No. 18-55367

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HOMEAWAY.COM, INC. and AIRBNB, INC.,
Plaintiffs/Appellants,

v.

CITY OF SANTA MONICA,
Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California,
Nos. 2:16-cv-06641-ODW-AFM; 2:16-cv-06645-ODW-AFM
Honorable Otis D. Wright, II Presiding

CITY OF SANTA MONICA'S ANSWERING BRIEF

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INTRODUCTION

Santa Monica is committed to expanding affordable housing and helping residents stay in their homes. The City has dedicated countless hours, as well as millions of dollars, to preserving and producing housing within its roughly 8.3 square miles. Rising residential rents and real estate prices, however, have led some to declare a "housing crisis" across Los Angeles County; and an ever-expanding short-term rental industry creates new incentives for landlords to evade rent control laws, evict tenants, and convert residential units into *de facto* hotels, threatening also to undermine community ties in residential neighborhoods.

In this context, Santa Monica adopted the "Home-Sharing Ordinance" (the "Ordinance"), which strikes a balance by allowing residents to supplement income through home-sharing, inviting guests into a home for profit while the resident is present, but prohibiting short-term vacation rentals where the resident is not present in the home. The Ordinance also regulates "hosting platforms", like Appellants, who have contributed to the proliferation of illegal short-term vacation rentals. The Ordinance prohibits any "hosting platform[]" from "complet[ing] any booking transaction for any residential property or unit unless it is listed on the City's registry . . . at the time the hosting platform receives a fee for the booking transaction." Santa Monica Municipal Code ("SMMC") 6.20.050(c), ER-34-35.

Appellants assert the Ordinance runs afoul of Section 230 of the

Communications Decency Act because, "as a practical matter," it "would compel the platforms to *remove* third-party content to prevent their websites from becoming littered with unbookable listings." Appellant's Opening Brief ("AOB") 13 (emphasis in original). Two district courts have rejected this argument, properly holding that Section 230 protects only publishing activity and the Ordinance "creates no obligation on [Appellants'] part to monitor, edit, withdraw or block the content supplied by hosts." Excerpts of Record ("ER") 3, 9-11; *see also Airbnb, Inc. v. City & County of San Francisco*, 217 F.Supp.3d 1066, 1072-76 (N.D. Cal. 2016) (hereafter "*Airbnb*").

Appellants further suggest that Section 230's reach must be extended because, absent protection, Appellants and their peers will be subject to "idiosyncratic" or "numerous (and varied)" regulatory regimes. AOB-at 22. Appellants' interest in extending the reach of Section 230 is clear. Construed as Appellants suggest, Section 230 would exempt online booking platforms from virtually all regulation, granting additional competitive advantage to online companies as compared to their brick-and-mortar counterparts and allowing online businesses uniquely to write their own rules of conduct. A plain application of the law, however, will not bring the result Appellants fear. That Congress *did not* draft Section 230 to protect Appellants from penalties for unlawful financial transactions does not mean that Congress *could not*; and Santa Monica, like other state and

local governments, seeks constructive partnership, not unreasonableness, in drafting its laws.

Because Appellants' claims under the First Amendment and the California Coastal Act also lack merit for the reasons set forth below, this Court should affirm the district court's denial of Appellants' motion for a preliminary injunction.

STATEMENT OF JURISDICTION

The City agrees with Appellants' statement of jurisdiction.

ISSUES PRESENTED

Whether the district court appropriately exercised its discretion to deny a preliminary injunction precluding enforcement of Santa Monica's Home-Sharing Ordinance ("the Ordinance"), where:

1. It correctly held that the Ordinance regulates only non-publishing conduct that falls outside the scope of any protection conferred by Section 230 of the Communications Decency Act;
2. It correctly held that the Ordinance does not violate the First Amendment because it imposes only incidental burdens on commercial speech;
3. It correctly determined that Appellants failed to meet their burden to demonstrate a likelihood of success in their claim that the Ordinance

conflicts with the California Coastal Act or required Coastal Commission approval; and

4. The balance of hardships and the public interest, factors not reached by the district court, tip in the City's favor.

STATEMENT OF THE CASE

Santa Monica is a California municipality occupying slightly more than eight square miles with a resident and visitor population of up to 500,000 people daily. ER-19. A small city without room to expand, the City has consistently dedicated policies and resources to promoting the preservation, production, and affordability of housing, and protecting the quality and character of its residential neighborhoods. *See, e.g.*, ER-656, 662, 675-80, 692-693; *see also Nash v. City of Santa Monica*, 37 Cal.3d 97, 100 (1984) (upholding City's rent control ordinance and describing "Demolition Derby" that resulted in City's loss of over 1,300 residential units to condominium conversions during 15-month period in 1970s).

Consistent with its efforts to preserve and protect housing, the City has prohibited short-term vacation rentals within its residential neighborhoods since at least 1988. See discussion in Argument § III.B.1 below. Short-term rentals threaten to reduce housing supply, particularly affordable housing, by converting residential homes and apartments to tourist use. ER-1138, 1144-1145, 1148, 1151. Additionally, the "'residential character' of a neighborhood is threatened when a

significant number of homes . . . are occupied not by permanent residents but by a stream of tenants staying a weekend, a week, or even 29 days, . . . [as] such rentals undoubtedly affect the essential character of a neighborhood and the stability of a community." *Ewing v. City of Carmel-By-The-Sea*, 234 Cal.App.3d 1579, 1591 (1991).

Appellants have been operating commercial online platforms facilitating short-term rentals since 2006 and 2008. ER-1868 (HomeAway FAC ¶ 16); ER-1836 (Airbnb FAC ¶ 27). Airbnb matches hosts and guests, completes booking transactions for short-term rentals, and extracts a service fee from both hosts and guests. ER-1837 (Airbnb FAC ¶ 29). Airbnb chooses not to charge for advertisements, and instead to collect fees on booking transactions, because it believes this business method to be more "convenient" for its users and more likely to result in an increased number of transactions on which it may charge a percentage. *Id*. HomeAway operates using two different business models: a pay-per-booking option (similar to Airbnb's approach), or a subscription option under which hosts pay HomeAway fees to list their units on HomeAway's website. ER-1869 (HomeAway FAC ¶ 21).

In May 2015, in the midst of a continuing statewide housing crisis exacerbated by a burgeoning short-term rental industry, the Santa Monica City Council reconsidered its longstanding prohibition on short-term rentals. Carefully

weighing harms and benefits, the City adopted Ordinance 2484 which expressly adopted and reaffirmed the City's longstanding prohibition against "Vacation Rentals," defined as rentals of residential property for 31 consecutive days or less in which residents do not remain within their units to host guests. Sections 6.20.010(c), 6.20.030; ER-22-23, 24. But it newly authorized "Home Sharing," allowing residents to host visitors for compensation for a period of less than thirty-one days, so long as residents obtain a business license and remain on-site throughout the visitors' stay. Sections 6.20.010(a), 6.20.020; ER-22-23; *see also* ER-1058-1059, 1062, 1078. In this manner, Ordinance 2484 enabled residents to supplement income to meet increased rents and housing prices, while it ensured that Santa Monica's housing units, and particularly affordable units, would not be surreptitiously or openly converted into *de facto* hotels.

Two sections of Ordinance 2484 placed specific prohibitions or responsibilities on online "hosting platforms" such as Appellants. *See* Section 6.20.010(b); ER-22 (defining "Hosting Platform"). Section 6.20.030 prohibited hosting platforms from advertising, or assisting in advertising, vacation rentals or unlawful home-sharing. ER-24. Section 6.20.050 required hosting platforms to: (1) collect and remit applicable Transient Occupancy Tax; and (2) disclose on a regular basis each home-sharing and vacation rental listing within the City, together with certain information about each such listing and any bookings of those

listings. *Id*.

Appellants filed challenges to Ordinance 2484. On September 21, 2016, the parties agreed to stay the cases to allow the City to prepare and consider amendments to Ordinance 2484 to address Appellants' challenges. ER-1885 (Dkt. 21), ER-1900 (Dkt. No. 20).

During this period, Appellants were also challenging the City and County of San Francisco's short-term rental laws in the Northern District of California. On November 8, 2016, District Judge James Donato issued a published opinion finding that Appellants had established neither a likelihood of success on the merits nor questions serious enough to require litigation, and denying Appellant's request for a preliminary injunction with respect to their CDA and First Amendment challenges. *Airbnb*, 217 F.Supp.3d at 1072-76 (CDA), 1076-79 (First Amendment), 1080.[1] Appellants appealed but then entered a public settlement in which they agreed to comply with San Francisco's laws and cease booking

[1]On November 18, 2016, based on San Francisco's acknowledgment that "an effective registration verification procedure is not up and running," the court issued a temporary restraining order barring enforcement. ER-60-62. In issuing the restraining order, the court reiterated its prior determination "that plaintiffs' First Amendment and CDA claims did not show a likelihood of success on the merits or raise serious questions requirement more litigation," and made clear that the restraining order went "only to the serious questions relating to fair enforcement." ER-62. Here, to facilitate compliance and enforcement, the City publishes its registry of licensed home-sharing hosts and their properties online. *See* SMMC § 6.20.020(b), ER-34; *see also* n.3 below.

transactions with unregistered rental properties in San Francisco, subject to enforcement procedures set forth in the settlement agreement. ER-64-78.

On January 24, 2017, Santa Monica adopted Ordinance 2535, which amended Ordinance 2484 and SMMC Chapter 6.20 to limit their application to hosting platforms such as Appellants in accordance with those aspects of the San Francisco ordinance upheld in the Northern District of California. ER-29-39. Ordinance 2484 as amended by Ordinance 2535 is codified at SMMC Chapter 6.20 and referred to herein as "the Ordinance."

The Ordinance imposes obligations only on hosting platforms that participate "in the home-sharing or vacation rental business by collecting or receiving a fee, directly or indirectly through an agent or intermediary, for conducting a booking transaction using any medium of facilitation." SMMC §6.20.010(c) (defining "Hosting Platform"), ER-32; *see also* ER-1313 (staff report explaining amended ordinance would not regulate platforms that "do not charge for booking services" but rather "act solely as publishers of advertisements for short term rentals").

The Ordinance imposes four obligations on this limited set of hosting platforms: (1) to collect and remit applicable Transient Occupancy Tax; (2) to disclose on a regular basis each home-sharing and vacation rental listing within the City, together with certain information about each such listing and any bookings of

those listings; (3) not to complete any booking transaction for any residential property or unit unless it is listed on the City-created registry of validly licensed home-sharing properties; and (4) not to collect any fees for facilitating or providing services such as insurance, catering, entertainment, cleaning, property management, or maintenance for any vacation rental or unregistered home-sharing properties. SMMC §6.20.050, ER-34-35.

The Ordinance does not prohibit the publication of, or require the monitoring or removal of, content provided to Appellants by third-party hosts. Indeed, the Ordinance includes a "Safe Harbor" provision stating that any online hosting platform that complies with the four responsibilities described above will be presumed to be in compliance with the law, making clear that they could not be held liable based on activities of hosts that may publish listings on their sites. SMMC §6.20.050(e), ER-35. Nor does the Ordinance require hosting platforms to engage in ongoing monitoring or verification of content provided by third-party hosts. Rather, to facilitate compliance and enforcement, the City publishes its registry of licensed home-sharing hosts and their properties online (*see* https://data.smgov.net/Permits-Licenses/Home-Sharing-Registry/qza6-nc9s) where it is readily available to Appellants. *See* SMMC §6.20.020(b), ER-34.

At the time of the hearing on their preliminary injunction motion, Appellants continued to facilitate the majority of known short-term rentals—both

lawful and unlawful—in Santa Monica. ER-1617 ¶ 5. The City has 196 licensed home-sharing hosts, 90% of whom advertise on Appellants' platforms. *Id*. ¶¶ 4, 6. In May 2017, one of Santa Monica's peak tourist months, Airbnb had approximately 950 short-term rental listings for Santa Monica, well in excess of the number of licensed home-sharing properties. ER-1618 ¶ 8.[2] Between November 2015 and October 2017, Airbnb and its hosts collected approximately $15.5 million a year from Santa Monica short-term rentals, the majority of which operated without complying with the Ordinance. ER-1617-1618 ¶¶ 5, 8, 13.

As Appellants continue to receive a financial windfall by conducting booking transactions for unlawful rentals in the City, the threat short-term rentals pose to the City's housing stock continues. ER-1625 ¶¶ 6, 7. Throughout California, housing production has been outpaced by population growth, adding to the housing affordability crisis. ER-1625 ¶ 8. The City has seen 2,272 rental housing units withdrawn from the permanent rental market through the Ellis Act, Cal. Gov't Code §§7060 *et seq*., since 1986. ER-1613 ¶ 8. A disproportionate number of removed units were in the City's Coastal Zone. ER-1613 ¶ 9. It is estimated that over 300 short-term rentals operated within rent-controlled units between 2015-2017, increasing the concern that short-term rentals threaten a loss

[2] Airbnb asserts that there are currently approximately 1,400 listings in Santa Monica. ER-393 ¶ 15. The City has been unable to verify this number. ER-1618 ¶ 12.

of affordable rental units available to City residents. ER-1618 ¶ 11; ER-1625 ¶ 7.[3]

On December 13, 2017, Appellants moved for a preliminary injunction arguing that the Ordinance violated the California Coastal Act, the CDA, and the First Amendment. ER-1891 (Dkt. No. 57). On March 12, 2018, the district court found no likelihood of success on the merits and denied Appellants' motion. ER-1-12.

SUMMARY OF ARGUMENT

Unregulated short-term rentals seriously impact communities, neighborhoods, and affordable housing stock in Santa Monica. In crafting a legislative solution, the City sought to regulate hosting platforms that have facilitated the proliferation of short-term rentals, and looked to the courts for delineation of the boundaries of its authority under Section 230 of the Communications Decency Act ("CDA"). Judge Donato's decision in *Airbnb* recognized that local law could regulate hosting platforms' own non-publishing conduct, following an unbroken line of guidance from this Court. *See Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (hereafter "*Internet*

[3] Santa Monica is only one of many cities noting the deleterious effect Appellants' facilitation of home sharing has on communities, especially with respect to permanent housing. *See, e.g.*, Johanna Interian, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. Int'l & Comp. L. Rev. 129, 156–57 (2016).

Brands"); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 n. 15 (9th Cir. 2008) (hereafter "*Roommates.com*"); *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (hereafter "*Barnes*"). The Ordinance therefore unremarkably regulates non-publishing conduct (hosting platforms' facilitation and completion of booking transactions) while leaving publishing conduct untouched. The Ordinance does not regulate platforms' publication of listings at all and does not require platforms to screen, monitor, edit or remove any listing, legal or illegal. Platforms simply may not take the additional and affirmative step of brokering an illegal rental through their websites.

There is nothing too "creative," "clever" or "backdoor" about the City scrupulously following guidance from statutory text, as clarified by the courts. AOB-at 1, 5, 25, 26. It is Appellants who seek to have this Court depart from its prior precedent and create new law. Construed as expansively as Appellants suggest, Section 230 would offer booking platforms virtually limitless protection for all their activities, including non-publishing activities, so long as they could be characterized as deriving from publishing activity "as a practical matter" or "in effect." See AOB-at 2, 23, 27. Congress did not draft Section 230 this broadly, and this Court has squarely rejected such an expansive reading of its reach. *See Internet Brands,* 824 F.3d at 853 ("CDA does not provide a general immunity against all claims derived from third-party content").

Appellants' First Amendment argument fails for similar reasons. The Ordinance regulates Appellants' commercial conduct (its participation in booking transactions), not speech. And the First Amendment does not prevent restrictions directed at commercial conduct from imposing incidental burdens on speech, particularly commercial speech promoting illegal commercial activity such as host postings for illegal vacation rentals. *See Central Hudson Gas & Electric Co. v. Public Service Commission of New York*, 447 U.S. 557, 563-64 (1980) (no constitutional protection for "commercial speech related to illegal activity").

Appellants' California Coastal Act claim also fails. The Ordinance reflects a balancing of interests entirely consistent with the multiple purposes of the Coastal Act, is local land use legislation not subject to Coastal Commission review, and is neither development nor an amendment to the City's Land Use Plan that would require approval by the Coastal Commission. The district court correctly concluded that Appellants had failed to demonstrate any likelihood of success in this complex area of state law.

STANDARD OF REVIEW

The denial of a preliminary injunction is reviewed for abuse of discretion. *See Pacific Radiation Oncology, LLC v. Queen's Medical Center,* 810 F.3d 631, 635 (9th Cir. 2015). In deciding whether the district court abused its discretion, this Court applies a two-part test: "first, determining whether the trial court identified

the correct legal rule to apply to the requested relief and second, determining whether the court's application of that rule was illogical, implausible, or without support from inferences that may be drawn from facts in the record." *Pacific Radiation*, 810 F.3d at 635. The district court's conclusions of law are reviewed de novo and its findings of fact for clear error. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

"A preliminary injunction is an extraordinary and drastic remedy," *Munaf v. Geren*, 553 U.S. 674, 689 (2008), that should be entered only "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). A party seeking a preliminary injunction must show (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Pimentel*, 670 F.3d at 1105. Likelihood of success on the merits is the most important of these factors; "if a movant fails to meet this 'threshold inquiry,' the court need not consider the other factors in the absence of 'serious questions going to the merits.'" *Disney Enterprises v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (citations omitted). Where questions go to the merits, a preliminary injunction may be appropriate only if "the balance of hardships . . . tips sharply towards" it and the other factors are satisfied. *Id.*

ARGUMENT

I. THE ORDINANCE REGULATES NON-PUBLISHING CONDUCT, OUTSIDE THE LIMITED PROTECTION PROVIDED BY SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Two federal district courts have found that a local law that holds Appellants liable only "for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with" unregistered or unlicensed units "does not regulate what can or cannot be said or posted" and "creates no obligation on plaintiffs' part to monitor, edit, withdraw or block the content supplied by hosts." ER-10 (Order Denying Preliminary Injunction) (citing *Airbnb*, 217 F.Supp.3d at 1072–73). These findings are entirely correct. The Ordinance prohibits only active participation in illegal booking transactions, which is non-publishing conduct by Appellants that falls outside the scope of Section 230 protection. *Id*.

A. Section 230 Protection Is Expressly Limited to Publishing Activities

Section 230 is "not meant to create a lawless no-man's-land on the Internet." *Internet Brands,* 824 F.3d at 852-53; *Roommates.com,* 521 F.3d at 1163. It is not "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, and it does not declare "a general

immunity from liability deriving from third-party content." *Id.* at 852 (quoting *Barnes*, 570 F.3d at 1100); *accord City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) ("Chicago"). Rather, the statute's protection must be limited to "its narrow language and its purpose." *Internet Brands*, 824 F.3d at 853. As this Court has repeatedly cautioned, "we must be careful not to exceed the scope of the immunity provided by Congress." *Id.* at 853 (quoting *Roommates.com*, 521 F.3d at 1164 n.15).[4]

In construing a statute, courts "first look to the language of the statute to determine whether it has a plain meaning." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009). "The preeminent canon of statutory interpretation requires us to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *McDonald v. Sun Oil Co.*, 548 F.3d 774, 780 (9th Cir. 2008)(citation and internal quotation marks

[4] Appellants' cite *Roommates.com* as emphasizing Section 230's "broad grant" of immunity, and as a result holding that "close cases . . . must be resolved in favor of immunity." AOB-17. A partially concurring minority opinion, however, took the majority to task for ostensibly upending "the settled view that interactive service providers enjoy broad immunity." 521 F.3d at 1176. And the statement that close cases should be resolved in favor of immunity came in the context of addressing whether the website's actions should cause it to be treated as an information content provider, 521 F.3d at 1174-75, a matter not at issue in this appeal. *See* n.7 below. Moreover, as discussed below, that the Ordinance does not penalize publishing activities is not a close question.

omitted).

Section 230(c)(1) of the CDA states: "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." This Court held that the text means what it says and protects from liability only: (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).[5]

The district courts in this case and *Airbnb* heeded this Court's admonitions in recognizing that the plain text of Section 230 protects online businesses from liability arising from publishing activities, but nothing more. Appellants portray both decisions as wrongly-decided outliers. AOB-39-423. But, both are

[5] The City does not dispute that Appellants are providers of an interactive computer service. Appellants argue that the third factor is also "indisputably met." AOB-16. In the district court, the City reserved its argument on this point (ER-618 n.7), and the court did not address it. Given this procedural posture, the City does not here contend that the third prerequisite is absent because Appellants should be considered "information content providers" under Section 230(f)(3). As in the district court, the City reserves the right to develop the factual basis for and present this argument in any other proceedings. *See, e.g.*, *Kimzey v. Yelp!, Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016) (hereafter "*Kimzey*") ("[C]ases establish that a website may lose immunity under the CDA by making a material contribution into the creation or development of content."); *Roommates.com*, 521 F.3d at 1167–68 ("[A] website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct.").

straightforward applications of this Court's precedent to nearly identical facts and claims. As *Airbnb* explains, the cases cited by Appellants do not contradict *Barnes*, *Roommates.com*, and *Internet Brands*, all of which instruct that the correct test is "not whether a challenged activity merely bears some connection to online content; [i]t is whether a regulation or claim 'inherently requires the court to treat' the 'interactive computer service' as a publisher or speaker of information provided by another." 217 F.Supp.3d at 1074 (quoting *Barnes*, 570 F.3d at 1102); *see also Internet Brands*, 824 F.3d at 850. The district court in this case correctly followed this precedent.

B. The Ordinance Penalizes Only Non-Publishing Conduct Outside of Section 230's Limited Protection

The Ordinance was drafted to regulate Appellants' activities in accordance with the limits on Section 230's protection recognized by this Court and others. Accordingly, the Ordinance prohibits and penalizes only non-publishing conduct: platforms direct activity conducting commercial booking transactions for unlicensed short-term rentals.

This Court has defined publication activities protected by Section 230 as involving "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102; *see also Internet Brands*, 824 F.3d at 852 ("efforts, or lack thereof, to edit, monitor, or remove user

generated content"); *Roommates.com*, 521 F.3d at 1170-71 ("any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online"); *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) ("exercising the usual prerogative of publishers to choose among proffered material.").[6] The district court correctly found that the Ordinance penalizes no such publication activities because it "creates no obligation on [Appellants'] part to monitor, edit, withdraw or block the content supplied by hosts." ER-10 (quoting *Airbnb,* 217 F.Supp.3d at 1072-73).

Appellants argue that the district court was incorrect, and that the Ordinance requires them to monitor, review, and remove third-party listings. AOB-at 18, 21, 22-24. Though they do not contend that the Ordinance on its face requires any of these actions, Appellants make two arguments to support their claim.

First, Appellants contend that the City "admits" that the Ordinance requires

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[6] Other courts have similarly described publishing activity as involving decisions about what third-party content may be posted online. *See*, *e.g.*, *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014) ("publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content") (quoting *Zeran v. America Online, Inc.,* 129 F.3d 327, 330 (4th Cir. 1997)); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014) ("making the decision whether to print or retract a given piece of content"); *Universal Communication Systems, Inc. v. Lycos, Inc.*, 478 F.3d 413, 422 (1st Cir. 2007) ("decision not to reduce misinformation [contained in third-party postings] by changing its web site policies"); *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) ("monitoring, screening, and deletion of content from its network").

them "to monitor and review third-party content" and that this admission is "fatal" to the City's position. AOB-at 21. To support this argument, Appellants cite a sentence from the City's briefing below: "True, in order to provide booking services in connection with a unit, Plaintiffs will have to determine whether the unit is properly licensed for rental." ER-617 (cited in AOB-at 18). That sentence says nothing about monitoring and reviewing third-party listings. It is contained within a paragraph that begins: "The Home-Sharing ordinance also does not require Plaintiffs to monitor and review listings." *Id.* Given the context, there is no basis for the claim that the cited sentence constitutes an admission by the City that the Ordinance requires monitoring and review of third-party listings. Indeed, at the City's urging, the district court expressly found to the contrary. ER-3, 10.[7]

Second, Appellants contend that, "effectively," the only way to comply with the Ordinance is to "scrutinize third-party listings to determine whether the listed properties appear on the Santa Monica registry" and then remove or refuse to

[7] Relying on a series of cases criticizing and disregarding civil plaintiffs' efforts at "creative pleading in an effort to work around" Section 230 protections, Appellants contend the Ordinance's express limitations to booking transactions should similarly be disregarded. AOB-at 24-25 & n.4, 28. This argument is unfounded. The City made no secret of its desire to regulate Appellants' activities, and so limit their transactions facilitating illegal home-sharing, to the extent permitted under Section 230 and other law. The City's modification of the Ordinance to accord with the San Francisco law upheld against a CDA challenge is neither "disingenuous" nor an example of "artful pleading" that should be disregarded. Instead, it is a valid effort to conform regulation to existing law.

accept those that do not appear on the registry. AOB-at 21, 23. Appellants cite to two declarations submitted by Airbnb's Head of Policy Strategy (ER-395) and a HomeAway Vice President (ER-504). See AOB-at 21, 23. Both make clear that the referenced scrutiny could occur "after publication but prior to processing the payment and transaction for the listing." ER-395; see also ER-504. Moreover, given Santa Monica's public posting of its registry of licensed home-sharers, which lists property addresses, all Appellants would need to do, at the time of a proposed booking transaction, is compare the address of the proposed booking with the online registry to confirm that the property is registered. This limited check relates to a decision not whether to remove posted listings, but instead whether to proceed with a booking transaction; it therefore does not constitute publishing activity protected by Section 230.

Both declarations assert that for business reasons, Appellants do not find viable the option of checking addresses against the registry at the time of the booking transaction, and would instead likely comply either by monitoring and screening listings prior to publication, removing those listings not on the registry, or by ceasing to operate in Santa Monica. ER-395; ER-504. Appellants argue this establishes they have no choice but to engage in review and removal if they are to avoid liability, citing *National Meat Association v. Harris*, 565 U.S. 452 (2012). AOB-at 26-27. That case generally instructs that preemption analysis may include

the "practical effect" of a challenged law. Appellant's similar contention regarding the San Francisco ordinance was squarely rejected. *See Airbnb*, 217 F.Supp.3d at 1074-75. The reasons cited by the San Francisco court apply here as well: there are options for compliance other than review and removal; *National Meat* involved a statute under which preemption is different from and potentially much broader than under the CDA, particularly given this Court's express caution against applying CDA protection "beyond its narrow language and its purpose," *Internet Brands*, 824 F.3d at 853; and cases that have construed *National Meat* in other contexts have limited it to its particular facts.[8]

Complying with the ordinance through independent, post-publication checks in connection with authorizing booking transactions may impose costs, whether directly by causing Appellants to expend funds to modify their software and implement procedures for these checks, or indirectly by affecting Appellants' relationships with hosts or vacation renters who are upset when they find themselves unable to complete illegal booking transactions through Appellants'

[8]Appellants also cite *Wos v. E.M.A. ex rel Johnson*, 568 U.S. 627 (2013). AOB-25-26, 27. The San Francisco court's reasons for distinguishing *National Meat* apply equally to *Wos*, which relied on *National Meat* to preempt a North Carolina statute that, in certain circumstances, operated "to allow the State to take one-third of the total recovery, even if a proper stipulation or judgement attributes a smaller percentage to medical expenses," thus creating a direct "conflict" between "North Carolina's law and the Medicaid anti-lien provision," which limited liens to actual recoveries of medical expenses. *Wos*, 568 U.S. at 638.

sites. Such costs are a common result of regulatory compliance. *E.g., United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) ("all regulations have their costs"). Appellants' declarations state that given the indirect regulatory costs, Appellants are likely, for business reasons, to pursue a different method of compliance, monitoring and removing illegal listings before booking transactions are attempted and aborted. Such a voluntary choice to engage in publishing activity as a means of minimizing regulatory costs does not convert the Ordinance into one that targets or requires that publishing activity.

Moreover, extending CDA protection based on the costs of regulatory compliance would give Appellants an unjustified business advantage over potential competitors. The Ordinance applies to all hosting services, whether online or not. SMMC 6.20.010(b), ER-32. Expanding CDA protection based on Appellants' desire to avoid regulatory costs would improperly carve out favorable treatment for them, as online companies, that booking service providers not based on the Internet would not enjoy. *See Roommates.com*, 521 F.3d at 1164 n.15 (CDA immunity should not be applied to "give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability"). Such a competitive advantage would be particularly unwarranted given the internet's status as "the dominant -- perhaps the preeminent -- means through which commerce is conducted." *Id.*

C. The Cases on Which Appellants Rely Simply Confirm that Section 230 Protection Is Limited to Publishing Activities

This Court has consistently declined to extend Section 230 protection beyond publication activities. In *Internet Brands*, this Court held a website could be liable for failing to warn users regarding a serial rapist it knew was using the website to hunt potential victims. 824 F.3d at 851. Section 230 did not immunize the website because the plaintiff did not seek to hold Internet Brands liable as a "publisher or speaker," but rather for its own non-publishing conduct. *Id*. In *Barnes,* for similar reasons, this Court concluded that the CDA did not preclude liability against Yahoo! for a breach of its promise to remove nude photographs from its website. 570 F.3d at 1107.

Other Courts similarly have recognized that liability based on non-publishing conduct—distinct from acts of publishing—is not entitled to Section 230 protection. For example, in *Chicago*, the Seventh Circuit addressed whether Section 230 prevented the City of Chicago from imposing a tax on Internet auction sites. 624 F.3d at 365. The court concluded that Section 230 was "irrelevant" because Chicago's "tax does not depend on who 'publishes' any information or is a 'speaker'." *Id*. at 366. The tax liability was imposed based on StubHub's conduct (Internet auction transactions) and had nothing to do with whether or how an auction offer was published. Appellants attempt to distinguish this case because it

"involved tax collection, not reviewing, monitoring, or removing, third-party content." AOB-at 30 n. 6. But that is precisely the point: the internet sites could avoid Chicago's tax liability by ceasing to conduct auction transactions without regard to who was the publisher or speaker of the auction listings, just as Appellants can avoid liability by ceasing to conduct booking transactions for illegal home-shares without regard to who is the publisher or speaker of home-sharing listings. The publication of postings for sale of tickets (on StubHub) or postings for short-term rentals (on Appellants' sites) is entirely separate. Like *Chicago*, this case does not involve any required review and removal of postings.[9]

Appellants rely on a litany of federal and state cases that have found Section 230 protection. AOB-17, 19 n.2, 20 n.3. All, however, "involved claims and regulations that would have imposed liability on the service provider as a publisher or speaker of content supplied by a third party." *Airbnb*, 217 F.Supp.3d at 1073.[10]

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[9] Other examples include *Nunes v. Twitter, Inc.*, 194 F.Supp.3d 959, 967 (N.D. Cal. 2016) (Section 230 does not bar claim premised on Twitter's redistribution, through automatic telephone dialing system, of unwanted messages to consumers in violation of the Telephone Consumer Protection Act because claim "does not depend on the content of any tweet, or on any assertion that Twitter is required to sift through content to make sure the content is not bad") and *Anthony v. Yahoo! Inc.*, 421 F.Supp.2d 1257, 1263 (N.D. Cal. 2006) (liability is premised not on content of third-party created profiles but on "manner" of distribution of those profiles).

[10] The San Francisco district court distinguished *Doe v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016) (challenge to website features that "reflect choices about what content can appear on the website and in what form" which "are

Appellants contend that the decisions upholding Santa Monica's and San Francisco's ordinances rely on a distinction between websites that engage in commerce and those that do not. AOB-at 28. They neither draw nor require any

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editorial choices that fall within the purview of traditional publisher functions"); *Backpage.com, LLC v. Cooper*, 939 F.Supp.2d 805, 824 (M.D. Tenn. 2013) ("sale of online advertisements" "derives from a website's status and conduct as an online publisher of classified advertisements"); *Backpage.com, LLC v. McKenna*, 881 F.Supp.2d 1262, 1273 (W.D. Wash. 2012) (Washington state law imposed criminal liability on websites for "publishing, disseminating, or displaying" information "created by third parties -- namely ads for commercial sex acts depicting minors"); and *Goddard v. Google*, No. C 08-2738 JF (PVT), 2008 WL 5245490 at *1, *5 (N.D. Cal. Dec. 17, 2008) (plaintiff sought to hold Google liable for fraud committed by third-party advertisers). Other cases cited by Appellants are similarly distinguishable because they involved claims premised on websites' permitting to be posted or failing to remove third-party generated content. *See Jones*, 755 F.3d at 408-17 (defamation claims based on third party postings); *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir. 2008) (claims alleging negligent failure to implement safety measures to protect minors are "merely another way of claiming that MySpace was liable for publishing" online third-party generated content); *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1108, 1118-1119 (9th Cir. 2007) (state law unfair competition and false advertising claims based on posting of images stolen from magazine and website); *Green v. America Online, Inc.*, 318 F.3d at 465 (3d Cir. 2003) (claim asserting AOL negligence in "promulgating harmful content and in failing to address certain harmful content on its network" is attempt to "hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher's role"); *Pennie v. Twitter*, 281 F.Supp.3d 874, 889-90 (N.D. Cal. 2017), *appeal filed*, No. 17-17536 (9th Cir. Dec. 26, 2017) (material support claims based on Twitter's provision of accounts to Hamas -- "Plaintiffs explicitly base their claims on the content that Hamas allegedly posts" and "Defendants could only determine which accounts are affiliated with Hamas by reviewing the content published by those accounts"); *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735 (RMB), 2009 WL 1704355 at *4 (S.D.N.Y. June 15, 2009) ("alleged failure to block, screen, or otherwise prevent the dissemination of a third party's content, i.e., the gun advertisement in question").

such distinction. Monetizing online activity is not itself a reason to deny Section 230 protection; rather, a platform operates outside the scope of that limited protection when it engages in activity that is not publishing activity. The cases cited by Appellants (AOB-29 n.5) first found that Section 230 protection existed in the first place, generally because each case addressed liability claims predicated on what were publishing activities; and only then held that a platform's commercial profit from such publishing activities did not defeat Section 230's otherwise applicable protection.[11]

Stoner v. eBay, Inc., No. 305666, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000), and *Hill v. StubHub, Inc.*, 219 N.C. App. 227 (2012) -- state cases that neither carry precedential weight here nor were controlled by this Court's

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[11] *See Hinton v. Amazon.com.dedc*, LLC, 72 F.Supp.3d 685, 690 (S.D. Miss. 2014) (claims arise from publication of third-party information because Plaintiffs' central allegation is that eBay permitted retailer "to advertise and sell the aforementioned recalled product to the Plaintiff through a listing on its auction website" after eBay knew or should have known of the recall); *Evans v. Hewlett-Packard Co.*, No. C 13-02477 WHA, 2013 WL 5594717 at *3-*4 (N.D. Cal. Oct. 10, 2013) (state law claims based on content of app posted for sale by third party); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024, at *2, *7 (W.D. Pa. Nov. 18, 2011) (where eBay was "not involved in the actual transaction between buyers and sellers," alleged sale of vacuum tubes "was facilitated by communication for which eBay may not be held liable under the CDA"); *Milgram v. Orbitz Worldwide, Inc.*, 419 N.J. Super. 305, 324 (Law. Div. 2010) (online ticket broker protected by CDA because not responsible "for the creation or development of the alleged inaccurate or misleading ticket listings" posted by third-parties); *Corbis Corp. v. Amazon.com, Inc.*, 351 F.Supp.2d 1090, 1118 (W.D. Wash. 2004) (no dispute that state law claims rested on Amazon's publishing activities, and images at issue were provided by third-party vendors).

precedents -- are not to the contrary. *Stoner*, an unpublished California superior court opinion decided without the guidance of this Court's subsequent decisions in *Roommates.com*, *Barnes*, and *Internet Brands* limiting the scope of Section 230's protection, involved claims brought under California's Unfair Competition Law alleging that eBay sold or caused the sale of "bootleg" recordings. *Hill*, a North Carolina Court of Appeals case, rejected a ticket buyer's attempt to hold StubHub responsible for a ticket seller's violation of a North Carolina anti-scalping law. Both courts determined that the plaintiffs' claims were predicated on content provided by and liability directed at the seller. *Stoner*, WL 1705637 at *3; *Hill*, 219 N.C. App. at 248-49. In contrast, the Ordinance does not impose liability on platforms based on content provided by short-term rental hosts; and neither *Stoner* nor *Hill* extended CDA protection to a law expressly limited to online brokers directly participating in illegal commercial booking transactions.

Appellants point to three cases in which courts have found Section 230 to protect them specifically, but these cases are merely in line with the many that hold Section 230 precludes liability premised on failure to remove third-party postings. *See MDA City Apartments, LLC v. Airbnb, Inc.*, 2018 WL 910831 (Ill. Cir. Ct. 2018) (MDA alleged that "Airbnb Defendants can be held liable because the complained of listings are unlawful since they advertise rentals that violate the terms of MDA's leases" and "Defendants have failed to remove such listings");

Hiam v. Homeaway.com, Inc., 267 F.Supp.3d 338, 348 (D. Mass. 2017) (Section 230 precludes liability for "misleading or inaccurate material" posted by Homeaway.com's customers); *Donaher v. Vannini*, No. CV-16-0213, 2017 WL 4518378 at *2 (Me. Super. Aug. 18, 2017) ("At the heart of plaintiff's claims against Airbnb is their allegation that Airbnb failed to take down Vannini and Macri's post offering plaintiff's house [that they did not own] for rent on Airbnb's website. A decision not to delete a particular posting is an editorial decision.").

Appellants also rely on *La Park LaBrea A LLC, et al. v. Airbnb, Inc., et al.*, 285 F.Supp.3d 1097 (C.D. Cal. 2017), *appeal filed*, No. 18-55113 (Jan. 26, 2018), which is almost identical to *MDA City Apartments*. In *La Park LaBrea*, the district court neither questioned nor disagreed with the San Francisco court's ruling in *Airbnb*, instead distinguishing it by noting allegations in the complaint before it regarding Airbnb's refusal to remove listings and continuing "to allow the listing to persist." 285 F.Supp.3d at 1108. The court followed the San Francisco court in recognizing that "the correct test for CDA protection 'is not whether a challenged activity merely bears some connection to online content' but whether the claim 'inherently requires the court to treat the "interactive computer service" as a publisher or speaker of information provided by another.'" *Id.* (quoting *Airbnb*, 217 F.Supp.3d at 1074). Relying on the particular allegations in the complaint, the court concluded that the claims before it satisfied this test. It is utterly

unremarkable that the courts in these cases found Section 230 protection to apply, just as it is utterly unhelpful to the present case.[12]

Appellants cannot seriously dispute that Section 230 protection has limits. This Court has plainly defined those limits, applying Section 230 protection only to

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[12] Appellants note that certain courts, "led by the First Circuit," have applied Section 230 protection to "a website's 'overall design and operation' with respect to third-party content, including features related to payment services." AOB-30. The approach of these courts is consistent with this Circuit's holdings regarding the limits on Section 230 protection because they too require a connection between a website's "overall design and operation" and publishing activities related to third-party content. Thus, for example, in *Doe v. Backpage*, the First Circuit applied Section 230 protection to claims premised in part on design features alleged to encourage sex trafficking (including allowing third-party posters to pay anonymously for their actual posts) because those features reflected "choices about what content can appear on the website and in what form" which "are editorial choices that fall within the purview of traditional publisher functions." 817 F.3d at 20-21. Similarly, the two other cases cited by Appellants involved websites' operational decisions (whether to allow members of ISIS and Hamas to obtain and use accounts) that related directly to whether or not to allow particular third-party content to be posted, again, a traditional publishing function. *See Fields v. Twitter, Inc.*, 217 F.Supp.3d 1116, 1123-24 (N.D. Cal. 2016), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018) (decision to decline to furnish account to particular user based on apparent ISIS affiliation would be "a publishing decision to prohibit the public dissemination of these ideas"); *Cohen v. Facebook, Inc.*, 252 F.Supp.3d 140, 156-58 (E.D.N.Y 2017), *motion to reconsider denied*, *Force v. Facebook, Inc.*, 2018 WL 472807 at *4, *10 (E.D.N.Y. Jan. 18, 2018), *appeal filed*, No. 18-397 (2d Cir. Feb. 9, 2018) (Facebook's choices as to who (including Hamas) may use its platform and associated services "are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users would equally derive[] from [Facebook's] status or conduct as a publisher or speaker") (internal quotations and citations omitted). None of these cases raised or resolved the question posed here: whether Section 230 protects platforms from a law prohibiting the completion of a financial transaction for an unlawful activity.

publishing activities and refusing to apply it simply because a challenged activity "bears some connection to online content." *Airbnb,* 217 F.Supp.2d at 1072; *see also Barnes*, 570 F.3d at 1100. As this court has observed, "[p]ublishing activity is a but-for cause of just about everything [Appellants are] involved in. [They are] internet publishing business[es]. Without publishing user content, [they] would not exist. As noted above, however, we held in *Barnes* that the CDA does not provide a general immunity against all claims derived from third-party content." *Internet Brands,* 824 F.3d at 853. Appellants' booking transactions that are the object of the Ordinance are not publishing activity, and therefore fall outside the limits of Section 230 protection.

D. Appellants' Argument Based on "Obstacle Preemption" Is Misplaced and Unpersuasive

Appellants attempt to separate Congressional intent from Section 230's text by making an argument based on "obstacle preemption." AOB-at 32-39. But "federalism requires that we assume federal law was not intended to supersede the states' historic police powers 'unless that was the clear and manifest purpose of Congress." *Arellano v. Clark County Collection Service, LLC*, 875 F.3d 1213, 1216 (9th Cir. 2017). Thus, courts "read even express preemption provisions narrowly," using as the "ultimate touchstone" the actual purpose of Congress. *Id.* at 1216-17.

Congressional intent in enacting section 230 is well-established--to "promote the free exchange of information and ideas over the Internet," *Carafano v. Metrosplash.com, Inc.,* 339 F.3d 1119, 1122 (9th Cir. 2003), protect internet service providers from liability for "other parties' potentially injurious messages," *Zeran*, 129 F.3d at 330–31, and "encourage voluntary monitoring for offensive or obscene material." *Carafano*, 339 F.3d at 1122. These concerns are affirmed by Section 230(c)'s title, "Protection for 'Good Samaritan' blocking and screening of offensive material," which this Court has opined reflects intent not to protect internet operators engaged in commercial, transactional activities in flagrant disregard of the law, but rather to allow and encourage online providers to act voluntarily as publishers without fear of liability to take steps to ferret out defamatory or otherwise unlawful speech. *Roommates.com*, 521 F.3d at 1163-64. These speech and information-based concerns are reiterated in Congressional findings in Section 230(a). *See* 47 U.S.C. §230(a). In accord with these findings regarding the potential political, educational, and informational benefits of the then-nascent internet, Congress stated its policy goals of promoting "the continued development of the Internet and other interactive computer services" and preserving "the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. §230(b).

Congress nowhere articulated a policy or intent to exempt online service providers engaged in non-publishing activity from reasonable regulation of that activity simply because it takes place, or is based on information posted, on the Internet. [13] Nor has this Circuit succumbed to online businesses' attempts to expand the law to that effect:

> 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.

Roommates.com, 521 F.3d at 1164 n.15. If completing an illegal booking transaction "is prohibited when practiced in person or by telephone, [there is] no reason why Congress would have wanted to make it lawful to profit from it

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[13] Filing as an amicus on behalf of Appellants, former Congressman Christopher Cox cites both his personal motivations and his floor statements in the debate over Section 230's adoption as support for extending it to preclude the Ordinance's application to Appellants. *E.g.*, Cox Amicus Brief at 4-5, 9, 10. Former congressman Cox's statements in his amicus brief are entitled to no independent weight in interpreting Congress's legislative intent in adopting the CDA. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)) ("even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history").

online." *Id.* at 1167. Unlawful commercial transactions "don't magically become lawful when [conducted] electronically online." *Id.*

Online businesses have engaged in a thoughtful, concerted campaign to expand the reach of Section 230 protection. Their attempts to rewrite Congressional intent using judicial dicta accumulated over the two decades since enactment must be rejected. *Batzel*, for example, is frequently cited by Appellants for its brief statements that a purpose of Section 230 was to "promote the development of e-commerce" and that Congress sought to advance "e-commerce interests on the Internet." *See* AOB-at 3, 29-30, 32, 34, 39. But commercial, non-publishing activity was not at issue or even considered in *Batzel*, which reviewed denial of an anti-SLAPP motion and underlying defamation claims.

Moreover, Appellant's arguments in this regard have no limiting principle and rest on a fundamentally invalid assumption, namely, that regulations such as the Ordinance "purport[] to regulate transactions as a way to regulate content *sub rosa*." AOB-at 37. Under this approach, any regulation addressing any transactional activity dependent on a third-party posting would arguably fall within Section 230's protection. This Court has expressly rejected this broad an approach. *See Internet Brands*, 824 F.3d at 853 (not enough that action as "publisher or speaker" of user content is "but-for" cause of conduct resulting in liability because "CDA does not provide a general immunity against all claims derived from third-

party content" and court must "be careful not to exceed the scope of the immunity provided by Congress"); *see also Roommates.com*, 521 F.3d at 1171 ("[p]roviding immunity every time a website uses data initially obtained from third parties would eviscerate the exception to section 230 for 'develop[ing]' unlawful content 'in whole or in part.'") (citation omitted). Such a broad approach is similarly precluded by the plain text of Section 230, which, as this Court has repeatedly recognized, squarely limits the scope of the statutory protection to publishing activities, not transactional activities of the type regulated by the Ordinance.[14]

II. THE ORDINANCE COMPORTS WITH THE FIRST AMENDMENT

The district court correctly determined that the Ordinance comports with the First Amendment. By prohibiting illegal booking transactions for unlicensed short-term rentals, the Ordinance "regulates conduct, not speech." ER-11. Any incidental burden on speech does not trigger First Amendment protection, as "restrictions on protected expression are distinct from restrictions on economic activity or, more

[14] The validity of this distinction, and the absence of limits on Appellants' contrary position, are demonstrated by *Doe v. Backpage*, in which the court extended Section 230 protection to design features alleged to encourage sex trafficking, including allowing third-party posters to pay anonymously for their actual posts, because those features reflected "choices about what content can appear on the website and in what form." 817 F.3d at 20-21. Appellants' position would extend the protection even further, to a website's participation in booking (and taking a percentage of the booking payment for) sex acts arising from the posts.

generally, on nonexpressive conduct," and "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). In any event, the Ordinance is narrowly drawn to advance the City's significant government interests in preserving long-term housing, reducing evictions, and preserving the character and quality of life of Santa Monica's residential neighborhoods.

A. The Home-Sharing Ordinance Targets Conduct, Not Speech

As two district courts have now concluded, "[a] booking transaction as defined and targeted by the Ordinance is a business transaction to secure a short-term rental, not conduct with any significant expressive element." ER-11; *Airbnb,* 217 F.Supp.3d at 1076. By restricting such business transactions, the Ordinance neither restricts conduct "with a 'significant expressive element'" nor "has the inevitable effect of singling out those engaged in expressive activity." 217 F.Supp.3d at 1076 (quoting *International Franchise Association v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015). The Ordinance, put simply, "is directed at specific business transactions and practices, and 'not to any message the businesses express.'" *Id.* at 1077 (quoting *International Franchise*, 803 F.3d at 409).

Appellants' attempt to blur this distinction by positioning themselves not as commercial operators but as traditionally protected First Amendment speakers and publishers. AOB-43-44. But Appellants are not news organizations, and the

Ordinance has not imposed a tax on the very paper and ink with which they speak. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (use tax on paper and ink that applied to only small number of newspapers was impermissible and implicated area where "First Amendment has its 'fullest and most urgent' application"); *Pitt News v. Pappert*, 379 F.3d 96, 109 (3d Cir. 2004) (state statute prohibiting college newspapers from receiving payment for alcoholic beverage advertising violated First Amendment by imposing "special financial burdens on . . . a narrow sector of the media"). Appellants' attempt to invoke the First Amendment protections accorded individuals engaged in door-to-door solicitation of charitable contributions, is similarly unavailing. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (charitable appeals for funds are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues" and "[c]anvassers in such contexts are necessarily more than solicitors for money").

Appellants rely largely on *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), and *Sorrell*, to contend that the district court failed to consider the second half of the *International Franchise* test, namely, whether the "ordinance has the inevitable effect of singling out those engaged in expressive activity." AOB-at 42-44 & n.15. But the laws in those cases targeted

expressive activity, not unlawful financial transactions. As Judge Donato explained, the New York "Son of Sam" law at issue in *Simon & Schuster, Inc.*, by "restricting a criminal's right to profit from literary or other works based on [a] crime," "singled out income derived from classically 'expressive activity' (e.g., books, movies, magazines articles, or other 'expression[s] of [an] accused or convicted person's thoughts, feelings, opinions or emotions' about the crime), and was directed only at 'works with a specified content' (i.e., relating to the 'reenactment of [the] crime')." *Airbnb,* 217 F.Supp.3d at 1077 (quoting *Simon & Schuster, Inc.*, 502 U.S. at 110, 116). Similarly, the Vermont statute at issue in *Sorrell* created content and speaker-based restrictions that could not withstand First Amendment scrutiny because the law "on its face 'disfavor[ed] marketing, that is, speech with a particular content,' and 'more than that, . . . disfavor[ed] specific speakers, namely pharmaceutical manufacturers.'" *Id.* (quoting *Sorrell*, 564 U.S. at 564). As Judge Donato correctly recognized, *Simon & Schuster* and *Sorrell* involved "core First Amendment concerns . . . not implicated by the Ordinance here." *Id.* at 1077.

The district court therefore properly concluded that the Ordinance, like San Francisco's before it, "does not implicate expressive activity or speech." ER-12; *see also Airbnb,* 217 F.Supp.3d at 1077.

B. Any Incidental Burden Falls On Commercial Advertisements For Unlawful Activity Not Subject To First Amendment Protection

Appellants argue that the "conduct/speech distinction" so firmly rooted in First Amendment law will "allow the government to ban a wide swath of otherwise protected speech, especially on the internet." AOB-at 46. This presents no such threat. "To the limited extent the Ordinance might be said to affect speech, the impact or burden is purely incidental" and "involves speech that 'does no more than propose a commercial transaction.'" *Airbnb*, 217 F.Supp.3d at 1078 (quoting *Lone Star Security and Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1198 n.3 (9th Cir. 2016) (internal citation omitted)).

First Amendment concerns are even more lacking where the commercial speech on which any incidental impact falls relates to unlawful activity. "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-89 (1973). Put more succinctly, commercial speech that proposes an illegal transaction is excluded from First Amendment protection. *See United States v. Williams*, 553 U.S. 285, 298 (2008) ("offers to give or receive what it is

unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection"); *Central Hudson*, 447 U.S. at 563-64 (1980) (no constitutional protection for "commercial speech related to illegal activity").

Appellants argue that the Ordinance requires them to "'investigate the advertisements they print,' raising the risk that commercial speech will be 'impermissibly chill[ed].'" AOB-at 47 (quoting *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1119 (11th Cir. 1992)). The Ordinance requires no such thing. As the district courts found, the Ordinance targets a business transaction -- completion of a booking transaction for an unlicensed and therefore unlawful rental -- and "does not limit [Appellants'] ability to publish advertisements for rentals that may violate the Ordinance" or require Appellants to "edit, withdraw, or block the content supplied by hosts." ER-10, 11; *see also Airbnb,* 217 F.Supp.3d at 1078.[15]

[15] Contrary to Appellants' claim (AOB-at 47), where a burden falls only incidentally on advertisements, those advertisements need not be "unlawful on their face" to ameliorate any First Amendment concerns. *Pittsburgh Press* itself addressed a situation where the "illegality" posed by the advertisements at issue was "less overt" -- they were not want ads "proposing a sale of narcotics or soliciting prostitutes," but instead want ads for nonexempt employment placed in columns headed with the gender of the applicants being sought. 413 U.S. at 388-89. In any event, unlike both *Pittsburgh Press* and *Braun* (the case on which Appellants primarily rely), where the publication of advertisements was itself the conduct giving rise to liability, here the Ordinance penalizes not the publication of advertisements (the home-share postings) but participation in subsequent booking transactions.

C. The Ordinance Is Narrowly Tailored To Serve A Substantial Government Interest

Under *Central Hudson*, actual restrictions on commercial speech promoting lawful transactions, even if content-based, need only withstand intermediate scrutiny, that is, the restriction "must directly advance" a "substantial state interest" and must be "narrowly drawn" to "extend only as far as the interest it serves." 447 U.S. at 564-65; *see also Lone Star*, 827 F.3d at 1198 n.3. Even were the Ordinance a content-based restriction, it would survive this scrutiny. It is a balanced local law that is narrowly drawn to advance substantial government interests in protecting affordable housing and preserving residential neighborhoods by preventing home-sharing or vacation rental from converting residential homes and apartments into *de facto* hotels.[16]

The Ordinance is not, however, a content-based restriction on commercial speech, but rather a lawful restriction of purely commercial conduct with, at most,

[16] Appellants take issue not with the validity of the asserted interest, but with the Ordinance's tailoring to serve that interest. In particular, Appellants assert that the Ordinance is under-inclusive because it does not apply to online bulletin board sites like Craigslist that "advertise the very same properties but have no booking functionality." AOB-50. This limit on the Ordinance's reach is the result of efforts to avoid potential conflict with Section 230. The City's efforts to comply with Section 230 cannot be a basis for arguing, as Appellants do, that the Ordinance's "under-inclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker." AOB-50 (citation and internal quotation marks omitted).

incidental effects on commercial advertisements for unlawful transactions. "Every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities." *Arcara v Cloud Books*, 478 U.S. 697, 706 (1986). The Ordinance falls well within the sphere of permissibility by penalizing only unlawful, non-expressive financial transactions in service of substantial governmental interests.

D. The Ordinance Does Not Impose Strict Liability

Appellants argue that the Ordinance also violates the First Amendment because it imposes "criminal penalties on publishers without any mens rea requirement." AOB-at 51. This argument should be rejected for three reasons. First, for all the reasons discussed above, the Ordinance imposes liability on Appellants, not as publishers, but for engaging in and collecting fees for unlawful booking transactions and therefore penalizes only non-expressive commercial conduct. Second, the Ordinance itself contains narrowing provisions. *See* SMMC 6.20.050(e) ("Safe Harbor"), (f) ("provisions of this section shall be interpreted in accordance with otherwise applicable state and federal law(s)"), ER-35. Finally, the California Supreme Court reads scienter into statutes with criminal penalties, *see, e.g., Stark v. Superior Court*, 52 Cal.4th 368, 393 (2011); *People v. Salas*, 37 Cal.4th 967, 978 (2006), and the City stated in the district court that it would accept imputation of a scienter requirement here. ER-620; *see also Airbnb.*, 217

F.Supp.3d at 1079-80 (noting that San Francisco accepted "imputation of a scienter requirement").

III. THE DISTRICT COURT PROPERLY DENIED AN INJUNCTION BASED ON APPELLANTS' CALIFORNIA COASTAL ACT CLAIM

The district court properly determined that Appellants failed to meet their burden of demonstrating a likelihood of success on their pendent state law claim under the California Coastal Act of 1976, Cal. Pub. Res. Code ("CPRC") §30000 *et seq.* (the "Coastal Act"). The Coastal Act does not preempt the police powers of California municipalities absent a clear conflict. *Id*. §30005(a), (b); *see also* Cal. Const., Art. XI §7 (municipalities may make and enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"). Rather, the Coastal Act provides the California Coastal Commission ("Coastal Commission") with limited powers, namely, authority to review and certify a local land use plan ("LUP"), review and certify a local coastal program ("LCP") and subsequent amendments thereto, and (in the absence of a certified LCP, as in Santa Monica's case) grant or deny Coastal Development Permits ("CDPs") for development within the Coastal Zone. *See* CPRC §§30512, 30512.2, 30513, 30600. These enumerated powers are the full extent of the Commission's relevant authority within the City's Coastal Zone. *See Ibarra v. California Coastal Comm'n*, 182 Cal.App.3d 687, 696 (1986) (Commission's "primary duties under

the coastal act are to grant or deny permits for coastal development . . . . and approve or disapprove [LCPs]").

The Ordinance is a lawful exercise of municipal legislative authority, consistent with the stated purposes of the Coastal Act, and not procedurally subject to Coastal Commission review. Moreover, even if there were a significant issue as to the merits of Appellants' pendent Coastal Act claim, an injunction based on that claim could apply to only the 18 percent of Santa Monica that lies within the Coastal Zone and would not address the harms Appellants allege. For all these reasons, the district court's order denying issuance of a preliminary injunction on this basis should be affirmed.

A. Background: The Coastal Commission Has Only Limited Approval Authority Over Local Legislation

Under California law, the authority to regulate land use flows from the constitutional police power: "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. "Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Morehart v. County of Santa Barbara*, 7 Cal.4th 725, 747 (1994) (citations omitted). "[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of

particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute." *Big Creek Lumber Co. v. City of Santa Cruz*, 38 Cal.4th 1139, 1149 (2006) (citing *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal.4th 81, 93 (1991)).

The California Legislature has expressed its intent to retain the maximum degree of local control over land use. *See, e.g.*, Gov. Code §§65800, 65802; *IT Corp.*, 1 Cal.4th at 89. The Coastal Act itself expressly preserves the constitutional police power of municipalities absent a clear conflict with the Act's explicit terms. *See* CPRC §30005(a), (b). The California Supreme Court has held that "the wording of the Coastal Act does not suggest preemption of local planning by the state; rather, under the language of section 30005, local governments have the authority to zone land to fit any of the acceptable uses under the policies of the act and have the discretion to be more restrictive than the Act." *Conway v. City of Imperial Beach*, 52 Cal.App.4th 78, 85 (1997) (citing *Yost v. Thomas*, 36 Cal.3d 561, 572–573 (1984)).

The Coastal Act grants the Commission authority to certify LUPs, which are policy documents "showing the land uses to be permitted in the Coastal Zone and continuing policies for carrying out the goals of the Coastal Act." ER-721; *see also* CPRC §§30108.5, 30512, 30512.2. Santa Monica has a certified LUP. ER-708-

789. The Commission has authority to review and approve amendments to this LUP. *See* CPRC §30512(c).

The Coastal Commission has not yet certified any implementing zoning or other land use ordinances (which would constitute the additional components of an LCP, *see* CPRC §30108.6), and as a result Santa Monica does not have a certified LCP. ER-238, 243; *see* 70 Ops. Cal. Atty. Gen. 220, 1987 WL 247254 at *2 (Sep. 10, 1987) ("AG Op") ("city may have a certified LUP for its coastal zone without a certified LCP").

As noted above, where a city has submitted implementing ordinances as part of its LCP certification process, or where a city seeks to amend implementing ordinances that are part of a previously certified LCP, the Commission may review and certify or reject and request modifications to those implementing ordinances. *See* CPRC §§30513; 30514(a); *Douda v. California Coastal Com'n*, 159 Cal.App.4th 1181, 1192 (Cal. Ct. App. 2008). Once an LCP is certified, any amendments thereto (including any amendments to any implementing ordinances that make up the certified LCP) are effective only if and when the Coastal Commission certifies them. *See* CPRC §30514(a), (b), (e).

These limited powers are the extent of the Commission's relevant authority to review and approve City zoning and other land use ordinances that apply in the City's Coastal Zone. *See Ibarra*, 182 Cal.App.3d at 696.

B. Procedurally, the Ordinance Is Not Subject to Coastal Commission Approval

1. The Ordinance is not an amendment to the City's LUP

Appellants contend that the Ordinance constitutes an unauthorized "amendment" to the City's certified LUP. AOB-55-56. They do not, however, contend that the Ordinance directly amends any provision of the LUP. Instead, they argue, the Ordinance worked an effective amendment to the LUP because it seeks to impose in the Coastal Zone "further conditions, restrictions or limitations" on land use that "conflict" with the Coastal Act or with the provisions of the City's certified LUP. AOB-55-56. At the time its LUP was certified, however, Santa Monica's permissive zoning scheme did not expressly permit, and as a result under well-settled principles of California land use law prohibited, any short-term rentals. *See Urgent Care Medical Services v. City of Pasadena*, 21 Cal.App.5th 1086 (2018) (permissive zoning is valid method of prohibiting marijuana dispensaries); *City of Corona v. Naulls*, 166 Cal.App.4th 418 (2008) ("where a particular use of land is not expressly enumerated in a city's municipal code as constituting a *permissible* use, it follows that such use is *impermissible*") (emphasis in original). As the record demonstrates, short-term rentals have not been a permitted use, and thus have been prohibited, in every residential zoning district in Santa Monica since at least 1988. ER-855-873 (1988 Zoning Ordinance Permitted Uses); ER-

942-951 (Amended Zoning Ordinance); ER-984-1039 (current Zoning Ordinance).

Appellants contend that despite this clear record, home sharing was actually permitted throughout Santa Monica prior to the Ordinance, and that the Ordinance therefore constitutes a new restriction on use, inconsistent with the LUP, that is an effective amendment to that LUP requiring Commission approval. In support, Appellants make four arguments.

First, Appellants rely on a California Attorney General Opinion, which they contend requires Commission review whenever a city seeks to impose further conditions, restrictions, or limitations on land use in the Coastal Zone, if the changes conflict with any certified LUP. AOB-at 56. In the cited opinion, the Attorney General concluded that "local action [including an ordinance] which prohibits a use of land in the coastal zone which is authorized by a certified LCP or LUP 'amends' such certified LCP or LUP . . . and therefore does not become effective until it is certified by the Commission." AG Op 1987 WL 247254 at *6. This conclusion has no application here because the LUP did not itself authorize short-term rentals. Indeed, the LUP, as written, neither promotes nor expressly permits short-term rentals. ER-708-788. Even assuming that prior to the Ordinance the City's zoning ordinances authorized short-term rentals (which, as discussed above, they did not), the Ordinance would amend those zoning ordinances, not the LUP, which did not even mention short-term rentals. Moreover, as discussed

above, at the time the LUP was certified, the City's permissive zoning scheme prohibited short-term rentals, meaning that the Ordinance did not prohibit any land use not already prohibited by zoning ordinances in effect at the time of the LUP's certification. Finally, because the Ordinance's limits on short-term rentals serve to decrease the removal of residential housing, including affordable housing, they are consistent with the stated LUP goal to encourage "preservation of low and moderate income housing within the Coastal Zone." ER-772.

Second, Appellants rely on a letter in which a Commission staff member states that the Commission "has interpreted local zoning ordinances in a broad fashion and found that vacation rentals are a form of residential use, permitted by right, in any residentially zoned area unless such uses are specifically prohibited or otherwise restricted." AOB-55 (citing ER-289). This letter is not binding on this Court, nor would it be afforded deference by the California courts. *See, e.g.*, *Harlick v. Blue Shield of California*, 686 F.3d 699, 716–17 (9th Cir. 2012) ("Positions taken by an agency for purposes of litigation ordinarily receive little deference under California law."); *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal.4th 1, 7-8 (1998) ("Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative."). The letter is also not persuasive. It cites no legal authority to support its assertion, which conflicts both with the line of

California cases discussed above affirming that permissive zoning schemes implement actual prohibitions and with the City's interpretation of its own zoning ordinances, which, as discussed below, is entitled to deference.

Third, Appellants contend "the record shows that properties historically *were* available for short-term rentals in Santa Monica. AOB-56 (citing ER1815). They cite a transcription of a portion of the April 28, 2015 City Council meeting at which the Ordinance was considered, which does not support this contention. To the contrary, the excerpt includes a City staff member confirming a Council member's statements that Santa Monica's zoning laws "prohibited short-term rentals of 30 days or less across the board" and that "to the extent we're now allowing this home sharing option, in a way, we are liberalizing our regulations about short-term stays." ER-1815. This is consistent with the staff report submitted in support of the Ordinance and the findings contained in the Ordinance, which reference preservation of "the City's prohibition on vacation rentals" and new authorization of "home-sharing." ER-30, 1058, 1062 The City's interpretation of its own zoning ordinances is entitled to deference. *MHC Operating Limited Partnership v. City of San Jose*, 106 Cal.App.4th 204, 219 (2003).

Finally, Appellants point to the absence from the record of "evidence of any action to prevent, stop, or punish a resident from offering their home for a short-term rental before" implementation of the Ordinance. AOB-at 56-57. The district

court noted the absence of any such evidence, but correctly, given the record otherwise establishing the City's pre-existing longstanding ban on short term rentals, held that Appellants had not "demonstrated a likelihood of success" on their claim that the Ordinance amended the LUP. Concurrently with this brief, the City is submitting a request for judicial notice containing both administrative citations and a criminal complaint that demonstrate the City's efforts to enforce the ban on short-term rentals in place prior to passage of the Ordinance. *See* Exhibits A and B to motion for judicial notice. These enforcement efforts confirm that the Ordinance did not amend the LUP, either expressly or in effect. A California Superior Court decision has reached the same conclusion. *See Hayek v. City of Santa Monica*, No. 17STLC02007 (LA Sup. Ct. Feb. 3, 2018)(unpublished); (Ordinance is "not an unauthorized amendment to [the] City's LUP") (Opinion at 9). [17]

2. The Ordinance does not constitute development subject to Coastal Commission approval

Because Santa Monica does not have a certified LCP, the Coastal Commission retains authority to issue, and must approve, all CDPs for

[17] The unpublished opinion in *Hayek* is Exhibit C to a concurrently-filed motion for judicial notice.

development within the City's Coastal Zone. *See* CPRC §30600(c). Appellants argue that the Ordinance "constitutes 'development' and therefore requires a CDP from the Commission." AOB-at 57.

Neither the text of the Coastal Act nor a single reported case in almost a half century of Coastal Act litigation supports this position. California state court decisions have strongly suggested that a municipal ordinance is not "development" under the Coastal Act, and thus not subject to Commission review. *See, e.g.*, *City of Dana Point v. California Coastal Commission*, 217 Cal.App.4th 170, 188-193, 205-09 (2013) (Commission had no jurisdiction to review municipal ordinance but could take actions against actual developments -- e.g. gates limiting beach access and implementation of time limits for beach access -- authorized by ordinance that were inconsistent with Coastal Act and city's LUP).

Consistent with this longstanding law, the California Court of Appeal recently considered and rejected the argument that municipal ordinances are generally subject to Commission review outside the LCP certification process. In a case involving a Coastal Act challenge to a Hermosa Beach ordinance prohibiting short-term rentals in residential districts, the court upheld the ordinance, finding that it "was enacted pursuant to the City's police power and did not fall under the auspices of the Coastal Commission." *Johnston v. City of Hermosa Beach*, No. B278424, 2018 WL 458920 at *4 (Cal. Ct. App. Feb. 13, 2018) (unpublished),

review denied (Apr. 11, 2018). Similarly, in *Hayek*, a California Superior Court determined that the Ordinance "is not a development permit and the Commission's authority does not extend to approving or rejecting general laws adopted by cities." Opinion at 9.

Appellants rely (AOB-58) on a December 6, 2016, letter signed by the then-Chair of the Coastal Commission that states "regulation of short-term/vacation rentals . . . constitutes development." ER-227. As discussed above, this letter does not bind this Court. *See, Harlick*, 686 F.3d at 716–17; *Yamaha*, 19 Cal. 4th at 7-8. Nor is it persuasive. It contains no citation to legal authority to support this assertion, and is contrary to the approach of *Dana Point*, discussed above.

The additional cases cited by Appellant address private action, not municipal legislation, and are not on point here. *See Greenfield v. Mandalay Shores Community Association*, 21 Cal.App.5th 896, 901 (2018) (short-term rental ("STR") bans are "a matter for the City and Coastal Commission" and "may not be regulated by private actors"); *Surfrider Foundation v. Martins Beach 1, LLC*, 14 Cal.App.5th 238, 249-55 (2017), *petition for cert. filed*, No. 17-1198 (U.S. Feb. 26, 2018) (private parties "conduct in closing public access to Martins Beach [through erection of beach closure signs and permanent closure of existing gate] constituted 'development' requiring a CDP"); *Gualala Festivals Comm. v. California Coastal Comm'n*, 183 Cal.App.4th 60, 67-70 (2010) (private party required to obtain CDP

for fireworks display over coastal estuary). The distinction between private entities and local governments is a critical one. Private actors are not empowered to regulate land use as the City is, under both the California Constitution (Art. XI. §7) and the Coastal Act (CPRC §30005(a), (b)). These cases therefore do not address the issue here, whether a City's municipal ordinance constitutes "development" requiring Coastal Commission approval. Other California cases make clear that it does not. The district court did not err in finding that Appellants failed to meet "their burden to demonstrate a likelihood of success on this issue." ER-8.

3. The Ordinance Is Substantively Consistent With the Coastal Act

The Ordinance reflects a balancing of interests consistent with the Coastal Act: it liberalized a longstanding prohibition on short-term rentals to authorize commercial home sharing, thereby promoting access to the coast, *see* CPRC §30210, while protecting the availability and affordability of housing in Santa Monica, *see id*. §30604 (f), (g) (directing Commission to "encourage housing opportunities for persons of low and moderate income"). *See also* Cal. Gov't Code §65590 (laws authorizing and encouraging moderate and low-income housing protections apply within Coastal Zone); ER-772 ("Santa Monica LUP shall encourage the preservation of low- and moderate-income housing within the Coastal Zone consistent with the Coastal Act policies contained herein"). The

Ordinance is not, as Appellants would label it, a "blanket vacation rental ban" of the type that the Commission has rejected when reviewing proposed amendments to zoning ordinances constituting part of a certified LCP. *See* AOB-54; ER-249-51 (noting Commission actions rejecting certain proposed prohibitions of short-term rentals, and approving, sometimes with requested modifications, certain proposed restrictions on short-term rentals).

Commission staff reports on proposed amendments to certified LCPs seeking to limit previously authorized short-term lodgings ("STLs") recognize that recent surges in STLs pose complex policy questions that may be answered in different ways depending on particular "applicable community and area specific factors." ER-279. Commission staff has recognized, for example, city concerns with "STL rentals causing problems (e.g. noise, disorderly conduct, traffic congestion, excessive trash, etc.) that could negatively impact residents and communities, reducing the long-term rental housing stock, and unduly burdening City services." ER-265, 271, 278-79.[18]

The Ordinance, which liberalized Santa Monica's long-standing prohibition on all short-term rentals in favor of permitting home-sharing (subject to certain

[18] The views of Commission staff are not binding, and the proposed amendments under discussion related to changes to implementing ordinances that were part of certified LCPs. As discussed above, the City does not have a certified LCP.

limitations) throughout Santa Monica reflects just such a balancing of interests premised on Santa Monica's particular circumstances. As such, it does not substantively conflict with the Coastal Act.

C. An Injunction Based On Appellants' Coastal Act Claim Will Not Provide The Relief They Seek

This Court should affirm the district court's denial of Appellants' motion to enjoin the Ordinance because Appellants cannot prevail on their Coastal Act claim. Even if Appellants presented a more persuasive claim, an injunction on this ground would apply to only the 18 percent of Santa Monica that lies within the coastal zone and would revert the City to its previous complete prohibition on short-term rentals, in place before the City Council adopted the Ordinance.

IV. THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST FAVOR THE DISTRICT COURT'S DENIAL OF A PRELIMINARY INJUNCTION

The balance of hardships and the public interest strongly favor the City and support the district court's denial of a preliminary injunction. The district court did not address these factors, finding that a preliminary injunction should be denied because Appellants failed to meet their burden of proving a likelihood of success on the merits of any their claims. ER-9, 11, 12; *Compare*, *Am. Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1057 (9th Cir. 2009)

(reaching harms analysis only after concluding "it is likely that many of [the challenged] provisions are preempted.").

Santa Monica's elected City Council unanimously concluded that the Ordinance serves the public's interest. ER-1585-87. Courts generally defer to such legislative findings of public interest. *See, e.g., Berman v. Parker*, 348 U.S. 26, 32 (1954). Even putting deference aside, it is clear that California's and Santa Monica's housing crisis is real, and the impacts of rampant, unchecked short-term rentals are documented. ER-1405, 1410, 1411-1419. The Ordinance unquestionably serves to protect diminishing affordable housing stock, preserve residential communities, and facilitate coastal access, all via reasonable regulations.

Public interest is also served by courts ensuring prompt implementation of duly adopted legislation. Absent a clear showing that laws are unconstitutional, it is in the public interest to ensure that the City's carefully crafted and duly passed laws are timely implemented. *See Golden Gate Rest. Ass'n v. City & Cty. of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008); *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943).

The balance of hardships also tips heavily in the City's favor. An injunction would allow Appellants to continue to profit from Ordinance-violating short-term rentals in Santa Monica, while simultaneously encouraging landlords to take

affordable and rent-controlled housing off the market, likely never to return. ER-1411. Enforcement of the Ordinance, by contrast, will not irreparably harm Appellants -- they lose only money derived from rentals that violate the Ordinance. *See Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980) ("monetary injury is not normally considered irreparable."). Appellants have demonstrated their ability to continue operations under a similar regulatory scheme -- they have been operating under an almost identical ordinance in San Francisco for almost a year now, and they have not gone bankrupt, nor has the internet been irreparably harmed. Compliance with the Ordinance is made simpler by the City's posting of its registry of licensed home-share properties on line and the City has committed to work with Appellants to facilitate compliance with the Ordinance. ER-68.

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CONCLUSION

For all the reasons set forth above, this Court should affirm the district court's denial of Appellants' motion for a preliminary injunction.

Dated: May 16, 2018

Respectfully submitted,

LANE DILG
City Attorney

By: */s/ Michael R. Cobden*
MICHAEL R. COBDEN

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STATEMENT OF RELATED CASES

City of Santa Monica is not aware of any related cases that are currently pending in this Court.

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 18-55367

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

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Signature of Attorney or Unrepresented Litigant: /s/ Michael R. Cobden

Date: May 16, 2018

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

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 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.

May 16, 2018

LANE DILG
City Attorney

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