl. ¶ 18); ER 89 (Williams Decl. Ex. D, ECF No. 23-21) (Airbnb website: "When you create a listing on Airbnb, we suggest a price for your property based on your location and other factors.").

A traveler seeking to book a rental enters the dates she wants to stay in the Airbnb's booking box in the listing. Like a brick-and-mortar real estate broker, Airbnb determines whether the property is available and, if so, the cost of the rental including applicable taxes and Airbnb's fees. ER 226-227 (Compl. ¶¶ 12, 14); ER 47 (Ward Decl. ¶ 8); ER 96-98 (Williams Decl. Ex. K, ECF No. 23-28).

Payment Services. Airbnb provides a suite of payment services to effectuate short-term rental transactions. ER 227 (Compl. ¶ 16).[13] Airbnb collects funds from the traveler "when a reservation is made." ER 89 (Williams Decl. Ex. D) (Airbnb website). After the rental period begins, Airbnb delivers a "payout" to the tenant, consisting of the payment collected less applicable taxes and Airbnb's fees.

[13] *See* ER 85 (Williams Decl. Ex. B, ECF No. 23-19) (Airbnb promotional document: "Guests are required to pay through Airbnb's secure payment platform when they book a listing"); ER 88-89 (Williams Decl. Ex. D) (Airbnb website: "Airbnb's secure payment system means you never have to deal with money directly"; and "[a]ll payments are processed securely through Airbnb's online payment system").

ER 89 (*Id.*); ER 227 (Compl. ¶ 17); ER 133, 136 (Airbnb's Payment Terms of Service §§ 7.1, 7.2.1, 7.2.2, 11.1, Williams Decl. Ex. SS, ECF No. 23-61 ("PTOS")). If the traveler cancels before the reservation date, Airbnb issues any refunds due according to Airbnb's and the tenant's cancellation policies. ER 133-135 (PTOS §§ 7.3.2, 10.2); *see* ER 59 (TOS § 9.5) (providing Airbnb the right to cancel a confirmed booking in certain circumstances).

Insurance and Dispute-Resolution Services. Airbnb provides numerous services to address disputes between tenants and travelers. For tenants, Airbnb provides $1 million of liability insurance[14] and a "Host Guarantee" to cover property damage of up to $1 million.[15] For travelers, Airbnb provides a "Guest Refund Policy" under which travelers can obtain reimbursement for amounts paid to Airbnb if they are unable to obtain access to the property or experience other "travel issue[s]." ER 228 (Compl. ¶ 20); ER 124 (Williams Decl. Ex. OO, ECF No. 23-57) (terms of Airbnb's Guest Refund Policy "supersede" tenants' cancellation policies).

[14] ER 228 (Compl. ¶ 19); ER 120 (Williams Decl. Ex. LL, ECF No. 23-54) (Airbnb's "Host Protection Insurance program provides primary liability coverage for up to $1 million per occurrence" for "third party claims of bodily injury or property damage").

[15] ER 116-118 (Williams Decl. Ex. KK, ECF No. 23-53) (describing Host Guarantee).

Airbnb also requires tenants and travelers to agree to participate in mediation conducted by Airbnb or a mediator of its choosing to resolve property-damage claims. ER 60 (TOS § 11.3). In addition, travelers authorize Airbnb to charge their payment method on file if "Airbnb determines in its sole discretion" that the traveler is responsible for property damage. ER 60 (TOS § 11.2); ER 136 (PTOS § 12.1). Travelers also authorize Airbnb to seek reimbursement from the traveler's homeowner's or other insurance policy. ER 60 (TOS § 11.4). When travelers overstay their rental period, Airbnb charges their credit cards according to Airbnb's overstay policy. ER 58 (TOS § 8.2.2); ER 134 (PTOS § 8.6). If travelers fail to pay, Airbnb engages in collection efforts to recover unpaid amounts. ER 135-136 (PTOS § 10.8).

Communications Services. Airbnb enables tenants to advertise, book, and pay for rentals without revealing their identities or locations. ER 233-234 (Compl. ¶¶ 44-45). Airbnb does not display property addresses on its website and provides a traveler with an apartment's exact location only after the reservation is booked. ER 92 (Williams Decl. Ex. H, ECF No. 23-25). Indeed, Airbnb requires its customers to conceal property locations: "[c]ontent that is sufficient to identify a listing's location" violates Airbnb's content policy,[16] and Airbnb removes

[16] What is Airbnb's Content Policy?, https://www.airbnb.com/help/article/546/what-is-airbnb-s-content-policy (last accessed June 18, 2018).

user-provided content that violates this policy, ER 56 (TOS § 5.8); ER 214 (Tanner Decl. Ex. H, ECF No. 23-16) (email from Airbnb to user stating that Airbnb had removed a user-provided photo that violated Airbnb's prohibition on "direct contact information," including "addresses").

Airbnb also maintains "a smart messaging system" so that tenants and travelers can "communicate with certainty." ER 227 (Compl. ¶ 16) (quoting Airbnb's website). The system forwards messages to customers' personal email accounts, so tenants can appear only as a first name and profile photo while "[k]eeping [their] real personal email address hidden." ER 129 (Williams Decl. Ex. RR, ECF No. 23-60) (quoting Airbnb's website); ER 93-95 (Williams Decl. Ex. I, ECF No. 23-26).

Airbnb's communications services reduce the inherent risk of renting to strangers and, for those renting properties unlawfully, dramatically reduce the risk of detection. *See Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066, 1070 (N.D. Cal. 2016) (city enforcement of short-term rental ordinance is "hampered" when websites like Airbnb enable rentals while concealing addresses and contact information).[17]

[17] *See* Benjamin G. Edelman & Abbey Stemler, *From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces* 15-16, 27 (Jan. 31, 2018) (Harv. Bus. Sch. NOM Unit Working Paper, Paper No. 18-063), HARV. J. ON LEGIS. (forthcoming), https://ssrn.com/abstract=3106383.

2. Neighbors and communities struggle to deal with Airbnb

Airbnb's turnkey services make it easy for tenants to rent their apartments to strangers: all tenants need to do is provide basic property information, and Airbnb handles the booking, payment, insurance, and disputes. That makes Airbnb attractive to individuals renting out their homes, as well as commercial "hosts" renting multiple properties on a full-time basis.[18] For example, an investigation by the New York Attorney General found that 6% of Airbnb hosts account for 36% of private listings, many of which are vacant when not rented through Airbnb.[19]

As Airbnb and its customers have profited, neighbors and communities have frequently suffered. Communities are hurt as short-term rentals reduce the stock of rental housing and increase housing prices.[20] Neighbors suffer because travelers

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[18] *See* Br. *Amicus Curiae* of Unite Here International Union in Supp. of Def./Appellee City of Santa Monica at 4-9, *HomeAway.com, Inc. v. City of Santa Monica*, No. 18-55367 (9th Cir. filed May 23, 2018), ECF No. 42 ("*HomeAway Appeal*").

[19] *See* OFFICE OF N.Y. ATT'Y GEN. ERIC SCHNEIDERMAN, *Airbnb in the City* at 2-3 (Oct. 2014) (also finding that 38% of units on Airbnb are used for "short-term rentals for more than half the year"), https://ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf.

[20] *See* David Wachsmuth et al., *The High Cost of Short-Term Rentals in New York City* at 2, URB. POL. & GOVERNANCE RES. GRP. (Jan. 30, 2018) (finding that Airbnb has reduced housing supply and increased median rent), https://mcgill.ca/newsroom/files/newsroom/channels/attach/airbnb-report.pdf; *Short-Term Rentals, Long-Term Impacts: The Corrosion of Housing Access and Affordability in New Orleans* at 3-4, JANE PLACE NEIGHBORHOOD SUSTAINABILITY INITIATIVE (Mar.

who will be gone in the morning have little reason to care about maintaining friendly and respectful relations with neighbors. Some travelers book Airbnb units for the specific purpose of loud parties, prostitution, and drug use. ER 231-232 (Compl. ¶¶ 31-34). Residents of Appellants' properties have complained that Airbnb guests are "generally disruptive and disrespectful" and that the unauthorized use of Airbnb is "destroying," "degrading," and "ruining" their communities.[21] And even the best-behaved guests cannot replicate what is lost when neighbors are replaced by a revolving cast of vacationers: as one long-term resident whose L.A. neighborhood had become popular on Airbnb put it, "I have no real neighbors anymore."[22]

Victims of the short-term rental boom have struggled to respond. Cities seeking to stop the conversion of full-time housing stock have enacted laws governing where, how frequently, or for how long units may be rented — only to have those ordinances challenged in court by Airbnb and other short-term rental brokers. *See, e.g.*, *Airbnb*, 217 F. Supp. 3d at 1070 (San Francisco requires Airbnb hosts to be a "permanent resident[ ]" and to register with the city); *HomeAway.com*,

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2018), https://www.documentcloud.org/documents/4421169-Short-Term-Rentals-Long-Term-Impacts-the.html.

[21] Pls.' Notice of Mot. & Mot. for Prelim. Inj.; Mem. of Points & Authorities in Supp. Thereof at 8-10 (Oct. 18, 2017), ECF No. 23 ("Pls. Prelim. Inj. Mem."); *see also* ER 232-233 (Compl. ¶¶ 37-43).

[22] ER 163 (Williams Decl. Ex. HHH, ECF No. 23-76).

Inc. v. City of Santa Monica, No. 2:16-cv-06641-ODW (AFM) ("*HomeAway*"), 2018 WL 1281772, at *1 (C.D. Cal. Mar. 9, 2018) (Santa Monica prohibits vacation rentals where the host does not remain in the property), *appeal pending*, No. 18-55367 (9th Cir. filed Mar. 21, 2018).

In addition, many property owners have sought to offer their residents a quiet, safe, Airbnb-free community through lease conditions prohibiting short-term rentals. Appellants are among such property owners. ER 230 (Compl. ¶¶ 27-28).

3. Airbnb knowingly brokers short-term rentals that violate Aimco's leases

Appellants (referred to collectively as "Aimco"[23]) own several rental communities in Los Angeles County and manage those communities to protect residents' safety and quality of life. ER 229 (Compl. ¶¶ 24-25). Every tenant's lease includes a clause that prohibits the tenant from renting the apartment through Airbnb or similar services. ER 230 (*Id*. ¶ 27).[24]

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[23] Appellants are LA Park LA Brea A LLC, LA Park La Brea B LLC, LA Park La Brea C LLC, and Aimco Venezia, LLC. ER 223-225 (Compl. ¶¶ 1-4). Apartment Investment and Management Company ("Aimco") is Appellants' parent company. ER 234 (*Id*. ¶ 45).

[24] The provision in Aimco's standard form lease states as follows:

> Resident shall not sublet the Apartment or assign this Lease for any length of time, including, but not limited to, renting out the Apartment using a short term rental service such as airbnb.com, VBRO.com or homeaway.com. Any purported assignment or sublet of this Lease or the Apartment Home

Airbnb has brokered hundreds of rentals that violate that lease provision — and municipal law[25] — causing many of the problems for which Airbnb has become notorious. ER 232 (*Id.* ¶ 37). Airbnb guests have held loud, late-night parties, gotten into fights, and ignored rules governing community amenities. ER 230-231, 233 (*Id.* ¶¶ 29, 38-43). Frustrated residents have moved out, and Aimco has been forced to hire additional security, repair property damage, and incur other costs. ER 230-231, 233 (*Id.* ¶¶ 29, 42-43). Although Aimco has committed extensive resources to trying to identify the tenants who are renting their units on Airbnb, Airbnb's anonymous platform makes it extremely difficult to do so. ER 233-234 (*Id.* ¶¶ 44-45).

In 2016, Aimco requested Airbnb's help in preventing unlawful short-term rentals in Aimco's properties. ER 234-236 (*Id.* ¶¶ 45-52). After being advised by Airbnb that it would help reduce short-term rental activity, Aimco provided a copy of its standard lease agreement, and it identified listings suspected of being Aimco

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> without the prior written consent of [the] Landlord is null and void.

ER 230 (Compl. ¶ 27).

[25] Rentals of less than 30 days in Aimco's properties violate the Los Angeles zoning code. *See* ER 18-19 (Suppl. Decl. of Michael T. Williams ¶¶ 21-25, Ex. 6 of Pls.' Reply in Supp. of Mot. for Prelim. Inj., ECF No. 54-1 ("Williams Suppl. Decl.")); ER 21-26 (Williams Suppl. Decl. Ex. D, ECF No. 54-5); ER 27-32 (Williams Suppl. Decl. Ex. E, ECF No. 54-6); ER 33-38 (Williams Suppl. Decl. Ex. F, ECF No. 54-7); ER 39-44 (Williams Suppl. Decl. Ex. G, ECF No. 54-8).

apartments rented unlawfully through Airbnb. ER 234-235 (*Id*. ¶ 49). Despite its earlier assurances, Airbnb refused to stop brokering prohibited rentals in Aimco's properties. ER 235 (*Id*. ¶¶ 50-51). Airbnb advised Aimco that Airbnb could provide some "transparency into home sharing activity in a building" and permit some control over rental activity, but only if Aimco agreed to allow Airbnb rentals. ER 229, 234 (*Id*. ¶¶ 23, 46-47). Airbnb continues to broker rentals in violation of Aimco's leases, and travelers booking rentals through Airbnb continue to cause problems for Aimco and its rule-abiding residents. ER 236 (*Id*. ¶¶ 53-54).

C. Procedural History

In February 2017, Aimco commenced an action in California Superior Court against Airbnb, Inc. and Airbnb Payments, Inc. (referred to collectively as "Airbnb").[26] In June 2017, it filed an amended complaint seeking relief on behalf of a class of similarly situated property owners. ER 221-253 (Compl.). The operative complaint seeks relief for Airbnb's brokering of short-term rentals at Aimco's properties over Aimco's repeated objections and in violation of Aimco's leases. ER 230, 232, 239 (*Id*. ¶¶ 27, 37, 62-64). The complaint pleads California statutory and common-law causes of action for tortious interference with contract, intentional and negligent interference with prospective economic advantage, unjust

[26] ER 254-267 (Original Compl. (Feb. 14, 2017), Ex. C to Notice of Removal (filed July 3, 2017), ECF No. 01-03) (removal from *La Park La Brea A LLC v. Airbnb, Inc.*, No. BC650575 (Cal. Super. Ct., L.A. Cty.)).

enrichment, trespass, aiding and abetting trespass, private nuisance, and violation of California Business & Professions Code § 17200 *et seq.*, governing unfair and deceptive business practices. ER 243-249 (Compl. ¶¶ 82-137).

Aimco's claims are "premised on Airbnb's own conduct as a rental broker that knowingly and wrongfully induces breaches of existing contracts, interferes with Plaintiffs' prospective economic advantage, and violates Plaintiffs' property rights." ER 239 (*Id.* ¶ 63). The complaint requests damages and equitable relief, including an injunction prohibiting Airbnb from "entering into short-term rental transactions" with tenants and travelers seeking to rent Aimco's apartments and from "processing payments for the rental of" its apartments. ER 239 (*Id.* ¶ 64). The complaint disclaims liability arising from "third-party content [that Airbnb] may have published on its website." ER 239 (*Id.*).

After Aimco filed the amended complaint, Airbnb removed the action to federal district court and moved to dismiss.[27] As relevant here, Airbnb argued that Aimco's claims are "preempted by" § 230 because its brokerage and booking services are "inextricably intertwined with" the "publishing [of] third-party listings" for short-term rentals. MTD at 20, 24.

[27] *See* Defs.' Notice of Mot. & Mot. to Dismiss First Am. Compl.; Mem. of Points & Authorities in Supp. Thereof (Aug. 7, 2017), ECF No. 16 ("MTD").

In opposition, Aimco explained that § 230, as interpreted by this Court, does not preempt Aimco's claims for two independent reasons.[28] *First*, none of Aimco's claims "treat[s]" Airbnb as a "publisher" of third-party content. 47 U.S.C. § 230(c)(1). On the contrary, Aimco seeks to hold Airbnb responsible for the wide range of brokerage services that Airbnb provides to Aimco's tenants, not for publishing third-party content. *See* Pls. Opp'n at 24. *Second*, § 230 "applies only if the interactive computer service provider is not also an 'information content provider,' which is defined as someone who is 'responsible, in whole or in part, for the creation or development of' the offending content." *Roommates*, 521 F.3d at 1162 (quoting 47 U.S.C. § 230(f)(3)). Aimco's claims are not preempted because Aimco seeks to hold Airbnb liable as an 'information content provider of *Airbnb's own* "offending content" that interferes with Aimco's contractual and property rights. Pls. Opp'n at 24.[29] Aimco requested leave to amend if the court dismissed any of its claims. *See id.* at 25.

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[28] *See* Pls.' Opp'n to Defs.' Mot. to Dismiss First Am. Compl. at 23-25 (Sept. 27, 2017), ECF No. 20 ("Pls. Opp'n").

[29] In October and November 2017, Aimco moved for preliminary injunctive relief from the irreparable harm to its business resulting from Airbnb's ongoing tortious conduct and sought limited discovery in support of that motion. *See* Pls. Prelim. Inj. Mem.; Pls.' Notice of Mot. & Mot. for Limited Expedited Disc.; Mem. of Points & Authorities in Supp. Thereof (Nov. 7, 2017), ECF No. 41. After granting Airbnb's motion to dismiss, the district court denied those motions as moot. ER 1-2, 12-13 (Order).

In December 2017, the district court granted Airbnb's motion to dismiss, holding that § 230 preempts Aimco's claims. ER 1-13 (Order). The court acknowledged Aimco's argument that the complaint "is not premised on the Airbnb listings, but on Airbnb's own misconduct — contracting with Aimco's tenants (or failing to refrain from contracting with Aimco's tenants) and processing payments for rentals of Aimco-owned apartments," ER 9 (*id.*), among other misconduct, ER 2-3 (*id.*) (recounting complaint's allegations regarding the numerous services Airbnb provides "[t]o encourage and facilitate booking"). But the court nevertheless concluded that "it is with Airbnb's publication of this content [i.e., listings] that Aimco takes issue." ER 11 (*Id.*). The court did not explain that conclusion, except to state without elaboration that Aimco had sought "to plead around the CDA." ER 11 (*Id.*); *see* ER 9 (*id.*) (stating "'creative pleading' does not place this case outside the CDA's purview") (quotation omitted). The court also cited out-of-circuit cases that it read as having "come out the same way with respect to the CDA's coverage on analogous facts." ER 10 (*Id.*); *see* ER 9 (*id.*) (asserting that "[c]ourts have granted CDA protection to websites that process payments").

The district court also held that Airbnb could not be subject to liability as an information content provider for information that Airbnb itself created. ER 7-8 (*Id.*). Relying on language in *Carafano* that this Court abrogated as "unduly

broad" in *Roommates*, 521 F.3d at 1171, the district court reasoned that, "because no [listing] has any content until a user actively creates it," Airbnb is not an information content provider, and § 230 preempts Aimco's claims based on Airbnb's content, ER 8 (Order) (alteration in original).

SUMMARY OF ARGUMENT

The district court erred in granting Airbnb's motion to dismiss Aimco's claims as preempted by the Communications Decency Act, 47 U.S.C. § 230. By its plain terms, § 230 preempts only claims that "treat[]" a defendant like Airbnb "as the publisher or speaker of any information provided by another information content provider." *Id*. § 230(c)(1). Thus, § 230 does not preempt a claim if either: (1) the claim premises liability on conduct other than publishing or (2) the claim premises liability on the defendant's own information content, not content wholly provided by a user. The district court erred in dismissing Aimco's complaint under § 230 because Aimco's claims seek to hold Airbnb liable for its non-publishing brokerage services and for content of Airbnb's own creation.

I. Section 230 does not apply here because Aimco's claims derive liability from Airbnb's brokerage services, not publishing. A claim "treats" a defendant "as the publisher" if it "derive[s] liability from behavior that is identical to publishing" user content. *Barnes*, 570 F.3d at 1100-02, 1107. Section 230 does not preempt a claim merely because publication of user content is a but-for cause

of the plaintiff's injury. *See Internet Brands*, 824 F.3d at 853. The district court failed to follow *Barnes* and *Internet Brands*. Instead, although the court recognized that Aimco's claims for relief in its operative complaint were based on Airbnb's non-publishing conduct — its rental brokerage services — it nevertheless dismissed Aimco's complaint based on its unexplained assertion that Aimco "t[ook] issue" with Airbnb's publication of rental listings. ER 11 (Order). Compounding the error, the district court relied on a superseded complaint and off-point, out-of-circuit decisions.

II. In addition, § 230 does not preempt liability based on Airbnb-created content — the online tools and information Airbnb provides that induce and enable tenants to take advantage of Airbnb's brokerage services — because Airbnb is "responsible" for the "creation or development" of that content. 47 U.S.C. § 230(f)(3). Airbnb's content makes it possible for Aimco's tenants to book unauthorized rentals while evading detection, and therefore "contributes materially to the alleged illegality." *Roommates*, 521 F.3d at 1168. In reaching a contrary conclusion, the district court relied on "unduly broad" language from an earlier decision that the en banc Court in *Roommates* expressly abrogated. *Compare* ER 7-8 (Order) (relying on *Carafano*, 339 F.3d at 1124) *with Roommates*, 521 F.3d at 1171 (abrogating *Carafano* in relevant part).

III. In any event, the district court abused its discretion in dismissing the complaint with prejudice because it offered no reason for rejecting Aimco's request for leave to amend.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to grant a motion to dismiss. *See Internet Brands*, 824 F.3d at 849. The failure to grant leave to amend is reviewed for abuse of discretion. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (per curiam).

ARGUMENT

I. SECTION 230 DOES NOT PREEMPT AIMCO'S COMPLAINT BECAUSE THE CLAIMS DO NOT "TREAT" AIRBNB "AS THE PUBLISHER" OF USER CONTENT

A. Section 230 Preempts Only Claims That Derive Liability From Publishing

1. Section 230(c)(1) preempts only "certain kinds of lawsuits": those that would "treat[ ]" a website operator "as the publisher or speaker of any information provided by another information content provider." *Barnes*, 570 F.3d at 1099-1100 (quoting 47 U.S.C. § 230(c)(1)) (emphasis omitted). To determine whether a claim "treat[s]" a provider "as the 'publisher,'" this Court looks to "whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher.'" *Id.* at 1102. "[P]ublication," this Court has explained, "involves reviewing, editing, and deciding whether to publish

or to withdraw from publication third-party content." *Id.* Thus, "[a] clear illustration of a cause of action that treats a website proprietor as a publisher is a defamation action founded on the hosting of defamatory third-party content." *Internet Brands*, 824 F.3d at 851.

This Court has also held that § 230 does *not* apply to every case in which publishing activity "could be described as a 'but-for' cause of [the plaintiff's] injuries." *Id.* at 853. Because "[p]ublishing activity is a but-for cause of just about everything" online companies do, *id.*, more is required to trigger preemption under § 230. For § 230 to preempt a claim, the "*duty*" alleged to have been violated must "derive[] from" publishing. *Barnes*, 570 F.3d at 1102 (emphasis added). Otherwise, § 230 would provide "an all purpose get-out-of-jail-free card for businesses that publish user content on the internet," *Internet Brands*, 824 F.3d at 853 — a result this Court has repeatedly rejected. *See Barnes*, 570 F.3d at 1100 (§ 230 does not "declare[] a general immunity from liability deriving from third-party content"); *Roommates*, 521 F.3d at 1164 (§ 230 "was not meant to create a lawless no-man's-land on the Internet").

2. *Barnes* and *Internet Brands* illustrate the proper application of § 230. In *Barnes*, a woman whose ex-boyfriend maliciously created a fake Yahoo profile for purposes of harassing her brought suit against Yahoo for promising to remove the profile, but failing to do so. *See* 570 F.3d at 1098-99. She alleged two

theories: negligent undertaking and promissory estoppel. *See id.* at 1102-03, 1106. This Court held that the negligent-undertaking claim was preempted because it alleged that Yahoo had undertaken to remove content and failed to do so with due care — a claim that "necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1103.

In contrast, § 230 did not bar the promissory-estoppel claim because that claim derived liability from "Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication." *Id.* at 1107. Section 230 did not apply even though the promise was "to take down third-party content from [Yahoo's] website, which is quintessential publisher conduct." *Id.* The "difference" was that, unlike the negligent-undertaking claim, the promissory-estoppel claim did not "derive liability from behavior that is identical to publishing or speaking." *Id.* The "legally significant event" from which liability derived was the failure to honor a promise, *id.*, not publishing.

In *Internet Brands*, this Court reaffirmed that the "essential question" for determining whether § 230 bars a claim is whether the claim "'inherently requires'" the defendant to be treated as the publisher of user content. 824 F.3d at 850 (quoting *Barnes*, 570 F.3d at 1102). The plaintiff in *Internet Brands* was a model who was raped by fake "talent scouts" she met through a modeling website. *Id.* at 848-49. She brought a failure-to-warn suit against the website company,

alleging that the website's operators knew and should have warned her that the rapists had previously used the site to lure their victims. *See id.* at 850-51. This Court reversed the dismissal of the complaint because the plaintiff's claim was premised on the website's failure to warn her, and not the content published by the provider. *See id.* at 851. Section 230 did not apply — even though the defendant could have satisfied its duty to warn by "posting a notice on the website," which "could be deemed an act of publishing information." *Id.*; *see also Beckman v. Match.com, LLC*, 668 F. App'x 759, 759 (9th Cir. 2016) (mem.) (reversing dismissal of failure-to-warn claim under *Internet Brands*).

3. Other circuits have similarly recognized that § 230's preemptive scope is limited to claims deriving liability from publishing user content. The Seventh Circuit held that § 230 did not prevent the City of Chicago from enforcing an ordinance requiring ticket "reseller's agent[s]," including websites publishing third-party ticket advertisements, to collect and remit ticket taxes. *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 365 (7th Cir. 2010). StubHub, one such website, argued that enforcing the ordinance would treat it as a publisher of users' ticket advertisements. *Id.* The Seventh Circuit held § 230 was "irrelevant" because the duty imposed by the ordinance "does not depend on who 'publishes' any information." *Id.* at 366; *see also FTC v. LeadClick Media, LLC*, 838 F.3d 158,

176-77 (2d Cir. 2016) (recognizing that § 230 does not bar claims based on non-publishing conduct).[30]

4. By looking to the act from which liability derives and not the potential publishing effects of that liability, this Court's approach comports with the Supreme Court's rejection of an "effects-based test" for preemption in *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 445 (2005). *Bates* rejected an argument that a federal statute preempting state pesticide labelling requirements applied to any cause of action that would give a company "a 'strong incentive' to change its label." *Id.* at 436. The Supreme Court dismissed that "inducement test" as "unquestionably overbroad" and held that "[t]he proper inquiry calls for an

[30] Many federal district and state courts have rejected § 230 preemption defenses advanced by online companies when the claims derive liability from conduct other than publishing. *See, e.g.*, *HomeAway*, 2018 WL 1281772, at *6 (booking unregistered rental units); *Airbnb*, 217 F. Supp. 3d at 1072, 1074 (collecting a fee for booking unregistered units); *Daniel v. Armslist, LLC*, No. 2017AP344, 2018 WL 1889123, at *3 (Wis. Ct. App. Apr. 19, 2018) (designing and operating website to encourage illegal gun sales); *McDonald v. LG Elecs. USA, Inc.*, 219 F. Supp. 3d 533, 538 (D. Md. 2016) (negligence and breach of warranty for distributing defective product); *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 967-68 (N.D. Cal. 2016) (unwanted delivery of third-party tweets in violation of Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227); *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257, 1263 (N.D. Cal. 2006) (misleading dissemination of profiles created by third parties); *see also Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 891-92 (N.D. Cal. 2017) (observing that CDA may not bar claims against Twitter for sharing advertising revenue with Hamas where those payments could give rise to liability, but declining to reach the issue because the claim failed on its facts), *appeal pending*, No. 17-17536 (9th Cir. filed Dec. 26, 2017).

examination of the elements" of the claim to determine whether they "require[ ]" that manufacturers label their products in a particular way. *Id.* at 445. Similarly, under § 230, the fact that subjecting an online company to liability might induce it to engage in activity that can be characterized as publishing (such as by removing or editing content to avoid future liability) does not suffice for preemption.

B. Aimco's Claims Do Not Derive Liability From Publishing

1. Aimco's claims fall outside § 230's limited scope because they do not derive liability from publishing user content. The conduct at issue is akin to a real estate brokerage that displays in its windows the listings of properties available for short-term rentals. If the real estate agent helps a tenant breach a lease by brokering an unauthorized short-term rental, the agent would be subject to liability for its actions without regard to the window displays. Indeed, courts have upheld claims similar to Aimco's, as elaborated below. The district court erred in treating § 230 as conferring immunity simply because the unlawful activity was conducted over the Internet. An online company's conduct does not "magically become lawful" merely because it operates a website. *Roommates*, 521 F.3d at 1164.

Tortious Interference with Contract. Aimco's claim for tortious interference with contract seeks to hold Airbnb liable for conduct "that facilitated the breach of Plaintiffs' lease agreements." ER 243 (Compl. ¶ 85). The elements of such a claim are: "(1) [the existence of] a valid contract between [the] plaintiff

and a third party; (2) [the] defendant's knowledge of th[e] contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (1990).

Here, liability derives from Airbnb's "intentional acts" to "facilitate[ ] the breach of" Aimco's leases, including the brokerage services described above, after being informed that Aimco's leases prohibit short-term rentals. ER 226-228, 232-237, 239-240, 243 (Compl. ¶¶ 12-20, 37-56, 64, 66, 85); *see supra* pp. 9-17. Thus, the "legally significant event[s]," *Barnes*, 570 F.3d at 1107, are Airbnb's performance of brokerage services that induce tenants to breach their leases. Those activities are not "publishing" — they are not "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* at 1102. Moreover, courts have recognized that real estate brokers and other non-publishing companies can be held liable under analogous theories.[31] Because

[31] *See Blizzard Entm't Inc. v. Ceiling Fan Software LLC*, 28 F. Supp. 3d 1006, 1016 (C.D. Cal. 2013) (seller of software that helps video game players cheat interfered with license agreement between game manufacturer and game players, prohibiting the use of such software); *Madison Third Bldg. Cos. v. Berkey*, 30 A.D.3d 1146, 1146 (N.Y. App. Div. 1st Dep't 2006) (property owner stated interference claim against brokers for negotiating new lease that enabled tenant to breach existing lease); *Shamblin v. Berge*, 166 Cal. App. 3d 118, 122-24 (1985)

the conduct on which the claim is based is not "identical to publishing," *Barnes*, 570 F.3d at 1107, § 230 does not preempt the claim.

Interference with Prospective Economic Advantage. The elements of this claim are that the defendant knew about, and committed wrongful "intentional acts" designed to disrupt, an economic relationship between the plaintiff and a third party and that harmed the plaintiff. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1153 (2003). The intentional acts here are Airbnb's performance of brokerage services, including "renting apartments" and "processing financial transactions to facilitate the unauthorized short-term rentals," ER 246 (Compl. ¶ 108), which are wrongful because, among other things, they violate local zoning laws, *see supra*, p. 21 & n.25. Those acts are not "publishing," and they are akin to acts for which non-publishing, brick-and-mortar businesses have been held liable.[32]

Trespass and Aiding and Abetting Trespass. A trespass claim alleges an intentional, reckless, or negligent entry onto the property of another without the owner's permission, causing harm for which the plaintiff's conduct was a

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(affirming verdict of interference against real estate agents that caused would-be buyers to breach purchase contract).

[32] *See Abraham v. Pac. Union Real Estate Grp., Ltd.*, No. A098900, 2004 WL 1047392, at *9-10 (Cal. Ct. App. May 6, 2004) (reversing summary judgment because of fact issues as to whether real estate broker interfered with lease by helping force a tenant out of a rent-controlled unit).

substantial factor. *See Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 113 Cal. Rptr. 3d 88, 93 (Ct. App. 2010), *reversed on other grounds by* 55 Cal. 4th 1083 (2012). One who causes another to make such an entry may be liable for trespass. *See Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1132 (1995). Aiding and abetting trespass occurs when the defendant knows about and "substantially assist[s]" the trespass. *Upasani v. State Farm Gen. Ins. Co.*, 227 Cal. App. 4th 509, 519 (2014).

Aimco's claims for trespass and aiding and abetting trespass "do[ ] not seek to hold [Airbnb] liable as a publisher or speaker of third-party content, but rather as" a person who causes or substantially assists in unauthorized and harmful entry by Airbnb customers. *Barnes*, 570 F.3d at 1107; *see* ER 248 (Compl. ¶¶ 120-122, 127-128). Courts have recognized trespass claims based on comparable theories against brick-and-mortar businesses.[33]

Unfair Competition Under California Business & Professions Code § 17200 et seq. California's Unfair Competition Law, Cal. Bus. & Prof. Code

[33] *See Aberdeen Apartments v. Cary Campbell Realty All., Inc.*, 820 N.E.2d 158, 170 (Ind. Ct. App. 2005) (reversing denial of landlord's motion to enjoin, under trespass theory, real estate company from sending unauthorized individuals into landlord's property to distribute advertisements for new homes); *see also Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point Events LP*, No. CV 08-0856 DSF (RCx), 2009 WL 10671400, at *5-6 (C.D. Cal. Aug. 12, 2009) (selling non-transferrable tickets).

§ 17200 *et seq.* ("UCL"), is a "sweeping" statute, *Kwikset Corp. v. Superior Court of Orange Cty.*, 51 Cal. 4th 310, 320 (2011), that prohibits "any unlawful, unfair or fraudulent business act or practice," Cal. Bus. & Prof. Code § 17200. Violations of other laws are actionable under the "unlawful" prong of the UCL. *See Blizzard*, 28 F. Supp. 3d at 1017 (tortious interference actionable under UCL). Airbnb's conduct in brokering unauthorized rentals violates the UCL by, among other things, "allowing" and "enabling" unauthorized short-term rentals, causing trespass, and violating local zoning laws. ER 232, 243-244 (Compl. ¶¶ 35, 90). As with the interference and trespass claims, liability derives from Airbnb's brokering activities, not the publication of third-party content. Section 230 therefore does not preempt the claim.

Unjust Enrichment. To prevail on a claim that Airbnb was unjustly enriched, Aimco must show the "receipt of a benefit and [the] unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000); *see also Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). Aimco alleges that Airbnb has received and unjustly retained benefits from "facilitating and brokering" rentals at Aimco's properties over Aimco's repeated objections. ER 246 (Compl. ¶ 103). Because liability derives from brokering, not publication, the claim is not preempted by § 230.

Private Nuisance. A nuisance claim requires "some sort of conduct . . . that unreasonably interferes with another's use and enjoyment of his property." *Lussier v. San Lorenzo Valley Water Dist.*, 206 Cal. App. 3d 92, 102 (1988). Because the conduct that Aimco alleges created such an interference is Airbnb's brokering activities, not publishing, ER 249 (Compl. ¶ 131), this claim, too, is not preempted by § 230.

In sum, an "examination of the elements" of Aimco's claims, *Bates*, 544 U.S. at 445, demonstrates that none of the claims is preempted because none of "the dut[ies] that [Aimco] alleges [Airbnb] violated derives from [Airbnb's] status or conduct as a 'publisher or speaker'" of user content, *Barnes*, 570 F.3d at 1102.

2. Two additional considerations reinforce the conclusion that § 230 does not preempt Aimco's claims. *First*, as in *Internet Brands*, "[t]he core policy of section 230(c)(1) supports" rejecting Airbnb's preemption defense. 824 F.3d at 851. Section 230 was enacted in "reaction to *Stratton Oakmont*" and was intended to enable websites "to act as a 'Good Samaritan' to self-regulate offensive third party content without fear of liability." *Id.* at 852. Congress did not intend to "give online businesses an unfair advantage over their real-world counterparts," *Roommates*, 521 F.3d at 1164 n.15, by exempting them from generally applicable laws and regulations (including not only tort law but also zoning regulations and licensing requirements for real estate brokers) governing their non-publishing

conduct. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) (clear statement required to interpret statute to override "areas of traditional state responsibility," including "land . . . use").[34] Nor does § 230's "narrow language," *Internet Brands*, 824 F.3d at 853, reflect any intent to radically disrupt property rights by shielding Airbnb from liability for brokering rentals that trespass on private property and disturb other residents' quiet and safe enjoyment of their apartments. Because Aimco's claims are based on Airbnb's non-publishing brokerage services, and not Airbnb's "efforts, or lack thereof, to edit, monitor, or remove user generated content," rejecting Airbnb's preemption defense "would not discourage the core policy of section 230(c), 'Good Samaritan' filtering of third party content." *Internet Brands*, 824 F.3d at 852.

The *Internet Brands* Court also rejected the policy argument that preemption was necessary to avoid a "chilling effect upon Internet free speech." *Id.* It acknowledged that "imposing any tort liability on Internet Brands 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." *Id.* "But," the Court concluded, "such a broad policy

[34] *See also* Br. of *Amici Curiae* Internet, Business, & Local Government Law Professors in Supp. of Def.-Appellee & Affirmance of District Court at 7-9, *HomeAway Appeal*, No. 18-55367 (9th Cir. filed May 23, 2018), ECF No. 41.

argument does not persuade us" because it is contrary to *Barnes*' holding that "the CDA does not declare 'a general immunity from liability deriving from third-party content.'" *Id.* (quoting *Barnes*, 570 F.3d at 1100). The same analysis applies here.

Second, the fact that Aimco would not have a claim for defamation on the facts alleged in the complaint bolsters the conclusion that § 230 does not apply. In *Barnes*, this Court looked to the "reach" of defamation to "confirm[]" that the negligent-undertaking claim was preempted. 570 F.3d at 1103. Defamation requires "a false and defamatory statement concerning another," Restatement (Second) of Torts § 558 (1977), and a "communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him," *id.* § 559. Here, Aimco does not allege that any of the user-provided content in the listings displayed on Airbnb's website is defamatory. To be sure, "the tort of defamation is not the only form of liability for publishers to which subsection (c)(1) applies." *Barnes*, 570 F.3d at 1103. But the absence of a defamation claim "under our facts . . . strongly confirms [the] view" that § 230 does not preempt this lawsuit. *Id.*

C. The District Court Committed Legal Errors In Dismissing Aimco's Complaint

The district court committed three legal errors in dismissing Aimco's claims based on Airbnb's non-publishing conduct. *First*, in concluding that Aimco's

complaint "takes issue" with user-provided content, the district court mischaracterized the operative complaint and ignored this Court's standard for § 230 preemption in *Barnes* and *Internet Brands*. *Second*, the district court erroneously relied on a superseded complaint in reaching its incorrect conclusion that Aimco's complaint "takes issue" with third-party content. *Third*, the district court relied on off-point, primarily out-of-circuit cases while rejecting directly analogous, persuasive authority that correctly applied this Court's precedents.

1. The district court's reasoning contravenes this Court's standard for § 230 preemption

The district court recognized that Aimco's complaint sought to hold Airbnb liable for services including "contracting with Aimco's tenants" and "processing payments for rentals of Aimco-owned apartments." ER 9 (Order); *see supra* pp. 9-17 (describing Airbnb's non-publishing conduct). It nevertheless concluded that Aimco "takes issue" with Airbnb listings and that § 230 therefore bars its claims. ER 11 (Order). In reaching that conclusion, the court not only badly mischaracterized the complaint's allegations but also disregarded the standard for § 230 preemption under this Court's cases. The plaintiff in *Barnes* took issue with Yahoo's failure to remove the malicious profile that harmed her, but that was not a sufficient basis to conclude that § 230 preempted the complaint. *See* 570 F.3d at 1107-09. Instead, this Court conducted a claim-by-claim analysis to determine

whether the activity from which liability derived under each claim was "identical to publishing." *Id.* at 1107.

Under the district court's approach of determining when a complaint "takes issue" with publication, a defendant cannot be held liable for any activity that has some relationship to the publication of user content. That approach allows § 230 preemption to be based on but-for causation, which this Court rejected in *Internet Brands* as inconsistent with § 230's "narrow language and its purpose." 824 F.3d at 853. A defendant that operates a website will nearly always be able to point to some connection to the display of user content in an attempt to claim § 230's protection. But, although "Congress could have written the statute more broadly" to cover all claims against website operators, "it did not." *Id.*; *see also Barnes*, 570 F.3d at 1100 (§ 230 does not provide "general immunity"); *City of Chicago*, 624 F.3d at 366 (same). Thus, even if Airbnb's displaying of listings on its website "could be described as *a* 'but-for' cause of [Aimco's] injuries," that is not enough for preemption under § 230. *Internet Brands*, 824 F.3d at 853 (emphasis added).

2. The district court erroneously relied on a superseded complaint

The district court also erred in basing its ruling on the observation that Aimco's superseded original complaint included "listing apartments" among Airbnb's "wrongful act[s]." ER 11 & n.8 (Order). It is "well-established" in this circuit that an amended complaint supersedes the original, the latter of which then

"cease[s] to exist." *Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). The district court should have looked only to the claims and theories alleged in Aimco's operative complaint, which the district court acknowledged were based on Airbnb's brokerage activities including "engaging in rental transactions," providing "ancillary services" such as tax collection and insurance, "contracting with Aimco's tenants," and "processing payments for rentals of Aimco-owned apartments." ER 3, 7-9 (Order). The district court erred in construing the complaint to allege a theory Aimco expressly disclaimed. *See Barnes*, 570 F.3d at 1098 & n.1 (in deciding a motion to dismiss, a court construes allegations in the "light most favorable to the plaintiff"); ER 239 (Compl. ¶¶ 62-64) (disclaiming liability for "third-party content").

The district court also mistakenly concluded, based on the superseded complaint, that Aimco was making the same "basic argument" that failed as "creative pleading" in *Kimzey*. ER 9-11 (Order) (quoting *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016)). In *Kimzey*, "[t]here was . . . no question that" the plaintiff's defamation claims were "premised on Yelp's publication" of a negative review and one-star rating. 836 F.3d at 1268. The complaint in *Kimzey* did not allege that the defendant did anything that gave rise to liability other than "publish[ing] user-generated speech that was harmful to" the defendant. *Id.* at 1266. That is why this Court's opinion addressed only whether the plaintiff had

adequately alleged that Yelp was subject to liability as an "information content provider." *See id.* at 1268-70. *Kimzey* provides no support for the district court's conclusion that § 230 preempts Aimco's claims based on Airbnb's non-publishing conduct.

3. The district court erroneously relied on off-point, out-of-circuit decisions

Instead of applying this Court's "derives liability" standard to the specific causes of action and facts alleged in Aimco's complaint, the district court looked to out-of-circuit cases that it erroneously perceived to be "analogous." ER 10-11 (Order). The court primarily relied on a state intermediate appellate decision holding that the bare fact of "payment processing" does not make an online business an "information content provider."[35] That decision does not support the district court's conclusion because, as this Court recognized in *Barnes*, the question whether a cause of action "treat[s]" a defendant as a "publisher" under § 230 is distinct from whether that defendant is an "information content provider." 570 F.3d at 1100. In other cases the district court cited, *see* ER 10-11 (Order), the plaintiffs' claims were based on defendants' publishing activities, and additional,

[35] ER 9-10 (Order) (discussing *Hill vs. StubHub!*, 727 S.E.2d 550 (N.C. Ct. App. 2012) (StubHub's payment processing services held "irrelevant" to that court's "information content provider" inquiry).

non-publishing conduct was not at issue.[36] The remaining cases provide no guidance here because the plaintiffs' allegations regarding "payment processing" or other non-publishing conduct were conclusory or otherwise entirely unlike Aimco's allegations regarding Airbnb's extensive brokerage services.[37]

The district court also erred in relying on *Donaher, III v. Vannini*, No. CV-16-0213, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017), which involved

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[36] *See Doe v. MySpace, Inc.*, 528 F.3d 413, 415-18 (5th Cir. 2008) (§ 230 bars claim based on social media website's publication of an underage user's profile that led to her meeting and being sexually assaulted by another user); *Green v. Am. Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir. 2003) (§ 230 bars claim against AOL for "negligent failure to properly police its network for content transmitted by its users"); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735(RMB), 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009) (§ 230 bars complaint that would hold Craigslist liable for negligent failure to screen "the dissemination of a third party's content").

[37] *See Inman v. Technicolor USA, Inc.*, Civ. A. No. 11-666, 2011 WL 5829024, at *1, *6 (W.D. Pa. Nov. 18, 2011) (although plaintiff referred to "business transactions and the shipping and packaging of goods," the complaint did "not set forth any facts" regarding eBay's activities); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 834-36 (2002) (only relevant non-publishing conduct alleged was eBay's failure to comply with statute requiring sellers of antiquities to provide a certificate of authenticity for memorabilia); *Stoner v. eBay, Inc.*, No. 305666, 2000 WL 1705637, at *2, *4 (Cal. Super. Ct. Nov. 1, 2000) (concluding that facts alleged did not support plaintiff's claims that eBay was an "active participant" in challenged transactions, but acknowledging that immunity would not apply if website were "actively involved" in illegality). Moreover, a number of the cases on which the district court relied pre-date and are inconsistent with the reasoning in this Court's decisions in *Barnes* and *Internet Brands*. *See, e.g.*, *Stoner*, 2000 WL 1705637, at *2 (looking to whether eBay's acts "make eBay the *seller*" rather than the duty from which liability derives) (emphasis added).

claims against Airbnb. The court in that case appears to have understood the payment services Airbnb provides as analogous to the payments at issue in *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 20-21 (1st Cir. 2016) ("*Backpage*"). *See Donaher*, 2017 WL 4518378, at *3. The "payment processing" at issue in *Backpage* was the receipt of payment for the publication of third-party advertisements for escort services. *See* 817 F.3d at 20. There was no allegation that Backpage actually *brokers* escort services in the way that Airbnb brokers prohibited rentals (such as by scheduling the services escorts provide to their clients, receiving clients' money to pay escorts upon services being rendered, or resolving disputes between escorts and their clients); nor is there any indication that the *Donaher* court took note of that distinction.[38]

The district court also erred in failing to follow the holding of a court in the Northern District of California that § 230 does not protect *the exact same* "reservation and/or payment service[s]" at issue in this litigation. *Airbnb*, 217 F.

[38] Moreover, the court in *Backpage* embraced a but-for test that is inconsistent with *Internet Brands*. *See Backpage*, 817 F.3d at 19-20 (observing that "there would be no harm to [the plaintiffs] but for the content of the postings"); *see also Airbnb*, 217 F. Supp. 3d at 1073 (declining to rely on *Backpage* because the First Circuit applied a "more expansive" test for § 230 preemption than does this Court).

In addition, although one Illinois court has followed the district court's opinion in this case, that decision is erroneous for the same reasons as the district court's. *See MDA City Apartments, LLC v. Airbnb, Inc.*, No. 17 CH 9980, 2018 WL 910831, at *13-14 (Ill. Cir. Ct. Feb. 14, 2018).

Supp. 3d at 1071; *accord HomeAway*, 2018 WL 1281772, at *5-6 (denying preliminary injunction challenging city ordinance requiring Airbnb and others to confirm legality of rentals before providing booking services because the ordinance penalizes "facilitating business transactions" that violate the law, not "*publishing* activities"); *HomeAway*, No. 2:16-cv-06641-ODW (AFM), 2018 WL 3013245, at *1 (C.D. Cal. June 14, 2018) (dismissing challenge to ordinance). The district court's only basis for distinguishing *Airbnb* was its erroneous assertion that, whereas the San Francisco ordinance at issue in that case imposed a fee on Airbnb's "booking services," here, "Airbnb's website features are central to Aimco's claims." ER 12 (Order). As demonstrated, that assertion both mischaracterizes Aimco's complaint and disregards this Court's decisions in *Internet Brands* and *Barnes*.[39]

[39] As a makeweight at the end of its opinion, the district court referred to the notion that the CDA was intended to promote "e-commerce." ER 12 (Order) (quoting *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003)). The quoted portion of the *Batzel* opinion referred to congressional findings and policy statements describing the Internet as "'a forum'" for "'political discourse,'" "'cultural development,'" and "'intellectual activity.'" 333 F.3d at 1027 (quoting 47 U.S.C. § 230(a)). *Batzel* also cited statements by members of Congress expressing outrage over pornography and a desire to address the problem without government censorship. *See id.* at 1028 & n.11 (citing 141 Cong. Rec. H8469-72 (Aug. 4, 1995)). Nothing in *Batzel*, or the provisions and legislative history to which it referred, suggests an intent to protect online businesses that provide the same services as brick-and-mortar competitors while claiming special immunity from suit under the CDA. This Court's subsequent en banc decision in *Roommates* confirmed that the CDA "was not meant to create a lawless no-man's-land on the

II. SECTION 230 DOES NOT PREEMPT CLAIMS BASED ON AIRBNB'S OWN CONTENT

In addition to its brokerage services and other non-publishing conduct discussed in Part I, Airbnb creates and publishes original content that allows its customers to take advantage of its services — that is, the online tools and information that allow Airbnb's customers to book and pay for rentals anonymously. ER 227 (Compl. ¶¶ 16-18). Section 230 does not preempt Aimco's claims premised on content for which Airbnb is an "information content provider" within the meaning of that provision. 47 U.S.C. § 230(c)(1), (f)(3).

A. Section 230 Does Not Preempt Aimco's Claims Based On Airbnb's Content

Section 230 does not preempt Aimco's claims based on Airbnb's own content. By its terms, that provision applies only to claims that treat a website operator as the publisher "of any information provided by *another* information content provider." 47 U.S.C. § 230(c) (emphasis added). Thus, § 230 "applies only if the interactive computer service provider is not . . . 'responsible, in whole or in part, for the creation or development of' the offending content." *Roommates*, 521 F.3d at 1162 (quoting 47 U.S.C. § 230(f)(3)). The CDA "does not immunize

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Internet." 521 F.3d at 1164; *see id.* at 1169 n.24 ("Compliance with laws of general applicability seems like an entirely justified burden for all businesses, whether they operate online or through quaint brick-and-mortar facilities.").

[a website operator] for the content it creates and posts." *Xcentric Ventures, LLC v. Borodkin*, 798 F.3d 1201, 1203 (9th Cir. 2015) (per curiam).[40]

"[C]reation" and "development" — the operative terms in § 230's definition of "information content provider," 47 U.S.C. § 230(f)(3) — are broad. *See In re Amex-Protein Dev. Corp.*, 504 F.2d 1056, 1058 (9th Cir. 1974) (per curiam) ("creat[ion]" means "to bring into existence," "to cause to be or to produce," "to cause or occasion"); *Roommates*, 521 F.3d at 1167-68 (in the context of the Internet, "development" can mean " 'the process of researching, writing, gathering, organizing and editing information for publication on web sites' "). Section 230(f)(3) further expands the reach of those broad terms, by providing that a platform may be held liable for content it creates or develops only "in part." 47 U.S.C. § 230(f)(3).

[40] Many other courts have reached the same conclusion. *See, e.g.*, *Hiam v. HomeAway.com, Inc.*, 267 F. Supp. 3d 338, 348 (D. Mass. 2017) (§ 230 does not preempt claims based on "HomeAway's own content" and related actions), *aff'd on other grounds*, 887 F.3d 542 (1st Cir. 2018); *NPS LLC v. StubHub, Inc.*, Civ.A. No. 06-4874-BLS1, 2009 WL 995483, at *11, *13 (Mass. Super. Ct. Jan. 26, 2009) (§ 230 does not preempt claim against website that "help[]ed to develop unlawful content" that contributed to illegal ticket scalping, such as through not requiring ticket sellers to show the face value of the ticket); *Mazur v. eBay Inc.*, No. C 07-03967 MHP, 2008 WL 618988, at *14 (N.D. Cal. Mar. 4, 2008) (where eBay's own content affirmatively promised auctions were safe, § 230 did not bar claims premised on its failure to ensure third-party auctions were safe).

In *Roommates*, this Court held that § 230 did not preempt antidiscrimination claims against the operator of "a website designed to match people renting out spare rooms with people looking for a place to live," because the operator provided functionalities that contributed to the illegality of user listings. 521 F.3d at 1161. Among other content, the plaintiffs sought to hold Roommates liable for the "development and display of subscribers' discriminatory preferences." *Id.* at 1165. The Court held that Roommates helped "develop" the user-created listings through its functional content, including drop-down menus that required users to give their preferences based on categories such as race, as well as search and email notification functions that filtered results based on a user's preferences. *See id.* at 1165-67. Not every user's preferences were necessarily discriminatory — for example, a user could click a box indicating a willingness to live with roommates without regard to their sexual orientation. *See id.* at 1165.

Even though users provided the substantive content for each listing, and therefore controlled whether any particular listing was, in fact, discriminatory, the Court held that Roommates was an "information content provider" because, "[b]y any reasonable use of the English language, Roommate[s] is 'responsible' at least 'in part' for each subscriber's profile page, because every such page is a collaborative effort between Roommate[s] and the subscriber." *Id.* at 1165-67. This Court distinguished Roommates from a site, such as an "ordinary search

engine," *id.* at 1167, that provides "*neutral* tools to carry out what may be unlawful or illicit searches," *id.* at 1169, because Roommates "materially contribut[ed]" to the "alleged unlawfulness" of discriminatory housing ads, *id.* at 1168.

B. Airbnb's Content Enables Unauthorized Rentals

Airbnb is an information content provider of online content that harms Aimco because it creates and develops content designed to enable Aimco's tenants to rent apartments illegally to strangers. *See* 521 F.3d at 1172; ER 243 (Compl. ¶ 86).

First, Airbnb creates and publishes listings for unauthorized rentals through a "collaborative effort" with tenants. *Roommates*, 521 F.3d at 1167. Airbnb solicits information from tenants and combines that information with Airbnb-created content to create a listing in a standardized format developed by Airbnb and governed by Airbnb's Content Policy. ER 226-227 (Compl. ¶ 12); *see supra* pp. 10-13, 16. Each Airbnb listing presents the tenant's first name and photo in a standardized format and location, and additional contact information is prohibited. *See supra* pp. 13, 16. Airbnb also offers and pays for professional photography, and displays such photos as "verif[ied]" by Airbnb. ER 227 (Compl. ¶¶ 16-17); *supra* p. 11. Hosts that use Airbnb's "'Smart Pricing' tool" authorize Airbnb to set the price for a rental. ER 227 (Compl. ¶ 18); *supra* p. 14. Airbnb displays "Highlights," such as whether a tenant is an Airbnb-designated "superhost" or

whether a rental is a "rare find." *Supra* p. 13 (screenshot). All told, the description of the property supplied by the tenant is a relatively small portion of the listing. *Id.*

Second, Airbnb creates and displays content that enables tenants to use Airbnb's brokerage services. For example, to book a rental, a traveler must enter desired dates and the number of guests into a "booking box" that Airbnb publishes as a part of each listing. *See supra* pp. 12-14. The publication of that Airbnb-created content — the booking box that appears on a computer screen — is a distinct act from effectuating the booking when a traveler clicks the "book" button.

Third, Airbnb's content "materially contribut[es]," *Roommates*, 521 F.3d at 1168, to unauthorized rentals because it allows properties to be advertised, booked, and paid for anonymously, which helps them avoid detection. ER 233-234 (Compl. ¶¶ 44-45) ("Airbnb operates through [the] anonymity of its hosts."). For example, Airbnb's booking box is what allows its customers to book rentals without publishing their contact information or property location. If Airbnb did no more than display advertisements for third-party listings like a newspaper does, Aimco could readily identify lease violators through the advertisement itself. Instead, Aimco cannot identify lease-violating tenants through Airbnb's listings without agreeing to Airbnb's terms of service and using Airbnb's website to book and pay for a stay in its own property. *See supra* pp. 16-17 (Airbnb does not

provide property location until a tourist completes a booking by paying Airbnb); ER 233-234, 243 (Compl. ¶¶ 44-45, 86).

C. The District Court Erred In Holding That § 230 Preempts Claims Based On Content Airbnb Creates

1. The district court erred in holding that Airbnb is not an information content provider because "Airbnb hosts . . . are responsible for providing the actual listing information" and "no [listing] has any content until a user actively creates it." ER 8 (Order) (alteration in original) (quoting *Carafano*, 339 F.3d at 1124). That analysis relies on the "unduly broad" language from *Carafano* that this Court, sitting en banc, clarified in *Roommates*. As the Court explained, "[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate" Congress's exclusion for providers who develop content "'in part.'" 521 F.3d at 1171 (quoting 47 U.S.C. § 230(f)(3)).

In *Roommates*, it was also the case that no listing would have content until a user created it, but that did "not preclude Roommate[s] from *also* being an information content provider by helping 'develop' at least 'in part' the information in the profiles." *Id.* at 1165. Likewise, Airbnb cannot escape liability for its own

booking-related content merely because it presents that content "intertwined," MTD at 20, 24, with information provided by Aimco's tenants.[41]

2. Holding Airbnb liable as an information content provider is consistent with this Court's decision in *Kimzey* (on which the district court relied, ER 6-8 (Order)) because Airbnb's original content is not "simply a representation" of user-created information. 836 F.3d at 1270. The Court in *Kimzey* rejected the plaintiff's "convoluted[] theory" under which Yelp became the author of a negative review for purposes of a defamation claim because its website aggregated user-created data to create a "one-star rating" that appeared alongside the allegedly defamatory review. *Id.* at 1269. Here, the content that allows Airbnb's customers to book rentals, communicate, and pay each other anonymously is Airbnb's own creation, and it does not "'represent[]'" or "aggregate" user-created data. *Id.* at 1270. Nor does Airbnb simply set broad editorial parameters for content appearing on its site. *Cf. Evans v. Hewlett-Packard Co.*, No. C 13-02477 WHA, 2013 WL 5594717, at *4 (N.D. Cal. Oct. 10, 2013).

[41] The district court also mischaracterized Aimco's complaint as alleging that the "listings" are "'offending'" because "they advertise rentals that violate Aimco's lease agreements." ER 8 (Order). Airbnb's content is "unlawful" because it effectuates or otherwise contributes to unauthorized rentals, *see supra* Part II.B, not because it "advertises" them.

3. Airbnb's content "materially contributes" to the illegality alleged in Aimco's complaint even though its services can be used by parties offering authorized and unauthorized listings alike. The district court erroneously reached the opposite conclusion by analogizing Airbnb's platform to the dating website in *Carafano* that "merely provide[d] a framework that could be utilized for proper or improper purposes." ER 8 (Order) (quoting *Roommates*, 521 F.3d at 1172). Critically, the dating website "did absolutely nothing to enhance" the defamation, "to encourage defamation[,] or to make defamation easier." *Roommates*, 521 F.3d at 1172.

Airbnb's content is everything that the dating website's was not. Airbnb encourages and enhances unauthorized rentals and makes them *significantly* easier to effectuate. Most notably, it requires customers to conceal their locations and contact information, refusing to disclose this information until a booking is paid for, and removing content that violates that policy. *See supra* pp. 16-17. Airbnb is therefore akin to the website in *Roommates*, which materially contributed to illegal listings not because it required its users to discriminate (it did not, *see id.* at 1165), but because it designed its site to allow users to discriminate. *See id.* at 1167

(Roommates was "designed to achieve illegal ends" by making it "more difficult or impossible for individuals with certain protected characteristics to find housing").[42]

In short, because Airbnb "is directly involved with developing and enforcing a system" that enables tenants to breach Aimco's leases, § 230 does not apply. *Roommates*, 521 F.3d at 1172; *see also Daniel*, 2018 WL 1889123, at *8 (§ 230 does not bar claims against gun-sale website based on "content it creates" to encourage illegal gun sales, including through anonymizing "unregistered" posts); *J.S., S.L. v. Vill. Voice Media Holdings, L.L.C.*, 359 P.3d 714, 717-18 (Wash. 2015) (en banc) (holding that classified advertising website Backpage is an "information content provider" because it was allegedly designed to allow sex traffickers "to evade law enforcement").

[42] The district court erroneously relied on *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 986 (N.D. Cal. 2015), for the premise that the "materially contribute[s]" test is satisfied only if a provider "require[s]" a user to create illegal content. ER 10 (Order). That approach finds no support in the statutory language (which refers to creating or developing content "in part," 47 U.S.C. § 230(f)(3)) and misreads *Roommates*. The *Roommates* Court explained that § 230 does not apply if a website "encourage[s] illegal content, *or* design[s] [the] website to require users to input illegal content." 521 F.3d at 1175 (emphasis added); *see also FTC v. Accusearch Inc.*, 570 F.3d 1187, 1200 (10th Cir. 2009) (describing Roommates as "encourag[ing]" discriminatory content). Indeed, the portion of *Opperman* on which the district court relied was denying reconsideration of its prior conclusion that Apple was an information content provider because it "encourage[d] data theft" by third parties. *Opperman v. Path, Inc.*, 87 F. Supp. 3d 1018, 1032 (N.D. Cal. 2014). In any case, Airbnb does require its customers to conceal their locations. *See supra*, pp. 16-17.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING AIMCO'S COMPLAINT WITH PREJUDICE

In the alternative, the district court abused its discretion in dismissing the complaint with prejudice and failing to permit leave to amend. Rule 15 provides that leave to amend should be "freely give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a)(2), and this Court has applied that "policy" with "extreme liberality," *Eminence Capital*, 316 F.3d at 1051 (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)). Leave to amend should be denied only when there is a good reason, such as "bad faith" or "futility." *Id.* at 1052; *see also Barahona v. Union Pac. R.R. Co.*, 881 F.3d 1122, 1134 (9th Cir. 2018) (finding "leave to amend should be denied as futile 'only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense'"). Although dismissal with prejudice under § 230 may be appropriate if "[t]he basis" of a claim is the defendant's "role as a publisher of third-party information," *Beckman*, 668 F. App'x at 759, Aimco's claims are not based on Airbnb's publication of user information. Moreover, Aimco's complaint could be amended to add significant new allegations regarding Airbnb's extensive

activities to broker unauthorized rentals and to create content to enable those rentals.[43]

Here, although Aimco requested leave to amend, *see* Pls. Opp'n at 25, the district court dismissed the complaint with prejudice and without addressing Aimco's request. The court did not find that any amendment would be futile or was sought in bad faith. By failing to "consider the relevant factors and articulate why dismissal should be with prejudice," the district court abused its discretion. *Eminence Capital*, 316 F.3d at 1052; *see also Beckett v. Mellon Inv'r Servs. LLC*, 329 F. App'x 721, 723 (9th Cir. 2009) (holding that district court abused its discretion in denying leave to amend to allege non-preempted claims).

CONCLUSION

The district court's judgment dismissing the complaint should be reversed and the case remanded for further proceedings.

[43] In addition to facts contained in Aimco's preliminary injunction briefing, Aimco has learned additional facts regarding Airbnb's practices to encourage, facilitate, and broker unauthorized rentals through litigation involving other Aimco properties. *See* Pls.' Mot. for Leave to File Fourth Am. Compl., *Bay Parc Plaza Apartments, L.P. v. Airbnb, Inc.*, No. 2017-003624-CA-1 (Fla. 11th Cir. Ct. June 15, 2018), Dkt. 217.

Respectfully submitted,

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STATEMENT OF RELATED CASES

In accordance with Ninth Circuit Local Rule 28-2.6, Aimco states that there is currently a related case pending in this Court, *HomeAway.com, Inc. v. City of Santa Monica*, No. 18-55367 (9th Cir. filed Mar. 21, 2018). The issue before the Court in *HomeAway* is whether the district court in that case correctly held that, because booking services are not publishing, § 230 does not preempt a local law requiring short-term rental companies, including Airbnb, to confirm that units can be legally rented before booking a transaction. *HomeAway* thus presents the question whether § 230 preempts an ordinance regulating the same brokerage activities as are at issue here. The appellants in *HomeAway* submitted their reply brief on June 6, 2018.

CERTIFICATE OF COMPLIANCE PURSUANT TO NINTH CIRCUIT RULE 32-1 FOR CASE NO. 18-55113

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this brief complies with the applicable type-volume limitation permitted by Ninth Circuit Rule 32-1. This brief was prepared in Times New Roman 14-font and complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), as well as the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 13,504 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Office Word 2007) used to prepare this brief.

/s/ David C. Frederick
Counsel for Plaintiffs-Appellants

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 18-55113

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Signature of Attorney or Unrepresented Litigant [/s/ David C. Frederick] Date [Jun 22, 2018]

("s/" plus typed name is acceptable for electronically-filed documents)

ADDENDUM

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47 U.S.C. § 230
§ 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).

(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, 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; 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, 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.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be filed electronically the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 22, 2018.

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

/s/ David C. Frederick
Counsel for Plaintiffs-Appellants

Case No. 18-55113

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LA PARK LA BREA A LLC, LA PARK LA BREA B LLC, LA PARK LA BREA C LLC, and AIMCO VENEZIA, LLC.,
Plaintiffs-Appellants,

v.

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

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

On Appeal from the United States District Court
for the Central District of California
Nos. 2:17-cv-4885
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INTEREST OF AMICUS CURIAE

Amicus curiae the City and County of San Francisco is striving to preserve and expand affordable housing for its residents.[1] California has a shortage of nearly 1.1 million affordable rental homes for extremely low-income renters. In the San Francisco Bay area alone, extremely low-income renters face a shortage of 127,000 units.[2] This shortage of affordable housing poses a significant challenge to San Francisco's future.

Alongside and exacerbating this worrisome trend, both short-term rentals and the use of online hosting platforms are growing in California. Across the state "the number of people sharing their homes on [Airbnb] soared 51 percent to 76,600 in 2016."[3] This development has a significant impact on housing availability in cities like San Francisco. Before San Francisco began enforcing its regulations against Airbnb last year, the website hosted some 10,000 listings in the city, reducing the number of rental units otherwise available for permanent rental housing.[4] Entire apartment buildings were transformed into *de facto* tourist hotels,

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[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, San Francisco hereby certifies 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 San Francisco or its counsel—contributed money that was intended to fund the preparation or submittal of this brief. Pursuant to Rule 29(a)(2), San Francisco attests that all parties to this appeal have consented to the filing of this brief.

[2] 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.

[3] 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-20170301-story.html.

[4] Carolyn Said, *Airbnb listings in San Francisco plunge by half,* San Francisco Chronicle (Jan. 18, 2018), https://www.sfchronicle.com/business/

with the direct result that these apartments become unavailable for families seeking to make their homes in the City. The unrestrained growth of short-term rentals through on-line hosting platforms has a material impact on the price and availability of permanent housing in San Francisco, driving up rental prices across the board.[5] In the last three years, the median monthly rent for a two-bedroom apartment in San Francisco has risen more than 40% to $3,400, higher than any other city in the country.[6]

San Francisco has taken action to address the impact of short-term rentals on housing availability and affordability. San Francisco requires short-term rental hosts to register their short-term rental units and restricts short-term rentals to the host's primary residence. In 2017, faced with widespread noncompliance amount short-term rental hosts, San Francisco imposed liability on short-term rental platforms if they provide booking services and receive booking fees for facilitating unlawful short-term rental transactions for unregistered units. This amended ordinance reflects a careful effort to strike an appropriate balance between encouraging the innovation of the short-term rental market and preserving and increasing access to affordable housing. Other cities have enacted similar laws.[7]

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article/Airbnb-listings-in-San-Francisco-plunge-by-half-12502075.php.

[5] *See, e.g.*, Kyle Barron, Edward Kung & Davide Proserpio, *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. zip codes with the median owner-occupancy rate).

[6] Public Policy Institute of California, *California's Future: Housing* at 3 (Jan. 2018), http://www.ppic.org/wp-content/uploads/r-118hjr.pdf.

[7] *See* SF Admin. Code § 41A.5(g)(4)(C); Seattle Mun. Code § 6.600 (2017); Santa Monica Mun. Code § 6.20.050(c).

San Francisco's interest in the scope of CDA immunity extends beyond housing to the myriad aspects of local life that now occur online. To govern effectively and represent the interest of its residents, San Francisco must be able to regulate commercial conduct—whether it takes place in a storefront or online. Indeed, as commercial transactions increasingly occur online, the need to regulate online companies likewise increases. The overly-broad interpretation of the CDA that Airbnb urges would undermine San Francisco's reasonable and necessary regulations not just of short-term rental platforms—but of all online companies.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1996, Congress enacted the CDA to nurture the fledgling internet by protecting service providers from liability for content third parties post 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. Many brick-and-mortar enterprises have been replaced by internet firms, which frequently claim legal immunity merely because they operate on the web. Internet giants like Airbnb—whose profits are projected to top $3 billion by 2020[8]—try 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*.

In *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016), the Northern District of California adhered to well-established Ninth Circuit precedent and upheld a San Francisco ordinance that prohibits online

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

hosting platforms like Airbnb from providing booking services (like reservation and payment processing services) in connection with the short term rental of unregistered units. Rejecting Airbnb's plea that the CDA preempted San Francisco's ordinance, the Northern District's ruling permitted the City to continue to protect its local housing stock and abate significant public nuisances. The ordinance has already helped drive down illegal short-term rentals and return critically needed rent-controlled and subsidized units to the permanent housing market. *See* Part III, *infra*. And legitimate internet commerce continues to flourish.

This Court has repeatedly recognized that liability does not end where the internet begins. Changing course now and adopting Airbnb's overly broad reading of the CDA could significantly undermine San Francisco's—and other state and local governments'—ability to regulate commerce within its borders.

ARGUMENT

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

A party is immune from liability under Section 230 of the CDA "only" when it is "(1) a provider 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), as amended (Sept. 28, 2009); 47 U.S.C. § 230(c)(1).

In an unbroken line of cases, the Ninth Circuit has 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, claims against online companies do not implicate the CDA when

online companies are held to account for their own commercial conduct that falls outside this narrow publishing role.

A. The Ninth Circuit Properly Applies 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 conduct as a publisher—*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 invoke 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.* Outside of these publishing functions, the CDA does not restrict state or local laws regulating the conduct of online companies.

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 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 the narrow scope of 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 come not 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, because the claim did not arise from the act of publishing third-party 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, other courts have reached the same conclusion.

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

Airbnb contended in the District Court that imposing liability on it for commercial conduct, like providing payment services, "goes against the overwhelming weight of case law." Defs.' Mot. to Dismiss at 23, *La Park La Brea A LLC v. Airbnb, Inc.*, No. 2:17-cv-4885-DMG-AS (Aug. 7, 2017), ECF No. 16, 2017 WL 6997211. Not so. Airbnb did not cite a single circuit court case to support its claim. All of the authorities Airbnb cited below are district court or state court opinions—the majority of which are unpublished and/or out-of-circuit

cases. *See id*. at 23-24; Defs.' Reply in Supp. of Mot. to Dismiss at 21-23, *La Park La Brea A LLC v. Airbnb, Inc.*, No. 2:17-cv-4885-DMG-AS (Oct. 18, 2017), ECF No. 24, 2017 WL 9517867.

These cases cannot trump the Ninth Circuit precedent discussed above establishing that where an online company's own commercial conduct is in question, the CDA does not apply.[9] Moreover, this Court's decisions imposing reasonable limitations on the scope of Section 230 immunity are typical of other circuits.

[9] Airbnb did cite a handful of circuit court cases to support the separate assertion that the CDA provides immunity for Airbnb's actions as "a publisher or speaker." But none of these cases suggests that the CDA immunizes an online company when it is engaged in commercial conduct, such as providing payment or booking services. In *Kimzey v. Yelp Inc.*, 836 F.3d 1263 (9th Cir. 2016) (cited in Defs.' Mot. to Dismiss at 23 and Defs.' Reply in Supp. of Mot. to Dismiss at 25), this Court granted Yelp immunity under the CDA because the plaintiff's claim was "directed against Yelp in its capacity as a publisher or speaker" and Yelp, as a platform for customer reviews, was more akin to "an online messaging board" and thus did not contribute "to the creation or development of the content." *Id*. at 1266-1269. In *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (cited in Defs.' Mot. to Dismiss at 23), sex trafficking victims sued classified advertising website Backpage.com for hosting advertisements that allegedly encouraged sex trafficking, but the First Circuit noted 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. Similarly, plaintiffs in *Chicago Lawyers Comm. for Civil Rights v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (cited in Defs.' Mot. to Dismiss at 23) and *Green v. Am. Online*, 318 F.3d 465, 471 (3d Cir. 2003) (cited in Defs.' Reply in Supp. of Mot. to Dismiss at 24-25) did not challenge the commercial activity of defendant websites. All of these decisions are entirely consistent with the Ninth Circuit's reasonable interpretation of the publisher or speaker requirement, which does not provide immunity where a company's commercial conduct is implicated.

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 to this one. 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 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. 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 and recognized the narrow 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. Stubhub 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 sued 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 raised Section 230 as a defense against the consumer's claim, but the court rejected Twitter's CDA defense. *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. The plaintiff's claim 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 had 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 Provide Broad Immunity to Online Companies.

As the cases discussed above establish, the CDA 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, the CDA limits an online company's liability *only* when it arises directly from the act of publishing third-party content. *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.

Accordingly, online hosting platforms are not *de facto* immunized from liability under the CDA. Hosting platforms like Airbnb typically perform two distinct functions: they publish listings for rental units, and they provide booking services in connection with the rental of those units. If state or local law would require hosting platforms to review or vet or remove user content, the CDA may indeed be implicated. But where hosting platforms face no obligations to change how they review, edit, decide to publish, do publish, or remove from publication any third-party content, the CDA provides no immunity. *See Internet Brands*, 824 F.3d at 851; *Barnes*, 570 F.3d at 1102.[10]

[10] Under San Francisco's ordinance, for example, hosting platforms can publish (and earn publishing fees from) whatever listings they want—both lawfully

By way of analogy, assume that a landlord were to sue a travel agent for routinely booking clients on the landlord's property, against the landlord's tenancy rules. There is no argument that such a lawsuit would treat the travel agent as a "publisher." The mere fact that hosting platforms also post hosts' listings online does not render their booking services "publishing activity" and does not make their booking service that violates tenants' leases "magically" lawful. Nor does the fact that these platforms provide separate publishing services immunize their discrete non-publishing activities.

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 observation rings all the more true now.

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registered and unregistered short-term rental listings—without incurring liability. 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. Providing these services is not a publication function, and the fact that third parties created the listings for those units "does not absolve [hosting platforms] from liability" for providing unlawful booking services. *Anthony*, 421 F. Supp. 2d at 1263. Although Airbnb *does* act as a publisher of third-party content when it posts hosts' listings, San Francisco regulates only the hosting platforms' "conduct as Booking Service providers," and "cares not a whit about what is or is not featured on their websites." *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016).

II. Extending Immunity To An Online Company's Own Commercial Conduct Is Inconsistent 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 its 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.

San Francisco is particularly concerned that the overly broad interpretation of the CDA urged by Airbnb would allow internet companies to make 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. It would be improper to assume this is what Congress intended. 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 Liability For An Online Company's Own Commercial Conduct Does Not Adversely Impact The Internet Or Electronic Commerce.

Airbnb asserted below that if their own far-reaching theory of immunity under the CDA were rejected, internet companies would face a parade of horribles: "[A]ll websites that allow third parties to post listings and that process transactions in connection with those listings would face far-reaching liability that Congress never intended for events beyond their control." Defs.' Mot. to Dismiss at 24. Similarly, in other CDA cases, Airbnb has claimed that liability will "dramatically set back" e-commerce and "render the modern Internet unrecognizable." Appellants' Opening Br. at *3, *35, *Homeaway.com, Inc. and Airbnb, Inc. v. City of Santa Monica*, (No. 18-55367), 2018 WL 2017523 (9th Cir. 2018).

San Francisco's experience demonstrates that Airbnb's fears are unfounded. In 2016, San Francisco enacted its ordinance that made online hosting platforms liable if they charged booking fees for unregistered units. *See* SF Admin. Code § 41A.5(g)(4)(C). Airbnb and HomeAway filed a lawsuit alleging, *inter alia*, that the CDA preempted San Francisco's Ordinance. *San Francisco*, 217 F. Supp. 3d

1066. After the District Court denied Airbnb and HomeAway's request for a preliminary injunction (*id.*), the parties settled the case in May 2017. 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), http://www.latimes.com/business/la-fi-airbnb-san-francisco-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), 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 successfully advances key public policy goals for its residents while e-commerce platforms—many of which call this city their home—continue to thrive.

A. The San Francisco 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 facilitates drive up these costs.[11] Accordingly, San Francisco—like many other cities—regulates short-term rentals to maintain affordable housing stock for permanent residents, reduce evictions, and preserve neighborhood character. Prior to 2015, San Francisco simply prohibited short-term rental of residential units. 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 require residents to register their homes with the city before making them available as short-term rentals.[12]

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 San Francisco's Ordinance against hosting platforms 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

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[11] *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); *see also* Office of the New York City Comptroller, *Impact of Airbnb on NYC Rents* (May 3, 2018), https://comptroller.nyc.gov/reports/the-impact-of-airbnb-on-nyc-rents/ (finding that 9.2% of citywide rental increases in New York City could be attributed to increase in Airbnb listings).

[12] San Francisco also specified that only the primary resident of a unit may offer it as a short-term rental, that "whole house" rentals are limited to 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* SF Admin. Code Ch. 41A.

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 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 disrupt 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, returning critically needed rent-controlled and subsidized BMR units to the permanent housing market. As the base of legitimate short-term rental hosts broadens, these legitimate hosts receive more bookings to 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 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 *de facto* hotels have been rightfully restored to full-time housing, and San Francisco has been able to abate significant nuisances that it previously struggled to address.

B. The San Francisco Ordinance Did Not Break The Internet.

None of the "doom and gloom" (*Roommates.com*, 521 F.3d at 1175) Airbnb portended as a result of its liability under the San Francisco ordinance has materialized. Even with the ordinance in full force and effect, e-commerce has

continued to thrive. E-commerce platforms, which already generate billions of dollars of revenue, are still "expected to grow exponentially." 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/.

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.

Threats of liability are frequently met with doom and gloom prophesies by targeted 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 liability for non-publishing conduct of short-term rental platforms 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).

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CONCLUSION

This Court should apply the CDA's immunity clause narrowly and consistently with its past decisions in order to ensure that online companies may continue to be held liable for their own non-publishing commercial conduct.

Dated: June 29, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus is 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 6,209 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: June 29, 2018

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CERTIFICATE OF SERVICE

I, Alison Lambert, 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 June 29, 2018.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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 June 29, 2018, at San Francisco, California.

/s/ Alison Lambert
ALISON LAMBERT

COURT OF APPEAL CASE NO. 18-55113

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH DISTRICT

LA PARK LA BREA A LLC, et al.
Plaintiffs and Appellants,

v.

AIRBNB, INC., et al
Defendants and Appellees

Appeal from the United States District Court
for the Central District of California,
Case No. CV 17-4885 DMG (AS)
The Honorable Dolly M. Gee

AMICUS CURIAE BRIEF OF COMMUNITIES ASSOCIATIONS INSTITUTE IN SUPPORT OF PLAINTIFFS AND APPELLANTS LA PARK LA BREA A LLC, AND FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by Amicus Curiae, Community Associations Institute, of the following corporate interests:

a. Parent companies of the corporation or entity:

None.

b. Any publicly held company that owns ten percent or more of the corporation or entity:

None.

June 28, 2018

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INTERESTS OF AMICUS CURIAE

Community Associations Institute ("CAI") is an international non-profit organization providing education, resources and advocacy for community association leaders, members and professionals to promote successful communities through effective, responsible governance and management. CAI's more than 39,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. These important voices are not otherwise before the Court, and they well deserve to be heard and accorded their due significance.

Although community associations and apartments differ in many respects, vacationers ("Guests") frequently violate covenants governing community associations just as they violate apartment leases. CAI has an interest in this matter because it promotes the ability of associations to self-govern, allowing rules specific to Short-Term Rentals ("STRs") to be established through a well-documented and resident-engaging process that leads to decisions that suit the majority of HOA owners in the community. These rules preserve the residential character of associations, protect the quiet enjoyment of the residents and protect the property values within.

To date, numerous community associations ("HOAs") have enacted lease restrictions against STRs and apartment owners have beefed up their leases to make it a breach of the lease to even advertise their unit as an STR. Although landlords can bring an action to evict the tenant for the nonmonetary breach of the lease and HOAs can impose fines, the time and expense in doing so does not alleviate the impact on the Host's neighbors; nor does it ensure that the landlord or HOA will be compensated for the losses it incurs in monitoring, enforcing and remedying the Host's breach.

We believe the proposed analysis and CAI's unique perspective will focus the issues before this Court and will simplify the Court's analysis. CAI's brief will assist the court in deciding this matter by highlighting the impact the illegal activity has on its members.

INTRODUCTION AND SUMMARY OF ARGUMENT[1]

> *Realtors and developers …use the Internet to market worldwide the short-term rentals of Encinitas homes. One has only to look at the internet to see how large these commercial operations have become and their potential for future growth. …Many of us in Encinitas that live in residential areas have seen our neighbor's homes sold and turned into motel-like operations… Once commercialization starts in a neighborhood and reaches the so called "tipping point", your property becomes unattractive to normal home buyers. The only people who will buy your home are those that wish to use it as a rental property- thus "tipping" a residential area into commercial usage*.[2]

In "*South Dakota v. Wayfair Inc*.", ("*Wayfair*")[3], the U.S. Supreme Court held that it is unfair to require "a business with one salesperson in each State [to] collect sales taxes in every jurisdiction in which goods are delivered; but not a business with 500 salespersons in one central location and a website accessible in every State," even though they have identical national sales." The same analysis applies here. If brick-and-mortar travel service providers engaged in booking

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[1] All parties have consented to the filing of this brief. No party or 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 submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money to fund the preparation or submission of this brief.

[2] Rubenstein, Irwin Letter to Cal. Coastal Commission, October 2006; https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf, at pages 71-73.

[3] 2018 U.S. LEXIS 3835, 24 (2018)

STRs must defend claims of 17200 violations[4], online travel service providers should also be required to do so. Section 230[5] ("CDA") immunity did not apply in *Wayfair*, and it should not apply here!

Airbnb asserts that under the CDA, it is not an "information content provider" as that term is defined in the CDA[6] and that any harm caused to Appellants is a result of its publishing conduct, not its other conduct. Thus, no liability may be imposed against it for encouraging and facilitating bookings of known illegal STRs.

Airbnb is wrong! Airbnb should not get a pass simply because one aspect of its conduct is protected under the CDA. Airbnb, like state licensed leasing agents, advertise listings for vacation rentals. Importantly, and just like brick-and-mortar listing agents, it also collects a percentage commission from Hosts and Guests, verifies personal profiles and listings, collects and transfers payments to Hosts, helps set pricing, and sends out its own professional photographers to photograph the STRs.[7] Airbnb, like Marriott and Hyatt, also partners with airlines

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[4] CA Bus. & Prof. Code § 17200.
[5] Communications Decency Act, 47 U.S.C. § 230.
[6] *Id.*, at 47 U.S.C. § 230(f)(3).
[7] Airbnb, Careers at Airbnb, https://www.airbnb.com/careers/departments/photography.

and credit card companies offering "points" for booking on Airbnb.[8] Unlike brick-and-mortar real estate brokers, it also obtains insurance (or self-insures) Hosts and Guests[9] and calculates, collects and remits the Hosts' transient occupancy taxes ("TOTs").[10] It is this conduct that is harming our members.

Amicus does not deny that the listing itself creates problems for its members. The larger concern is that the additional services provided by Airbnb are driving the increase in illegal listings and exacerbating an already difficult situation. Its entry into the rental market has created an uneven playing field, robs our communities of affordable housing and turns countless residential properties into deregulated and decentralized motels.

The voices of residents in apartment buildings and in HOAs with restrictions on STRs- those who live every day with the nuisance of "*vacation mania*"- are too often unheard in the debate over CDA immunity. Although those who oppose any regulation of the internet speak of the dangers of regulating online speech, rarely is

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[8] Airbnb.com- Help, "Airbnb Partnership Program", https://www.airbnb.com/help/article/1545/delta-skymiles--airbnb-partnership-program

[9] Airbnb.com- "Host Protection Insurance"; https://www.airbnb.com/host-protection-insurance

[10] Airbnb.com, "Occupancy Tax Collection and Remittance by Airbnb in California", https://www.airbnb.com/help/article/2297/occupancy-tax-collection-and-remittance-by-airbnb-in-california

there discussion about how on-line travel service companies are abusing private property rights, violating local laws, raising rents and interfering with the quiet enjoyment of permanent residents. This omission is unfortunate because property managers and residents are uniquely qualified to speak about how it impacts property rights, privacy, and a sense of safety. This brief presents the voices of the people who are forced to bear the cost and nuisance created by Airbnb's business model.

Amicus respectfully joins in Appellants' assertion that the CDA does not give online booking services "an all-purpose get-out-of-jail-free card"[11] and requests the Court to overrule the lower court decision granting Airbnb CDA immunity.

ARGUMENT

> *We live next door to two (2) transient units…. The transient/motel people coming and going every few days is very disruptive to our quiet enjoyment of this residential 4-plex…[L]ots of people in and out every few days at all hours of the day and night. They take up parking…(They often have more than 2 cars & lots of people). Common areas are crowded… These are homes not motel rooms... We want to live in a neighborhood of homes- not a motel….*[12]

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[11] *Doe v. Internet Brands, Inc*., 824 F.3d 846, 853 (9th Cir. 2016).

[12] Minor, Carolyn, Letter to the Imperial Beach City Council re STRs; https://documents.coastal.ca.gov/reports/2002/11/Th16a-11-2002.pdf

Through peer to peer marketplaces, Guests and Hosts access a marketplace from their living room couch. Regardless of the popularity of these sites, laws exist that regulate internet commerce, including STRs. Just as it is impracticable to try and collect sales taxes from individual purchasers of products on the internet,[13] it is impracticable to expect HOAs and landlords to prevent Guests from arriving when Hosts operate without a license and their identity and location is secret.

Seal Beach, California is a good example; it passed an ordinance banning STRs.[14] However, search "Short Term Rentals Seal Beach" on the internet, and you will find a host of listings: VRBO - 1,147 rentals, Hometogo.com - 51 rentals, Tripping.com - 9, and Airbnb - 232."[15] Clearly, restrictions against STRs are either blindly ignored or with full knowledge not followed.

Airbnb seeks a regime where it can continue to extract massive profits from its travel services while disclaiming any requirement to comply with restrictions against STRs. Airbnb is the leader in the online STR travel service market. It has

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[13] *Wayfair*; *See*, Note 3, above, at page 10.
[14] *See*, Seal Beach Municipal Code § 11.4.05.135 (2013).
[15] Airbnb does not identify where any home in Seal Beach is located. It refers to it as Coastal Orange County; however, it is happy to give you a list of homes just rented in Seal Beach!

over 3,000,000 properties in 65,000 cities and 191 countries worldwide.[16] It exceeded its financial projections for 2017, with $93 million in profit on $2.6 billion in revenue.[17] The sheer number of Airbnb's listings means that it offers quadruple the options of the largest traditional hotel chain, Marriott.[18] Alarmingly, much of this growth appears to be from multi-unit operators who rent out two or more units and full time operators who rent their unit(s) out most of the year.[19]

It is estimated that as of October of 2014 Airbnb had 11,401 listings in the Los Angeles region, generating revenue of $80 million in 2014 alone.[20] Although Airbnb describes itself as a member of the "sharing economy," helping the middle

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[16] Hartmans, Avery, "*Airbnb Now Has More Listings Worldwide Than the Top Five Hotel Brands Combined*," Business Insider, August 10 2017. http://www.businessinsider.com/airbnb-total-worldwide-listings-2017-8.

[17] Zaleski, Olivia and Newcomer, Eric, "*Inside Airbnb's Battle to Stay Private*", Bloomberg, February 2018, https://www.bloomberg.com/news/articles/2018-02-06/inside-airbnb-s-battle-to-stay-private

[18] Chafkin, Max, "*Can Airbnb Unite the World?*", FAST COMPANY (Jan. 12, 2016), https://www.fastcompany.com/3054873/can-airbnb-unite-the-worldeqreeee; https://perma.cc/RZ3W-QJBV, note 144.

[19] O'Neill, Dr. Joh .W. and Ouyang, Yuxia, "*From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb*" January 2016, http://3rxg9qea18zhtl6s2u8jammft-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/0000-0000_PennState_AirBnbReport_011916ee_Embargo.pdf .

[20] Samaan, Roy, LAANE: *"Airbnb, Rising Rent, and the Housing Crisis in Los Angeles"*, March 2015, https://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf .

class earn extra income, a rising share of its revenues in Los Angeles, (42%), comes from commercial operators, not middle class home-sharers.[21]

Despite the impossible task of enforcing restrictions against STRs, HOAs cannot ignore illegal rentals.[22] They cannot turn a blind eye on one illegal rental, and thereafter enforce the restriction on another. Airbnb's secrecy model and the fact that the Guest is gone long before the HOA can investigate, mean that HOAs are hard-pressed to prevent illegal rentals before they occur, which is a breach of the promise they made to residents who purchased or rented in reliance on the restrictions.

HOA's have limited tools to enforce compliance with the governing documents, such as imposing a fine, suspending association voting rights or suspending the right to use the common area. Otherwise, a court order is required. As to fines, the reality is that most fines are the $100 - $200 range, and the cost is easily absorbed by the Host. As to suspension of right to use the common area, as a practical matter it is difficult for an HOA to monitor pool use. Most HOAs do not have an onsite manager so anyone with a card key can access the pool (or other

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[21] *Id.*

[22] *See*, *Mission Shores Assn. v. Pheil*, 166 Cal. App. 4th 789, 795 (2008); and *Ironwood Owners Assn. IX v. Solomon*, 178 Cal. App.3d 766.

amenities). Hiring staff to monitor the pool or asking for proof of residency is expensive and impractical.

Alternatively, an association can initiate a suit for injunctive relief. Since there is no privity of contract with the Guest, the HOA is limited to bringing an action against the Host. As indicated by the court in *Nahrstedt v. Lakeside Village*, enforcement on a "case by case" basis is inherently inefficient and would impose "great strain on the social fabric" of the development and would "frustrate owners who had purchased their units in reliance on the CC&Rs"[23] The explosion in numbers of illegal STRs is undermining our members' communities!

> *I just want to paint a picture for you what life is like on a Saturday in my neighborhood… At around 8:00 or 9:00, the maids come into the neighborhood, trucks and cars with all their supplies. All the giant SUVs, extra cars, vans etc. who have come to rent for the week are packing up for their so called Check-out time. It's a madhouse, a real zoo… By the time the maids are finished driving around to the RENTAL homes, it's time for Check-In… Then the strangers come in droves. It's party time at the beach in our residential neighborhood, and believe me, these people want to get their money's worth.*[24]

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[23] 8 Cal. 4th 361, 384.

[24] Bourgo, Linda, Letter to Cal. Coastal Commission, August 2006, https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf, at page 76.

I. THE CDA DOES NOT IMMUNIZE AIRBNB FROM LIABILITY FOR DAMAGES RESULTING FROM ITS OWN CONDUCT.

Ninth Circuit binding precedent establishes that the CDA precludes liability for claims involving "publication".[25] There is no dispute that Appellees have an internet presence or that information on its site is entered by Hosts in drop down menus provided by Airbnb. What is at issue is whether Airbnb's "non-third party content" on its website and conduct performed by Airbnb separate and apart from its internet presence is immunized under the CDA and whether Appellant has stated a cause of action for each of the alleged state torts.

Again, Appellants are only seeking to hold Airbnb liable for activities traditionally performed by licensed real estate brokers, not for third-party content. Airbnb is perfectly free to publish any listing they receive and to collect publishing fees, whether or not the unit is lawfully registered, whether or not the tenant is allowed under the lease to sublet the apartment, and whether or not the HOA imposes restrictions against STRs. As clearly stated in *Lansing v. Southwest Airlines Co.*[26], where Section 230 preemption was not found:

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[25] *Doe v. Internet Brands, Inc.*, 824 F.3d 846,850 (9th Cir. 2016); *see also, Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp.3d 1066, 1072 (U.S. Dist. Ct, N.D. Cal. 2016).

[26] *Lansing v. Southwest Airlines Co.*, 2012 Il App (1st) 101164; 980 N.E.2d 630, 638.

> *The CDA was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve the use of the Internet. Such an overly broad interpretation of the CDA is inconsistent with the statutory purpose to encourage the restriction of objectionable or inappropriate online material. Moreover, such a grant of blanket immunity would lead to the anomalous result that occurred in the trial court below, i.e., plaintiff was allowed to proceed with his negligent supervision claim against defendant where the evidence of the employee's threatening and harassing conduct arose from telephone calls, but that same cause of action was barred where the evidence of the very same wrongful conduct arose from e-mails and text messages. The CDA does not bar plaintiff's cause of action simply because defendant's employee used the Internet access provided by defendant as one vehicle to harass and threaten plaintiff.*

II. AIRBNB'S ONLINE TAX PAYMENT PROGRAM IS NOT PROTECTED PUBLICATION OF THIRD PARTY CONTENT.

In addition to providing booking and other services to Hosts and Guests, Airbnb also offers its Hosts transient occupancy tax ("TOTs") services for taxes imposed under CA Rev. & Tax Code § 7280.[27] Airbnb collects TOTs from its Hosts and through pre-negotiated agreements with cities/counties, shields the Hosts identity, helps them avoid audits and in some instances, obtains amnesty for unpaid back taxes. When a city signs a "Voluntary Collection Agreement" ("VCAs") with Airbnb, Airbnb registers as the taxpayer and remits the collected

[27] *See*, Note 10 above and *In re Transient Occupancy Tax Cases*, 2 Cal. 5th 131 (2016), where the City of San Diego filed a putative class action against various booking agents, alleging each such company was liable for the TOT on the amount retained by the booking agent.

tax. Depending upon the negotiating skills of the taxing authority, VCAs may limit the number of audits that can be performed and limit the time period in question.[28]

Airbnb's tax service is not "publication of third party content." Airbnb's negotiated VCA agreements are a tool to attract large multiple-unit operators who wish to avoid direct tax enforcement and audits. This service creates an un-level playing field, to the disadvantage of brick-and-mortar leasing brokers. It also contributes to the increasing number of residential communities being turned into *defacto* motels.

III. HOAS HAVE THE RIGHT TO CONTROL USE AND MANAGEMENT OF COMMON AREAS IN THEIR COMMUNITIES.

Covenants, conditions and restrictions ("CCRs") create a special relationship between an HOA and its members; prospectively, they "run with the land" and so become part of every owner's sale transaction. The CCRs provide certainty of operations, rights and responsibilities. Deferring to use restrictions contained in an

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[28] *See*, Airbnb's agreement with Sonoma County at: http://www.sonoma-county.org/tax/tot/pdf/Signed_Airbnb_VCA.pdf;and, Airbnb's proposed agreement with the City of Pacific Grove at: https://www.cityofpacificgrove.org/sites/default/files/city-council/2017/10-18-2017/city-council-10-18-2017-13a-airbnb-agreement.pdf. *See also*, Dan R. Bucks, "*Airbnb Agreements with State and Local Tax Agencies*," March 2017, https://www.ahla.com/sites/default/files/Airbnb_Tax_Agreement_Report_0.pdf .

association's governing documents protects the general expectations of the owners that restrictions imposed by the developer or approved by the membership will be enforceable.[29]

With only two exceptions noted below, an association has the right to restrict the use of property in a community[30] and as long as the restrictions are reasonable they will be upheld by the courts. Restrictions are reasonable if: (i) they are rationally related to the protection, preservation or proper operation of the property; and (ii) if they are exercised in a fair and nondiscriminatory manner.[31]

Watts v. Oak Shores Community Assn. ("Watts")[32] is on point. There, the board assessed STR landlords additional fees, limited their use of boats and other watercraft and placed restrictions on parking. STR landlords challenged the restrictions. The court ruled that associations have the right to restrict STRs, boards can impose a reasonable fee to offset expenses associated with STRs, and courts should defer to boards on decisions related to the maintenance, control and

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[29] CA. Civ. Code § 5975; See *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361,377.
[30] *See, Colony Hill v. Ghamaty*, 143 Cal. App. 4th 1156, 1164 (2016), (Associations have the power to limit room rentals as a commercial enterprise).
[31] *See, Laguna Royale Owners Ass'n. v. Darger* (1981) 119 Cal. App. 3d 670, 680.
[32] 235 Cal. App. 4th 466, 468.

management of common areas.[33] That STRs "cost the Association more than long-term renters or permanent residents is not only supported by the evidence but experience and common sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse."[34]

While the Davis-Stirling Common Interest Development Act regulates virtually all transactions in an association, only two statutes address access to a common interest development by nonmembers. One deals with the enforcement of rental prohibitions against owners who acquire title to property after enactment of the prohibitions (Civil Code § 4740); the other authorizes association members to invite guests, including public officials, to use meeting space for "social, political, or educational purposes." (Civil Code § 4515). Neither statute applies in this instance.

The legislature sometimes "overrides" an association's governing documents to give effect to a public policy, as illustrated by enactment of the two statutes

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[33] *Id.*, at 474-477.
[34] *Id.*, at 473.

above; however, with the exception of associations within the coastal zone[35], there is no public policy that requires HOAs to accommodate the impact of STRs on their communities. In fact, the general rule is that common areas in HOAs are intended for membership use and not public use.[36]

IV. GRANTING IMMUNITY UNDER SECTION 230 UNDERMINES LAND USE RESTRICTIONS AND THE QUIET ENJOYMENT OF RESIDENTS WHO BOUGHT IN RELIANCE THEREON.

> *As a hotel operator within the city, we were very concerned with the unfair competition of lodging within residential zones. We understand the need to have visitor-serving commercial uses within the city, but strongly believe such uses should be in commercial zones. Our investments in the lodging industry are substantial and continuing to allow the proliferation of lodging in residential neighbor[hoods] undermines that investment.*[37]

Use restrictions contained in CC&Rs are an inherent part of common interest developments and are crucial to the stable, planned environment of any shared ownership arrangement.[38] Airbnb's business model undermines the community concept and is partly responsible for our members' complaints, complaints that

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[35] *Greenfield v. Mandalay Shores Community Assn*., 21 Cal. App. 5th 896.
[36] *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1600, 1607-1609 (non-residents may be excluded from use of common areas).
[37] Georgees, Eddie, Letter to Cal. Coastal Commission, October 2006; https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf, at page 67.
[38] *Nahrstedt v. Lakeside Village*, 8 Cal. 4th 361, 372-374.

must be addressed if a STR violates zoning ordinances, occupancy standards, building and fire codes or the ADA.[39]

Numerous counties and cities require STRs to meet all applicable building, health, fire and related safety codes and that they be inspected by the fire department before any rental activity can occur.[40] Higher standards apply for hotels vs. apartments vs. single family dwellings.[41] Converting a residence into an STR often requires the Host to (i) install carbon monoxide and smoke detectors; (ii) make sure stairs, decks and guardrails are structurally sound; (iii) install fire extinguishers; (iv) make sure appliances are in good working condition; (v) install fences or locking covers on hot tubs, pools and spas; (vi) and make sure the rentals are free of pests, including bedbugs.[42] It is highly unlikely that Hosts are voluntarily complying with the increased standards!

Airbnb enables Hosts to escape complying with these laws. Their business model also undermines the ability of agencies, landlords and/or HOAs to enjoin

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[39] The Americans with Disabilities Act, 1990, Title 42, chapter 126, of the United States Code beginning at Section 12101.
[40] *See*, Monterey County, Code Section 17.134.040(f); Mono County Code Section 26.040; and City of Santa Cruz, Municipal Code Section 4.02.070.
[41] California Code of Regulations, Title 24, Part 9; http://www.citymb.info/home/showdocument?id=28089
[42] *See*, Mono County Code Section 26.040.

illegal rentals before the Guest arrives, resulting in unsafe and unsanitary conditions for Guests and neighbors, alike.

V. ILLEGAL STRS ALSO EXPOSE COMMUNITY ASSOCIATIONS TO ADA ENFORCEMENT ACTIONS.

> *None of these Condos are Handicap Friendly. There could be lawsuits if we go Transient Housing Week or Weekend rentals.*[43]

When residential property is converted into an STR, an argument can be made that the STR, like a motel property, is a "public accommodation" under the ADA.[44] A decision that a STR is a "public accommodation" exposes an HOA to a claim that the common areas be ADA complaint, the cost of which must be borne by the Host, the property owner, renter, and the other residents in the HOA [45] and Airbnb.[46] STRs are considered "public accommodations" under the ADA if they

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[43] Shipley, Loren Letter to City Council re STRs, *see*, Note 12.

[44] *See*, Voluntary Agreement and Release entered into by Airbnb at: https://rbgg.com/wp-content/uploads/RBGG-Airbnb-Executed-Voluntary-Agreement-with-Exhibits-9-20-17.pdf .

[45] *See*, Johnson ,Denise, "Why Claims Under Americans with Disabilities Act are Rising," October 7, 2016, https://www.insurancejournal.com/news/national/2016/10/07/428774.htm

[46] *See*, *National Federation of the Blind of California, et al., v. Uber Technologies, Inc. et al*, 103 F. Supp. 3d 1073 (Dist. Court, ND California 2015).

are "virtually indistinguishable from a hotel[47] or if they are a "place of lodging, as that term is defined in the statute.[48]

Unfortunately, the sheer number of "secret" listings raises concerns about the ability of current enforcement mechanisms to regulate ADA compliance. Granting immunity under Section 230 for booking services would not only allow Airbnb and its Hosts to continue to defy restrictions against STRs, it would allow Airbnb to avoid its obligation as a "*travel service*" to comply with the ADA and other state and local laws governing access to public accommodations.

CONCLUSION

Airbnb's travel services are not protected publication of third-party content. Airbnb's "unprotected" conduct, along with its protected publishing activities, has negatively impacted community associations and has contributed to the rise of housing costs and rents in our communities.[49] Immunizing all of Airbnb's conduct because listings are protected speech will undermine local and private governance.

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[47] *See, Access 4 All, Inc. v. Atlantic Hotel Condominium Association*, 2005 U.S. Dist. LEXIS 41600 (S.D. Fla.); *Kromenhoek v. Cowpet Bay W. Condo Ass'n*, 77 F. Supp. 3d 454, 457 (D.V.I. 2014).

[48] Except if it is located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor. *See,* 42 U.S.C. § 12181(7)(A).

[49] Samaan, Roy, LAANE, "*Airbnb, Rising Rent, and the Housing Crisis in Los Angeles*," March 2015,

It is unfortunate that the short term nature of a Guest's stay creates a culture in which Guests feel entitled to impede the quiet enjoyment of their neighbors to instead promote their vacation "*extravaganzas.*" These issues are not easily deterred or prevented; nor should they be ignored. Broad immunity from liability for tortious conduct is a rarity in our law. We respectfully ask the Court to listen to the voices of those who suffer as a result of Airbnb's non-publishing conduct and reverse the decision of the lower Court.

Respectfully submitted,

Dated: June 28, 2018

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https://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B), Fed. R. App. P., because it contains **4,182** words, excluding those parts of the brief exempted by Rule 32(a)(B)(iii), Fed. R. App. P.

2. This brief complies with Circuit Rule 32(b), the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word using Times Roman 14-point type.

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CERTIFICATE OF SERVICE

I certify that on 28th day of June, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

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Appeal No. 18-55113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA PARK LA BREA A LLC, et al
Plaintiffs-Appellants,

vs.

AIRBNB, INC., et al
Defendants-Appellees.

On Appeal From the United States District Court
for the Central District of California
The Honorable Dolly M. Gee
Case No. CV 17-4885 DMG (AS)

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, & CALIFORNIA STATE ASSOCIATION OF COUNTIES TO ADVOCATE REGARDINDING THE INTERPRETATION OF THE COMMUNICAIONS DECENCY ACT AND NEUTRAL AS TO THE PARTIES

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1 and 29

The League of California Cities it is a nonprofit corporation which does not issue stock and which has no parent corporation, nor is it owned in any part by any publicly held corporation.

International Municipal Lawyers Association and the California State Association of Counties likewise are nonprofit corporations which do not issue stock and which have no parent corporation, nor is either owned in any part by any publicly held corporation.

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I.
STATEMENT OF INTERESTS

California's housing shortage is serious. And California is not alone. The nationwide critical housing shortage has left at the doorstep of local governments a myriad of problems that must be addressed: homelessness, skyrocketing housing costs, impacts to public health, and decaying overtaxed infrastructure. A lot of political attention has been paid to strategies to add to the housing stock. But a more immediate threat looms in the loss of existing housing, which exacerbates the current crisis.

Maintaining the current inventory of housing is a crucial component of the overall effort to meet the demand for housing. Short term vacation rental (STVR) is a lucrative alternative to residential rentals and Defendant Airbnb, Inc. has created a readily available customer base that makes it easy for property owners (and tenants) to go into the STVR business with Airbnb, Inc.

The so-called sharing economy has its early roots as renegade, even outlaw, enterprises. Private transactions conducted over the internet have evaded tax and regulation. But that is changing. The United States Supreme Court has just acknowledged that internet businesses must be subject to the regulations like other businesses, as

is fair and necessary to provide the services of government in the public interest:

> In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that "'[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.'" Brief for Petitioner 55. What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers' furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the "sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price," *Quill*, 504 U. S., at 328 (opinion of White, J.); and help create the "climate of consumer confidence" that facilitates sales, *see ibid.* According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requiring companies that avail themselves of the States' benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result.

South Dakota v. Wayfair, Inc. (2018) 585 U. S. ____, Slip Op. at 16-17.

The conduct of the businesses needs to be reconciled with community values. That is where local government steps in.[1]

[1] "The care of human life and happiness, and not their destruction, is the first and only object of good government." –Thomas Jefferson

Government regulation of short term vacation rentals assists in the preservation of affordable housing stock, promotes the value of maintaining zones for residential life, and contributes to a healthy local economy by zoning interdependent tourist-serving businesses in proximity to each other.

The League is an association of 474 California cities united in promoting open government and home rule to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys representing the 16 divisions of the League from every part of California. The committee monitors appellate cases affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments

around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League, CSAC and their member cities and counties have a substantial interest in the outcome of this case. Their member cities and counties have enacted a range of regulations addressing the impacts of the sharing economy and in particular the short term vacation rental (STVR) of homes zoned for residential use: some allow STVR and tax the use; some prohibit transient uses like STVR in residential zones; and many local governments impose various limits aimed at assuring the STVR uses are compatible with the

residential zones in which they operate. The League and CSAC's perspective on this important matter will provide the Court a broader context of the policy implications of the District Court's unnecessarily expansive interpretation of the federal Communications Decency Act (CDA). The League and CSAC urge the Court to consider this context in reaching an appropriate decision in the case at bar.

IMLA also has a substantial interest in the outcome of this case. Airbnb, Inc. attempts to insulate its businesses from liability for its own conduct, which might frustrate reasonable regulation. By applying the CDA in a manner that was not intended, IMLA members' clients may face an insurmountable obstacle in the effort to implement housing policy and prevent the loss of affordable housing to STVRs. IMLA's commitment to understanding the reach and the limits of local lawmaking authority offers a perspective that it respectfully requests this Court consider in deciding the case at bar.

The League, IMLA, and CSAC's counsel is familiar with the issues involved. We believe additional briefing would be useful; and, therefore, we offer this honorable Court the accompanying amicus curiae brief.[2]

[2]Pursuant to Federal Rule of Appellate Procedure Rule 24(a)(4)(E),

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29-2(a), all parties to the appeal, through their respective counsel, have consented to the filing of this amicus curiae brief.

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counsel for amici represents that she authored this brief in its entirety and *pro bono* and that none of the parties or their counsel, nor any other person or entity made a monetary contribution intended to fund the preparation or submission of this brief.

II.
INTRODUCTION

Airbnb, Inc. collaborates with tenants and owners of residential property to use those properties like hotel rooms for short term rentals. Both Airbnb, Inc. and the tenants/property owners make money on the transaction. *La Park La Brea LLC v. Airbnb, Inc.*, 285 F.Supp.3d 1097, 1100 (C.D. Cal. 2017). Airbnb, Inc. seeks to avoid responsibility for those transactions from which it profits but which it knows violate the terms of leases. The District Court accommodated Airbnb, Inc. with an expansive interpretation of the Communications Decency Act (CDA). A better reading of the CDA has led other courts to conclude that businesses are accountable for their own commercial conduct, whether they conduct business in storefronts or on-line.

In 1996, Congress enacted the CDA to protect internet service providers from liability for content third parties posted on their websites. In other words, Congress protected the internet providers from the actions of others and insulated their publishing activities from liability. The legislative history of Section 230 demonstrates that Congress did not intend a broad immunity for all actions of online companies. Instead, Congress intended to accomplish two main goals:

(1) to encourage blocking and filtering technologies that protect minors from adult material on the Internet, and (2) to protect the Internet from excessive government regulation. Congress was worried state-law libel lawsuits would threaten the growth of the Internet. *Batzel v. Smith*, 333 F.3d 1018, 1026-29 (9th Cir. 2003);[3] 47 U.S.C. § 230(b).

Of course, 1996 was light years behind 2018 in terms of internet business. Today, the internet's infrastructure is well established and access to it widespread. Businesses that conduct their commercial transactions through the internet have no disadvantage to warrant special immunity from liability. Yet Airbnb, Inc. invokes the statute to allow it to profit from transactions that violate local laws or that are tortious. The CDA was not enacted to provide such asylum.

III.
COMMUNICATIONS DECENCY ACT SHOULD NOT BE EXPANDED TO CREATE IMMUNITY FOR BUSINESS CONDUCT

The District Court's willingness to immunize Airbnb, Inc. from liability using the CDA is misguided because Airbnb, Inc. is more like a pawnbroker than a bulletin board. Indeed, the District Court

[3]Unrelated portion of decision superseded by changes in California's Anti-SLAPP statute as noted in *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766 (9th Cir. 2017).

acknowledges that Airbnb, Inc.'s business involves more than just posting content. *La Park La Brea, supra,* 285 F.Supp.3d at 1105. But, to conclude that Airbnb, Inc. is not an "information content provider" (within the meaning of the CDA) such that statutory immunity attaches, the District Court has to turn a blind eye to the fact that Airbnb's website content proposes the precise commercial transaction from which Airbnb, Inc. itself profits.

Airbnb, Inc. is not merely in the business of processing payments. The company's name has become nomenclature for short term vacation rental, to wit "*let's Airbnb on our trip to Los Angeles*." Airbnb, Inc. may fairly be described as the world's largest hotelier, with some of its accommodations offered in what would otherwise be desperately-needed affordable housing in California and throughout the country.

The United States Supreme Court overruled the requirement of a "physical presence" for internet businesses to be liable for state sales taxes; and it did so explicitly because it found the notion antiquated. *Wayfair, Inc., supra,* Slip Op. at 14-15 ("Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.") The idea that Airbnb, Inc. needs

immunity from its own business conduct in order for its online business to survive is similarly antiquated.

Airbnb, Inc. may have other defenses to claims that it should be liable for its contribution to the alleged breach of Aimco's leases; but the CDA cannot reasonably be read to immunize that conduct. From the point of view of the League, CSAC, and IMLA, the District Court's interpretation suggests the dangerous proposition that internet commerce can be disguised as third party speech, immunizing the business conduct from liability by a statute never intended for that purpose. Given the particular effect of Airbnb, Inc. on affordable housing, the stakes here are terribly high.

The growing jurisprudence in this area confines the immunity offered by CDA to damages caused by the utterances of third parties and not to the internet businesses' own conduct. *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102 (9th Cir. 2009) (limiting Section 230 liability to publishing activities); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* 521 F.3d 1157, 1161 (9th Cir. 2008) (denying CDA immunity to online roommate-finding business and noting that if a real estate broker cannot lawfully inquire about a prospective buyer's race, then the same liability attaches to

similarly impermissible inquiries made by an online broker); *Doe v. Internet Brands* 824 F.3d 846 (9th Cir. 2016) (online companies liable for business conduct other than narrow category of publishing third party created content).

By virtue of the CDA, Airbnb, Inc. is not responsible if a "host" describes its dumpy subterranean unit as a palace with sweeping scenic views. However, it remains accountable for its own actions. When Airbnb, Inc. conducts its business to book STVRs in residences, it must conduct business lawfully. This is true whether Airbnb, Inc. conducts business on the internet or from behind a card table at a strip mall storefront.

Internet businesses will find ways to thrive – as good businesses do – within bounds of applicable laws. In this regard, Airbnb, Inc. has some kinship with pawnbrokers. Pawnshops are a heavily regulated business. The laws aim to prevent the business from transacting in stolen goods. Customers must provide positive identification and a complete description of the merchandise. In most jurisdictions, pawnshops provide local law enforcement with data on all transactions on a daily basis. Nevertheless, the businesses thrive.

Finally, the District Court distinguishes *Airbnb, Inc. v. City and County of San Francisco*,217 F.Supp.3d 1066 (N.D. Cal. 2016) on the ground that San Francisco prohibited the booking of an unlawful STVR while Aimco sought to prevent Airbnb Inc. from soliciting an unpermitted transaction. The District Court makes the distinction to further Congress' purpose of "promoting the development of e-commerce." *Id.* at 1108. First, Congress did not intend to protect solicitation of illegal commercial transactions. Second, the success of e-commerce does not depend on the ability of Airbnb, Inc. to solicit, arrange, and profit from an illegal booking. Between 1996 and 2018, e-commerce has found its footing.

Airbnb, Inc. profits on the booking transactions offered on the websites they control, just as the pawnbroker stands to earn a profit off collateral jewelry it will sell. All businesses should be held responsible for assuring the commercial transactions from which they profit are lawful. When it enacted the CDA, Congress certainly did not intend otherwise.

IV.
CONCLUSION

For the foregoing reasons, the League of California Cities, the International Municipal Lawyers Association, and the California State Association of Counties urge this Honorable Court to apply the CDA as it was intended and without expanding its immunity from liability to the mere conduct of internet business.

Dated: June 28, 2018

By: *s/ Christi Hogin*

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

In accordance with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this *Amicus Curiae* Brief is in a proportionally spaced 14-point font; that the brief was produced on a computer using a word processing program; and that the program calculated that the brief including the statement of interests and footnotes (but excluding tables of authorities and contents) contains 2221 words.

Dated: June 28, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2018, 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.

June 28, 2018 By: *s/ Wendy Hoffman*
WENDY HOFFMAN

CASE NO. 18-55113

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

La Park La Brea A LLC, et al.

Plaintiffs-Appellees,

v.

Airbnb, Inc., et al.

Defendants-Appellants.

On Appeal From The United States District Court,
for the Central District of California

Case No. 17-CV-4885, Hon. Dolly M. Gee

BRIEF OF *AMICI CURIAE* NEIGHBORHOOD, HOUSING, AND HOTEL GROUPS

COOPER SQUARE COMMITTEE, FRIENDS OF PETROSINO SQUARE, HELL'S KITCHEN NEIGHBORHOOD ASSOCIATION, HOTEL ASSOCIATION OF NEW YORK CITY, HOUSING CONSERVATION COORDINATORS, AND WESTSIDE NEIGHBORHOOD ALLIANCE

IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* Cooper Square Committee, Friends of Petrosino Square, Hell's Kitchen Neighborhood Association, Hotel Association of New York City, Housing Conservation Coordinators, and Westside Neighborhood Alliance, state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of *amici* stock.

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I.

INTEREST OF *AMICI CURIAE*[1]

New York City has one of the tightest real estate markets in the country. Affordable housing is in high demand and low supply. Without affordable housing, the economic diversity and opportunity on which so many New Yorkers depend would be a thing of the past.

The New York City hotel industry is competitive and highly regulated. Hotel regulations result from democratic processes that take into account competing interests, including those relating to the health and safety of travelers, the interests of employees and other economic actors that benefit from a thriving hotel industry, relations among hotel operators and neighbors, and the preservation of local communities. The hotel industry creates good jobs and generates tax revenues that contribute to the diversity of cities and that enhance urban quality of life.

Among the state and local requirements that balance competing economic interests are land use laws that limit transient residential occupancy to designated areas. In both Los Angeles and New York, laws are in place that designate the locations and circumstances under which short-term residential occupancy (occupancy of less than 30 days) are and are not appropriate. These laws are not inherently suspect or oppressive. Neither are private lease terms that mirror and support such regulations.

Airbnb users violate laws and lease terms on a massive scale. Airbnb knows about, and facilitates, these violations. This conduct injures many third-parties,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no counsel for any party authored this brief in whole or in part, and no party or counsel for any party contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a).

including those who need affordable housing, city dwellers who value stable communities, and traditional hotel operators and employees who seek to comply with—rather than claim immunity from—the law.

Airbnb contributes to these injuries through conduct that goes far beyond publishing third-party content. Airbnb makes money by administering every aspect of the illegal short-term rental transactions it facilitates, while Airbnb is in possession of the facts that demonstrate the illegal nature of such transactions. Airbnb creates contractual terms and policies that govern the illegal short-term rental agreements. Airbnb provides insurance to address various risks inherent in these agreements. Airbnb provides pricing suggestions to maximize the possibility of third-parties entering these agreements. Airbnb provides dispute resolution services to help resolve issues between guests and hosts. Airbnb conceals the identity of its customers who are directly responsible for causing injury. Appellants' E.R. 164, 177-78, 213-215, Declaration of Anthony Tanner ¶ 61 & Ex. H, ECF No. 23-8; *see also* Declaration of Michael T. Williams, Ex. QQ, ECF No. 23-59. Airbnb provides incomplete and misleading information about existing laws, leading to more illegal transactions. Airbnb solicits property owners to be "friendly" to Airbnb, even with respect to properties on which short-term occupancy is illegal. None of this is friendly. Nor is it shielded from liability based on an immunity that relates to the actions of speaking and publishing online.

Airbnb's pitch that it helps the little guy "make ends meet" and just facilitates short-term uses of extra space in resident-occupied units may sound nice, but the reality is very different. In New York, for example, most listings are for entire units. Airbnb rentals are routinely taken off the market for long-term use and are run like mini, unauthorized, unregulated, and illegal hotel rooms. An enormous percentage of Airbnb rentals violate city or state laws. Airbnb hosts are not just moms and pops welcoming guests to use an extra bedroom.

Amici are New York City-based affordable housing and hotel industry groups, all of which have a strong interest in informing the Court of the serious harms Airbnb has caused and the legal violations that underlie its business model.

A. Cooper Square Committee ("CSC")

CSC works with tenants to contribute to the preservation and development of affordable housing, and community/cultural spaces so that the Lower East Side remains racially, economically, and culturally diverse. With over 600 members, CSC provides tenants with information about their rights to healthy and safe housing, to receive public assistance and social security, the resources to report building violations, and to counsel seniors interested in entitlement assistance programs.

B. Friends of Petrosino Square ("FPS")

Petrosino Square is a small New York City park that sits at the crossroads of Little Italy, the Bowery, Chinatown, and SoHo. FPS is an unincorporated neighborhood association that seeks to preserve affordable housing and other aspects of community life in the neighborhoods surrounding Petrosino Square. FPS is a neighborhood partner of the New York City Historic Districts Council. The Historic Districts Council is an advocate for all of New York City's historic neighborhoods, working to ensure the preservation of significant historic neighborhoods, buildings, and public spaces in New York City.

C. Hell's Kitchen Neighborhood Association ("HKNA")

HKNA is a volunteer membership and advocacy association that seeks to involve those who live and work in Hell's Kitchen in the future of their neighborhood and community. HKNA addresses concerns about open space, traffic, air quality, and affordable housing. HKNA has organized public discussions with city agencies and neighborhood events, and, with the help of

New York's Port Authority, has created two out of three public green spaces in the neighborhood.

D. Hotel Association of New York City ("HANYC")

HANYC is a nonprofit, nonpartisan membership organization, and one of the oldest professional trade associations in the nation. An industry leader since 1878, HANYC represents the interests of more than 280 hotels in New York City, which comprise more than 80,000 hotel rooms, and employ approximately 50,000 employees. HANYC represents the interests of hotel owners, hotel developers, and hotel operators both locally and nationally. It represents these interests in a variety of different areas—including, for example, legislative representation, fire protection and public safety regulation, and in negotiations with various labor entities and unions.

Airbnb has caused serious negative impacts to the neighborhoods and industry in which Amici operate, and a decision in this case will have an important effect on whether or not Airbnb continues to act with impunity with respect to the interests of others who care deeply about their city.

E. Housing Conservation Coordinators ("HCC")

Founded in 1972, HCC is a legal not-for-profit organization that seeks to preserve safe, decent and affordable housing on the west side of Manhattan. Each year, HCC provides legal services, tenant and community organizing, and weatherization assistance to thousands of neighborhood residents to help keep their homes, improve their living conditions, and fight for the changes that will keep neighborhoods affordable and diverse.

F. West Side Neighborhood Alliance ("WSNA")

WSNA is an independent, member-run organization sponsored by Housing Conservation Coordinators that mobilizes Manhattan's West Side residents to take charge of planning its community. WSNA advocates for a diverse, affordable,

livable neighborhood that preserves the mixed-income character of today's West Side. It works to guarantee that the ongoing development of the neighborhood serves community members of all races, incomes, and backgrounds.

II.

ARGUMENT

A. Introduction

Airbnb is a cool website.

The impacts of its deliberate misconduct, however, are not so cool.

One negative impact is the decline in affordable housing. Long-term residents are being pushed out of neighborhoods so that "hosts" and "guests," can engage in a "free market" of short-term rental activity that violates leases and state and local laws. With units off the market, rents escalate. The cycle is vicious.

Especially in New York and Los Angeles, affordable housing is an urgent public need. Cities have a vital interest in protecting their residents' ability to obtain long-term affordable housing, including by prohibiting transient uses that otherwise encourage property owners to take units off the market for long-term renters. In Los Angeles and New York, thousands of affordable rental units have been removed from the market as a result of Airbnb. Rents have increased dramatically. The effect, including the increased risk of homelessness, on low-income residents (who already pay an enormous percentage of their income for housing) is harrowing. Additional problems arise from the introduction of unregulated hotel-like operations into residential communities and buildings that are not designed for such uses. Airbnb pushes the costs for these dislocations onto others. Los Angeles residents have approved billions of dollars in new taxes to address the problem of homelessness that Airbnb has exacerbated. Building operators and cities incur enormous costs trying to ameliorate the problems Airbnb causes.

At issue in this case is Airbnb's radical contention that it is immune from liability for claims based on harms Airbnb intentionally causes to real property interests. In the district court, Airbnb sought to brush aside these harms with unrealistic, upbeat assurances like "all can benefit by embracing homesharing." Opp'n to Pls.' Mot. for a Prelim. Inj. 2:17-18 (Dec. 8, 2017), ECF No. 52. Airbnb criticized prohibitions against transient occupancy as "draconian" and "unreasonable." *Id.* at 20:25-26.

In reality, people who want to live in stable neighborhoods with actual neighbors are not anachronistic relics. Laws enacted for their protection cannot be dismissed as oppressive inefficiencies. Such laws result from democratic processes that balance competing interests. If those background laws are to be changed (a possibility that is the subject of great controversy and public debate in cities throughout this Circuit), any change would naturally occur, if at all, through the same democratic processes.

This brief first addresses the local nature of land use regulation. It then goes on to explain the laws governing short-term occupancy in the City of Los Angeles and New York. Next it addresses authoritative studies that have documented and analyzed the harmful impacts of Airbnb in the City of New York with respect to affordable housing and the hotel industry. Finally, it discusses the doctrines under which Airbnb may be held responsible for its conduct.

B. Airbnb Undermines Core Values Of State And Local Control

Built to take advantage of the physical and social infrastructure that supports quality housing and neighborhoods in major metropolitan areas, Airbnb has thrived on an improper claim of immunity from the state and local laws governing land use and real estate transactions.

1. Zoning And Land Use Are Subject To State And Local Laws As To Which Preemption Is Highly Disfavored

States and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (affirming denial of challenge to landmark law); 8 WITKIN, SUMMARY OF CAL. LAW, CONSTITUTIONAL LAW § 1130 (11th Ed. 2018) (noting that California zoning laws are designed "to make an orderly distribution of activities throughout the community, with the resulting benefits of safety and convenience to those who live in purely residential districts.").

California law has long recognized that land use is an area over which local government "traditionally has exercised control." *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal.4th 1139, 1149–1150, *as modified* (2006) (reversing, and holding that local ordinances were not preempted by the state Forest Practice Act); *see also DeVita v. County of Napa*, 9 Cal.4th 763, 782 (1995) ("The Legislature, in its zoning and planning legislation, has recognized the primacy of local control over land use."). Land use measures will not be preempted by state laws "absent a clear indication of preemptive intent." *Id.*

The California Legislature has "expressed its intent to retain the maximum degree of local control" regarding local zoning regulations, subject only to minimum state standards. *Devita*, 9 Cal.4th at 782 (citing Cal. Govt. Code §§ 65850, 65800, 65802). Such local control is grounded in the California Constitution. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST., art. XI, § 7; *Miller v. Board of Public Works of City of Los Angeles*, 195 Cal. 477, 495, 496 (1925) (recognizing local zoning authority as

grounded in the power to "promote the health, safety, morals, and general welfare of the community").

Principles of federalism also counsel strongly against interpreting federal statutes as nullifying land use laws. *Atay v. County of Maui*, 842 F.3d 688, 699 (9th Cir. 2016) (finding no preemption of Hawai'ian county land use ordinance; "Particularly where a statute regulates a field traditionally occupied by states, such as health, safety, and land use, a 'presumption against preemption' adheres.") (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009)); *see also Mejia v. County of San Bernardino*, No.09-CV-5476-SVW-FFMX, 2009 WL 10699520, at *10 (C.D. Cal. Oct. 29, 2009) (refusing to assume that "Congress intended [federal law] to preempt so broadly that it overrides land-use and zoning regulations").

2. Local Zoning Law Prohibits Short-Term Rentals On Plaintiffs' Properties

Pursuant to its constitutional authority, the City of Los Angeles has adopted a "Comprehensive Zoning Plan." Los Angeles Municipal Code ("L.A.M.C.") § 12.00. The purpose of this plan is, among other things, to "consolidate and coordinate all existing zoning regulations and provisions into one comprehensive zoning plan in order to designate, regulate and restrict the location and use of buildings, structures and land, for agriculture, residence, commerce, trade, industry or other purposes." L.A.M.C. § 12.02. These regulations are "necessary" to many objectives, including to "encourage the most appropriate use of land; to conserve and stabilize the value of property; . . . to prevent undue concentration of population; to lessen congestion on streets; to facilitate adequate provisions for community utilities and facilities such as transportation, water, sewerage, schools, parks and other public requirements; and to promote health, safety, and the general welfare." *Id.*

In furtherance of these goals, the City is divided into various zones, with varying levels of restrictiveness relating to permitted uses. L.A.M.C. § 12.04.A. The boundaries of these zones are designated in a Zoning Map, L.A.M.C. § 12.04.B, and the zoning designation of particular parcels are publicly available through the City's online system known as "ZIMAS," http://zimas.lacity.org; *see also* Appellants' E.R. 18, Williams Supp. Dec. ¶ 21.

Section 12.03 of the Los Angeles Municipal Code defines zoning terms. An "apartment house" is a "residential building" that has three or more dwelling units and not more than five guest rooms or suites of guest rooms. *Id.* A "dwelling unit" is a "group of two or more rooms, one of which is a kitchen, designed for occupancy by one family for living and sleeping purposes." *Id.* A "transient occupancy residential structure" includes residential buildings (like apartment houses with multiple dwelling units) "wherein occupancy, by any person by reason of concession, permit, right of access, license, or other agreement is for a period of 30 consecutive calendar days or less. . . ." *Id.*

Land uses not expressly authorized by applicable zoning laws for a particular zone are prohibited in that zone. *See*, *e.g.*, L.A.M.C. §§ 12.09.1.A, 12.11.A. Airbnb's typical transactions—those involving occupancy for fewer than 30 consecutive days—are prohibited in apartment buildings in many parts of Los Angeles. For example, "transient occupancy residential structures" are prohibited in many zones, including in zones designated "RD" (Restricted Density Multiple Dwelling Zones, L.A.M.C. §§ 12.09.1.A.1-A.11); "R3" (Multiple Dwelling Zone, L.A.M.C. § 12.10); or "R4" (Multiple Dwelling Zone, L.A.M.C. § 12.11). Transient occupancy residential structures are permitted in some commercial zones, including those zoned C1 and C2, but only when not located within 500 feet of from any A or R (agricultural or residential) zone (Commercial Zone, L.A.M.C. §§ 12.13, 12.14).

In many parts of California, excessive transient occupancy poses a threat to the "residential character" of neighborhoods. *Ewing v. City of Carmel-by-the-Sea*, 234 Cal.App.3d, 1579, 1581, 1591 (1991).

Violations of Los Angeles zoning laws are subject to civil penalties, including a maximum civil fine of $2,500 for each offense. L.A.M.C. § 11.00(l). Each day a violation continues is a new and separate offense. *Id.* Violations are also misdemeanors. *Id*. § 11.00(m).

Appellants' properties are zoned in RD, R4, and C2 zones. Appellants' E.R. 18-19, 21-44, Williams Supp. Dec. ¶¶ 22-25, Exs. D-G. In the C2 zone, Appellants' property is within 500 feet of an R zone. *Id.*, E.R. 19, 39-44, Williams Supp. Dec. ¶ 25, Ex. G. Accordingly, use of any of these structures for transient occupancy is prohibited. *Cf. People v. Panoussis,* No. BC624202 (L.A. Superior Court, filed Jun. 17, 2016) (City Attorney enforcement action arising from Airbnb activity).[2]

3. New York Law Also Restricts Short-Term Rentals

In New York, land use is a subject of both state and local control. Local governments have broad power to "adopt and amend local laws" concerning the "protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. CONST., art. IX, § 2(c)(10). At the same time, the New York Legislature has enacted the "Multiple Dwelling Law" governing buildings with multiple dwelling units.

[2] California law also requires those engaged in real estate brokering activity to be licensed. Cal. Bus. & Prof. Code § 10130. This requirement covers anyone who, among other things, "solicits listings of places for rent, or . . . collects rents from real property." Cal. Bus. & Prof. Code § 10131(b). Airbnb solicits listings of places for rent and collects rents from real property. Airbnb, however, has no license, a fact that can be verified by entering: "Airbnb" under "Licensee/Company Name" in the search tool of the California Department of Consumer Affairs Bureau of Real Estate: http://www2.dre.ca.gov/PublicASP/pplinfo.asp.

The Multiple Dwelling Law prohibits rentals of certain apartment building units for less than thirty days. N.Y. Multiple Dwelling Law § 4(8)(a)(1). An exception exists if a "permanent occupant," i.e., a "natural person" who lives in the unit for more than thirty days consecutively, is present. *Id.* § 4(8)(a)(1)(A). Thus, it is illegal for the resident of a unit covered by the Multiple Dwelling Law to move out and put the unit on the market for short-term rental through Airbnb. Violations, however, are rampant. *See* Ameena Walker, "New York's anti-Airbnb Law is Proving Tough to Quickly Enforce," CURBED NEW YORK (May 11, 2017), https://bit.ly/2ti2EWF; *see also* Ameena Walker, "City Council Seeks Additional $2M for anti-Airbnb Crackdowns," CURBED NEW YORK (Apr. 17, 2018), https://bit.ly/2leFtJ6.

C. Airbnb Has Hurt The Affordable Housing Market

Studies conducted by government entities and educational institutions consistently demonstrate Airbnb's impact on the broader housing market. The following studies detail the effect of Airbnb on New York City:

- New York City Comptroller, "The Impact of Airbnb on NYC Rents," (Apr. 2018) ("the Comptroller Report"), https://on.nyc.gov/2t4X36N.
- New York State Attorney General, "Airbnb in the City," New York State Office of the Attorney General, (Oct. 2014) ("AG Report"), http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf.
- David Wachsmuth, David Chaney, *et al.*, "The High Cost of Short Term Rentals in New York City," (Jan. 30, 2018), MCGILL UNIVERSITY, SCHOOL OF URBAN PLANNING ("McGill Report"), https://bit.ly/2Gb4qyS.
- BJH ADVISORS, LLC, "Short Changing New York City: The Impact of Airbnb on New York City's Housing Market," HOUSING

CONSERVATION COORDINATORS, NEW YORK CITY (June 2016) ("HCC Report"), https://bit.ly/2M1weaF.

Each study analyzed different data sets, and ultimately reached similar conclusions, i.e., that Airbnb has had a significant negative impact on the New York housing market. Documented impacts include increased rents, removal of affordable housing from the New York market, reduced vacancy rates, and health and safety violations. These impacts stem in great part from commercial operators, not those who merely want to supplement their income by letting in an occasional short-term guest. The following are some of the studies' key findings relating to Airbnb in the New York City market.

Residential units are converted to transient use by commercial operators, resulting in removal of units from the market for long-term housing.

- Entire home/apartment listings, as opposed to renting a room in an apartment or home, account for 75% of total Airbnb revenue and 51% of listings from September 2014 to August 2017. McGill Report at 2.
- Airbnb "commercial" hosts (those who list more than one home on Airbnb, since only one listing could be a primary residence) constitute 12% of hosts (or 6,200 of the City's 50,500 hosts) over the same period. *Id.*
- These operators earned 28% of the revenue of all Airbnb listing in New York City (or $184 million of $657 million). *Id.*
- The top 10% of commercial hosts earned 48% of the revenue generated by commercial hosts. *Id.*
- More than 30% of listings in New York in 2015 were for units listed for at least three months per year by hosts that listed more than one unit on Airbnb or were listed for at least six months per year. HCC Report at 4-5.

- According to the New York Attorney General, hosts with three or more unique listings, "controlled more than one in five unique units . . . , accepted more than one in three private reservations, and received more than one of every three dollars." AG Report at 10.[3]

A huge percentage of Airbnb rentals are illegal.

- According to the New York Attorney General, 72% of *all rentals* on Airbnb violate New York's Multiple Dwelling Law, which prohibits short-term rentals unless the person who resides in the unit is present. AG Report at 8.
- The McGill study found between 85% and 89% of *entire-home rentals* violated New York's Multiple Dwelling Law. McGill Report at 2.
- Such activity accounted for 45% of all reservations for entire home listings, and 66% of the revenue generated in 2017 from those listings was illegal. *Id.*

Airbnb has an enormous impact on the rental vacancy rate, causing rents to rise and resulting in a great loss of affordable housing.

- The use of Airbnb caused between 7,000 and 13,500 units of housing to be removed from New York City's housing market between September 2014 and August 2017. McGill Report at 2.
- 4,700 ghost hotels (a single unit in which multiple rooms are listed for the same dates, causing guests to be lodged in close quarters with one

[3] Nationally, 30% of hosts manage more than one property. *See* CBRE Hotels' Americas Research, "Hosts with Multiple Units – A Key Driver of Airbnb Growth: A Comprehensive National Review Including a Spotlight on 13 U.S. Market," (Mar. 2017), at 6 https://bit.ly/2LW1rfl/.

another), were operating in New York during this period, resulting in the removal of 1,400 units from the long-term rental market. *Id.*

- The number of ghost hotels in New York has increased by **79%** since 2015. *Id.* at 29.
- As units listed on Airbnb increase in price by one percentage point, rental rates in the neighborhood go up 1.58 percent, after controlling for variables. Comptroller Report at 2.
- As a result of Airbnb-related rent increases, New York City renters paid an additional $616 million rent in 2016 alone. Comptroller Report at 2.
- Between 2009 and 2016, approximately 9.2% of New York City increases in rental rates were attributable to Airbnb. Comptroller Report at 2.
- Between 2011 and 2017, New York City lost 183,000 affordable units of housing as a result of Airbnb. Comptroller Report at 1.
- Homelessness stands at a record high with 60,000 people sleeping in shelters every night. *Id.*
- For 2014, 30% of New York households were characterized as severely rent burdened, meaning that rent accounted for 50% or more of their household income. HCC Report at 8-9.
- One study focused on "impact" units—a total of approximately 8,000 units in New York City that were highly likely to have been removed from the long-term rental market. This classification covered units in which all three of the following criteria were met: (1) their listings related to the entire home or unit; (2) they were booked multiple times in a given month; and (3) the unit was listed for at least three months per year, with the "host" controlling multiple units, or the unit was

listed for at least six months per year. If these 8,000 units returned to the market, the number of vacant units citywide would increase by 10%, and the vacancy rate would rise from 3.4-3.6%. HCC Report at 6. That increase would be even greater in gentrifying neighborhoods, *id.* at 30, and would go a long way toward addressing New York's housing emergency, *id.* at 4.

Similar impacts exist in Los Angeles.

- The use of Airbnb has resulted in the removal of 7,300 units from the housing market since it began operating in Los Angeles. Roy Samaan, "Airbnb, Rising Rent, and the Housing Crisis in Los Angeles," LOS ANGELES ALLIANCE FOR A NEW ECONOMY (Mar. 2015) ("LAANE Report") at 3, https://bit.ly/2lehAkX.
- These units represent the equivalent of seven years of affordable housing construction in Los Angeles. *Id.*
- In 2014 alone, 1% of Los Angeles's rental units were removed from the market as a result of Airbnb, leading to an increase in monthly rent of 7.3%. Dayne Lee, "How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations," 229 HARV. L. & POL'Y R. 230, 240 (2016).
- If the 11,000 Airbnb units in Los Angeles were hotel rooms, approximately 7,400 persons would be employed by the hotels. LAANE Report at 3.
- Commercial hosts, or those who listed two or more units on Airbnb, were responsible for six percent of listings. *Id.* at 9-12. Thirty-five percent of the revenue generated on Airbnb in Los Angeles is generated by those properties. *Id.* at 12.

- Higher median rent and home prices are strongly correlated with more people living on the streets or in shelters. *See* UCLA Newsroom, "UCLA Anderson Forecast Sees Economy Moving Ahead—For Now," (Jun. 13, 2018) https://bit.ly/2tc00Cr. It is likely that 2,000 people will be placed into homelessness if Los Angeles rents rise by 5%. *See* Andrew Khouri, "High Cost of Housing Drives Up Homelessness," L.A. TIMES (Jun. 13, 2018), https://lat.ms/2t7Wx71.

D. Hotel Regulatory Environment and Purposes

Airbnb also has significant impacts on the hotel industry, resulting in losses of jobs, taxes, and other harms. Hotels provide stable employment to 50,000 New Yorkers. *See* Hotel Association of New York City, "About Us," https://www.hanyc.org/about/. Hotel jobs offer opportunity for upward mobility to thousands. These jobs come with benefits like health insurance, life insurance, dental insurance, retirement benefits, scholarship opportunities, and so on. New York Hotel and Motel Trades Council Union, "Benefits," https://bit.ly/2thzt63.

Tourism contributes to the New York economy in many ways. Tourism brings paying customers to restaurants, stores, museums, and theaters throughout the City. Many industries revolve around catering to the tourism industry: providing tour guides, running tour buses, selling souvenirs, taxis, and airport transfers. *See* Tourism Economics, "The Economic Impact of Tourism in New York in the 2016 Calendar Year," https://on.ny.gov/2MDVHrF.

At the same time, New York's hotels are heavily regulated. Hotels are subject to more stringent fire safety restrictions than those classified for "permanent resident purposes." N.Y. Building Code §§ 310.1.1-2. A "major reason for this distinction is that the visitors who stay in transient residential occupancies are not familiar with the layout of the building, including the exit

stairwells, as are permanent residents." AG Report, Affidavit in Support by Thomas Jensen, N.Y. Chief of Fire Prevention, at ¶ 8.

Hotels are also required to do the following: post diagrams on every guest room entrance door showing the route to two stairwells or other means of egress (N.Y. Fire Code § 405.5), appoint a fire and life safety director (*id.* § 401.4.5.1), host regular fire and non-fire emergency drills (*id.* § 401.7.6), and have a fire safety/emergency action plan (*id.* §§ 405.1, 405.2, 405.3).

The New York Department of Health requires permits to run temporary residences. N.Y. Health & Safety Code § 7-1.3. To maintain a permit, an operator is subject to reporting requirements for health concerns (*id.* § 7-1.5). The operator must also notify officials before commencing any construction (*id.* § 7-1.7), follow additional fire safety requirements (*id.* § 7-1.8), ensure the water supply is sanitary and clean (*id.* § 7-1.9), properly dispose, collect, and treat any sewage (*id.* § 7-1.10), properly maintain any structures (*id.* § 7-1.15), store and dispose of hazardous materials properly (*id.* § 7-1.16), ensure there are no vermin or rodents (*id.* § 7-1.17), change linens regularly (*id.* § 7.1-1.18), and store and dispose of refuse appropriately (*id.* § 7-1.19).

All of these regulations exist to protect health and safety for the benefit of guests and the community at large.

HVS Consulting & Valuation conducted a recent report showing the dramatic impact of Airbnb on New York City hotels and the local economy in general. HVS Consulting, "Airbnb and Impacts on the New York City Lodging Market," (Oct. 13, 2015), https://bit.ly/2t4la5h ("HVS Report"). That study reached the following conclusions for the 12-month period from September 2014 through August 2015:

- Airbnb was responsible for more than $2.1 billion in total economic losses. HVS Report at 1.

- The losses to hotels include approximately $451 million in direct loss of room revenue plus ancillary losses of approximately $136 million, including lost food sales ($88 million), and lost beverage sales ($20 million). *Id.* 1, 5, 21.
- These numbers are expected to grow, resulting in more than $1 billion in direct room and ancillary losses by the end of this year. *Id.* at 21.
- Airbnb causes job losses, including nearly 4,000 positions in 2015, resulting in $294 million in lost compensation to employees. *Id.* at 23.

Hotels also generate tax revenue. In New York, taxes include a Hotel Room Occupancy Tax of approximately 5.875% of the room rate (*See* New York City Department of Finance, "Hotel Room Occupancy Tax," https://on.nyc.gov/2FZ09le [describing how to calculate the tax rate]), a State Hotel Unit Fee of $1.50 a day (*id.*), New York City Sales Tax of 4.5% (*see* N.Y.C. Department of Finance, "New York State Sales and Use Tax," https://on.nyc.gov/2pIhwxt), State Sales Tax of 4% (*id.*), and the Metropolitan Commuter Transportation District surchage of 0.375% (*id.*). In total, occupants of New York City hotel rooms pay tax of approximately 14.75% of the room rate. Conservative estimates put New York's lost taxes from Airbnb at more than $33 million. AG Report at 9. Airbnb causes significant tax losses in New York. Estimates are:

- $28 million lost in taxes on employees' salaries;
- $835,000 lost in tax on proprietor income;
- $78 million lost in tax on production and imports;
- $31 million lost in taxes on households;
- $11 million lost in taxes on corporations; and
- $76 million lost in lodging taxes.

Id. at 38. Airbnb's unfair competition thus leaves cities with less revenue with which to address the extensive negative impacts that Airbnb itself causes.

E. Airbnb Does Not Protect The Public

Beyond the above impacts, Airbnb's business model has been to externalize the obvious risks inherent in its business model.

Guests throw wild parties in rented apartments and homes, which frequently cause significant property damage and destroy guests' homes. *See* Julie Bort, *How an Airbnb Guest Trashed a Penthouse*, BUSINESS INSIDER, (Mar. 18, 2014), https://read.bi/1l41Kor; *Man Who Rented His Apartment on Airbnb Returns Home to Find an Orgy*, HUFFINGTON POST (Dec. 6, 2017), https://bit.ly/2thQ2yD; Nathan Tempey, *Airbnb Scammer Wrecks Williamsburg Family's Home in Epic Rager*, GOTHAMIST (Sept. 30, 2016), https://bit.ly/2dDXMHb; Harry Bradford, *Most Airbnb Rentals Go Perfectly, Then There are These Horror Stories*, HUFFINGTON POST (July 29, 2014), https://bit.ly/2tn70fh.

Airbnb properties are used for prostitution. *See* Dana Sauchelli and Bruce Golding, *Hookers Turning Airbnb Apartments into Brothels*, N.Y. POST (Apr. 14, 2014), https://nyp.st/2I1m07A; Gaby Del Valle, *My NYC Duplex Rental Was Actually a Brothel*, GOTHAMIST (Sept. 8, 2016), https://bit.ly/2MyaV1m.

In Manchester, England, a registered sex offender used a fake name to advertise a *Harry Potter*-themed rental aimed at children. Toby Meyjes, *Paedophile advertises Harry Potter inspired cupboard for 10 pounds a night*, METRO NEWS (May 14, 2017), https://bit.ly/2t5gHzB.

Airbnb users have also discovered hidden cameras spying on them in houses and apartments they have rented. Nina Golgowski, *Couple Uncovers Hidden Cameras in Nightmare Airbnb Stay*, HUFFINGTON POST (Oct. 11, 2017), https://bit.ly/2lh9O9Q.

Guests frequently steal or destroy their hosts' personal items. *See* Jen Chung, *Airbnb Guest Admits to Stealing Luxury Watches, Bags from Manhattan Apartment*, GOTHAMIST (Jan. 16, 2017), https://bit.ly/2MCB6Uu.

Many hosts evade fire and safety requirements. *See* Ronda Kaysen, *Can I Stop My Neighbor From Running an Airbnb?* N.Y. TIMES (Apr. 21, 2018), https://nyti.ms/2Kk9YJ4 (advising a reader that "[a] single-family residence has different fire safety requirements than a hotel and restrictions on which rooms can be used as bedrooms").

Hosts illegally subdivide rooms. *See* Emma Whitford, *East Williamsburg Airbnb Turned One Loft into Eight Tourist Cubbyholes*, GOTHAMIST (Feb. 29, 2016), https://bit.ly/2MwDr3n (noting that Inspectors from New York's Office of Special Enforcement found that *each* of the eight "rooms" had no natural light or ventilation and inadequate means of egress).

Airbnb users are frequently defrauded by hosts who post fake photographs and fake descriptions of apartments and houses for rent. *See* Julia Marsh, *Airbnb Renter Duped into Paying $9k For Dingy Apartment*, N.Y. POST (Aug. 30, 2016) https://nyp.st/2yh4r44.

City regulators cannot keep up. Tanay Warerkar, "City Sues Hell's Kitchen Landlord Running Illegal Airbnb Rentals," CURBED (Jun. 7, 2018), https://bit.ly/2yjiNka (describing enforcement action relating to illegal use of rent controlled apartments that included **150** existing building and fire violations); *see also* Tanay Warerkar, "Lower East Side Landlord Hit with $1.2 M Lawsuit Over Illegal Airbnb Listings," CURBED (May 15, 2017), https://bit.ly/2riK5Pr (describing lawsuit alleging that landlord had been seeking to evict rent-stabilized tenants to create more Airbnb rentals); Ameena Walker, "Manhattan Couple Hit with $1M Fine for Illegal Airbnb Listings," CURBED (Apr. 3, 2018), https://bit.ly/2rnRvDF (building owners fined $1 million for illegally listing seven

units within Manhattan buildings); Emily Nonko, "Chelsea Landlord Who Converted Rent-Stabilized Units to Airbnb Listings Hit with Lawsuit," CURBED (Jan. 23, 2018), https://bit.ly/2E2f75v (building owner sued for operating illegal hotels on Airbnb after 13 illegal hotel complaints, 23 building and fire violations, three criminal summonses, and one advertising summons).

Airbnb also does not protect its users from discrimination. Studies have shown, for example, that African-American Airbnb hosts earn less for comparable listings than other hosts. One study, compared Airbnb hosts' profile pictures and rental prices, ultimately finding that black hosts charged 12% less than non-black hosts for listings in comparable neighborhoods. Benjamin G. Edelman, Michael Luca, *Digital Discrimination: The Case of Airbnb.Com*, HARVARD BUSINESS SCHOOL (Jan. 28, 2014), https://hbs.me/2gKyWXV; *see also* Emma Whitford, *NYC Public Advocate Says Airbnb Racism is "Pervasive,"* GOTHAMIST (May 6, 2016), https://bit.ly/1rCUPIw.

Airbnb users are also face discriminatory treatment. *See* Hugo Martin, *Aribnb Host Must Pay $5,000 For Canceling Reservation Based on* Race, L.A. TIMES (July 13, 2017), https://lat.ms/2sVtt1m; Sam Levin, *As Airbnb Grows, So Do Claims of Discrimination*, N.Y. TIMES (Apr. 27, 2017), https://nyti.ms/2vQjQ5L.

The whack-a-mole nature of city enforcement efforts and the persistence of the problem have driven officials to extreme measures. AvalonBay, an apartment management company, was found civilly and criminally liable as a result of its tenants listing their apartments on Airbnb. The City instituted these enforcement actions relating to transient use *in spite of* AvalonBay's efforts to enforce prohibitions on short-term rentals in many of its communities. Brief of Amicus Curiae Brief of California Apartment Association, Apartment Investment and Management Company, AvalonBay Communities, Inc., and Community

Associations Institute, *Homeaway.com, Inc. v. City of Santa Monica*, No. 18-55367, 2018 WL 2434971, at *5 (9th Cir. May 23, 2018).

F. Airbnb Can Be Held Responsible

The problems described above will only grow worse unless Airbnb can be held accountable for the conduct it engages in that goes beyond publishing third-party listings. Conduct for which Airbnb can be held accountable includes the torts it commits by aiding and abetting legal violations by its customers.

Airbnb has knowledge of the unlawful activities of its hosts. In order to make a booking on Airbnb, the "host" must enter the address of the property. Appellants' E.R. 226, FAC ¶ 12. Due to the public nature of zoning laws, and because Airbnb (like everyone else) is charged with knowing the law, Airbnb's possession of the relevant addresses puts it on notice of violations of City zoning laws where short-term rentals are not allowed. Appellants' E.R. 18-19, 21-44 Williams Supp. Dec. ¶¶ 22-25, Exs. D-G. *Bibeau v. Pacific NW Research Foundation Inc.*, 188 F.3d 1105, 1110-11 (9th Cir. 1999) ("What the law presumes is that everyone is aware of the obligations the law imposes on them."); *see also Benson v. California Coastal Comm'n*, 139 Cal.App.4th 348, 355-56 (2006) (holding plaintiff could not rely on conversations with coastal commission in plan review process because "[e]veryone is presumed to know the law"). In this case, Airbnb had not just constructive knowledge but actual knowledge that short-term rentals were not permitted. Appellants' E.R. 232, 236-37, FAC, ¶¶ 37, 54-56.

Under California law, Airbnb is liable for aiding and abetting if it had both knowledge of the violation and "substantially assisted" in its commission. Judicial Council of California Civil Jury Instructions § 3610 (2018); *see also Saunders v. Superior Court*, 27 Cal.App.4th 832, 845-46 (1994) (reversing order sustaining demurrer holding plaintiffs adequately pled cause of action for aiding and abetting).

Airbnb's business operations provide substantial assistance to violators. Airbnb "maintains a messaging system for hosts and guests; collects and transfers booking payments; offers free professional photography to hosts; calculates, collects, and remits local occupancy taxes on hosts' behalf in some jurisdictions; offers a 'smart pricing' tool that automatically adjusts prices to match demand; provides a $1,000,000 'host guarantee' in the event of property damage; provides 'Host Protection Insurance' for third-party claims against hosts and landlords for both property damage and bodily injury; and reimburses guests in the event of a 'travel issue' such as hosts' failure to provide guests reasonable access to the accommodation." Appellants' E.R. 2-3, Order Granting Motion to Dismiss.

Airbnb also sets the contract terms for guests and hosts, provides dispute resolution services, (Appellants' E.R. 230-31, FAC, ¶ 29), and offers a "Friendly Buildings Program" to induce property owners and HOAs to allow their tenants to rent on Airbnb. Airbnb sought to induce Plaintiffs and their neighboring property owners to be "friendly" to short-term rentals, even though such use is illegal in the zones in which Plaintiffs operate. *Id.*, Appellants' E.R. 234, FAC, ¶¶ 45-46.

In exchange for being "friendly," Airbnb allows property owners to "know when residents participating in the program are hosting, how many guests are staying with them, and how much money is being earned." Appellants' E.R. 229, FAC, ¶ 23. If a building does not participate in this program, it will **not** receive access to that and other information. *Id.*, Appellants' E.R. 223, FAC ¶ 2. Courts have found "substantial assistance" based on far less significant acts of encouragement. *Schulz v. Neovi Data Corp.*, 152 Cal.App.4th 86, 93 (2007) (payment processor aided and abetted violation when it provided its name and logos to "lend an aura of respectability and further encourage participation"); *In re First Alliance Mortg. Co.*, 471 F.3d 977, 994-95 (9th Cir. 2006) (finding "ordinary business transactions" can serve as the basis for an aiding and abetting claim if the

defendant "actually knew those transactions were assisting the [primary tortfeasor] in committing a specific tort"); *cf. In re Aimster Copyright Litig.*, 334 F.3d 643, 655 (7th Cir. 2003) (affirming grant of preliminary injunction determining a likelihood that the defendant had contributorily infringed when it provided a messaging and download service through which people sent copyrighted works, a tutorial showing a user listening to copyrighted works, and requested users pay a monthly fee); *Columbia Pics. Indus., Inc. v. Fung*, No. 06-CV-5578-SVW(JCx), 2009 WL 6355911, at *13-14 (C.D. Cal. Dec. 21, 2009), *aff'd in part as modified by Columbia Pics. Indus. Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (finding that the defendant contributed to infringement when he provided technical assistance to users seeking copyrighted works and when moderators of the messaging forums provided instructions on how to upload and download copyrighted works).

Wrongful conduct such as that alleged above can serve as the basis for an unfair competition claim pursuant to California Business and Professions Code § 17200, *et seq*. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 959 (9th Cir. 2009) ("[A]n action based on [the UCL] to redress an unlawful business practice 'borrows' violations of other laws and treats these violations . . ."") (quoting *Famers Ins. Exch. v. Superior Court*, 2 Cal.4th 377, 383 (1992); *see also City and County of San Francisco v. Sainez*, 77 Cal.App.4th 1302, 1319-21 (2000) (finding that building and housing code violations can serve as the basis for a UCL claim); *People v. Toomey*, 157 Cal.App.3d 1, 15 (1984) (holding liability under the UCL can arise when one aids and abets the principal's violation).

Airbnb's wrongful conduct also satisfies the element of independently wrongful conduct that is necessary for a claim for intentional interference with prospective economic advantage. Judicial Council of California Civil Jury Instructions § 2202 ¶ 3. Plaintiffs also adequately allege that Airbnb aids and abets trespass and that Airbnb intentionally interferes with Plaintiffs' leases. Appellants'

E.R. 232, 236-39, 248, FAC, ¶¶ 37, 54-61, 119-21; *see also* Appellants' Opening Brief at 35-36. Airbnb's objection that the lease terms precluding short-term rentals are unreasonable gives no cover when such terms mirror prevailing zoning restrictions, as is the case here, and are designed to prevent significant injuries like those described above.

III.

CONCLUSION

Airbnb exacerbates the existing affordable housing crisis and engages in tortious conduct, contributing to unlawful conduct of others.

The way to promote values other than those embodied in existing law is to seek to change those laws through the democratic process.

It does not work to claim that a company's own business operations, which extend far beyond speaking and publishing third-party content, are beyond the rule of law.

The judgment of the district court should be reversed.

DATED: June 28, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE REGARDING FRAP 32(a)(7)

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)–(C) and Ninth Circuit Rule 32-1, I, the undersigned counsel of record for *Amicus Curiae*, Cooper Square Committee, Friends of Petrosino Square, Hell's Kitchen Neighborhood Association, the Hotel Association of New York City, Housing Conservation Coordinators, and Westside Neighborhood Alliance certify that this Brief in Support of Affirmance complies with the applicable Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements, as the brief contains 6,931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and it is proportionally spaced using a Microsoft Word Times New Roman typeface of 14 points or more.

Dated: June 28, 2018

Respectfully submitted,

/s/ Laura W. Brill

9th Circuit Case Number(s) 18-55113

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Case No. 18-55113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA Park La Brea A LLC, *et al.*,

Plaintiffs-Appellants,

v.

Airbnb Inc., *et al.*,

Defendants-Appellees.

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

AMICI CURIAE BRIEF OF CALIFORNIA APARTMENT ASSOCIATION AND AVALONBAY COMMUNITIES, INC. IN SUPPORT OF PLAINTIFFS AND APPELLANTS' APPEAL

[All Parties Have Consented. FRAP 29(a).]

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June 29, 2018

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CORPORATE DISCLOSURE STATEMENT

California Apartment Association has no parent corporations and no publicly held corporation owns 10% or more of its stock.

AvalonBay Communities, Inc. has no parent corporations. The Vanguard Group, Inc. and BlackRock, Inc. each own 10% or more of AvalonBay Communities, Inc.'s stock.

DATED: June 29, 2018

/s/ Andrew M. Zacks
Counsel for Amici Curiae California Apartment Association and AvalonBay Communities, Inc.

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IDENTITIES AND INTEREST OF *AMICI CURIAE*

All parties have consented to the filing of this brief. *See* FRAP 29(a).

The California Apartment Association (CAA) is the largest statewide rental housing trade association in the country, representing more than 50,000 rental property owners and operators who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in the rental of residential housing, and to promote and aid in the availability of high quality rental housing in California. CAA represents its members in legislative, regulatory, judicial, and other state and local forums.

AvalonBay Communities, Inc. owns and manages apartment communities in leading metropolitan areas throughout the United States. AvalonBay is committed to providing its customers with comfortable, convenient, and distinctive apartment living experiences. As of March 31, 2018, AvalonBay had approximately 78,000 apartment homes in operating communities and an additional 6,000 apartment homes in communities under development.

Despite AvalonBay's efforts to enforce prohibitions on short-term rentals in many of its communities, they have persisted. Unfairly, the

numerous short-term rentals brokered by AirBnB have led to AvalonBay being civilly and criminally cited for not complying with certain safety regulations applicable to transient occupancy buildings, and AvalonBay is then burdened with the expense and effort of defending against and settling these citations. AvalonBay has an interest in ensuring that the decision in this appeal does not undermine its ability to: (i) control the types of occupancies and uses in its own buildings; (ii) comply with local laws and regulations; and (iii) provide the residential experience that the vast majority of its residents have chosen.

The California Apartment Association and AvalonBay Communities, Inc.'s counsel authored this brief in whole. No party, party's counsel, or other person besides amici contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION

Core and fundamental property rights of housing providers are at stake in this litigation. As rental housing providers, AvalonBay and CAA's members build residential communities by carefully deciding the terms under which persons may lease apartment homes including duration, occupancy limits, and community rules such as noise limitations. The rental lease terms of these occupancies are critical. Longer term residents who have read and signed leases with the landlord are invested in the substantive quality of their living environments that short term, hotel-style guests lack. Accordingly, AvalonBay and many of CAA's members prohibit subletting and exercise significant oversight over replacement occupancies, including the use of specific lease terms banning short term commercial occupancies by non-approved visitors.

The decision below immunizing AirBnB from liability for its intentional, profit motivated interference with the contractual rights of housing providers undermines their property rights by facilitating and encouraging the ability of tenants to illegally breach their lease agreements. That intrusion saps the ability of housing providers to control the use of their own properties, diminishes the quality of life for the long-term residents of

these communities, and negatively impacts the fabric and character of residential neighborhoods.

In granting the motion to dismiss, the District Court incorrectly ruled that AirBnb cannot be held accountable for the many direct actions that go well beyond mere publishing activity and imperil the operation of AvalonBay's and CAA's members' businesses.

Relying on the Communications Decency Act (CDA), the District Court here ruled that CDA immunity applied to plaintiffs' causes of action on the basis that their grievance was related to AirBnb's publication of rental listings created by plaintiffs' tenants. While we disagree with that application of the CDA, AirBnb also should be held liable for the panoply of *other* ways, unrelated to the mere postings of ads, in which it facilitates and encourages tenants' breaches of their leases by making it more convenient, worry-free and profitable, including those detailed below. Because these other forms of conduct do not involve AirBnb's role as publisher, Appellants' claims are viable as pled, and the judgment below should be reversed for the development of a factual record in discovery and trial if warranted.

ARGUMENT

I. AVALONBAY AND CAA'S MEMBERS HAVE A RIGHT TO CONTROL OVER THEIR RESIDENTIAL RENTAL PROPERTIES WITHOUT INTERFERENCE FROM AIRBNB

By choosing to invest in the long-term-rental housing business, AvalonBay and CAA's members build stable and safe communities. Tenants customarily, and by express written agreement, reside at these properties not for days or weeks, but for years. They also agree to abide by various community rules. These housing units are their homes—places of repose that have a special status under our laws. *E.g.*, *Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Tom v. San Francisco*, 120 Cal.App4th 674, 684 (2004) Long-term residents have an interest in observing their building's rules and holding accountable those who don't. Such accountability helps maintain the building's physical condition and improves safety. Long-term residents also get to know each other over time, which engenders a sense of familiarity and mutual respect that we ascribe to neighbors.

These communities of long term neighbors benefit housing providers and their customer-tenants alike. Tenants who live by the rules promulgated for the common good respect each other and require less resources, making rents more affordable. In addition, these communities

make rental housing buildings more desirable to prospective and current tenants. That allows property owners to keep their buildings occupied and maintain more stable rent levels.

AvalonBay and CAA's members work hard to cultivate these communities. They create and enforce building rules so that tenants respect each other's rights and maintain a safe environment. AvalonBay and CAA's members also construct and maintain attractive common areas where tenants socialize, engendering a spirit of community and mutual well-being.

The choice to build and cultivate long-term-residential communities is a core right of our rental property ownership. Historically, property ownership includes "the rights 'to possess, use and dispose of'" the property as the owner sees fit. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Thus, AvalonBay and CAA's members should have the right to choose who leases each of their apartments subject to a minimum lease term and laws restricting unlawful discrimination. It follows that housing providers should have the "power to exclude" everyone else from occupying their properties – "one of the most treasured strands in an owner's bundle of property rights." *Ibid.* To preserve the long-term-residential communities they have fostered and helped create, AvalonBay

and CAA's members' leases that ban subletting, specifically prohibit short term commercial AirBnb type occupancies, have maximum occupancy requirements, and set limits on noise and disturbances.

II. AIRBNB'S BUSINESS MODEL FACILITATES TENANTS' BREACHES OF THEIR LEASES WHILE AIRBNB EARNS BROKER COMMISSIONS AND BUILDS MASSIVE MARKET VALUE

Enter AirBnb. This company employs a business model that relies on tenants' ability to sublet their units by the day. AirBnb does not get paid as a publisher of advertisements ordinarily would for listing a unit on its website. Instead, when a guest reserves a listed unit and pays for the stay, AirBnb receives a percentage of the rental price from both the host and its guest – a dual broker commission.

This commission-based revenue requires AirBnb to do much more than "publish" short-term-rental listings. Indeed, the company provides a full suite of services that induces both hosts and guests to agree to engage in unlawfully subletting:

- it verifies the identifies of hosts and guests;
- it takes appealing photographs of units;
- it promotes units by adding designations such as "rare find" to listings;
- it sometimes vets units in person to certify them as "AirBnb

Plus";

- it helps set an optimal rental price, depending on demand;
- it provides an electronic messaging service for hosts and guests to communicate;
- it processes guests' payments and holds them in escrow until the rental period has begun;
- it calculates, collects, and remits local occupancy taxes;
- it provides dispute-resolution services for issues between tenants and guests;
- it reimburses guests under certain circumstances; and
- it insures hosts for up to $1 million in damages.

These services are critical components of AirBnb's business. If AirBnb were simply an online publisher of short-term-rental listings, as the trial court appears to have concluded, hosts would be leery of allowing strangers to stay in their homes unsupervised. Likewise, guests would be hesitant to send substantial sums of money to unknown hosts for units the guests have not seen in person and have no assurance actually will be available. So, AirBnb's services – such as identify verification, escrow, dispute resolution, and insurance – help remove these suspicions. That is why, on its website, AirBnb touts that it is "built on trust." www.airbnb.com.

These services lead to more bookings, and thus more broker commissions for AirBnb and a higher market value for its planned initial public offering.

All of this has profound consequences for AvalonBay and many of CAA's members who have attempted to ban AirBnb activities in their buildings. AirBnB's non-publication activities place a large carrot in front of tenants (i.e., easy money) and take away much of the tenants' worry and inconvenience associated with breaching their leases.

This business model includes rental units in AvalonBay's and CAA's members' buildings where leases expressly prohibit unauthorized subletting and short term commercial occupancies. See e.g. CAA 2017 Approved Lease Form, Paragraph 19[1]. In fact, for tenants trying to evade no-sublet clauses and other lease restrictions on short term rentals, AirBnb provides another critical service: it anonymizes important information on a listing, such as the host's full name and the unit's address. That makes it

[1] "19. No portion of the premises shall be sublet nor this Agreement assigned. Any attempted subletting or assignment by Resident shall, at the election of Owner/Agent, be an irremediable breach of this Agreement and cause for immediate termination as provided herein and by law. Resident is prohibited from offering all or part of the premises for short term rental, such as through AirBNB, VRBO or other such sites. Any person who is not an Occupant or Resident, who occupies any portion of the dwelling unit, for any period whatsoever, for any compensation or consideration whatsoever (including, without limitation, the payment of money and/or trade and/or barter of other goods, services or property occupancy rights) is not a Guest. This constitutes subletting or assignment under this Agreement."

more difficult for housing providers to discover which of their units are being unlawfully sublet to hotel guests in direct violation of express lease restrictions.

Thus, in direct and knowing contravention of these lease terms, AirBnb seeks to convert *long*-term rental buildings into commercial, *short*-term hotel style uses. This conversion strips rental housing providers of their "power to control the use of the property" and to "exclude others[.]" *Loretto*, 458 U.S. at 436. Indeed, AvalonBay and CAA's members "suffer(s) a special kind of injury" because AirBnb enables "a *stranger*" to use and "occup[y] the owner's property" – adding "insult to injury." *Ibid.*

Injury to rental housing extends beyond AirBnb abridging control of their property – a "valuable right[]" in and of itself. *Phillips v. Washington Legal Foundation* (1998) 524 U.S. 156, 170. By undermining the long-term-residential character of rental housing stock, AirBnb necessarily disrupts the buildings' communities – to the detriment of both owners and occupants. AirBnb occupants, who will be gone in a few days and have no contractual duty to the building owner, have no incentive to follow building rules and respect the rights of long term residents. That translates to burdensome overuse of common areas, increased damage to the property, nuisance activity (such as late-night noise and partying), and a variety of safety issues.

Short-term occupants also weaken a community's sense of familiarity and mutual respect. Current tenants, who value that close-knit environment, are more inclined to move out; prospective tenants are less likely to take their place.

All this inevitably takes a toll on AvalonBay and CAA's members' businesses. They must dedicate more resources to maintaining building property and security and spend their time resolving problems caused by tenants who breach their leases by accepting money from AirBnb occupants who disobey building rules (of which they are likely unaware) and whose short term use of their apartment often violates local ordinances. And it costs time and money to ferret out tenants who are breaching their leases with AirBnb's active assistance – no easy feat as explained below. When those violations are identified, members must spend even more time and money enforcing their leases, including through expensive legal action.

In addition, AvalonBay and CAA's members must confront evolving regulatory risks that directly follow, and are attributable to, AirBnb's conduct and business model. For instance, many urban housing providers are subject to affordable-housing agreements, rent and eviction controls and, perhaps most significantly, local zoning and other laws that restrict or ban short-term rentals or apply special accessibility and safety

requirements to such uses. Unauthorized AirBnb activities often result in violations of these onerous regulations through no fault of AvalonBay and CAA's members, who nevertheless may incur fines and civil and criminal penalties that flow from such activities. In addition, when local regulatory agencies discover AirBnb rentals in AvalonBay and CAA's members' properties, these property owners may not have even known about the issue. The agencies nevertheless have imposed significant financial penalties on these innocent housing providers without giving those members the opportunity to cure those violations and with no penalty to the actual perpetrators of the problem who reap the profits: AirBnB or the tenant violating the lease. For example, AvalonBay already has received two fines from the San Francisco Office of Short-Term Rentals for sublets that Airbnb brokered in its communities without AvalonBay's knowledge or consent, because the sublet was not listed by the tenant on the city's short-term residential rental registry under laws that went into effect earlier this year. Additionally, New York City imposed aggravated civil penalties on AvalonBay Communities for failing to comply with provisions of the safety and building codes that are applicable to transient rather than residential dwellings after Airbnb brokered short-term sublets in two of its apartment communities, even though AvalonBay prohibits short-term rentals and takes

active steps to prevent them, and even though the apartment community was developed to comply with the stringent building codes applicable to residential dwellings. The City has also served AvalonBay with a criminal citation for misdemeanor offenses related to the transient uses that occurred in one building as a result of an Airbnb-facilitated short term stay, and AvalonBay is now burdened with the expense and effort of defending against and settling these citations.

III. DESPITE ITS KNOWLEDGE THAT ITS CUSTOMERS ARE BREACHING THEIR LEASES, AIRBNB CONTINUES TO IMPOSE HARM ON AVALONBAY AND CAA'S MEMBERS

If Appellants were allowed to proceed with this action and develop a complete factual record, admissible evidence would establish that AirBnb is keenly aware that tenants are routinely and brazenly violating their leases. AirBnb's business practices actively encourage and assist these breaches. Yet AirBnb has made no effort to cease doing business with its tenant-customers. To the contrary, AirBnb knowingly provides those tenants with all the services the tenants need to continue illegally subletting their units all while AirBnb continues to receive hundreds of millions of dollars in commissions in exchange.

IV. THE CDA DOES NOT FORECLOSE APPELLANTS' CLAIMS BECAUSE AIRBNB IS NOT IMMUNE FROM LIABILITY JUST BECAUSE ONE OF ITS ACTIVITIES IS AS A PUBLISHER OF THIRD-PARTY CONTENT

Although AirBnb does publish short-term-rental listings as one aspect of its business model, that is only one of the various ways it interferes with the established property and contract rights of AvalonBay and CAA's members. Because AirBnb does not act as a publisher in carrying out these other services, the district court erred in finding CDA immunity should apply.

Congress passed section 230 of the CDA to spare websites[2] the "grim choice" "between taking responsibility for all messages" third-parties post on their site "and deleting no messages at all[.]" *Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163 (9th Cir. 2008) (en banc). Since the former choice isn't feasible given the volume of third-party content, Congress wanted to protect "Good Samaritan" websites who at least remove *some* offensive content. *Id.* at 1163–1164.

Thus, Congress enacted section 230(c) with the title "Protection for 'good samaritan' blocking and screening of offensive material," which states:

[2] The law uses the term "interactive computer services." (cite) "Today, the most common interactive computer services are websites." *Roommates.Com*, 521 F.3d at 1162, n. 6.

> (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 [removing offensive material or helping others do the same].

47 U.S.C. § 230(c) (West). Section 230 also provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. § 230(e)(3).

The District Court here ruled that Appellants' claims were inconsistent with section 230(c)(1), and thus preempted, because they are based on AirBnb's role as the publisher or speaker of third-parties' content. The District Court's ruling "stretch[es] the CDA beyond its narrow language and its purpose." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016). "[T]he CDA does not provide a general immunity against all claims derived from third-party content." *Ibid.* Rather, it precludes a cause of action only if the claim "*inherently requires* the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (emphasis added); *see also Internet Brands*, 824 F.3d at 850 (calling that the "essential question" of

CDA immunity under section 230(c)(1)). And that occurs only when the duty defendant allegedly breached "derives from the defendant's status or conduct as a 'publisher or speaker.' " *Barnes*, 570 F.3d at 1102.

To answer this evolving, factually-driven question, courts examine whether the alleged wrongful act is one typically associated with publishing: "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102. Any *other* type of conduct, which would be "unlawful when [done] face-to-face or by telephone, … do[esn't] magically become lawful when [done] electronically online." *Roommates.com*, 521 F.3d at 1164. The court below gave a broader construction of CDA immunity "giv(ing) online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Id.* at 1164, n. 15.

Appellants' claims here do not "inherently require" this Court to treat AirBnb as a publisher or speaker. To be sure, Plaintiffs allege that AirBnb posted listings of Plaintiffs units and refused to remove those listings. But those are not *necessary* allegations of the claims being asserted. *See Chicago Lawyers' Comm. for Civ. Rights Under L., Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (7th Cir. 2008) (finding the defendant protected because it could be found liable "*only* in a capacity as publisher") (emphasis

added). The complaint alleges, and evidence would establish, a panoply of *other* wrongful conduct that serves as independent grounds for AirBnb's liability. That other conduct is not typically associated with, and is distinct from, AirBnB's "publishing" activities.

Employing this Court's analogy in *Roommates.Com*, it is useful to consider "a real estate broker in real life" doing what AirBnb's business model includes. *Roommates.Com*, 521 F.3d at 1166; *id.* at 1162, 1164. Imagine that each tenant in one of Appellants' apartment buildings received the following letter in the mail:

> Dear Tenant:
>
> Do you want to extra make cash while you're away on vacation? I can help you!
>
> Just e-mail me about your apartment, when you'll be away, and I'll take care of the rest! I'll take photos of your apartment and promote how special it is to potential visitors. I'll even set the ideal rental price, verify visitors' identities, process visitors' payments, calculate and pay related taxes, arbitrate disputes with visitors, and provide you insurance.
>
> Visitors will be more likely to stay at your unit because I'll verify your identity for them, personally vet that your apartment has certain amenities, hold their payment in escrow until they arrive, and offer them a refund if they can't access your apartment or the apartment is not as advertised.
>
> Best thing of all, I get paid only on commission, in part by your guests. I don't make money unless you do!

> Sincerely,
> Aaron B. Enbee, Short-Term-Rental Broker
>
> P.S. I know your lease prohibits these activities. My efforts on your behalf protect your identity – making it difficult for your landlord to know that we're profiting from its property.

Now consider that, with the broker's help, several tenants successfully sublet their apartments to short-term visitors in direct violation of tenants' leasehold obligations. The short-term occupants cause property damage, engage in nuisance activities and otherwise drain Appellants' resources, and make the building less attractive to current and prospective tenants. This also results in the landlord being issued criminal and civil citations from the local regulatory agency for violating various codes. These acts ultimately cause rents to rise as the costs are passed on to current and future tenants, as well as burden the landlord with direct out-of-pocket damages by way of penalties.

There is little doubt that plaintiffs could state a cause of action against the fictional broker. For example, tortious interference with contract would require plaintiffs to allege " '(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual

relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' " *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 530 (Cal. 1998) (quoting *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (Cal. 1990) 791 P.2d 587, 589–590). The first, second, fourth, and fifth elements are satisfied by the posited facts. And the third element about defendant's intentional acts is satisfied by the services touted in the broker's letter. But note what the broker's letter does *not* say—how the broker finds the visitors to sublet apartments. Perhaps he goes door-to-door or cold calls candidates. Regardless, that fact is not necessary to state a claim against him because other intentional acts he committed to induce a breach suffice.

Because AirBnb allegedly does the same acts as the fictional broker described above to induce Appellants' tenants to breach their leases, Appellants should have been allowed to proceed with its tortious-interference-with-contract claim against AirBnb. In fact, none of the claims below are limited to, or depend on, AirBnb's publishing of third-party content because its other non publisher-based services equally facilitate tenants' breaches of their leases.[3] Finding AirBnb liable under any of

[3] Plaintiffs also allege causes of action for unfair competition, unjust enrichment, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, trespass, aiding

plaintiff's theories does not require a court to treat AirBnb as a publisher. The court below should have analyzed it as a full-service, profit-driven, real estate broker (or escrow holder or tax consultant or insurer).

The District Court reached the opposite conclusion only by construing the allegations of AirBnB's wrongful conduct far too narrowly. The court reasoned that, because offending tenants have control over whether to list their units on AirBnb, Appellants' only issue with AirBnb is the publication of those listings. In reality, though, the listing is only one of several steps that ultimately lead to the interference with the property and contract rights of housing providers. As previously explaint, *before* the listing is created, AirBnb induces Plaintiffs' tenants to list their units by offering a suite of useful services that induce its tenant-customers to ignore their lease obligations. *After* the listing is created and a booking occurs, AirBnb provides services through the rental period that are distinct from its publishing activities. The fact that a listing is one "but-for cause of [Plaintiffs'] injuries" does not mean immunity applies because separate acts of AirBnb form the basis for its liability that is not immunized by the CDA. *Internet Brands*, 824 F.3d at 853.

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and abetting trespass, and private nuisance. Each of these causes of action is premised upon AirBnb's committing wrongful acts that help plaintiffs' tenants breach their leases by subletting to strangers.

Indeed, *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066 (N.D. Cal. 2016) illustrates that AirBnb does more – and can be liable for more – than its publication of third-party content. San Francisco passed an ordinance criminalizing "booking services" (i.e., reservation or payment services) for unregistered, short-term-rental units. (*Id.* at 1071.) AirBnb and a similar website argued that the ordinance was preempted and immunized from liability by section 230(c)(1) because the law "requires that they actively monitor and police listings by third parties to verify registration" – which is "tantamount to treating them as a publisher[.]" (*Id.* at 1072.) The District Court disagreed because "the challenged ordinance regulates Plaintiffs' own conduct as booking service providers, and cares not a whit about what is, or is not, featured on their websites." *Id.* at 1074.

The District Court here tried to distinguish that case by claiming that AirBnb's website features are central to Plaintiffs' complaint here. However, because AirBnb should be liable here for its many services other than its publication of third-party content (including for its booking services), CDA immunity does not apply here and the District Court should not have granted the FRCP 12(b)(6) motion to dismiss.

V. IMMUNIZING AIRBNB FROM LIABILITY IS PARTICULARLY INEQUITABLE IN CITIES WITH RENT AND EVICTION CONTROLS

AvalonBay and CAA's members provide rental housing opportunities in cities that have adopted restrictive rent control laws. San Francisco, Berkeley, Oakland, Los Angeles, Santa Monica and other California cities have enacted strict limits on rental rates and allowable annual increases. Understandably, the District Court's grant of blanket immunity to AirBnB is particularly galling for housing providers in these cities. Unburdened by similar limits on their own subleases, rent controlled tenants frequently reap financial gain by listing their rent regulated units on AirBnB, where they can earn two or three times what they pay to their landlords. The legislative intent of these local ordinances – designed to stabilize housing costs for permanent, long term residents – is being upended by AirBnB's business model which removes units from the housing stock and replaces deserving residents with tourists. California's supply of rental housing, already woefully inadequate, will be further reduced if the lower court's grant of immunity to AirBnB is affirmed.

Compounding the problem in rent controlled cities, these jurisdictions almost always have onerous eviction control regulations that require just cause in order to evict tenants who violate their leases or the law.

Just cause eviction requirements make it expensive and time consuming for AvalonBay and CAA's members to terminate the tenancies of residents who engage in unlawful AirBnB activity. Holding AirBnB financially responsible for its integral role in these illegal activities is all the more critical given these burdensome hurdles to evicting violating tenants.

By granting AirBnB blanket immunity, the court allows AirBnB to impute the costs associated with its business model to third parties – namely AvalonBay and CAA's members. In addition to the damage done to the community, and the unjust enrichment of tenants who rent their rent-controlled units in violation of the terms of their lease, AvalonBay and CAA's members also shoulder the direct and substantial costs of enforcing their leases through the unlawful detainer process. Even in cities that have not adopted strict evictions controls (as most rent controlled cities have), an eviction based on a breach of the lease takes a minimum of 45 days and costs several thousand dollars. In cases in which the tenant contests the termination of the tenancy – which can include making a jury trial demand – the time and costs associated with the eviction are increased exponentially. Throughout this process the housing provider cannot collect rent from the tenant due to the risk of creating a waiver defense. Because of state-law limits on the amount of security deposit a housing provider is allowed to

collect, the security deposit is nearly always woefully inadequate to compensate the housing provider for this lost rent, not to mention any cleaning or repair of damages that may be necessary to get the unit ready to re-rent. Even in cases in which the housing provider is successful in obtaining a judgment, they are often awarded only a fraction of their attorney's fees – and in any event it is frequently nearly impossible to collect on the judgment.

CONCLUSION

AvalonBay and CAA's members are mindful of the need to foster and encourage technological advances in a rapidly evolving global economy and the age of the internet. But when these advancements harm long established property rights, the judicial system should not turn a blind eye. In dismissing the claims below on the pleadings, the District Court improperly immunized AirBnB's disruption of the rights of housing providers and the communities they foster. This Court should reverse the judgment of dismissal.

June 29, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9th CIRCUIT RULE 32-1 FOR CASE NO. 18-55113

Pursuant to Ninth Circuit Rule 32-1 and FRAP 32(a)(7)(C), I certify that this *amicus curiae* brief is proportionally spaced in Times New Roman, has a typeface of 14 points, and is 4,849 words (excluding tables and this Certification), i.e., it is less than one-half the maximum permissible length of the brief it supports (Appellants' Opening Brief).

DATED: June 29, 2018

/s/ Andrew M. Zacks
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 29, 2018.

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

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Case No. 18-55113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

La Park La Brea A LLC, *et al.*,

Plaintiffs-Appellants,

v.

Airbnb Inc., *et al.*,

Defendants-Respondents.

Appeal from a Decision of the United States District Court
for the Central District of California
No. 2:17-cv-04885-DMG-AS
Hon. Dolly M. Gee

BRIEF OF NATIONAL MULTIFAMILY HOUSING COUNCIL AND NATIONAL APARTMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 26.1 of the Federal Rules of Appellate Procedure, the National Multifamily Housing Council ("NMHC") and the National Apartment Association ("NAA") make the following disclosures:

The NMHC is a non-profit trade association that advocates on behalf of member firms.

The NAA is a non-profit federation consisting of state and local affiliates and multifamily housing companies.

Neither the NMHC nor the NAA is a publicly held corporation or other publicly held entity. Neither the NMHC nor the NAA has a parent corporation. No publicly held corporation or other publicly held entity owns ten percent or more of either the NMHC or the NAA.

Dated: June 29, 2018

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INTEREST OF AMICI CURIAE[1]

The National Multifamily Housing Council ("NMHC") is a national nonprofit association that represents the leadership of the $1.3 trillion per year apartment industry. NMHC's members engage in all aspects of the apartment industry, including ownership, development, management, and finance in order to provide homes for the 39 million Americans who live in apartments. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

The National Apartment Association ("NAA") serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of nearly 160 affiliates, NAA encompasses over 75,000 members representing more than 9.25 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity, and innovation.

Amici write to share their concerns about the consequences of the district court opinion for the nation's apartment industry. The activities of Airbnb and other short-term rental platforms occur, in no small part, through the country's rental apartment communities.

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[1] Amici affirm that no counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici and their members contributed money that was intended to fund preparing or submitting this brief. Counsel for plaintiffs-appellants and defendants-appellees have consented to the filing of this brief.

And so the implications of the district court opinion for amici and their members are sweeping. Amici represent entities that, collectively, have bought and built rentable housing for millions of families in the United States, and have attracted their residents based on the quality of their apartment properties and the terms that govern those communities.

Amici respectfully ask this Court to reach a decision that enables the owners and operators of these properties to choose whether to permit their residents to engage in short-term subletting in their buildings, and to have a meaningful opportunity to enforce that decision. A number of amici's members have chosen to take part in the short-term rental market. Others have chosen not to. Amici fully support the right of apartment communities to allow short-term sublets, as long as they comply with existing laws and regulations. Amici also believe, however, that owners must retain the ability to restrict the use of short-term sublets within their property if they so choose. The district court opinion runs contrary to this principle, one that lies at the heart of the fundamental right to property—the principle of owners' choice.

BACKGROUND

The apartment industry plays a central role in the U.S. economy. Over one-third of U.S. households rent, and nearly 16 percent of households do so in an apartment home, the term for a rented unit in a building with five or more such units.[2] The industry contributes

[2] U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Tenure; U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Tenure by Units in Structure.

$1.3 trillion annually to the national economy.[3] Apartment communities offer essential, practical housing options to a broad range of people, including students trying to make ends meet, recent graduates moving to a new city to start their careers, immigrants seeking their first home in their new country, families saving money to purchase a house, downsizing seniors looking for a quiet and safe place to live, and the many other Americans of all ages and circumstances who are drawn to the convenience and flexibility of rental housing.

The appeal of rental housing is ancient. At the height of the Roman Empire, apartment complexes soared to ten stories, offering rental units in areas where the population was dense and the land was expensive.[4] In the modern era, apartment housing first emerged in the 18th century in Paris and other European cities, where stacks of flats were rented to middle-class tenants.[5] And by the turn of the 20th century, the apartment building as we know it today was becoming a fixture in cities across the United States, a response to urbanization, the expense of one-family homes, and the emergence of modern amenities such as elevators and central heating that residents could share in common.[6]

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[3] *See* Stephen S. Fuller, National Multifamily Housing Council and National Apartment Association, *The Trillion Dollar Apartment Industry* (2013); We Are Apartments, *available at* https://www.weareapartments.org/data.

[4] *See, e.g.*, P.D. Smith, *City: A Guidebook for the Urban Age* 198 (2012).

[5] *See, e.g.*, Elizabeth C. Cromley, *Alone Together: A History of New York's Early Apartments* 40 (1990); Encyclopedia Britannica, *Apartment House*, July 20, 1998, *available at* https://www.britannica.com/technology/apartment-house.

[6] *See, e.g.*, Gunther Barth, *City People: The Rise of Modern City Culture in Nineteenth-Century America* 52 (1980); Encyclopedia Britannica, *supra* note 5.

Across much of this history, apartment owners (as well as governments) often banned or restricted the subletting of apartments by residents.[7] And in recent years, the vast majority of lease agreements—both in multifamily buildings and smaller rental properties—prohibit residents from subletting without the consent of the owner or operator of the property.[8] Many reasons explain this preference, among them the desire to avoid security or financial issues from unknown residents, minimize unexpected property damage and wear and tear, avert the need for a double eviction or other legal entanglements should issues with a subtenant arise, and maintain a quality of life that appeals to current and prospective residents.

The emergence of short-term rental platforms about a decade ago—including Airbnb's launch in August 2008—was a disruptive moment in the apartment economy. Airbnb offered residents the ability to sublet their units quickly and privately, and to do so with a new subletter every single day if they so chose. Airbnb did not inform the owners and operators of apartment communities that it was brokering sublets on their properties, even though the sublets violated the owners and operators' lease terms. As a result, short-term subletters quickly began to appear in apartment communities without the knowledge of the owners and

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[7] *See, e.g.*, Stephen L. Kaufmann, *The Right to Sublease in New York: Application of Real Property Law Section 226-B*, 10 Hofstra L. Rev. 527, 529-30 (1982); Robert Hunter, *A Dissertation on the History of the Lease* 55 (1860); J. Bedford, *A compendious and impartial view of the principal events in the history of Great Britain and Ireland* 202 (1820).

[8] For instance, the NAA Click and Lease agreement, which is the most widely used standardized lease form in the United States, used in more than 5 million apartment units across the country, provides that "[r]eplacing a resident, subletting, or assignment is allowed only when we consent in writing." Click and Lease Agreement ¶ 30. This provision resembles the terms most leases use to prohibit unauthorized rentals by authorized tenants.

operators, let alone their consent. And although Airbnb has the ability to block transactions or even remove parties who use its brokerage services to complete short-term rentals that breach a lease, the company reliably refused to exercise those powers when owners and operators reported that a rental is unsanctioned. Resident complaints, security problems, property damage, and a host of other issues began to accumulate.

Amici's members weighed carefully the advantages and disadvantages of participating in the short-term rental economy through Airbnb and other platforms. They have adopted an array of practices.

Most owners and operators choose not to allow their residents to offer short-term sublets through Airbnb and other platforms. They have adopted that policy for a number of reasons.[9] *First,* the introduction of short-term subletters can jeopardize the safety of residents and the security of the apartment community. The subletters have full access to the hallways and other common areas of the building, and duplicate keys can enter into circulation through complete strangers. It can be a challenge for owners and operators to screen short-term subletters with the same rigor as they screen their own residents, especially when the subletters are admitted without their knowledge or consent. The flexibility and secrecy of short-term rentals can even attract criminal activity.[10]

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[9] For instance, in a 2018 survey of NMHC members, a majority of respondents (61.5%) said that listing units on short-term rental sites is a lease violation at all of their communities and that they enforce this policy.

[10] *See, e.g.,* Dana Sauchelli & Bruce Golding, *Hookers turning Airbnb apartments into brothels*, New York Post, Apr. 14, 2014.

Second, short-term sublets can lead to property damage that ranges from wear and tear of common areas to outright destruction of units and the broader apartment community. Usually, short-term subletters are not listed on a lease, and only stay for a matter of days, minimizing their connection to the community and their sense of responsibility for its well-being. They often are unfamiliar with the fixtures in the units and the rules of the apartment community, which increases the risk of an accident. The added traffic from frequent short-term subletting also can lead to degradation of common areas. Reports of property damage due to short-term subletters are common, and in the most serious cases, have included damage to nearly all of the property in a unit, the defacement of hallways and other common areas, and the breakage of elevators and other infrastructure of the building.[11]

Third, short-term sublets can lead to significant compliance issues for the owners and operators of apartment communities. Municipalities have made clear that they will hold owners responsible for a sublet in their building, even if they were unaware of the sublet and took steps to prevent them.[12] As a result, the owners and operators of apartment communities have been exposed to sweeping civil liability—and even criminal sanctions—under local laws.[13] Short-term sublets also can give rise to possible compliance issues under the Fair

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[11] *See, e.g.,* Sage Lazzaro, *Airbnb Bribes Host with Cash Under NDA After 200 Partiers Destroy Apartment Complex*, Observer, Mar. 29, 2017; Lara Williams, *When Airbnb rentals turn into nuisance neighbours*, The Guardian, Sept. 18, 2016.

[12] Rebecca Baird-Remba, *How the City Nails Landlords for their Tenants' Illegal Airbnb Rentals*, Commercial Observer, Aug. 16, 2017.

[13] *See id.*

Housing Act. Finally, short-term rentals can conflict with the language in loan and insurance agreements, and whether such claims are meritorious or not, can be used by lenders and insurers to pressure amici's members.

Finally, without property owner consent, choice and involvement, short-term sublets can lead to quality-of-life issues and diminish the residential character of an apartment community. A short-term subletter has no existing relationship to the community or their neighbors, making it more likely that they will engage in conduct that is inconsistent with the quality of life that the owners and operators carefully cultivated for the current and future residents of their community. A resident in one apartment community reported people wrestling outside her apartment and someone trying to kick in her door; another in a separate community complained that a partygoer had fallen from one floor up onto the resident's balcony and was pounding on his window to get back in; and neighbors elsewhere endured a night of blaring music and people passed out in hallways.[14] The frequent traffic of short-term and unknown visitors through an apartment community also can lead residents to complain that the property loses its residential character.[15]

The proliferation of short-term rentals can give rise to particular challenges for apartment communities, as opposed to single-family homes. Monitoring the violations of a

[14] Lazzaro, *supra* note 11; Williams, *supra* note 11; James Dean, *Riot police called to Airbnb party*, The Times, May 14, 2016.

[15] *See, e.g.*, Robert McCartney, *Airbnb becomes flash point in the District's hot debate over gentrification*, Wash. Post, Nov. 21, 2017.

lease's core terms might be relatively easy for the owner of a single-family home: a house's unique façade is easy to spot in an online listing, and neighbors can readily see an unrecognized subletter coming and going, both of which make unauthorized rentals easy to detect. Apartment communities cannot monitor improper sublets so easily. The large number of units and residents, the similar outward appearance of many units, and the frequent traffic of residents in and out of an apartment building all make it more difficult to discern whether a person entering a building with a suitcase is a resident or an unscreened subletter.

Although most owners and operators, for some or all of these reasons, do not permit short-term subletters, others have made the decision to allow them in their apartment communities, at least subject to certain conditions. As with those owners who disallow these rentals, many reasons can drive this decision. *First*, a policy of allowing short-term sublets can attract prospective residents who are interested in participating the sharing economy. This feature can be a particular draw for the incoming generation of residents, who represent the future of the apartment industry. According to one recent survey of more than 270,000 apartment residents, 26 percent of respondents under the age of 25 say that an ability to participate in the short-term rental economy would positively affect their opinion of a rental community, the highest percentage of any age group.[16]

[16] *See* 2017 NMHC/Kingsley Associates Renter and Preferences Report, available at https://www.nmhc.org/research-insight/research-report/2017-nmhc-kingsley-apartment-renter-preferences-report/.

Second, short-term sublets can build awareness of an apartment community. The traffic of short-term sublets can help to increase word-of-mouth business about the community. The short-term rental platforms themselves allow users to post reviews of where they stay, which could steer prospective residents to that property.[17] A short-term rental also can serve as a "test drive" of a residential community. A happy short-term subletter could soon become a long-term resident.

Third, owners and operators see an opportunity to partner with short-term rental platforms or residents who wish to offer short-term sublets. A partnership of this sort might allow the owner and operator to share revenue from a short-term sublet, or even to offer short-term rentals themselves in the event of a vacancy, to defray the cost of operating the community. It also can allow the owners and operators to work with the platforms and the residents to adopt measures that mitigate the security concerns and other issues that can accompany short-term sublets. For the above reasons, owners and operators are increasingly open to the promise of short-term rentals.[18] However, owners and operators also wish to decide for themselves how to use their properties.

Over the last couple of years, the short-term rental economy has evolved in a manner that offers a glimpse into the possibilities of a market where owners and operators are

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[17] *See id.*

[18] For example, in one recent survey of NMHC members, 17 percent of respondents said they use a third-party short-term rental management company to handle short-term rentals in their community from platforms such as Airbnb, and another 36 percent said they would consider doing so.

empowered to choose whether and how to allow short-term rentals. A wave of new start-ups has emerged that seek to provide owners and operators with a degree of insight and control over how their residents offer short-term sublets.[19] And through an initiative known as the Friendly Buildings Program, Airbnb has started to negotiate agreements with owners and operators in which it offers protections in areas such as transparency, security and insurance, and a share of revenue, in exchange for the owners and operators agreeing to allow sublets in their communities through Airbnb.[20] Airbnb actively enforces the protections in this program and will decline to broker short-term rentals that violate these measures.[21]

However, Airbnb declines to protect the owners or operators who choose not to allow short-term sublets, and therefore decline to enroll in the Friendly Buildings Program. Airbnb refuses to make these owners or operators aware of residents who are offering short-term

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[19] Among their options, these platforms offer short-term background checks, additional insurance coverage, and the ability to limit short-term rental. Often, these companies also are able to fully manage the process of short-term rentals from providing lease addendums to handling maintenance and service requests to streamlining revenue management.

[20] *See, e.g.*, Laura Kusisto, *Airbnb Enlists San Francisco's Biggest Landlord*, Wall St. J., Nov. 5, 2017 (describing agreement between Airbnb and San Francisco's largest building owner to allow short-term rentals in five of their buildings, in exchange for measures including a revenue share, the opportunity to track short-term rentals, and insurance); Lisa Xing, *Toronto condo signs on to 1st agreement in Canada to regulate Airbnb rentals*, CBC News, Oct. 25, 2017 (describing agreement tailored to a Toronto condominium that includes a revenue share, transparency into who is hosting and to whom they are subletting, and a requirement that short-term subletters provide government-issued IDs that are kept on file with Airbnb).

[21] *See, e.g.,* Decl. of Kenneth A. Diamond in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 6-20, No. 2:17-cv-04885 (C.D. Cal. Dec. 1, 2017); Decl. of Alex Ward in Supp. of Defs.' Opp. to Pls.' Mot. for Prelim. Inj. ¶30, No. 2:17-cv-04885 (C.D. Cal. Dec. 8, 2017); Xing, *supra* note 20.

rentals on their property. Airbnb does not allow the owners to search the site for their property or residents. Airbnb refuses to provide the owners, even after a written request, with lists of the owners' properties that are being rented unlawfully on Airbnb. And when the owners and operators reach out to notify Airbnb that the sublets the company is brokering violate their leases, or to alert Airbnb to other problems, Airbnb usually fails to respond, or sends a boilerplate answer, and declines to take any meaningful action.

ARGUMENT

Owners and operators should be able to choose who may reside in their apartment communities, subject to the terms of their leases and the requirements of the law. This is a critical choice for owners and operators, one made in careful consideration of their business needs and the well-being of the apartment community. The district court opinion allows Airbnb to countermand this choice, by immunizing Airbnb from liability when it brokers short-term rentals that violate owners and operators' lease agreements. In so doing, the opinion sweeps aside the principle of owners' choice that lies at the heart of the right to property, and will lead to a host of serious consequences in the apartment industry.

I. The district court opinion is flatly at odds with the property rights of owners and the principle of owner's choice.

The right of ownership in property is one of the cornerstones of the modern legal system. In particular, the right of an owner to choose how to use her property and to be free from the interference of third parties in that choice is a foundational principle of law that

traces its origins to antiquity.[22] This principle of owner's choice finds expression in common law doctrines such as the law of trespass,[23] the law of bailments,[24] the law of licenses,[25] and the law of tortious interference with contract.[26] Also, and perhaps most directly relevant for present purposes, this principle appears in the law of landlord and tenant, which among other things provides that a lessor (such as a multifamily household) can place restrictions on the alienability of leasehold interests to third parties.[27]

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[22] *See, e.g.*, A.M. Honoré, *Ownership*, in *The Nature and Process of Law* 370, at 370-71 (Patricia Smith ed., 1993) (describing ownership as "one of the characteristic institutions of human society," encompassing an "owner's choice" to use the property as "one wishes"); J.E. Penner, *The 'Bundle of Rights' Picture of Property*, 43 U.C.L.A. L. Rev. 711, 717, 741 (1996) (observing that property "depends upon exclusion by law from interference" and "its contours are reflected largely in the duty others have not to interfere with an owner's use").

[23] *See, e.g.*, David A. Thomas, *Thompson on Real Property*, *Trespass* §§ 68.01, 68.06(b)(2)(iii) (3d ed. 2011) (trespass as physical invasion without consent of the owner); Penner, *supra* note 22, at 749 (discussing the duty not to trespass as "not altered in the least if the houses on the block are owned by one person, by many, or are occupied by licensee").

[24] *See, e.g.*, Romualdo P. Eclavea, Cal. Jur. 3d, Bailments § 43 (West Supp. 2018) (discussing how a bailor may bring an action "against a third party to recover damages for injury to, or destruction of, the bailed object").

[25] *See, e.g.*, Penner, *supra* note 22, at 742 (describing the right to property as encompassing the right "to license it to others (either exclusively or not)" and observing that those "who are not licensed, that is, everyone else, do not gain any duties or lose any rights as a result").

[26] *See, e.g.*, Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 Harv. L. Rev. 1510, 1512-13 (1980) ("Under the Blackstonian model, therefore, interference by a third party with the performance of a contract was treated as interference with property . . . . Thus, actions such as trespass and trover could be used by parties to the contract to recover damages from interfering third parties.").

[27] *See, e.g.*, Robert S. Schoshinski, *American Law of Landlord and Tenant* § 8:15 (1980) ("Such restrictions are justified as reasonable protection of the interests of the lessor as to who shall possess and manage property in which he has a reversionary interest and from which he is deriving income."); Thomas, *supra* note 23, at § 42.04(b) (discussing permissible restrictions).

The district court opinion trammels the property rights of owners and this principle of owner's choice. It does so with regard to each of three sticks in the bundle of property rights. *First*, the district court opinion overrides the right of property owners to exclude. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."[28] The right to decide whom to allow on one's property is "valued so highly," that the abolishment often will "result in the offending law being declared unconstitutional."[29] The district court opinion allows Airbnb to broker a short-term sublet into an apartment community against the express wishes of an owner. The implication of the opinion is that an entity can offer a for-profit service premised on the knowing infringement of the decision of a property owner about whom to admit onto and exclude from her property, as long as the entity does so online. Such a sweeping grant of immunity vitiates this essential property right.

Second, the district court opinion disregards the right of property owners to administer their property as they see fit. The bundle of property rights encompasses the prerogative of

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[28] *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 435 (1982); *see also Byrd v. United States*, 138 S.Ct. 1518, 1522 (2018) ("One of the main rights attaching to property is the right to exclude others." (quotations omitted)); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." (quotations and alterations omitted)).

[29] Jan Laitos, *Law of Property Protection* § 5.16 (1999); *see also, e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (describing the right to exclude as "so universally held to be a fundamental element of the property right" that it "falls within this category of interests that the government cannot take without just compensation").

an owner *to use, manage and enjoy the property*.[30] The decision to allow short-term sublets onto one's apartment property presents a series of known and significant risks, including security issues, property damage, exposure to civil and even criminal liability, angry residents, and disruptions to quality of life.[31] Many owners are unwilling to accept these risks, while others choose to do so. But that choice ought to lie with owners; *they* should be able to choose how to use their property. The district court opinion forces reluctant owners to accept the risks posed by short-term sublets, frustrating their right to use their property and manage their communities as they choose.

Finally, the district court opinion impairs the *right to dispose*, or the right of apartment owners to choose how to transfer, partition and draw income from their property.[32] Most owners and operators have chosen not to allow sublets without their consent, due to the various concerns discussed above.[33] This choice is embodied in a binding agreement—the lease—that sets out the terms under which a tenant may terminate or assign her rights or

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[30] *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (describing property as denoting "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); Honoré, *supra* note 22, at 370, 372 (describing ownership as embracing "the right to use"—"[the right to] use and enjoyment of the thing owned," as well as the "right to manage"—"the right to decide how and by whom the thing owned shall be used" and the right "to admit others to one's land . . . [and] to define the limits of such permission").

[31] *See supra* at text accompanying notes 8-15, *infra* text accompanying notes 41-46.

[32] *General Motors Corp.*, 323 U.S. at 378 (property includes the right "to dispose"); Honoré, *supra* note 22, at 253 (bundle of property rights includes the "right to income"—the right to "rents" and to the "benefit derived from foregoing personal use of a thing and allowing others to use it").

[33] *See supra* at text accompanying notes 8-15.

sublet the apartment she rents. Airbnb brokers countless transactions each month that violate those agreements. The district court opinion shields Airbnb from any accountability for its participation in these transactions, even when the owner and operator makes Airbnb aware of the existence of such an agreement, and that a transaction violates it. The result below exposes the right to dispose to unconstrained infringements by third parties, aided by Airbnb's for-profit brokerage services.

The district court's opinion frustrates the right to dispose in one final respect. Airbnb has started to negotiate agreements with owners and operators to give them a degree of visibility and control over short-term sublets on their property—provided that they accept short-term rentals through Airbnb. The district court opinion offers the owners and operators a Hobson's choice: accept a flood of Airbnb short-term rentals for which they now have no meaningful legal recourse, or sign an agreement with Airbnb that offers to ease that flood. This places the owners and operators in a vulnerable position in negotiations over the terms of the agreement, and may even sway owners who otherwise would prefer not to allow short-term rentals at all, to accept them on Airbnb's terms. The opinion encumbers, and results in the distortion of, the right to dispose.

The district court premised its opinion on a finding that Airbnb is acting as a publisher or speaker of information provided by another under Section 230 of the Communications Decency Act ("CDA"). But the present intrusion upon so many core property rights is not the result imagined by the CDA. The Ninth Circuit has held that for the CDA to shield a party

from liability, the party must be "(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."[34] The district court ruled that it is "Airbnb's publication" of rentals that users post on its website that is at issue in the case, and therefore Airbnb should be immune from suit.[35]

The CDA, however, is focused on content, not rental activities. If an Airbnb user posted a comment criticizing the cleanliness of a property or the quality of its amenities, Section 230 might insulate Airbnb from liability. Such posts would be appearing on Airbnb in its role as a publisher or speaker. But Airbnb's central purpose fulfils a second, unrelated role: it is acting as a broker, not a publisher. When Airbnb completes a booking service on the property of an owner without his or her consent, it is engaging in active market behavior that is far removed from the hosting of online posts. Just as Airbnb is not acting as a publisher or speaker of content when it is "providing, and collecting a fee for, Booking Services in connection with an *unregistered* unit" in San Francisco,[36] so too Airbnb is not acting as a publisher or speaker when it provides and collects a fee for booking services in connection with an *unapproved* unit in an apartment community.[37] In both cases, the conduct "does not

[34] *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (emphasis added).
[35] *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F.Supp.3d 1097, 1107 (C.D. Cal. 2017).
[36] *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F.Supp.3d 1066, 1073 (N.D. Cal. 2016) (emphasis added).
[37] *See also Homeaway.com v. Cty. of Santa Monica*, No. 16-cv-06641, 2018 WL 1281772, at *5-*6 (C.D. Cal. Mar. 21, 2018).

depend on who publishes any information or who is a speaker," but instead involves Airbnb as a participant in the rental market.[38]

Airbnb's conduct belies that it is merely publishing others' content, as its invocation of section 230 requires. Airbnb actively contracts not only with short-term renters, and residents in multifamily buildings, but (in some cases) with the owners and operators of the communities. Airbnb seeks out partners. It negotiates these contracts. And it plays an active role in implementing these agreements, even refusing to broker certain transactions that are seen to violate them. Airbnb, more than ever, is acting as a full-fledged market intermediary, one that has thrust itself into the market for apartment homes.

The motivating incident for the enactment of Section 230 was famously an instance where Prodigy, an early provider of online services, found itself exposed to liability for postings to its site that disparaged investment banks—pure speech.[39] The position of Prodigy is far removed from that of Airbnb. Prodigy was a bystander in the dispute between the bank and alleged defamer, with no meaningful relationship to the bank or its customers (except inasmuch as some of the customers happened to be the Prodigy members posting the disparaging comments). By contrast, Airbnb has partnered with the willing owners and operators of apartment communities, and every other segment of the supply chain for apartment homes.

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[38] *City & Cty. of San Francisco*, 217 F.Supp.3d at 1073 (quotations omitted).

[39] *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163-64 (9th Cir. 2008) (discussing the history of Section 230).

To our knowledge, this and the other recent cases involving short-term rental platforms are the first time that Section 230 has been interpreted to immunize a defendant for activities that so closely interfere with rights to real property. And a "property owner's right to exclude another's physical presence must be tenaciously guarded by the courts."[40] Airbnb undoubtedly has brought value to users and efficiencies to the rental economy through its market intermediary role. But when its performance of this role imposes injury upon property owners—most conspicuously by completing brokerage services to frustrate an owner's rights without their knowledge or consent—Airbnb should be accountable for its actions in the same manner as any other middleman.

II. The district court opinion will lead to serious consequences for the apartment industry.

Entirely apart from its dilution of the property rights of owners, the district court opinion will lead to a host of harmful consequences across the apartment economy, by disregarding the choice of owners not to allow sublets on their property. The opinion will expose the owners and operators of apartment communities to sweeping civil and criminal sanctions; frustrate the efforts of owners and operators to protect the well-being and meet the desires of current residents; and compromise the ability of owners and operators to develop a community to appeal to a range of future residents. These consequences are highly disruptive and will do significant harm to a sector that plays not only a central role in the

[40] *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992).

nation's economy, but an indispensable role in providing a safe place to live to millions of families.

First, the opinion will place the owners and operators of apartment communities in an untenable position relative to enforcement agencies. Municipalities have made clear that owners and operators will be responsible for the activities of a short-term subletter in their building.[41] This is true even if the owners and operators are unware the subletter was in their building, prohibit subletters in their lease agreement, and take measures to prevent subletting in their building. One industry source cited cases where owners having "nothing to do with the short-term rental—neither advertising, participating nor profiting—were fined tens of thousands of dollars by the city."[42] Occasionally, these penalties have been much larger, including even criminal sanctions.

For instance, New York City imposed aggravated civil penalties on AvalonBay Communities for failing to comply with provisions of the safety and building codes that are applicable to transient rather than residential dwellings after Airbnb brokered short-term sublets in one of its apartment communities. It did so even though AvalonBay prohibits short-term sublets and takes active steps to prevent them, and had developed the apartment

[41] *See, e.g.*, Baird-Remba, *supra* note 12 ("The Mayor's Office of Special Enforcement (OSE), which leads the charge against illegal hotels, acknowledges that it's burdensome for landlords to police their own apartments and tenants for short-term rentals. But it also argues that city law still holds owners accountable for what happens inside their buildings.").
[42] Baird-Remba, supra note 12 (quotations omitted).

community to comply with the stringent building codes applicable to residential dwellings. The City even sought to criminally prosecute them for misdemeanor offenses.

This case is but one example of how the actions of short-term rental platforms expose owners and operators to liability for short-term sublets in which the owners and operators played no role and wanted no part.[43] Except now, under the district court opinion, the *platforms themselves* are shielded from any liability for their actions, which will only place the owners and operators in an even tighter bind. And this problem is not confined to New York City. AvalonBay also has received two fines from San Francisco Office of Short-Term Rentals for sublets that Airbnb brokered in its communities without their knowledge or consent, because the sublet was not listed on the city's short-term residential rental registry under laws that went into effect earlier this year.

Second, the district court opinion places owners and operators in an untenable position with regard to their current residents. Amici's members have invested enormous sums to obtain and maintain their properties. Residents of apartment communities often choose their properties because of their particular traits, including the rules that the owners and operators of buildings set for the community. The opinion will sanction behavior that undermines those

[43] *See, e.g., id.* (describing one apartment owner who called the mayor's office to report that a tenant had illegally placed several bunk beds in his apartment and begun to advertise it on a short-term rental platform; the city issued a vacate order against the tenant, but then also fined the building owner).

traits and renders unenforceable those rules, with disruptive and even dangerous consequences for residents.

One short-term subletter hosted a party of 200 people that overflowed out of the apartment, destroyed "nearly every single thing inside the apartment," played blaring music through the night, left drug paraphernalia and alcohol trash throughout the community, and broke the security gate and elevator.[44] Another short-term subletter hosted a gathering that led other residents in the building to call riot police, with one attendee landing "with a crash on to his balcony from above" and knocking on his window to get back in.[45] Not all incidents are as severe of these, and subletters have no monopoly on poor behavior. Even so, these illustrations reveal the categories of problems that can accompany short-term subletters, who have no enduring connection to the apartment community. Residents grow frustrated with the security issues, disrespectful behavior and similar issues, and the episodes can gravely affect the residents' satisfaction with their community.

Finally, the activities of Airbnb disrupt the ability of owners and operators to appeal to some *future residents* in the apartment marketplace. Amici's members have devoted substantial resources, time, and care to fostering a residential character for their community that meets the desires and assures the well-being of current residents, and attracts future residents as well. When Airbnb offers short-term rentals in an apartment community without the consent

[44] Lazzaro, *supra* note 11.
[45] Dean, *supra* note 14.

of owners and operators, the company's actions dramatically alter that character, impairing the ability of amici's members to market the community to prospective residents.

Although short-term rentals are increasingly popular for younger cohorts of residents, *16 percent of all apartment residents* and *32 percent of apartment residents over the age of 65* said categorically in one recent survey that they would not lease at a community that included short-term rentals.[46] The district court opinion effectively removes this population from the prospective resident pool against the wishes of the owner or operator where Airbnb or another platform brokers short-term sublets on their property without their consent.

It is no answer for Airbnb to say that building owners can address these issues by taking legal action one by one against their own individual residents. Airbnb declines to provide owners and operators with the addresses of short-term rentals it is brokering. Airbnb does not allow an owner to search for the names or addresses of their residents on the site to determine if there is a lease violation. Airbnb usually does not take any meaningful action at all when apartment owners discover their properties on the site and ask that they be removed from any further subletting (unless the owners first agree to allow Airbnb to broker short-term rentals through the Friendly Buildings Program). And as discussed *supra*, apartment owners are exposed to civil and criminal liability and a host of other problems no matter what precautions or preventive measures they take in their own properties.

[46] *See* 2017 NMHC/Kingsley Associates Renter and Preferences Report, *supra* note 16.

These problems are not inherent to short-term rental platforms. They are, however, inherent to short-term rental platforms that operate *without owners' knowledge and consent*. A great many of these complications could be avoided or mitigated if owners were able to choose whether short-term rentals were appropriate for their particular communities, and once they so choose, have the opportunity to develop precautions, safety measures and ground rules that are appropriate to those communities. But that is not the model that Airbnb is pursuing. Instead, it brokers short-term sublets in apartment communities without regard for owners or operators' choice whether to allow short-term rentals. And the district court opinion now throws a cloak of immunity around that unilateral, and quite damaging, business decision.

CONCLUSION

For the above stated reasons, amici respectfully ask this Court to reverse the district court opinion.

Dated: June 29, 2018

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), 32(a)(7) and Circuit Rule 32-1(a), because it contains 6,537 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), because it was prepared in Microsoft Word using double-spaced 14-point Perpetua typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the 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.

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No. 18-55113

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA PARK LA BREA A LLC; LA PARK LA BREA B LLC; LA PARK LA BREA C LLC; and AIMCO VENEZIA, LLC,
Plaintiffs-Appellants,

v.

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

AMICUS BRIEF ON BEHALF OF THE AMERICAN HOTEL & LODGING ASSOCIATION, INC. AND THE CALIFORNIA HOTEL & LODGING ASSOCIATION, INC., AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, the American Hotel & Lodging Association, Inc. and California Hotel & Lodging Association, Inc. state that they do not have any parent corporations and that there are no publicly-held corporations that own 10% or more of their stock.

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INTEREST OF THE AMICI CURIAE

The American Hotel & Lodging Association, Inc. ("AHLA") is the only national trade association representing all sectors of the United States hotel industry. The California Hotel & Lodging Association, Inc. ("CHLA") is a non-profit trade association representing all sectors of the California hotel and lodging industry.

Hotels rent rooms to transient guests. Defendant-Appellee, Airbnb, Inc., owns and controls a website that lists millions of properties for rent to transient guests. Hundreds of thousands, if not more, of those listings are for units in apartment, condominium, and cooperative living buildings. Airbnb, Inc. and Defendant-Appellee, Airbnb Payments, Inc. (collectively, "Airbnb"), control the transactions by which the properties are listed and rented, and by which payments are made for the rentals. The other parties to those transactions are the owners or lessees of the properties, whom Airbnb refers to as "Airbnb hosts," and the transient guests.

According to Airbnb, it has virtually no responsibility if the transactions among it, the Airbnb hosts and the transient guests (1) violate laws of general applicability which apply to hotels, such as zoning laws, or (2) breach contracts between the Airbnb hosts and third parties, such as leases between Airbnb hosts and their landlords. Further, under Airbnb's business model neither Airbnb nor the

Airbnb hosts comply with the multitude of regulations traditionally placed on the hotel industry. Those regulations seek to protect guests and their personal property, as well as surrounding communities, and often subject hotels to more onerous taxes than assessed on residential buildings. The hotel industry's compliance with those regulations is costly and limits the time, place and manner in which hotels can conduct their businesses. Because Airbnb's business model, paired with its denial of liability described above, avoids those costs and limitations, Airbnb's business model has created an unfair and uneven competitive playing field.

Airbnb asserts that it is shielded from broad classes of liability by Section 230 of the Communication Decency Act, 47 U.S.C. § 230 (2012) ("Section 230"), because, according to Airbnb, it is fundamentally a platform that posts content created by third parties, the Airbnb hosts. Airbnb's assertion is based on an inaccurate depiction of the facts combined with an overly broad interpretation of Section 230.

The decision on appeal accepted Airbnb's broad construction of Section 230. If the decision is upheld, Airbnb will continue to evade regulations applicable to hotels, and other laws, to the detriment of the legitimate interests of the hotel owners and managers who are members of AHLA and CHLA, to the hotel industry in general, to the transient guests which the hotel industry serves, and to the communities in which hotels operate and which they support.

STATEMENT OF COMPLIANCE WITH RULE 29

This brief is submitted pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. All current parties to the action have consented to the filing of this brief.

No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amici curiae and their counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF LEGAL ARGUMENT

The hotel industry is the brick-and-mortar equivalent to Airbnb's online business. Airbnb's business model is based on the premise that it does not have to comply with laws of general applicability to the transient rental market. This Court has recognized the need to confine Section 230 within appropriate boundaries so as not to "give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability". *Fair Housing Council v. Roommates.com, LLC*, 521 F.3d 1157, 1164, n.15 (9th Cir. 2008) *(en banc)* (hereafter *"Roommates.com"); Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852-853 (9th Cir. 2016) (hereafter "*Internet Brands*"). Contrary to that admonition, the court below accepted Airbnb's expansive reading of Section 230, perpetuating Airbnb's unfair advantage over its "real-world counterparts" – hotels.

ARGUMENT

I. AIRBNB'S AVOIDANCE OF LAWS OF GENERAL APPLICABILITY GIVES IT AN UNFAIR ADVANTAGE OVER HOTELS

A more complete quote from *Roommates.com*, 521 F.3d 1157, 1164, n.15 is:

> The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses.

> Rather, it 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 exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.

See also Internet Brands, 824 F.3d at 852-853 (9th Cir. 2016):

> We have already held that the CDA does not declare "a general immunity from liability deriving from third-party content." [citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100 (9th Cir. 2009)]. "[T]he Communications Decency Act was not meant to create a lawless no-man's-land on the Internet." *Roommates.com, 521* F.3d at 1164. 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.

Airbnb's business model was designed to, and does, give Airbnb "an unfair advantage over [its] real-world counterparts, which must comply with laws of general applicability." *See Roommates.com*, 521 F.3d at 1164. Airbnb and its Airbnb hosts are functionally running massive hotel operations that violate zoning

restrictions and ignore the regulations that apply to hotels. Compliance with those laws and regulations is costly. As a result, a significant part of the revenue flowing to Airbnb and its Airbnb hosts is a result of their violations of law, and non-compliance with laws of general applicability and regulations imposed on hotels. That is what creates the uneven playing field.

A. Airbnb and Airbnb's Commercial Hosts Are Operating As Illegal Hotels

The imbalance of costs also attracts hosts who are intent upon making the most of Airbnb's brand of profiteering (hereafter "Commercial Hosts"). Unlike Airbnb's depiction of its Airbnb hosts as individuals living in apartments and seeking to share extra space in their homes with guests, these Commercial Hosts own or lease multiple apartments as investments which they list with Airbnb, generating nearly a third of Airbnb's revenue nationwide according to a report by CBRE. CBRE Hotels' Americas Research, *Hosts with Multiple Units – A Key Driver of Airbnb Growth: A Comprehensive National Review Including a Spotlight on 13 U.S. Markets* (March, 2017), at 5 (finding 32% of Airbnb's revenue nationally from hosts with two or more whole units), https://www.ahla.com/sites/default/files/CBRE_AirbnbStudy_2017_0.pdf (last visited June 27, 2018).

Three years earlier than the CBRE study, an October 2014 report by the New York State Attorney General foretold that nationwide result. It concluded that

a large percentage of Airbnb's revenue in New York City was derived from Commercial Hosts' operations. *See* Attorney General of New York State, *Airbnb in the City* (October, 2014), http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf (last visited June 27, 2018). According to the report, over 100 users controlled more than 10 different units that were rented out through Airbnb. *Id.* at 3. Together, these hosts booked 47,103 reservations and earned $59.4 million in revenue. *Id.* The most prolific user administered 272 unique listings, booked 3,024 reservations and took in $6.8 million in revenue. *Id.* These New York City Commercial Hosts on Airbnb at that time accounted for only 6% of the New York City Airbnb listings but they dominated the platform, generating 36% of all rental transactions and $168 million constituting 37% of Airbnb's total revenue in the city. *Id.* at 2, 10.

California wrestles with the same problem of Commercial Hosts turning what Airbnb typically describes as middle class families making ends meet into a commercial enterprise by taking apartments out of already tight rental markets and listing them on Airbnb. A 2015 study reported:

> [The] analysis of… Airbnb data identified three categories of hosts (listing agents): leasing companies, with two or more whole units; single lessors, who rent out whole units; and on-site hosts, with shared space. At the time, we found that six percent of Airbnb listing agents

> were leasing companies, responsible for generating 35 percent of Airbnb's Los Angeles revenue, while 48 percent of listing agents (single lessors and leasing companies) generated 89 percent of Airbnb revenue.

See Roy Samaan, *Short-Term Rentals and L.A.'s Lost Housing*, Los Angeles Alliance for a New Economy (August 24, 2015), at 2, http://www.laane.org/wp-content/uploads/2015/08/Short-Term_RentalsLAs-Lost_Housing.pdf (last visited June 27, 2018).

These commercial users are, for all purposes and intent, operating illegal hotels. Airbnb created and continues to create the incentives for them to do so, facilitates their rental transactions, and is a contractual party in their rental transactions.

B. Airbnb Created The Circumstances That Permit, and Is Heavily Involved In, The Rental Transactions That Occur On Its Platform

The public, influenced by Airbnb's website and its massive advertisement and lobbying campaigns, certainly gets the point that Airbnb is running the show. We have never heard anyone say "I am staying at John or Jane's home which they have posted for rent on a neutral platform called Airbnb." Instead we hear "I booked an Airbnb" and "I stayed at an Airbnb." The public's impression is validated by the history of Airbnb's creation and the way it runs the transactions on that platform.

To begin with, Airbnb created the model that all Airbnb hosts, including Commercial Hosts, use. Nathan Blecharczyk, Airbnb's Chief Technology Officer and Co-Founder of Airbnb, has explained that he and his co-founders built Airbnb's business on content that they originally developed in a format which they designed. In his words, this is how his company came from nowhere in early 2009 to 70 million room night rentals in 2015:

> Well, after the first year, in early 2009, we focused our attention on New York, and ah, really curating the experience that a traveler would have in New York by meeting every single host and photographing the properties professionally and helping to set the price, curate the description, and it's when we really got hands on and helped to shape this into an attractive product, then the booking started to happen and the network effect started to take off.

See World Economic Forum, Davos 2016 – A New Platform for the Digital Economy (January 21, 2016), https://www.youtube.com/watch?v=-pFRIlgEdl0, from 1:20 to 6:36 (last visited June 27, 2018).

Airbnb then crafted its Terms of Use on its website to operate as a master tri-partite contract of adhesion, binding hosts, guests and Airbnb. The preamble to Airbnb's Terms of Service (last updated April 16, 2018) at https://www.airbnb.com/terms (hereafter "Terms of Service") states:

> These Terms of Service ("Terms"') constitute a legally binding agreement ("Agreement") between you [referring to both hosts and guests] and Airbnb (as defined below) governing your access to and use of the Airbnb website, including any subdomains thereof, and any other websites through which Airbnb makes its services available (collectively, "Site"), our mobile, tablet and other smart device applications, and application program interfaces (collectively, "Application") and all associated services (collectively, "Airbnb Services").

Clause 3 of the Terms of Service makes clear the extent to which Airbnb controls the terms of transactions conducted through its website and the inability of hosts and guests to impact those terms, short of terminating their involvement with Airbnb. It states:

> Airbnb reserves the right to modify these Terms at any time in accordance with this provision. If we make changes to these Terms, we will post the revised Terms on the Airbnb Platform and update the 'Last Updated' date at the top of these Terms. We will also provide you with notice of the modifications by email at least thirty (30) days before the date they become effective. If you disagree with the revised Terms, you may terminate this Agreement with immediate effect.

Section 14.1 of the Terms of Service then explicitly prohibits use of the Airbnb Platform "to request, make or accept a booking independent of the Airbnb Platform, to circumvent any Service Fees or for any other reason…." Moreover, although Section 7.1.7 of the Terms of Service provides that a host enters into a legally binding agreement with a guest when there is an acceptance by the host, the final step in the contracting process is a step that only Airbnb can take. Section 8.1.2 of the Terms of Service provides:

> Upon receipt of a booking confirmation *from Airbnb*, a legally binding agreement is formed between you and your Host, subject to any additional terms and conditions of the Host that apply, including in particular the applicable cancellation policy and any rules and restrictions specified in the Listing. *(emphasis added).*

Airbnb also controls the flow of the money. The guest pays Airbnb, not the host. Airbnb takes its fees out of that payment and remits the remainder to the host. Airbnb Payment Terms, Sections 7.1, 10.2, https://www.airbnb.com/terms/payments_terms (last visited June 27, 2018).

In sum, Airbnb controls, or at least is heavily involved in, the contracts that embody the actual rental transactions. It is those actual rental transactions, not the hosts' listing of their units, that cause the breaches of zoning, fire and building regulations and of the leases between the hosts and

their landlords. Yet, Airbnb disclaims responsibility for those breaches, relying upon Section 230 and overlooking *Internet Brands'* rejection of but-for causation for Section 230 purposes. *Doe v. Internet Brands, Inc.*, *supra* 824 F.3d at 853.

The Airbnb hosts, who are using their units in residential buildings for transient use, are obviously not stopping their use of the Airbnb platform, despite the illegality and contract breaches. For example, the New York Attorney General concluded that "72 percent of units used as private short-term rentals on Airbnb appeared to violate" state and local laws (*Airbnb in the City*, *supra* at 2), and noted that "the analysis understates the degree to which rentals on Airbnb may have violated the law." *Id.* at 2, n. 2. The simple fact of the matter is that buildings zoned for residential use have less stringent protections for the resident than those applicable to buildings providing rentals for transient use. *See also Airbnb in the City*, *supra* at 21-37 (Affidavits of Thomas Jentsen, Chief of Fire Prevention, New York Fire Department explaining differences in the NYC building code, and Vladimir Pugach, an Associate Inspector of the NYC Department of Buildings, detailing violations of the Building and Fire Codes when a residential building is used for transient use).

C. Airbnb's Avoidance Of Compliance With Safety Regulations Is Dangerous

Many of the regulations that transactions on Airbnb's platform avoid are safety regulations. Unlike residents in residential properties, tourists and business travelers are unlikely to have the opportunity or the desire to learn the layout and safety features and procedures of the building in which they are staying. As a result, they cannot be expected to know what to do if there is a fire in a building. Unlike residential properties, the vast majority of hotels in the United States are required to have sprinkler systems in the common areas and in every guest room, detailed systems and protocols to let guests know of a fire, and detailed evacuation plans and adequate staff to man the systems and carry out the plans. Hotels are also usually required to adhere to detailed construction standards to prevent the spread of fire through the building. *See* Jack P. Jefferies & Banks Brown, Understanding Hospitality Law, Chapter 34 at 475-476 (5th Ed.)(AHLEI 2010) (hereafter "Understanding Hospitality Law"). When Airbnb and its hosts place transient guests in apartment buildings that are not subject to the strict fire and building laws that govern hotels, they create a real and present danger for those guests in the event of a fire. Unfamiliar with the buildings, Airbnb guests may find themselves wandering the hallways trying to locate a staircase with no staff or public address system to tell them whether to go up or down to avoid danger.

The enhanced fire protection in hotels is only one example. Hotels are deemed at common law to be quasi-public institutions with a duty to receive guests as long as there is room in the inn, and to take reasonable steps to protect guests and their property. *See* Understanding Hospitality Law, Chapter 1 at 3-4. Over time the protections that hotels have been required to provide to fulfill these duties of protecting the guests and their property have become the subject of a vast array of provisions in federal, state and local law.

As another example, hotels address the risk that a guest in the hotel can create a safety risk to other guests in the hotel or the surrounding community. When a guest enters a hotel and books a room, as a general rule, a front desk employee checks the guest in, a process now sometimes done over the internet. Hotels routinely, and often by law, require identification. Understanding Hospitality Law, Chapter 27. These simple steps create a record of who is in the hotel and where they are located. That record can be readily accessed by a responsible hotel employee if law enforcement seeks to determine if a particular individual is staying at the hotel.

Hotels also have security procedures and many have security officers on duty and security cameras on site. Every employee in a hotel knows the rule "if you see something, say something" and guests can easily seek help if needed from hotel staff. There are numerous instances in which a hotel guest may interact with

hotel staff — when ordering room service, eating at the hotel's restaurant, opening the door for the room attendant, passing the room attendants in the halls, being greeted by staff in the lobby, and many more. These dynamics allow hotel staff to detect signs of potential wrongdoing.

Most Airbnb rentals offer few or none of these protections. When Airbnb hosts turn their apartments over to strangers, everyone else who is living in the apartment building is at risk that the strangers in the building will endanger them or create a significant nuisance. The risk includes the presence of guests who engage in unlawful or unsafe activities in the rental or allow their acquaintances to walk the hallways of what amount to family homes. Common sense is enough to conjure the parade of horribles. It is not necessary to spell it out.

D. Creating Unfair and Uneven Playing Fields Such As Airbnb's Was Not Intended By Congress When It Enacted Section 230

Certainly, when Congress enacted Section 230, it was not thinking of a situation like that deliberately created by Airbnb and the Airbnb hosts. To the contrary, this Court has recognized that Section 230 was prompted by a state court case holding Prodigy, a company that controlled various online platforms, responsible for a libelous message posted on one of its financial message boards. *See Roommates.com*, 521 F.3d at 1163 (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995) (unpub.)). There, Prodigy had examined posts on its website for third party postings that were

offensive or in bad taste. *Id.* The court held that since Prodigy was reviewing the postings, it was liable for a defamatory message that it failed to delete. *Id.* Congress was also aware of *Cubby, Inc. v. CompuServe, Inc.*, 776 F.Supp. 135, 140 (S.D.N.Y. 1991), where the court held that CompuServe was not liable for a defamatory third party posting on its website since it had not had an opportunity to review the positions. *See Roommates.com* at 1163-1164.

Robert Cannon, the Senior Counsel for Internet Law in the Federal Communications Commission's Office of Strategic Planning and Policy Analysis, published a detailed contemporary account of the legislative history of the CDA. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L. J. 51 (1996) (hereafter "Cannon").

With respect to Section 230, he concludes:

> The opposition proclaimed that the Cox/Wyden Amendment [which became Section 230] forbade FCC regulation of the Internet; it did not. The opposition claimed that it preempted state regulation of the Internet; it did not. **The only thing that the amendment in fact did was to overrule *Stratton* by protecting from liability on-line services that make a good faith effort to restrict access to offensive material.** This one affirmative act was, in fact, consistent with the

> provisions of the CDA. The Cox/Wyden Amendment was described as a bill without a verb. In response to a growing on-line opposition movement, congressmen were able to declare their allegiance to the First Amendment and cyberspace without actually committing themselves to legislation of significance. The victory was hollow. (Cannon at 68-69) (*emphasis added*).

Given this history and the familiar "speaker" and "publisher" language of defamation law used in Section 230(c)(1), it is a fair conclusion that Congress was enshrining and expanding in Section 230(c)(1) the *CompuServe* holding that a provider of an interactive computer service could not be responsible for defamatory material posted by another on its website regardless of whether it had a chance to review the third party posting. Then, in Section 230(c)(2), Congress made it clear that the *Prodigy* ruling would have no effect in the future by providing that an interactive computer service could not be liable for reviewing third party postings and failing to delete defamatory ones.

In all events, Section 230 does not, either on its face or by fair implication, provide a defense to the provider of an interactive computer service involved in arrangements such as those between Airbnb and its Airbnb hosts, even if a part of the overall prearranged transactions is to have the Airbnb hosts post a listing.

Airbnb's platform was and is designed to entice apartment dwellers to list their apartments and travelers to rent those apartments, to entice the hosts, including the Commercial Hosts, to go into business with Airbnb, to facilitate the necessary transactions by dictating unilaterally the rules by which the necessary contracts can be made, to make Airbnb a party to those contracts, and to force the parties to use the platforms and their affiliates to receive the monetary consideration and to divvy it up under rules which Airbnb establishes. The circumstances clearly point to the conclusion that Airbnb and the Airbnb hosts are in business together. At the very least, there exists a factual question as to whether the hosts and Airbnb, despite the proclamations to the contrary in their contracts, are engaged in a joint venture or a conspiracy under state law to violate the law or to commit a tort.

CONCLUSION

We urge the Court to reverse the District Court, to continue its careful examination of the limits of Section 230, and to continue to limit it in a way that prohibits internet platforms from exceeding the scope of the immunity intended by Congress.

Respectfully submitted,

Dated: June 29, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(a)(4)(G) and Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(a)(5) because the petition contains 3,755 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman typeface.

Dated: June 29, 2018

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