

Case No. 18-55367, 18-55805, 18-55806

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

v.

CITY OF SANTA MONICA,
Defendant-Appellee.

**BRIEF OF THE CITY AND COUNTY OF SAN
FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND
CITY COUNCIL OF BALTIMORE, COOK COUNTY, CITY
OF COLUMBUS, DAYTON, GARY, OAKLAND,
SACRAMENTO, SANTA CRUZ, SEATTLE, SOMERVILLE,
AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN
SUPPORT OF APPELLEE'S OPPOSITION TO PETITION
FOR REHEARING AND REHEARING EN BANC**

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

DENNIS J. HERRERA, State Bar #139669
San Francisco City Attorney
YVONNE R. MERÉ, State Bar #173594
Chief of Complex and Affirmative Litigation
SARA J. EISENBERG, State Bar #269303
Chief of Strategic Advocacy
MOLLY J. ALARCON, State Bar #315244
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Telephone: (415) 554-4633
Facsimile: (415) 554-4715
E-Mail: sara.eisenberg@sfcityatty.org
Attorneys for CITY AND COUNTY OF
SAN FRANCISCO

(additional counsel listed on subsequent pages)

Additional Counsel for *Amici Curiae*:

KARL A. RACINE
Attorney General for the
District of Columbia
441 4th Street, NW, Suite 600 South
Washington, D.C. 20001
Telephone: (202) 727-3400
Email: oag@dc.gov

Attorney for the DISTRICT OF
COLUMBIA

ANDRE M. DAVIS
City Solicitor, City of Baltimore
100 N. Holliday Street, Suite 101
Baltimore, MD 21202
Telephone: (410) 396-3297

Attorney for the MAYOR AND
CITY COUNCIL OF BALTIMORE

KIMBERLY M. FOXX
States Attorney of Cook County
CATHY MCNEIL STEIN
PAUL A. CASTIGLIONE
Assistant State's Attorneys
500 Richard J. Daley Center
Chicago, Illinois 60602
Telephone: (312) 603-2350
paul.castiglione@cookcountyil.gov

Attorneys for COOK COUNTY,
ILLINOIS

ZACH KLEIN
Columbus City Attorney
77 N. Front Street, 4th Floor
Columbus, Ohio 43215
Telephone: (614) 645-7385
Email: zmklein@columbus.gov

Attorney for CITY OF COLUMBUS

BARBARA J. DOSECK
City Attorney
JOHN C. MUSTO
Chief Trial Counsel
City of Dayton, Ohio
101 West Third Street
Dayton, Ohio 45402
Telephone: (937) 333-4100
Email: John.Musto@Daytonohio.gov

Attorneys for the CITY OF DAYTON

RODNEY POL, JR.
City Attorney
401 Broadway, Suite 101
Gary, IN 46402
Telephone: (219) 881-1400

Attorney for the CITY OF GARY

BARBARA J. PARKER
City Attorney
City of Oakland
One Frank H. Ogawa Plaza, 6th Floor
Oakland, California 94612
Telephone: (510) 238-3601

Attorney for the CITY OF OAKLAND

SUSANA ALCALA WOOD
City Attorney
915 I Street, Fourth Floor
Sacramento, CA 95814
Telephone: 916-808-5346
Email: sawood@cityofsacramento.org

Attorney for CITY OF
SACRAMENTO

ANTHONY P. CONDOTTI
City Attorney
Atchison, Barisone & Condotti, APC
P.O. Box 481, Santa Cruz, CA 95061
Telephone: (831) 423-8383

Attorney for the CITY OF SANTA
CRUZ

PETER S. HOLMES
Seattle City Attorney
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Telephone: (206) 684-8200
Email: peter.holmes@seattle.gov

Attorney for CITY OF SEATTLE

FRANCIS X. WRIGHT, JR.
City Solicitor
93 Highland Avenue
Somerville, MA 02143
Telephone: (617) 625-6600

Attorney for the CITY OF
SOMERVILLE

JILL E. HABIG
Founder & President
JOANNA PEARL
Legal Director
LIJIA GONG
Staff Attorney
4096 Piedmont Avenue, #149
Oakland, CA 94611
Telephone: (510) 679-1076
Email: jill@publicrightsproject.org

Attorneys for PUBLIC RIGHTS
PROJECT, A PROJECT OF TIDES
CENTER

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT3

ARGUMENT4

 I. To Protect Their Residents And Interests, Local Governments
 Must Be Able To Regulate Online Companies Whose
 Operations Have An Effect In Their Jurisdictions.....4

 II. San Francisco’s Experience Demonstrates That Local
 Government Regulation Of An Online Company’s Own
 Commercial Conduct Does Not Adversely Impact The Internet
 Or Electronic Commerce..... 7

 A. The SF Ordinance Has Successfully Addressed A
 Significant Local Concern.9

 B. The SF Ordinance Did Not Break The Internet..... 11

CONCLUSION..... 14

FILER'S ATTESTATION 17

STATEMENT OF RELATED CASES 18

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS 19

CERTIFICATE OF SERVICE20

TABLE OF AUTHORITIES

Cases

Airbnb, Inc. v. City & Cty. of San Francisco
 217 F. Supp. 3d 1066 (N.D. Cal. 2016) 8, 10

Doe v. Internet Brands, Inc.
 824 F.3d 846 (9th Cir. 2016)14

Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC
 521 F.3d 1157 (9th Cir. 2008)11

Federal Statutes

47 USC
 § 230 3, 4, 5, 6, 7

State and Local Statutes and Codes

Cal. Health & Safety Code
 § 1596.8717

S.F., Cal., Admin. Code
 ch. 41A, § 41A.4(d)10
 ch. 41A, § 41A.5(g)(3)(A)10
 ch. 41A, § 41A.5(g)(4)(C)2, 8

S.F., Cal., Health Code
 art. 29, § 29.267
 art. 39, § 39026

Seattle, Wash., Mun. Code
 tit. 6, subtitle IV, ch. 6.6002

Rules

Federal Rules of Appellate Procedure
 Rule 29(a)(2)1
 Rule 29(a)(4)(E)1

Other References

Airbnb Press Release, *Airbnb is Global and Growing*, Airbnb Newsroom (Aug. 10, 2017), <https://press.airbnb.com/airbnb-global-growing/>12

Airbnb Press Release, *Airbnb Hosts Share More Than Six Million Listings Around the World*, Airbnb Newsroom (March 1, 2019), <https://press.airbnb.com/airbnb-hosts-share-more-than-six-million-listings-around-the-world/>.....12

Andrew Liptak, *Airbnb is expanding its Experiences feature to 200 cities this year*, The Verge (Jan. 28, 2018), <https://www.theverge.com/2018/1/28/16942308/airbnb-expanding-investing-experiences-200-cities-2018>.....13

Ben Lane, *Seattle passes sweeping short-term rental laws, limits Airbnb hosts to two units*, HousingWire (Dec. 13, 2017), www.housingwire.com/articles/42078-seattle-passes-sweeping-short-term-rental-laws-limits-airbnb-hosts-to-two-units.12

City Attorney of San Francisco, *All three illegal parking apps on hiatus in S.F. as Herrera’s Cease-and-Desist deadline passes* (July 11, 2014), <https://www.sfcityattorney.org/2014/07/11/all-three-illegal-parking-apps-on-hiatus-in-s-f-as-herrerass-cease-and-desist-deadline-passes/>5

Complaints Related to Illegal Airbnb-ing in S.F. Cut in Half, SocketSite (May 15, 2018), <http://www.socketsite.com/archives/2018/05/complaints-related-to-airbnb-ing-in-san-francisco-have-been-cut-in-half.html>.....11

Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 421 (2017), <http://ir.lawnet.fordham.edu/flr/vol86/iss2/3>14

Fareeha Ali, *US ecommerce sales grow 15.0% in 2018* (Feb. 28, 2019), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>.11

Gene Maddaus, *Kicked out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, L.A. Weekly (Sept. 18, 2014), <https://www.laweekly.com/kicked-out-of-san-francisco-monkeyparking-app-plans-a-fresh-start-in-santa-monica/>.....5

Hugo Martin, *Airbnb, HomeAway settle rental-registration lawsuit against San Francisco*, L.A. Times (May 1, 2017), <http://www.latimes.com/business/la-fi-airbnb-san-francisco-20170501-story.html>.8

Illegal Airbnb-Ing Activity in SF Persists but on the Decline, SocketSite (Oct. 31, 2018), <https://socketsite.com/archives/2018/10/illegal-airbnb-ing-activity-in-sf-persists-but-on-the-decline.html>. 11

Katie Benner, *Airbnb Settles Lawsuit With Its Hometown, San Francisco*, N.Y. Times (May 1, 2017), <https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html>.9

Khari Johnson, *Airbnb debuts premium Plus program and new listing categories*, VentureBeat (Feb. 22, 2018), <https://venturebeat.com/2018/02/22/airbnb-debuts-premium-plus-program-and-new-listing-categories/>.....13

Kyle Barron, Edward Kung & Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb* (Mar. 29, 2018), <http://dx.doi.org/10.2139/ssrn.3006832>2, 9

Leigh Gallagher, *Airbnb’s Profits to Top \$3 Billion by 2020*, Fortune (Feb 15, 2017), <http://fortune.com/2017/02/15/airbnb-profits/>.3

Lori Weisberg, *Income from San Diego Airbnb hosts soars 74 percent*, The San Diego Union-Tribune (Mar. 1, 2017), <http://www.sandiegouniontribune.com/business/tourism/sd-fi-airbnb-hosts-20170301-story.html>.2

National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes at 2* (Mar. 2018), http://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf. 1

Shaun Heasley, *Airbnb Rolls Out New Features for Those With Disabilities*, Disability Scoop (Mar. 20, 2018), <https://www.disabilityscoop.com/2018/03/20/airbnb-new-features-disabilities/24877/>.13

Ridester, *Lyft Driver App Overhaul – New Features And Updates* (Sept. 18, 2018), <https://www.ridester.com/lyft-driver-app-new-features/>.13

Tatiana Walk-Morris, *EBay rolls out AI-based personalization features*, Retail Dive (June 21, 2019), <https://www.retaildive.com/news/ebay-rolls-out-ai-based-personalization-features/557369/>13

Uber, *Check Out What's New*, <https://www.uber.com/drive/austin/resources/whats-new/> (last visited July 10, 2019).....13

INTEREST OF AMICI CURIAE

Amici curiae the City and County of San Francisco, District of Columbia, Mayor and City Council of Baltimore, Cook County, City of Columbus, City of Dayton, City of Gary, City of Oakland, City of Sacramento, City of Santa Cruz, City of Seattle, and City of Somerville, are cities and jurisdictions across the country striving to preserve and expand affordable housing for their residents.¹ *Amicus curiae* Public Rights Project is a nonpartisan nonprofit dedicated to supporting local and state government efforts to protect the rights of their communities. Nationally, the U.S. has a shortage of more than 7.2 million rental homes that are affordable and available to extremely low-income renters. National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes* at 2 (Mar. 2018), http://nlihc.org/sites/default/files/gap/Gap-Report_2018.pdf. This nationwide shortage in affordable housing presents significant challenges for all of *amici's* communities.

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

¹ Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *amici* hereby certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund the preparation or submittal of this brief; and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund the preparation or submittal of this brief. Pursuant to Rule 29(a)(2), *amici* attest that all parties to this appeal have consented to the filing of this brief.

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

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

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

² See, e.g., Kyle Barron, Edward Kung & Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb* (Mar. 29, 2018), <http://dx.doi.org/10.2139/ssrn.3006832> (finding that a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices for U.S. zipcodes with the median owner-occupancy rate).

³ See, e.g., S.F., Cal., Admin. Code ch. 41A, § 41A.5(g)(4)(C); Seattle, Wash., Mun. Code tit. 6, subtitle IV, ch. 6.600 (2017).

broad interpretation of the Communications Decency Act, 47 United States Code Section 230 (“CDA” or “Section 230”), urged by Appellants could be invoked to prevent *amici* from imposing reasonable and necessary regulations on any online company.

INTRODUCTION AND SUMMARY OF ARGUMENT

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

Over two decades later, the internet is no longer in its infancy. Today 290 million Americans are online every day engaging in commerce and activity that was unthinkable in 1996. If nascent internet startups needed broad protection from litigation to thrive, that cannot reasonably be argued now. Yet internet giants such as Airbnb—whose profits are projected to top \$3 billion by 2020⁴—seek to use the CDA to shield themselves from liability for their own unlawful commercial conduct. But neither the text nor the intent of the statute supports such a sweeping application. Accordingly, Appellants and their *amici* fall back on far-reaching policy arguments—claiming that local regulation like Santa Monica’s short-term rental ordinance (“Ordinance”) “substantially threatens e-commerce and the ongoing development of the Internet.” Appellants’ Petition for Rehearing or Rehearing En Banc (“Pet.”) at 17.

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

San Francisco’s experience demonstrates that these doomsday prophecies are unfounded. San Francisco has implemented a law virtually identical to Santa Monica’s Ordinance and the sky has not fallen. No terrible harm has befallen Appellants or e-commerce more broadly. And, at the same time, San Francisco has been able to protect its local housing stock and abate significant public nuisances. Similar regulations that address critical issues in areas of traditional state and local concern should be encouraged—not struck down simply because they apply to companies that conduct their business online.

ARGUMENT

I. To Protect Their Residents And Interests, Local Governments Must Be Able To Regulate Online Companies Whose Operations Have An Effect In Their Jurisdictions.

Appellants’ broad interpretation of Section 230 would create a new loophole for companies to avoid necessary and legitimate local regulations to which businesses have always been subject. So long as a business could claim that “monitoring” third-party content (*see* Pet. at 15) was the most effective way for it to comply with an ordinance, it could inoculate itself from regulation entirely. This expansive rule would severely restrict municipalities’ ability to regulate in traditional areas of local control, including the public rights-of-way, public health, and the general welfare.

A recent attempt by private companies in San Francisco to facilitate auctions of public parking spaces provides an example of how Appellants’ rule would render municipalities incapable of regulating their own public rights-of-way—the most fundamental local power. In 2014, platforms such as Monkey Parking were introduced in San Francisco, offering drivers the ability to auction off the public parking spaces they were about to vacate to the highest bidder in need of a nearby

parking space. Most spaces sold for \$5-\$7 each, and Monkey Parking took a 20% commission for facilitating the connection between the parties.⁵ This business substantially undermined the “public” nature of San Francisco’s public parking stock, allowing private parties to monopolize and profit off of the public right-of-way. Monkey Parking complied with a cease-and-desist order sent by San Francisco City Attorney Dennis J. Herrera directing Monkey Parking’s attention to an ordinance prohibiting the private sale of the public right-of-way,⁶ but under Appellants’ interpretation of Section 230, the company arguably could have ignored it and continued selling space on public streets to the highest bidder.

There is no question that municipalities can prohibit private parties from auctioning off access to public space. Likewise, municipalities can prohibit a brick and mortar company from charging a fee to connect a party seeking to rent publicly available space with a private party seeking, unlawfully, to sell it. That should not change simply because the company conducts business online. But in Appellants’ world, it would.

Imagine a re-vamped Monkey Parking operating under Appellants’ interpretation of Section 230: Monkey Parking 2.0 could allow third parties to auction off public and private parking spaces and flagrantly ignore any rule

⁵ Gene Maddaus, *Kicked out of San Francisco, MonkeyParking App Plans a Fresh Start in Santa Monica*, L.A. Weekly (Sept. 18, 2014), <https://www.laweekly.com/kicked-out-of-san-francisco-monkeyparking-app-plans-a-fresh-start-in-santa-monica/>.

⁶ Cease-and-desist letter from Michael S. Weiss to Monkey Parking (June 23, 2014), <https://www.sfcityattorney.org/wp-content/uploads/2015/07/S.F.-City-Attorney-letter-to-Monkey-Parking.pdf>; City Attorney of San Francisco, *All three illegal parking apps on hiatus in S.F. as Herrera’s Cease-and-Desist deadline passes* (July 11, 2014), <https://www.sfcityattorney.org/2014/07/11/all-three-illegal-parking-apps-on-hiatus-in-s-f-as-herrerass-cease-and-desist-deadline-passes/>.

prohibiting transactions involving public parking spaces. To comply with such a rule, Monkey Parking 2.0 would have to check whether the parking space at issue in the transaction was public, probably by referencing a database of public parking spaces against the transaction information. Because such a regulation of Monkey Parking’s *own booking service* might require “monitoring” content posted by third parties (*i.e.*, information about the parking space), it would violate Appellants’ expansive view of Section 230. In this dystopian streetscape, cities would be powerless to protect the “public” nature of their parking offerings—instead, spots would go only to the highest bidder. But the public at large would lose more than its parking access. The same business model could be used to auction off spots along parade or marathon routes on public land, in-demand bike racks on public spaces near stadiums and arenas, or even choice picnic spaces in public parks. And cities would have no ability to stop it.

Appellants’ rule would also eviscerate municipalities’ ability to enforce traditional permit requirements to protect health, safety, and the general welfare. So long as companies structured their businesses as platforms relying on third parties for labor—as many gig-economy companies now do—they could take advantage of Appellants’ loophole. Compare, for example, a brick and mortar dog walking business and an online dog walker platform that connects professional dog walkers with the many San Francisco canines at home all day long. San Francisco law requires dog walkers who take four or more dogs at a time on public property to obtain a license.⁷ San Francisco could also require brick and mortar companies that connect professional dog walkers with dogs needing walks to make sure the walker has a proper license (if needed) before the company brokers the transaction

⁷ S.F., Cal., Health Code art. 39, § 3902 (2013).

and accepts a fee. But Appellants' rule would shield the same dog walking business, structured as an online platform, from liability simply because it conducts its business online rather than in a storefront.

The same unfairness and inability to regulate would arise for any municipality's permitting or licensing schemes, so long as a company could structure its operations as a platform reliant on third-party labor or contributions. For example, many cities regulate massage parlors in part through permits and licenses, and can require brick and mortar parlors to ensure that masseuses have licenses before offering to book their services to clients. *See, e.g.,* S.F., Cal., Health Code art. 29, § 29.26 (2018). Under Appellants' view of Section 230, massage parlors would simply need to shift their business model to operate as online platforms to avoid any obligation to ensure that masseuses were licensed before taking a commission for facilitating a massage booking. The same would be true for licensed professions involving the care of children that require a background check (*e.g.*, to screen for individuals with child pornography or child molestation convictions; *see* Cal. Health & Safety Code § 1596.871). Cities and even entire states would find themselves handcuffed in these typical areas of regulation, unable to protect the public welfare as they normally would.

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

Appellants and their *amici* assert that regulations such as Santa Monica's Ordinance will usher in a parade of horrors—that they will “substantially threaten[] e-commerce and the ongoing development of the Internet” (Pet. at 17) and “jeopard[ize] the entire Internet economy.” Brief of *Amicus Curiae* Floor64, Inc. in Support of Plaintiffs-Appellants' Petition for Rehearing and Rehearing En

Banc [Dkt. No. 92] at 15.⁸ San Francisco’s experience demonstrates that these fears are unfounded.

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

Notably, even though the settlement left the SF Ordinance in place, Airbnb did *not* express any concern that e-commerce or the internet would suffer any negative consequences. To the contrary, at the time of the settlement, Chris Lehane, Airbnb’s head of global policy and communications, “called the deal ‘a proverbial ‘winner, winner chicken dinner.’”” Hugo Martin, *Airbnb, HomeAway settle rental-registration lawsuit against San Francisco*, L.A. Times (May 1, 2017), <http://www.latimes.com/business/la-fi-airbnb-san-francisco-20170501-story.html>. “He said complying with laws and working with local governments would allow Airbnb to ‘build the foundation’ and make sure it was ‘getting the

⁸ *See also* Brief of *Amici Curiae* Chris Cox and NetChoice in Support of Plaintiffs’ Petition for Rehearing or Rehearing En Banc [Dkt. No. 89] at 17 (claiming that such laws will “slow commerce on the Internet, increase costs for websites and consumers, and restrict the development of platform marketplaces”); Brief of *Amicus Curiae* Internet Association in Support of Plaintiffs-Appellants’ Petition for Rehearing En Banc [Dkt. No. 91] (“Internet Ass’n *Amicus* Br.”) at 15 (asserting that the panel’s decision will “thwart[] the development of e-commerce”).

basics right.”” Katie Benner, *Airbnb Settles Lawsuit With Its Hometown, San Francisco*, N.Y. Times (May 1, 2017), <https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html>.

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

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

Across the U.S., skyrocketing housing prices have left cities in crisis. And the short-term rentals that Airbnb and HomeAway facilitate drive up these costs.⁹ Accordingly, San Francisco—like many other cities—regulates short-term rentals out of a crucial duty to maintain affordable housing stock for permanent residents, reduce evictions, and preserve neighborhood character. In 2015, to accommodate the internet-based “sharing economy,” San Francisco created the Office of Short-Term Rentals (“OSTR”) and amended its Administrative Code to require residents

⁹ See, e.g., Kyle Barron, Edward Kung & Davide Proserpio, *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb* (Mar. 29, 2018), <http://dx.doi.org/10.2139/ssrn.3006832> (finding a positive correlation between Airbnb listings and increases in rents and housing prices for U.S. zipcodes with the median owner-occupancy rate).

to register their homes with the city before making them available as short-term rentals.¹⁰

At first, compliance with the registration requirement fell disappointingly short. As of March 2016, only 1,647 people had registered with OSTR, while Airbnb listed 7,046 San Francisco hosts. *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F. Supp. 3d at 1070. Implementation of the SF Ordinance has been a game-changer. Registrations quickly skyrocketed and have now nearly doubled. And at the same time that hundreds of permanent residents registered legitimate short-term rentals, thousands of illegal short-term rentals have been eliminated.

Illegal short-term rentals wrest scarce rental units—including below market-rate (“BMR”) housing—away from the long-time residents and working-class families who need them most, and drive up evictions of long-term residents by property owners tempted to run high-volume short-term rentals and charge higher rates to tourists. Such illegal *de facto* hotels also wreak havoc on neighborhoods with excessive noise, raucous parties, illegal drug use, and overflowing garbage. But the SF Ordinance has helped turn the tide on these harms to public safety and health. Its enforcement has forced illegal listings off of rental platforms, which returns critically needed rent-controlled and subsidized BMR units to the permanent housing market. As the base of legitimate short-term rental hosts broadens, these hosts receive more bookings to more robustly supplement their incomes. And with properly registered short-term rentals, OSTR rarely receives

¹⁰ San Francisco also specified that only the primary resident of a unit may offer it as a short-term rental, that units may only be rented for a maximum of 90 nights per year, and that units designated as a below market rate or income-restricted residential unit may not be registered for short-term rental. *See* S.F., Cal., Admin. Code ch. 41A, §§ 41A.4, Short-Term Residential Rental (d) (2015), 41A.5(g)(3)(A) (2015).

complaints about noise, illicit drug use, and other interruption to the quality of life in neighborhoods. Indeed, complaints related to illegal short-term rental activity in San Francisco have been cut in half since implementation of the SF Ordinance. *See Complaints Related to Illegal Airbnb-Ing in S.F. Cut in Half*, SocketSite (May 15, 2018), <http://www.socketsite.com/archives/2018/05/complaints-related-to-airbnb-ing-in-san-francisco-have-been-cut-in-half.html>; *Illegal Airbnb-Ing Activity in SF Persists but on the Decline*, SocketSite (Oct. 31, 2018), <https://socketsite.com/archives/2018/10/illegal-airbnb-ing-activity-in-sf-persists-but-on-the-decline.html>.

In short, under San Francisco’s Ordinance, illegal hotels have been rightfully restored to full-time homes and San Francisco has been able to abate significant nuisances that it previously struggled to address.

B. The SF Ordinance Did Not Break The Internet.

The SF Ordinance has been in effect for two years, and none of the “doom and gloom” (*Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1175 (9th Cir. 2008)) Appellants and their *amici* portend has materialized.

Appellants contend that if the Santa Monica Ordinance is upheld, “it will gravely harm the modern internet economy.” Pet. at 17. But even with the SF Ordinance in full force and effect, e-commerce has continued to march forward apace. E-commerce platforms, which already generate billions of dollars of revenue, continue to grow at a rate of nearly 15% per year. Fareeha Ali, *US ecommerce sales grow 15.0% in 2018* (Feb. 28, 2019), <https://www.digitalcommerce360.com/article/us-ecommerce-sales/>. And Airbnb itself remains as robust as ever. A \$30+ billion company with more than six

million listings, Airbnb boasts that it “is Global and Growing.” Airbnb Press Release, *Airbnb is Global and Growing*, Airbnb Newsroom (Aug. 10, 2017), <https://press.atairbnb.com/airbnb-global-growing/>; Airbnb Press Release, *Airbnb Hosts Share More Than Six Million Listings Around the World*, Airbnb Newsroom (March 1, 2019), <https://press.airbnb.com/airbnb-hosts-share-more-than-six-million-listings-around-the-world/>.

Amici Chris Cox and NetChoice asserted in their prior brief to this Court that upholding the Santa Monica Ordinance would “open the door to similar requirements by other municipalities.” Brief of *Amici Curiae* Chris Cox and NetChoice in Support of Plaintiffs and Reversal [Dkt. No. 17] at 25. They pointed to Seattle’s new short-term rental law as evidence that this proliferation has already begun, and suggested that the emergence of such laws “could easily damage or shut down Internet platforms.” *Id.* Airbnb, however, has “applaud[ed]” Seattle’s new rules as “a landmark win for Airbnb hosts and guests.” Ben Lane, *Seattle passes sweeping short-term rental laws, limits Airbnb hosts to two units*, HousingWire (Dec. 13, 2017), www.housingwire.com/articles/42078-seattle-passes-sweeping-short-term-rental-laws-limits-airbnb-hosts-to-two-units. And Airbnb and HomeAway’s ability to comply with laws like Seattle’s and San Francisco’s indicates that the burden imposed by such laws is not, in fact, so onerous.

The Internet Association writing as *amicus* claims that the Santa Monica Ordinance will “stifle innovation,” “chill the development of e-commerce,” and “harm[s] the millions of users who depend on services provided by platforms.” Internet Assoc. Internet Ass’n Amicus Brief at 6-7. None of these things has happened since the SF Ordinance went into effect. Consumers can still buy goods on Amazon or eBay, request a car on Uber or Lyft, or book a stay in someone’s

home on Airbnb or HomeAway. Airbnb announced that it is investing \$5 million in a new “Experiences” program,¹¹ rolled out new features for users with disabilities,¹² and debuted a new premium “Plus” program and new listing categories.¹³ Uber introduced several new features for its app.¹⁴ And countless other online companies have made similar changes to their services.¹⁵ There is absolutely no indication that e-commerce has been chilled, innovation has been stifled, or users have been harmed.

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

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

¹¹ Andrew Liptak, *Airbnb is expanding its Experiences feature to 200 cities this year*, The Verge (Jan. 28, 2018), <https://www.theverge.com/2018/1/28/16942308/airbnb-expanding-investing-experiences-200-cities-2018>.

¹² Shaun Heasley, *Airbnb Rolls Out New Features for Those With Disabilities*, Disability Scoop (Mar. 20, 2018), <https://www.disabilityscoop.com/2018/03/20/airbnb-new-features-disabilities/24877/>.

¹³ Khari Johnson, *Airbnb debuts premium Plus program and new listing categories*, VentureBeat (Feb. 22, 2018), <https://venturebeat.com/2018/02/22/airbnb-debuts-premium-plus-program-and-new-listing-categories/>.

¹⁴ Uber, *Check Out What’s New*, <https://www.uber.com/drive/austin/resources/whats-new/> (last visited July 10, 2019).

¹⁵ See, e.g., Tatiana Walk-Morris, *EBay rolls out AI-based personalization features*, Retail Dive (June 21, 2019), <https://www.retaildive.com/news/ebay-rolls-out-ai-based-personalization-features/557369/>; Ridester, *Lyft Driver App Overhaul – New Features And Updates* (Sept. 18, 2018), <https://www.ridester.com/lyft-driver-app-new-features/>.

that publish user content on the internet, though any claims might have a marginal chilling effect on internet publishing businesses.

Doe v. Internet Brands, Inc., 824 F.3d 846, 852-53 (9th Cir. 2016).

New areas of regulation are frequently met with doom and gloom prophecies by regulated entities. But just as Title VII, under which courts began to recognize claims for “sexually hostile work environments,” did not in fact force employers to shut down offices or otherwise “ruin the camaraderie of workspaces,” San Francisco’s experience demonstrates that modest local regulation of short-term rental housing has not and will not “break the Internet.” Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans* § 230 *Immunity*, 86 Fordham L. Rev. 401, 421 (2017), <http://ir.lawnet.fordham.edu/flr/vol86/iss2/3>.

CONCLUSION

This Court should deny Appellant’s Petition for Rehearing.

Dated: July 10, 2019

Respectfully submitted,

DENNIS J. HERRERA
San Francisco City Attorney

By: /s/ Sara J. Eisenberg
SARA J. EISENBERG
Chief of Strategic Advocacy

*Attorneys for the CITY AND COUNTY OF
SAN FRANCISCO*

KARL A. RACINE
Attorney General for the
District of Columbia
Attorney for the DISTRICT OF COLUMBIA

ANDRE M. DAVIS
City Solicitor, City of Baltimore
*Attorney for MAYOR AND CITY COUNSEL
OF BALTIMORE*

KIMBERLY M. FOXX
States Attorney of Cook County
Attorney for COOK COUNTY, ILLINOIS

ZACH KLEIN
Columbus City Attorney
Attorney for CITY OF COLUMBUS

BARBARA J. DOSECK
City Attorney
JOHN C. MUSTO
Chief Trial Counsel
Attorneys for CITY OF DAYTON

RODNEY POL, JR.
City Attorney
Attorney for CITY OF GARY

BARBARA J. PARKER
City Attorney
Attorney for CITY OF OAKLAND

SASANA ALCALA WOOD
City Attorney
Attorney for CITY OF SACRAMENTO

ANTHONY P. CONDOTTI
City Attorney
Attorney for CITY OF SANTA CRUZ

PETER S. HOLMES
Seattle City Attorney
Attorney for CITY OF SEATTLE

FRANCIS X. WRIGHT, JR.
City Solicitor
Attorney for CITY OF SOMERVILLE

JILL E. HABIG
Founder & President
JOANNA PEARL
Legal Director
LIJIA GONG
Staff Attorney
*Attorneys for PUBLIC RIGHTS PROJECT,
A PROJECT OF TIDES CENTER*

STATEMENT OF RELATED CASES

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

Dated: July 10, 2019

Respectfully submitted,

DENNIS J. HERRERA
San Francisco City Attorney

By: /s/ Sara J. Eisenberg
SARA J. EISENBERG
Chief of Strategic Advocacy

*Attorneys for the CITY AND COUNTY OF
SAN FRANCISCO*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

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

I am the attorney or self-represented party.

This brief contains 3,011 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a cross-appeal brief and complies with the word limit of Cir. R. 28.1-1.
- is an amicus brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated _____.
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature Sara J. Eisenberg Date July 10, 2019
(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I, MARTINA HASSETT, hereby certify that I electronically filed the following document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 10, 2019.

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND CITY COUNCIL OF BALTIMORE, COOK COUNTY, CITY OF COLUMBUS, DAYTON, GARY, OAKLAND, SACRAMENTO, SANTA CRUZ, SEATTLE, SOMERVILLE, AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF APPELLEE'S OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

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

Executed July 10, 2019, at San Francisco, California.

/s/ Martina Hassett

MARTINA HASSETT