Nos. 18-55367, 18-55805, 18-55806

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

CITY OF SANTA MONICA,
Defendant/Appellee.

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 RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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I.
INTRODUCTION

Carefully parsing the text and purposes of Section 230 of the Communications Decency Act, this Court has "consistently eschewed an expansive reading of the statute that would render unlawful conduct 'magically … lawful when [conducted] online.'" Panel Opinion, 918 F.3d at 683 (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1164 (9th Cir. 2008) (*en banc*)). Instead, this Court has applied Section 230 to preclude liability only where an ordinance or cause of action "inherently requires the Court to treat" an internet provider as the "publisher or speaker" of content provided by a third party. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009).

The panel correctly applied this Court's precedent to hold that the City of Santa Monica's "Home-Sharing Ordinance" – an essential element of City efforts to preserve housing in the face of rising residential rents and unauthorized vacation rentals – is not preempted by Section 230 because it hinges liability on neither status nor conduct as a publisher. The Ordinance "does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites" and prohibits only "processing transactions for unregistered properties." 918 F.3d at 682-83.

The petition for rehearing should be denied. The panel's acceptance at face value of the Platforms' assertion that, for their own business reasons, they would choose to avoid application of the Ordinance by removing listings rather than declining booking transactions does not convert the Ordinance into one that inherently treats the Platforms as publishers or speakers. The Supreme Court has rejected as overbroad such an "effects-based test" that would preempt claims simply because they "induce" conduct at odds with a statutory scheme. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445-46 (2005). For good reason. To apply

such a test would expand Section 230 into what this Court has repeatedly stated it is not: "a general immunity from liability deriving from third-party content" that would be an "all-purpose get-out-of-jail-free card for businesses that publish user content on the internet" and "give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852-53 (9th Cir. 2016); *Barnes*, 570 F.3d at 1100; *Roommates.com*, 521 F.3d at 1164 n.15. Congress did not provide such broad protection 23 years ago when the internet was in its infancy; there is no basis for this Court to provide it now, when the internet has evolved from "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" to become "the dominant – perhaps the preeminent – means through which commerce is conducted." *Roommates.com*, 521 F.3d at 1164 n.15.

II.
ARGUMENT

A. The Panel Properly Recognized the Limits on Section 230's Preemptive Scope

In determining a statute's preemptive scope, the "purpose of Congress is the ultimate touchstone." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (citation omitted). "[T]he statutory language … necessarily contains the best evidence of Congress' preemptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citation omitted). "Also relevant, however, is the structure and purpose of the statute as a whole, as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citation omitted).

Applying these principles, this Circuit and others have held that Section 230 preempts liability only for: (1) "a provider or user of an interactive computer service" (2) "whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker" (3) "of information provided by another information content provider." *Internet Brands*, 824 F.3d at 850 (citation omitted); *see also, e.g., FTC v. LeadClick Media*, LLC, 838 F.3d 158, 173 (2d Cir. 2016); *Jane Doe 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016).

Though Section 230's enactment was prompted by a defamation case, "the language of the statute does not limit its application to defamation cases." *Barnes*, 570 F.3d at 1101. "[W]hat matters is not the name of the cause of action … but whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Id.* at 1101-02. The publication activities protected by Section 230 involve "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Id.* 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").[1]

These limits on Section 230's preemptive reach reflect a recognition that it is "not meant to create a lawless no-man's-land on the Internet." *Roommates.com*, 521 F.3d at 1164. It is not "an all-purpose get-out-of-jail-free card for businesses that publish user content on the internet" and does not declare "a general immunity from liability deriving from third-party content." *Internet Brands*, 824 F.3d at 852-

[1] Other Circuits are in accord. *See, e.g., Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398, 407 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014); *Green v. AOL*, 318 F.3d 465, 471 (3d Cir. 2003).

53; *accord City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010). Preemption is properly limited to the statute's "narrow language and its purpose" because "we must be careful not to exceed the scope of the immunity provided by Congress." *Internet Brands*, 824 F.3d at 853 (citation omitted).

The panel correctly applied these limits to hold that Section 230 does not preempt the Ordinance because it prohibits and penalizes only non-publishing conduct – commercial booking transactions for unlicensed short-term rentals. As the panel recognized, "the Ordinance does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites" and "does not require the Platforms to monitor third-party content." 918 F.3d at 682-83.

B. The Panel's Holding That Section 230 Does Not Preclude Required Monitoring of Internal, Non-Public Information Is Consistent with Circuit Precedent.

Batzel v. Smith, 333 F.3d 1018, 1032-34 (9th Cir. 2003), holds that Section 230 applies only where a third-party furnishes its information to an internet service provider "under circumstances in which a reasonable person in the position of the service provider … would conclude that the information was provided for publication on the Internet." *Batzel* thus confirms that Section 230 does not preempt liability based on a platform's actions with respect to internal customer information it knows was not provided for publication.

The panel's decision comports with *Batzel* in declining to apply Section 230 preemption because "the only monitoring that appears necessary in order to comply with the Ordinance relates to incoming requests to complete a booking transaction – content that, while resulting from the third-party listings, is distinct, internal, and nonpublic." 918 F.3d at 682 (emphasis omitted). The Platforms concede that they do not publish on their websites the owner and address information from their customers. *See* Airbnb FAC ¶ 42, ER 1840; Airbnb FAC ¶

116, ER 1857; HomeAway FAC ¶ 34, ER 1872. Thus, determining whether a requested booking transaction involves a licensed home-share would require the Platforms only to compare two sets of information, neither taken from a published third-party listing: (a) the owner name and address for the property being booked (drawn from unpublished internal customer records); and (b) the owner names and addresses listed on the Santa Monica registry (derived from information independently gathered by the City).

Nor is there any conflict with the other cases the Platforms cite. *Internet Brands* allowed a failure to warn claim because it would "not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content." 824 F.3d at 851. The court recognized that requiring Internet Brands to warn its users by email would fall outside the preemptive scope of Section 230. *Id.* Internet Brands' need to pull user-provided email addresses to provide a warning is equivalent to the Platforms' need to pull user-provided property address information to compare to the City-published registry – *Internet Brands* makes clear that neither implicates monitoring of published user content within the scope of Section 230's preemption.[2]

The Platforms cite a reference in *Herrick v. Grindr LLC*, 765 Fed. Appx. 586 (2d Cir. Mar. 27, 2019) (unpublished), to "direct messages" in claiming that

[2] The language from *Internet Brands* cited by the Platforms (Petition at 15) comes from the court's recognition that, unlike two other cited cases that held Section 230 applicable to different tort claims, the "tort duty asserted here does not arise from an alleged failure to adequately regulate access to user content or to monitor internal communications that might send up red flags about sexual predators." 824 F.3d at 853. As the two cited cases make clear, the "internal communications" referenced in this sentence were actually communications between sexual predators and minors over the providers' websites. *See Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 573, 96 Cal. Rptr. 3d 148, 156-57 (2009); *Doe v. MySpace, Inc.*, 528 F.3d 413, 416, 419-20 (5th Cir. 2008).

other circuits have "held that the CDA preempts claims based on monitoring internal content." Petition at 15. But as the underlying district court opinion demonstrates, the reference to "direct messages" is to messages that were distributed between users over Grindr's smart phone app, *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584, 593 (S.D.N.Y. 2018),[3] and hence were published through the app. *See also Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 975 (N.D. Cal. 2016) ("private nature of Direct Messaging does not remove the transmission of such messages from the scope of publishing activity under section 230(c)(1)").

None of these cases questions *Batzel*'s holding. Indeed, *Fields* recognizes that *Batzel* resolves "what it means for content to be 'provided' by a third party," 200 F. Supp. 3d at 975, a prerequisite for monitoring of that content to implicate Section 230. As the panel correctly held, because the only monitoring required by the Ordinance is of internal, non-public information that the Platforms know is not provided for publication, Section 230 does not apply.

C. The Panel Opinion Does Not Conflict with Other Circuits' Limited Protection of Websites' "Design and Operation."

Relying on *Backpage* and *Herrick*, the Platforms argue that the panel opinion conflicts with "First and Second Circuit decisions holding that the CDA preempts local laws that regulate 'features that are part and parcel of the overall design and operation of [a] website." Petition at 12. These cases, however, apply Section 230 to decisions about design features only where those decisions reflect

[3] Resort to the district court opinion is necessary because the Circuit's unpublished summary order, which has no precedential effect, "assume[s] the parties' familiarity with the underlying facts." 765 Fed. Appx. at 588. The Platforms cite *Backpage* as also holding that Section 230 applies to monitoring of "direct messages." While that case nowhere references "direct messages," it does discuss "message forwarding services," 817 F.3d at 16, 21, which similarly appears to refer to messages forwarded between users through Backpage's website.

"choices about what content can appear on the website and in what form." *Backpage*, 817 F.3d at 20-21; *see also Herrick*, 765 Fed. Appx. at 590-91. These cases have no application here because the Ordinance prohibits the Platforms only from completing booking transactions for unlicensed home-shares, regardless of what content may or may not be posted on the Platforms' sites relating to those home-shares.[4]

D. The Panel Opinion Does Not Conflict with Supreme Court or Circuit Preemption Precedent

The Platforms do not dispute the panel's recognition that, on its face, the Ordinance "does not proscribe, mandate, or even discuss the content of the listings that the Platforms display on their websites." 918 F.3d at 683. The Platforms acknowledge that verifying whether a particular short-term rental property appears on the City's registry "could be done" "after publication but prior to processing the payment and transaction for the listing." Airbnb FAC ¶¶ 67, 69, ER 1847; see also Homeaway FAC ¶ 37, ER 1873. They assert, however, that this option is "not viable from a business standpoint." Airbnb FAC ¶ 69, ER 1847-48; see also Homeaway FAC ¶37, ER 1873. Thus, as the panel accepted, the Platforms assert that, for their own business reasons, they would "choose" to remove non-compliant listings from their sites, rather than leave them in place and perform checks at the time of proposed bookings. 918 F.3d at 683.[5]

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[4] The Platforms' contrary reading of the design feature protection recognized by *Backpage* would extend Section 230 protection to a website's participation in booking (and taking a percentage of the booking payment for) sex acts arising from posts. Section 230 cannot apply this broadly.

[5] The Platforms also allege that they would "have to" monitor, screen, and remove listings prior to publication. Airbnb FAC ¶ 70, ER 20; see also HomeAway FAC ¶ 4, ER 1866. The panel correctly held that it was not bound by this allegation because it was an incorrect legal conclusion couched as a factual allegation. 918 F.3d at 683 n.3.

In arguing that this warrants preemption, the Platforms assert an overbroad test. In *Bates*, addressing a federal statute with a broader preemptive reach that barred states from imposing any pesticide labelling requirements "in addition to or different from" federal requirements, the Court rejected as "unquestionably overbroad" an "effects-based test" under which the statute would preempt any state law claim that would "induce a manufacturer to alter its label." 544 U.S. at 444-46. Courts have similarly rejected an inducement test for other broad preemption statutes, including ERISA. *See, e.g., Mutual Pharmaceutical Co., Inc. v. Bartlett,* 570 U.S. 472, 492 (2013) ("As *Bates* makes clear, '[t]he proper inquiry calls for an examination of the elements of the common-law duty at issue; it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action."); *De Buono v. NYSA-ILA Medical and Clinical Services Fund,* 520 U.S. 806, 816 (1997) (any state law "that increases the cost of providing benefits to covered employees will have some effect on the administration of ERISA plans, but that simply cannot mean that every state law with such an effect is pre-empted by the federal statute"); *Dilts v. Penske Logistics, LLC,* 769 F.3d 637, 647 (9th Cir. 2014) ("Nor does a state law meet the 'related to' test for FAAAA preemption just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services relative to others, leading the carriers to reallocate resources or make different business decisions.") (emphasis omitted). Consistent with these cases, the panel correctly held that, even accepting that complying with the Ordinance would impose costs that would induce the Platforms, for their own business reasons, to remove listings, this is "insufficient to implicate the CDA." 918 F.3d at 683.

The cases the Platforms cite do not conflict with the panel opinion. *Wos v. E.M.A. ex rel Johnson,* 568 U.S. 627 (2013), is a straightforward example of conflict preemption. A federal statute generally preempted states from imposing

liens on Medicaid beneficiaries' tort recoveries, except for the portion representing payments for medical care. A North Carolina statute created an irrebuttable presumption that a third of each tort recovery was payment for medical expenses. The Court held this statute preempted because it would "allow the State to take one-third of the total recovery, even if a proper stipulation or judgment attributes a smaller percentage to medical expenses," in conflict with the Medicaid anti-lien provision. 568 U.S. at 638. The Court disregarded North Carolina's effort to "define" away the conflict through its irrebuttable presumption because "a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Id.* at 637. Here, the panel focused precisely on what the Ordinance "in fact does," recognizing that it does not "inherently require[] the court to treat [the Platforms] as the 'publisher or speaker' of content provided by another," *Barnes*, 570 F.3d at 1102, and rejecting the Platforms' effort to base preemption on economic inducement rather than actual compulsion.

National Meat Association v. Harris, 565 U.S. 452 (2012), involved FMIA's wide-sweeping preemption clause that, unlike Section 230, precluded "not just conflicting, but also different or additional state requirements." 565 U.S. at 459-61. Disregarding the comprehensive federal regulations governing slaughterhouse treatment of non-ambulatory pigs, the state statute sought "at every turn" to impose "additional or different requirements on swine slaughterhouses" and so to substitute "a new regulatory scheme" for that in place under the FMIA. *Id.* at 460. It was in this context that the Court rejected the State's argument that its ban on sales of non-ambulatory pig meat offered only an "incentive" to slaughterhouses to take non-ambulatory pigs out of the production process. As the Court explained -- "this argument mistakes how the prohibition on sales operates within [the state statute] as a whole. The sales ban is a criminal proscription calculated to help implement and enforce each of the section's other regulations – its prohibition of

receipt and purchase, its bar on butchering and processing, and its mandate of immediate euthanasia." 565 U.S. at 463-64.

The wide-ranging regulatory provisions of the state statute led the Court to hold the otherwise permissible sales ban was "something more than an 'incentive' or 'motivat[or]'" and instead functioned "as a command to slaughterhouses to structure their operations in the exact way the remainder of [the state statute] mandates." *Id*. at 464. In contrast, neither Section 230 nor the Ordinance implements a comprehensive regulatory scheme governing the Platforms. *National Meat* thus poses no conflict with the panel's recognition, consistent with *Bates*, that while the Ordinance's regulation of booking services may impose costs that lead the Platforms to choose to remove listings, this does not convert the Ordinance into a regulation of publishing activity preempted by Section 230.

The Platforms' reliance on *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), is misplaced for several reasons. First, the case relies on a limited exception to the Supreme Court's general rejection of preemption premised on economic inducement that is rooted in the breadth of ERISA's preemption clause, which, unlike Section 230, implements a form of field preemption; any rule derived from *Fielder* and the Supreme Court cases on which it relies, therefore, is properly limited to field preemption. *See Metropolitan Taxicab Board of Trade v. City of New York*, 633 F. Supp. 2d 83, 95 (S.D.N.Y. 2009) ("rule derived from these cases is that a local law is preempted" if it "indirectly regulates within a *preempted field* in such a way that effectively mandates a specific, preempted outcome") (emphasis added). This rule is not properly extended beyond its field preemption context. *See Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1180 n.5 (9th Cir. 2016) ("unnecessarily broad reading" of prior case has resulted from incorrectly "extending its reasoning" outside its "field preemption context").

Second, even if *Fielder* has application outside the field preemption context, this Court has declined to adopt or reject *Fielder*, noting that the majority opinion was "over a forceful dissent." *Golden Gate Restaurant Association v. City and County of San Francisco*, 546 F.3d 639, 659 (9th Cir. 2008). The *Fielder* dissent rejected the majority's conclusion that "the only rational choice employers have under the Fair Share Act is to structure their ERISA healthcare benefit plans so as to meet the minimum spending threshold," 475 F.3d at 193, and found Wal-Mart's claim that it would increase benefits rather than pay the alternative state fee "irrelevant because the choice to increase benefits is not compelled by the Act. That choice would simply be a business judgment that Wal-Mart is free to make." 475 F.3d at 202-03 (dissent).

Finally, even if *Fielder* has application outside the field preemption context and its majority opinion is assumed correct, preemption would remain improper because the Platforms have a "meaningful alternative" to comply with the Ordinance without removing listings from their sites. The Platforms' own allegations show that they can verify the legality of bookings *after* publication at the time of booking. They assert this is "not viable from a business standpoint" because their websites "would be highly confusing" if "populated by listings that guests could not actually book" and because users would experience unexpected booking delays if the Platforms "had to screen listings prior to payment and transaction processing to ensure that the rental is listed on the City's registry." Airbnb FAC ¶ 69, ER 1847-48. The harms the Platforms allege render this option unviable can be mitigated by posting a warning (general or specific to particular listings) to notify users that (a) the Platforms cannot book unlicensed home shares in Santa Monica; and (b) there will be some delay in determining whether booking can be completed because the Platforms have to verify licensing. As *Internet Brands* makes clear, such warnings would not be publishing activity within the

scope of Section 230 because the source of the information to generate the warnings (even if directed to specific listings) would be the City's registry.

E. The Panel's Rejection of the Platforms' Obstacle Preemption Argument Poses No Conflict with This Court's Precedent

Contrary to the Platforms' claim, the panel acknowledged the various purposes cited as support for Section 230, including "to preserve the vibrant and competitive free market that presently exists for the Internet . . . unfettered by Federal or State Regulation." 918 F.3d at 683-84 (quoting 47 U.S.C. § 230(b)(2)). But the panel also correctly recognized that, while acknowledging these purposes, this Court's decisions "have hewn closely to the statutory language of the CDA and have limited the expansion of its immunity beyond the protection Congress envisioned." *Id.* at 684. Indeed, the very cases on which the Platforms rely note these purposes but nevertheless recognize strict textual limits on Section 230's preemptive scope. *See Roommates.com*, 521 F.3d at 1165-71; *Batzel*, 333 F.3d at 1032-34.

The Supreme Court has emphasized that "no legislation pursues its purposes at all costs." *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014) (citation omitted). The argument for applying obstacle preemption is "particularly weak" where, as here: (1) the Ordinance legislates in an area of traditional state regulation, housing, triggering the presumption that "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) (quoting *Waldburger*, 573 U.S. at 18-19*); see also Bates*, 544 U.S. at 449; (2) "the level of generality at which [Section 230's] purpose is framed" is very broad, *Waldburger*, 573 U.S. at 18; and (3) the text of Section 230 is narrow and expressly recognizes and permits most state regulation, *id.*; *see also* 47 U.S.C. § 230(e) ("Nothing in this section shall be construed to prevent any State

from enforcing any State law that is consistent with this section."); *Internet Brands*, 824 F.3d at 853 ("Congress could have written the statute more broadly, but it did not."). All of this further supports the panel's rejection of obstacle preemption in favor of following this Court's prior decisions, which make clear that Section 230's text and purposes permit regulation of the Platforms' non-publishing activities.

F. The Panel Opinion Poses No Significant Risk to the Modern Internet Economy

The Platforms' claim that the panel opinion poses grave risks to internet commerce rings hollow. Not only have the Platforms voluntarily complied with a nearly identical San Francisco ordinance, just last term the Supreme Court recognized that "the Internet's prevalence and power have changed the dynamics of the national economy" and in the prior year "e-commerce grew at four times the rate of traditional retail, and it shows no sign of any slower pace." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018). Noting that in 1992 the Court "could not have envisioned a world in which the world's largest retailer would be a remote seller," the Court overturned its own longstanding precedent that had applied a cramped physical presence standard to limit local authorities' ability to tax online sales, rejecting online sellers' arguments that doing so would threaten Internet commerce by exposing start-ups and smaller companies "to the daunting complexity and business-development obstacles of nationwide sales tax collection." *Id.* at 2097-98; *see also Internet Brands*, 824 F.3d at 852-53 (alleged "chilling effect" on internet does not warrant expansive reading of Section 230). The Platforms' similar arguments here provide no valid basis for concern that the panel's narrow opinion, in full accord with Section 230's text, Congressional intent, and this Court's prior precedents, will somehow threaten the vast modern Internet economy.

IV.

CONCLUSION

For all the reasons set forth above, this Court should deny the petition for rehearing.

Dated: July 1, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

Signature //s// George S. Cardona **Date** July 1, 2019

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Dated: July 1, 2019

Respectfully submitted,

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