

**No: 18-55367**

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

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HOMEAWAY.COM, INC. and AIRBNB, INC.,

*Plaintiffs/Appellants,*

v.

CITY OF SANTA MONICA

*Defendant/Appellee.*

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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

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**BRIEF *AMICUS CURIAE* OF UNITE HERE INTERNATIONAL UNION IN  
OPPOSITION TO PETITION FOR REHEARING *EN BANC***

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Richard G. McCracken

Paul L. More

McCRACKEN, STEMERMAN & HOLSBERRY, LLP

595 Market Street, Suite 800

San Francisco, CA 94105

Telephone: (415) 597-7200

Facsimile: (415) 597-7201

E-mail: [rmccracken@msh.law](mailto:rmccracken@msh.law)

[pmore@msh.law](mailto:pmore@msh.law)

*Attorneys for Amicus Curiae UNITE HERE International  
Union*

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* UNITE HERE International Union certifies that it has no parent corporations nor any publicly held corporations owning 10% or more of its stock.

Dated: July 11, 2019

Respectfully submitted,

By: /s/Paul L. More  
Richard G. McCracken  
Paul L. More  
McCRACKEN, STEMERMAN &  
HOLSBERY, LLP  
595 Market Street, Suite 800  
San Francisco, CA 94105  
Telephone: (415) 597-7200  
Facsimile: (415) 597-7201

*Attorneys for Amicus Curiae UNITE  
HERE International Union*

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## STATEMENT OF INTEREST<sup>1</sup>

UNITE HERE is a labor union that represents 270,000 working people across Canada and the United States. Its members work in the hotel, gaming, food service, and airport industries, among others.

UNITE HERE members face a dire affordable housing crisis, particularly in high-cost areas like Los Angeles. The housekeepers, cooks, restaurant servers, and retail workers whom UNITE HERE represents live in destination cities where short-term rental (“STR”) businesses like Airbnb and Homeaway.com are most active and where their effect on housing affordability is most pernicious. These companies and their owners have profited by violating local laws designed to regulate the conversion of residential housing to commercial transient occupancy units. The effect in places like Santa Monica has been a reduction in the amount of available housing and increases in rental costs. The affordability crisis to which Airbnb, Homeaway.com and other STR brokers contribute has forced UNITE HERE members to choose between paying an even larger share of their family income on housing or living further and further from the urban core, where they have built communities and where their workplaces are located.

Airbnb’s business model also gives it a competitive advantage over hotels, which follow local zoning laws and other regulatory measures covering public accommodations such as the Americans with Disabilities Act. UNITE HERE believes that all forms of visitor accommodations should operate on a level playing

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<sup>1</sup> No counsel for a party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus or its counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E). All parties have consented to the filing of this brief.

field, and that the Communications Decency Act (“CDA”) was not intended to “give online businesses an unfair advantage over their real-world counterparts.” *Fair Housing Council v. Roommates.com LLC*, 521 F.3d 1157, 1164-65 n.15 (9th Cir. 2008) (en banc).

## INTRODUCTION

Airbnb and Homeaway.com (the “STR Brokers”)<sup>2</sup> claim that CDA Section 230 shields them from liability for brokering and profiting from illegal commercial transactions renting unregistered STRs in the City of Santa Monica. The panel in this case, and all of the other courts that have addressed the issue, recognized this as an unprecedented and dangerous attempt to extend CDA immunity well beyond its language or purpose. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 680 (9th Cir. 2019); *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F.Supp.3d 1066, 1071 (N.D. Cal. 2016); *Airbnb, Inc. v. City of Boston*, — F.Supp.3d—, 2019 WL 1981043, at \* 7 (May 3, 2019). There is no conflict between the panel’s straightforward application of Section 230’s language to the STR Brokers’ commercial activity and the law of this or any other circuit.

The real-world implications of the STR Brokers’ business model are clear. Airbnb and other STR Brokers have contributed greatly to the housing affordability crisis affecting Santa Monica and other popular destination cities, by facilitating the unlawful conversion of residential housing units into transient accommodations. The STR Brokers’ effect on housing availability and rent is well-documented, and supports reasonable regulations like Santa Monica’s.

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<sup>2</sup> Airbnb and Homeaway.com call themselves “platforms,” evoking the image of neutral scaffolding for activity engaged in by others. But this is not an accurate description of these companies’ business model, which relies on *direct involvement* in the provision and booking of STRs. The more accurate term for this role is “brokers”: companies that arrange transactions between a buyer and a seller for a commission when the deal is executed.

Section 230 is not an impediment to cities prohibiting the STR Brokers from booking and collecting fees for illegal commercial transactions.

## ARGUMENT

### **I. Airbnb and Other STR Brokers Fuel the Housing Affordability Crisis.**

Since their inception, the STR Brokers' business model has been predicated on violating local zoning laws regulating STRs. The companies' carefully crafted public images convey the sense that those who list STRs are ordinary homeowners sharing a room with a visitor, or renting their house while they are away on vacation. But in fact, while such home-sharing listings do exist, they represent a miniscule amount of revenues generated in places like Los Angeles. Instead, STR Brokers transact largely with investment-property owners renting out entire units of housing as part of commercial STR portfolios.

A 2015 study of Airbnb's impact in Los Angeles, for example, found that Airbnb listings for shared rooms accounted for less than one quarter of one percent of Airbnb's revenue. Instead, ninety percent of Airbnb revenue came from listings of entire housing units.<sup>3</sup> Commercial property management companies listing multiple units for rent earned the lion's share of AirBnB revenue.<sup>4</sup> A subsequent study conducted by CBRE Hotels' Americas Research found that multi-unit

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<sup>3</sup> Roy Samaan, "Airbnb, Rising Rent and the Housing Crisis in Los Angeles," LOS ANGELES ALLIANCE FOR A NEW ECONOMY (March 2015), at p. 9, at <https://www.laane.org/wp-content/uploads/2015/03/Airbnb-Final.pdf>.

<sup>4</sup> Roy Samaan, "Short-Term Rentals and LA's Lost Housing," LOS ANGELES ALLIANCE FOR A NEW ECONOMY (August 24, 2015), at p. 2, at: [http://www.laane.org/wp-content/uploads/2015/08/Short-Term\\_RentalsLAS-Lost\\_Housing.pdf](http://www.laane.org/wp-content/uploads/2015/08/Short-Term_RentalsLAS-Lost_Housing.pdf).

Airbnb listings increased by 87% in Los Angeles between 2015 and 2016, and represented fully 81% of Airbnb revenue in 2016.<sup>5</sup>

These trends are mirrored in other cities. McGill University researchers found that 66% of revenue (\$435 million) and 45% of all New York City Airbnb reservations in 2017 were illegal under New York State law. The researchers estimate that Airbnb listings had removed between 7,000 and 13,500 units of housing from New York City's long-term rental market, including 5,600 entire-home listings that were available as STRs 240 days or more during the year.<sup>6</sup> The CBRE study mentioned earlier found that multi-unit, entire-home operations were the fastest growing Airbnb segment in terms of the number of hosts, units, and revenue generated in 2016, and represented \$1.8 billion in Airbnb revenues that year. Property owners listing 10 or more units represented a quarter of all multi-unit hosts nationally, generating \$175 million in revenue.<sup>7</sup>

As the STR market has come to be dominated by commercial real-estate companies with multi-unit portfolios, sub-industries have emerged. STR operators hire property management services that promise to maximize revenues, offer professional photography of listed units, perform maintenance services, and

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<sup>5</sup> CBRE Hotels' Americas Research, "Hosts with Multiple Units – A Key Driver of Airbnb Growth A Comprehensive National Review Including a Spotlight on 13 U.S. Markets" (March 2017), at p. 14, at: [https://www.ahla.com/sites/default/files/CBRE\\_AirbnbStudy\\_2017.pdf](https://www.ahla.com/sites/default/files/CBRE_AirbnbStudy_2017.pdf).

<sup>6</sup> David Wachsmuth *et al.*, "The High Cost of Short-Term Rentals in New York City," McGill University School of Urban Planning (January 30, 2018), at p. 2, at: <https://www.mcgill.ca/newsroom/channels/news/high-cost-short-term-rentals-new-york-city-284310>.

<sup>7</sup> CBRE Hotels' Americas Research, *supra*, at p. 4.



restock household items.<sup>8</sup> Airbnb operators hire cleaning services specializing in STRs,<sup>9</sup> and companies like AirDNA and Everbooked offer operators data analytics designed to identify optimal price and occupancy targets.<sup>10</sup> Due to the profits at stake, illegal STR schemes are often large-scale and sophisticated.<sup>11</sup>

The conversion of housing units to tourist STRs has had the effect that standard economics would predict—the reduction in housing supply has resulting in an increase in rents. The McGill University study of New York City estimated a 1.4% increase in median rent over a three-year period due to Airbnb, with greater increases occurring in trendy neighborhoods in Brooklyn.<sup>12</sup> A study of Boston found that each standard deviation increase in Airbnb listings was associated with a 0.4% increase in asking rents.<sup>13</sup>

A national study published by the National Bureau of Economic Research (“NBER”) found that in low owner-occupancy cities like Santa Monica, each 1%

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<sup>8</sup> See, e.g., <https://www.airconcierge.net/>; <https://guestable.com/los-angeles/>.

<sup>9</sup> See, e.g., <https://maidthis.com/Airbnb-cleaning/>; <https://www.tidy.com/Airbnb/>.

<sup>10</sup> See, e.g., <https://www.airdna.co/>; <https://www.everbooked.com/>.

<sup>11</sup> See, e.g., Luis Ferre-Sadurni, *Inside the Rise and Fall of a Multimillion-Dollar Airbnb Scheme*, N.Y. TIMES, Feb. 23, 2019, at <https://www.nytimes.com/2019/02/23/nyregion/airbnb-nyc-law.html?login=email&auth=login-email>; Paris Martineau, *How 9 People Built an Illegal \$5M Airbnb Empire in New York*, WIRED, June 24, 2019, at: <https://www.wired.com/story/how-9-people-built-illegal-5m-airbnb-empire-new-york/>.

<sup>12</sup> David Wachsmuth *et al.*, *supra*, at p. 2.

<sup>13</sup> Keren Horn & Mark Merante, “Is home sharing driving up rents? Evidence from Airbnb in Boston,” 38 JOURNAL OF HOUSING ECONOMICS 14-24 (December 2017).

increase in Airbnb listings is associated with a .024% increase in rent.<sup>14</sup> While this might not sound like much, consider that Airbnb *rentals* increased by an average of 27% *annually* in Santa Monica between 2010 and 2018, according to data analytics company AirDNA,<sup>15</sup> and that the City's median move-in rent was \$3,200 per month for a two-bedroom unit in 2018.<sup>16</sup> Applying NBER's formula and conservatively assuming a 27% increase in *listings* annually, Airbnb was responsible for nearly 10% of the median rent increase for a two-bedroom apartment in Santa Monica between 2010 and 2018, or approximately \$1,400 per year in additional rent payments.<sup>17</sup> This impact is in line with other cities. For example, New York City's Comptroller determined that Airbnb had been responsible for nearly 10% of the total rent increase in that City between 2009 and 2017, meaning that "renters citywide paid a whopping \$616 million in additional rent in 2016 due to the exponential growth of Airbnb listings."<sup>18</sup>

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<sup>14</sup> Kyle Barron, Edward Kung, Davide Proserpio, "The Sharing Economy and Housing Affordability: Evidence from Airbnb," NATIONAL BUREAU OF ECONOMIC RESEARCH (April 1, 2018), at <https://papers.ssrn.com/abstract=3006832>.

<sup>15</sup> <https://www.airdna.co/market-data/app/us/california/santa-monica/overview>.

<sup>16</sup> Santa Monica Rent Control Board, 2018 Annual Report, at p. 14, at: [https://www.smgov.net/uploadedFiles/Department s/Rent\\_Control/Reports/Annual\\_Reports/2018%20Annual%20Report%20FINAL.pdf](https://www.smgov.net/uploadedFiles/Department%20s/Rent_Control/Reports/Annual_Reports/2018%20Annual%20Report%20FINAL.pdf)

<sup>17</sup> See Santa Monica Rent Control Board, 2010 Annual Report, at p. 4, at [https://www.smgov.net/uploadedFiles/Departments/Rent\\_Control/Reports/Annual\\_Reports/Annual\\_Report\\_10.pdf](https://www.smgov.net/uploadedFiles/Departments/Rent_Control/Reports/Annual_Reports/Annual_Report_10.pdf) (median monthly rental for two-bedroom apartment in 2010 was \$2,000).

<sup>18</sup> New York City Comptroller Scott M. Stringer, "Comptroller Stringer Report: NYC Renters Paid an Additional \$616 Million in 2016 Due to Airbnb" (May 2, 2018), at <https://comptroller.nyc.gov/newsroom/comptroller-stringer-report-nyc-renters-paid-an-additional-616-million-in-2016-due-to-Airbnb/>.

In short, “because of Airbnb, absentee landlords are moving their properties out of the long-term rental and for-sale markets and into the short-term rental market.”<sup>19</sup>

## **II. Airbnb Is More Than A “Platform” For Buyers and Sellers.**

The STR Brokers have not been passive by-standers to these impacts. They take a percentage of each booking and, as a profit-making enterprises, have an interest in expanding STRs in destination cities like Santa Monica. STR Brokers have not been satisfied with the role of a mere “platform” for third-party transactions. Airbnb actively partners with hosts in many ways, and uses the data that it gleans from participants in its venture to target marketing, expand its services, and increase its hosts’ revenue yield (in which it shares).

Airbnb, for example, provides “host insurance”—primary coverage for liability claims up to \$1 million—to all Airbnb operators. Airbnb’s role as insurance intermediary is not elective: “[b]y agreeing to list a property, or continuing to list a property, on Airbnb you agree to be covered under the Host Protection Insurance program.”<sup>20</sup> Airbnb enters into other commercial relationships with hosts, guests, and other companies, from the mundane, such as providing professional photography services that will “make your listing stand out and can help you get booked more often”<sup>21</sup> to more complex business offerings such as “Airbnb at Work,” which “consolidate[s] travel info and expensing in one

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<sup>19</sup> Kyle Barron, Edward Kung, and Davide Proserpio, “Research: When Airbnb Listings in a City Increase, So Do Rent Prices,” *HARVARD BUSINESS REVIEW*, April 17, 2019, available at: <https://hbr.org/2019/04/research-when-airbnb-listings-in-a-city-increase-so-do-rent-prices>.

<sup>20</sup> <https://www.Airbnb.com/host-protection-insurance>.

<sup>21</sup> [https://www.Airbnb.com/professional\\_photography](https://www.Airbnb.com/professional_photography).

place.”<sup>22</sup> Airbnb offers “Airbnb Plus”— “a new selection of only the highest quality homes.”<sup>23</sup> In order to be accepted, the STR operator must permit Airbnb to “complet[e] a home visit with a third-party inspector”<sup>24</sup> and pass “a 100+ point quality inspection[.]”<sup>25</sup>

Airbnb has a Data Science and Analytics Department, which handles the massive amount of data that Airbnb collects from both guests and STR operators. The Department, for example, has developed “a machine learning model that learns our hosts’ preferences for accommodation requests based on their past behavior,” and Airbnb uses the “billions of data points” that it collects to suggest price points to its hosts.<sup>26</sup> Using host addresses, Airbnb can conduct sophisticated analyses of optimal search results, based on guests’ searches and their ultimate booking decision.<sup>27</sup> Airbnb conducts “offline” tests of host data—location, price,

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<sup>22</sup> <https://www.Airbnbforwork.com/resources/the-Airbnb-dashboard-your-travel-management-success-tool?CO=N-CO-3-2-1&leadId=0>.

<sup>23</sup> <https://www.Airbnb.com/plus>.

<sup>24</sup> <https://www.Airbnb.com/help/article/2195/Airbnb-plus-program-terms-and-conditions>.

<sup>25</sup> <https://www.Airbnb.com/plus>.

<sup>26</sup> Ellen Huet, “How Airbnb Uses Big Data And Machine Learning To Guide Hosts To The Perfect Price,” FORBES (June 5, 2015), at <https://www.forbes.com/sites/ellenhuet/2015/06/05/how-Airbnb-uses-big-data-and-machine-learning-to-guide-hosts-to-the-perfect-price/#1b3fda206d49>.

<sup>27</sup> Maxim Charkov, Riley Newman, & Jan Overgoor, “Location Relevance at Airbnb” (May 1, 2013), at: <https://medium.com/Airbnb-engineering/location-relevance-at-Airbnb-12c004247b07>.

listing style, architecture—to develop the search tools that personalize results for the website’s users online.<sup>28</sup>

Airbnb’s payment processing is done “in-house” through a wholly owned subsidiary. *Airbnb v. City of Boston*, 2019 WL 1981043, at \*1. This payment processing system has evolved, so that it is now able to handle complex currency transactions in the 191 countries in which Airbnb operates.<sup>29</sup> Airbnb’s payment operation also uses hosts’ location to collect and remit occupancy taxes in 400 taxing jurisdictions around the world.<sup>30</sup>

So Airbnb is not a mere “platform” for the independent exchanges of buyers and sellers. It actively shapes the market for STR rentals, and brokers the commercial STR transactions from which it profits directly.

### **III. The Panel Decision Does Not Conflict With Circuit or Supreme Court Law.**

The STR Brokers argue that in prohibiting them from carrying out illegal booking transactions, the Ordinance violates Section 230 by “penaliz[ing] the Platforms if they fail to screen third-party rental listings that are not registered and compliant with local law before guests ‘book’ reservations for those listings.”

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<sup>28</sup> See, e.g., Mihajlo Grbovic *et al.*, “Listing Embeddings in Search Ranking” (March 13, 2018), at <https://medium.com/Airbnb-engineering/listing-embeddings-for-similar-listing-recommendations-and-real-time-personalization-in-search-601172f7603e>.

<sup>29</sup> Angela Zhu & Karen Kim, Airbnb Payments Engineering, “Scaling Airbnb’s Payment Platform” (Sept. 12, 2016), at: <https://medium.com/airbnb-engineering/scaling-airbnbs-payment-platform-43ebfc99b324>.

<sup>30</sup> “Airbnb collects landmark \$1 Billion in hotel and tourism taxes” (December 6, 2018 at: <https://press.airbnb.com/en-us/airbnb-collects-landmark-1-billion-in-hotel-and-tourism-taxes-2/>).

Appellants’ Petition for Rehearing and Rehearing *En Banc* (“App. Pet.”), at 2. The panel correctly rejected this argument.

The Ordinance does not “penalize” the STR Brokers for a “failure to screen” but for participating in an unlawful economic transaction. No court has held that the regulation of an economic transaction—including one that is consummated online—“treats” the provider of an interactive computer service as a “publisher” merely because that economic transaction came about as the result of published content. Instead, this and other courts have made clear that regulating economic transactions and contracts is distinct from regulating an interactive computer service provider as a publisher. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009) (holding company liable as “counterparty to a contract . . . does not seek to hold Yahoo liable as a publisher or speaker of third-party content”); *City of Chicago, Ill. v. Stubhub, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (Section 230 irrelevant to ordinance imposing tax on resale of tickets at premium since ordinance “does not depend on who ‘publishes’ any information or is a ‘speaker’”); *Airbnb v. City of Boston*, 2019 WL 1981043, at \*7.

The fact that purely economic regulation might be a “but for” cause of the website’s decision to engage in subsequent publishing functions—such as monitoring listings or deciding not to publish them—does not mean that Section 230 is implicated. *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016) (fact that online posting was a “but for” cause of rape resulting from response to it did not shield company from “duty to warn” liability, since “[p]ublishing activity is a but-for cause of just about everything Model Mayhem is involved in . . . [i]t is an internet publishing business”). To hold otherwise would expand Section 230’s reach far beyond what Congress intended. *Id.*; *Homeaway.com*, 918 F.3d at 682.

As the panel recognized, third-party listings *do not contain the addresses of the units for rent as a matter of policy*. *Homeaway.com*, 918 F.3d at (“[T]he 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.”). The STR Brokers could “scrutinize” their third-party listings as much as they wanted, but they would not find the information necessary to determine whether the listing is registered. Airbnb does not publish host addresses. It maintains that information *offline* and performs complex analyses of the information to establish optimal price points, identify areas of marketing and growth, and remit occupancy taxes. Airbnb’s Data Science and Analytics Department is more than able to perform the small-batch data comparison between host addresses and Santa Monica registry units that the Ordinance requires.

An STR operator listing on Airbnb’s site is assured that “[y]our listing’s address will only be shown to guests with a confirmed reservation. In public search results, we only show an approximate location for your listing.”<sup>31</sup> In fact, Airbnb *prohibits* anyone using the public portions of the website from posting any “[c]ontent that is sufficient to identify a listing’s location[.]”<sup>32</sup> Instead, a host provides Airbnb with the listing’s actual address when it is creating the listing.<sup>33</sup> The precise address and identifying contact information does not show up on the website until the booking is complete. This policy may be animated by Airbnb’s

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<sup>31</sup> “Is my listing’s address visible on Airbnb?” at <https://www.Airbnb.com/help/article/1502/is-my-listing-s-address-visible-on-Airbnb>.

<sup>32</sup> “What is Airbnb’s Content Policy?” at <https://www.Airbnb.com/help/article/546/what-is-Airbnb-s-content-policy>.

<sup>33</sup> *See* “How do I edit my listing’s address or map location?” at <https://www.Airbnb.com/help/article/478/how-do-i-edit-my-listing-s-address-or-map-location>.

concern for “personal safety risk[s] to an Airbnb community member.”<sup>34</sup> More likely, Airbnb and other STR Brokers do it so that they remain in control of the booking from which they profit.

The conduct at issue—comparing addresses contained in two data sets to determine overlap—thus takes place outside of any “publication” on the interactive computer service that the STR Brokers claim gives them expansive CDA immunity. *See Internet Brands*, 824 F.3d at 853 (“actual knowledge . . . from an outside source of information” took claims outside of Section 230); *Roommates.com*, 521 F.3d at 1171 (noting that to “provide immunity every time a website uses data initially obtained from third parties would eviscerate [the statute]”).

The STR Brokers and their *amici* take issue with the panel’s treatment of the “distinct, internal, and nonpublic” data that the Ordinance requires them to compare to Santa Monica’s registry. The STR Brokers argue that by requiring them to review host addresses (which are not part of the host listing) and compare them to the City’s registry, the Ordinance “compels monitoring of third-party content, which even the panel acknowledged was a protected publisher function.” App. Pet., at 16. But that misrepresents both the panel’s decision and this Circuit’s interpretation of Section 230. The panel recognized that while making this comparison “is ‘monitoring’ third-party content in the most basic sense, such conduct cannot be fairly classified as ‘publication’ of third-party content” under Section 230. *Homewaway.com*, 918 F.3d at 682-83. And in this Circuit, Section 230 applies only to information furnished “under circumstances in which a reasonable person in the position of the service provider . . . would conclude that

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<sup>34</sup> <https://www.Airbnb.com/help/article/546/what-is-Airbnb-s-content-policy>.



the information was provided for publication on the Internet.” *Batzel v. Smith*, 333 F.3d 1018, 1032-34 (9th Cir. 2003). Pre-booking “review” of host addresses that are provided under an express promise that they will not be made public does not implicate any “publisher” role.

The STR Brokers’ other argument is that the Ordinance “in operation and effect . . . forces [them] to *remove* third-party content.”” *Homeaway.com*, 918 F.3d at 683. Their argument is based on what they claim will be their business reaction to having a website that is “chock-full” of illegal STRs that cannot be booked. *Id.* But there is no precedent for holding that a law regulating a purely economic transaction “treats” a party to that transaction as a Section 230 “publisher” because of the party’s un compelled business decision to remove or edit content in response.

The STR Brokers argue that the panel decision engages in “formalistic preemption analysis” by distinguishing between their role as “publishers” and their role in consummating illegal economic transactions. *See* App. Pet., at 9. But that distinction is inherent in Section 230. The City is not using its regulation of illegal STR bookings as some indirect way to regulate the content of third-party STR listings, and thus to “circumvent” Section 230. *Cf.* Pet. App., at 9-10. Stopping illegal STR bookings is the whole point of the endeavor, and the City “cares not a whit about” the decisions STR Brokers make as publishers of listings. *Airbnb*, 217 F.Supp.3d at 1074. The claim that CDA preemption follows from the Supreme Court’s decision in *National Meat Association v. Harris*, 565 U.S. 452, 464 (2012), in which California regulated the sale of slaughtered meats as an indirect way to regulate slaughtering practices, is thus misplaced.<sup>35</sup>

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<sup>35</sup> In addition to this obvious reason for distinguishing the case, the Federal Meat Inspection Act contains a broad *field preemption* provision, barring states from enacting any marking, ingredient, or labeling requirements “in addition to, or

Next, the STR Brokers argue that because they may decide to restructure their websites in response to Santa Monica’s regulation, their participation in illegal bookings is protected. Their claim that “the CDA preempts local laws that regulate ‘features that are part and parcel of the overall design and operation of a [a] website’” and thus preempts the Ordinance because “booking services are integral to the Platforms’ design and operation as publishers of third-party content” is overstated and incompatible with this Court’s precedent. *See* App. Pet., at 12. The case on which the STR Brokers base this argument, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016), held only that Backpage.com’s “choices about what content can appear on the website and in what form”—its acceptance of anonymous postings and payment and its acceptance of modified search terms like “brly legal” for example—were part of its publisher’s role and did not permit liability for third-party content facilitating sex trafficking.

The Ninth Circuit has made clear that a website’s “overall design and operation” *can* take the website outside of Section 230 immunity, as when it structures the website to solicit discriminatory rental criteria. *Roommates.com*, 521 F.3d at 1164. In that case, the website’s owner was held liable for its own actions, not for acting as a publisher, just as the Ordinance holds STR Brokers liable for their participation in illegal booking transactions, not for publishing STR listings. The First Circuit did not hold that Section 230 immunized Backpages.com from

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different than, those made under this chapter.” 21 U.S.C. § 678. Section 230, by contrast, is expressly intended to co-exist with state laws that impact conduct that takes place online but does not conflict with Section 230. 47 U.S.C. § 230(e)(4). The same problem dooms the STR Brokers’ attempt to create an inter-circuit conflict out of the ERISA preemption found in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2017).

liability for actually *booking transactions* for underage prostitutes and taking a cut of the money paid by the john. Nor does Section 230 reach the regulation of illegal STR bookings here.

Ultimately, the STR Brokers' arguments betray a lack of faith in the "marketplaces" that they have created. The only purpose of listing STRs on Airbnb and similar sites is so that they will be rented. If it is clear to hosts that they do not stand to make any money by listing their illegal STRs because the booking transaction will not go through, there is no reason why they would continue to do so.

#### **IV. Section 230 Is Not A Blanket Shield for "E-Commerce."**

In the end, the STR Brokers are attempting to expand Section 230 immunity radically by invoking "broad statements of immunity" rather than performing "a careful exegesis of the statutory language." *Barnes*, 570 F.3d at 1100. There is nothing in the legislative history of the CDA or in its language demonstrating an intent to shield economic transactions from regulation "magically" when they are consummated online. *See Roommates.com*, 521 F.3d at 1164.

Santa Monica is not "deputizing [the STR Brokers] to enforce local laws requiring content removal" (Internet Assoc. Br., at 18), it is regulating their direct participation in illegal economic transactions, just as a bricks-and-mortar rental broker would be. The STR Brokers' profitable "e-commerce" business models are based on participating in economic transactions that evade the local regulations that their traditional competitors abide by. But this is not something that Congress intended to enable through Section 230.

That the panel's ruling will require STR Brokers to comply with "potentially thousands of local laws across the country" (App. Pet., at 18) is simply the result of the STR Brokers' national (indeed global) business model. Other companies—Marriott and Hyatt, for example—have found ways to comply with local laws

across the globe, and the STR Brokers' exemplary engineering capacity should enable them to do the same. Of course, if Airbnb and similar companies believe that they are entitled to compete under special rules that ignore democratically adopted zoning regulations, they may petition Congress or state governments for that right. But they may not use Section 230's decades-old, "Good Samaritan" protection of website "publishers" to achieve that end.

### CONCLUSION

The panel should deny the petition for rehearing, and the Court should deny the petition for rehearing *en banc*.

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Respectfully submitted,

By: /s/Paul L. More  
Richard G. McCracken  
Paul L. More  
McCRACKEN, STEMERMAN &  
HOLSBERRY, LLP  
595 Market Street, Suite 800  
San Francisco, CA 94105  
Telephone: (415) 597-7200  
Facsimile: (415) 597-7201

*Attorneys for Amicus Curiae UNITE  
HERE International Union*

**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

By: */s/Paul L. More*  
Richard G. McCracken  
Paul L. More  
McCRACKEN, STEMERMAN &  
HOLSBERRY, LLP  
595 Market Street, Suite 800  
San Francisco, CA 94105  
Telephone: (415) 597-7200  
Facsimile: (415) 597-7201

*Attorneys for amicus curiae UNITE  
HERE International Union*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 11, 2019

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Dated: July 11, 2019

Respectfully submitted,

/s/Katherine Maddux  
Katherine Maddux