

Case No. 18-55367

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HOMEAWAY.COM, INC. AND AIRBNB, INC., *Plaintiffs-Appellants*,

v.

CITY OF SANTA MONICA, *Defendant-Appellee*,

**On Appeal from the United States District Court
for the Central District of California,
Nos. 2:16-cv-06641-ODW (AFM), 2:16-cv-06645 ODW (AFM)**

**BRIEF OF *AMICI CURIAE* EBAY INC., GLASSDOOR, INC., LYFT, INC.,
OFFERUP INC., TASKRABBIT, INC., THUMBSTACK, INC., UBER
TECHNOLOGIES, INC., AND UPWORK INC. IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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<i>Doe No. 14 v. Internet Brands, Inc.</i> , 824 F.3d 846 (9th Cir. 2016)	17
<i>Doe v. MySpace, Inc.</i> , 528 F.3d 413 (5th Cir.), <i>cert. denied</i> , 555 U.S. 1031 (2008)	15
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<i>Jones v. Dirty World Entm't Recordings, LLC</i> , 755 F.3d 398 (6th Cir. 2014)	13
<i>Jurin v. Google Inc.</i> , 695 F. Supp. 2d 1117 (E.D. Cal. 2010)	13
<i>Kimzey v. Yelp! Inc.</i> , 836 F.3d 1263 (9th Cir. 2016)	6, 14
<i>M.A. v. Village Voice Media Holdings LLC</i> , 809 F. Supp. 2d 1041 (E.D. Mo. 2011)	15

Perfect 10, Inc. v. CCBill LLC,
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Zeran v. Am. Online, Inc.,
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State Cases

Barrett v. Rosenthal,
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Doe II v. MySpace Inc.,
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Hill v. StubHub, Inc.,
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47 U.S.C. § 230(b)8

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Rules

Fed. R. App. P. 29(a)(4)(d)4

Fed. R. App. P. 29(a)(4)(e)4

Other Authorities

About Tradesy, TRADESY, <https://www.tradesy.com/about/>;13

Internet Association, *Here They Come: A Look At The Future Of Cities In The Internet Age*, 8 (2018),
https://cdn1.internetassociation.org/wp-content/uploads/2018/01/IA-NLC_Here-They-Come-The-Future-Of-Cities-In-The-Internet-Age.pdf 12

Nextdoor, CRUNCHBASE
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Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 39 (2010),
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Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 40 (2010),
<http://www.oecd.org/dataoecd/49/4/44949023.pdf> 11

Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 40 (2010),
<http://www.oecd.org/dataoecd/49/4/44949023.pdf> 10

Pew Research, *Gig Work, Online Selling and Home Sharing* (2016),
http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/11/17161707/PI_2016.11.17_Gig-Workers_FINAL.pdf 12

David Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, Wash. Post (Aug. 27, 2015) 9

PricewaterhouseCoopers, *The sharing economy – sizing the revenue opportunity* (2015),
<http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-eizing-the-revenue-opportunity.html> 13

San Gabriel Valley Tribune (Nov. 6, 2017),
<https://www.pasadenastarnews.com/2017/11/06/report-airbnb-restrictions-could-cost-la-thousands-of-jobs-and-millions-in-revenue/> 21

U.S. Carma Hogue, *Government Organization Summary Report: 2012*, United States Census of Governments, 1 (Sept. 26, 2013),
https://www2.census.gov/govs/cog/g12_org.pdf 7

Devin Wenig, *The Sharing Economy Pays it Forward* (Mar. 24, 2016), <https://www.ebayinc.com/stories/news/the-sharing-economy-pays-it-forward/> 10

Kevin Wright, *Along for the ride: Tracking the sharing economy’s impact on GDP*, Ten Magazine, The Federal Reserve Bank of Kansas City (November 15, 2017), <https://www.kansascityfed.org/publications/ten/articles/2017/fall/ri-desharing> 11

Yann Zopf, *How Can Cities Leverage The Potential of the ‘Sharing Economy’?* (quoting Cheryl Martin, Head of Industries, World Economic Forum), <https://www.weforum.org/press/2017/12/how-can-cities-leverage-the-potential-of-the-sharing-economy/> 21

Legal Treatises

Ian C. Ballon, *Defamation, Torts and the Good Samaritan Exemption* (47 U.S.C.A. § 230), E-Commerce and Internet Law 2d Ed., § 37.05[3][B][ii] (West 2018)..... 16

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1, *Amici Curiae* eBay Inc., Glassdoor, Inc., OfferUp Inc., Thumbtack, Inc., Uber Technologies, Inc., and Upwork Inc. each certify that it is not a subsidiary or affiliate of any other entity, and no publicly held corporation owns 10% or more of its stock. *Amicus Curiae* Lyft, Inc. discloses that it has no parent corporation and that Rakuten, Inc. is a publicly held corporation that owns 10% or more of its stock. TaskRabbit, Inc. discloses that it is a wholly owned subsidiary of Fixit Investments II B.V. and that no publicly held corporation owns 10% or more of its stock.

Dated: April 25, 2018

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eBay Inc., Glassdoor, Inc., OfferUp Inc.,
TaskRabbit, Inc., Thumbtack, Inc., Uber
Technologies, Inc., and Upwork Inc.

INTERESTS OF AMICI CURIAE

Amici curiae operate online platforms that facilitate third-party transactions. eBay Inc. (“eBay”) operates the popular website www.ebay.com, an online marketplace that allows private sellers to list goods they wish to sell through an auction or at a fixed price. eBay currently has over 170 million active buyers and 1 billion live listings across 190 markets. eBay’s online marketplace gives sellers the platform, solutions, and support they need to grow their businesses and thrive.

Glassdoor, Inc. (“Glassdoor”) operates a website that combines all the latest jobs with millions of reviews and insights to make it easy for people to find a job that is uniquely right for them. As a result, Glassdoor helps employers hire truly informed candidates at scale through effective recruiting solutions like job advertising and employer branding products. Launched in 2008, Glassdoor provides reviews and insights for 770,000 companies in more than 190 countries.

Lyft, Inc. (“Lyft”) was founded in June 2012 by Logan Green and John Zimmer to improve people’s lives with the world’s best transportation. Lyft is one of the fastest growing rideshare companies in the U.S. and is available to 95 percent of the U.S. population as well as in Ontario, Canada. Lyft is renowned by drivers and passengers for its safe and friendly experience, and its commitment to effecting positive change for the future of our cities.

OfferUp Inc. (“OfferUp”), founded in 2011, provides a mobile marketplace that allows users to buy and sell items locally. OfferUp seeks to provide the simplest, easiest, and most trusted way for individuals to connect and purchase the items they need or sell the items they no longer need. OfferUp users include new parents looking for bargains on quality children’s clothing, homeowners selling excess items to de-clutter a basement or garage, people looking for a way to make some extra money as a side business, students seeking great deals, retirees downsizing their possessions, and many more. OfferUp offers its marketplace through iOS, Android, and web interfaces, and enables its millions of active users to sell billions of dollars in goods every year.

TaskRabbit, Inc. (“TaskRabbit”), founded in 2008, is a technology platform connecting clients who seek high quality and reliable on-demand home services with local entrepreneurs called Taskers. Taskers earn meaningful income through the TaskRabbit platform on their own terms – they decide what types of tasks they wish to perform, set their own rates and availability and work directly with the clients that hire them to scope out the task.

Thumbtack, Inc. (“Thumbtack”), founded in 2008, helps users find local service professionals with specialized skills for projects via its app and website, www.thumbtack.com. Using Thumbtack, people can search for landscapers, nutritionists, DJs, swimming instructors, and virtually any other local services

provider. Through Thumbtack, millions of users each year are finding professionals to help them complete projects in nearly 1,000 categories across all 50 states.

Uber Technologies, Inc. (“Uber”), founded in 2008, is a San Francisco-based technology company. It has developed a smartphone application that enables users of the application to request ridesharing services from independent, third-party transportation providers.

Upwork Inc. (“Upwork”) provides a freelancing website, www.upwork.com, that helps businesses and highly-skilled independent professionals connect. Users create and post their own business profiles, project posts, pricing proposals, and service contracts, and Upwork enables users to find their right match without the limitations of geography. Upwork provides independent professionals located outside major metropolitan areas with access to interesting clients and rewarding work, and at the same time provides businesses ready access to a larger talent pool to find individuals with the specialized skills they need to compete (which sometimes are lacking in smaller markets). Upwork’s website also features a chat and communication system and a vibrant community forum for independent professionals and other small business owners to share resources and tips.

The cornerstone of internet commerce is section 230 of the Communications Decency Act (“CDA”), which was enacted to promote the development of the

internet by immunizing websites from liability premised on content originating with a third party. *See* 47 U.S.C. § 230(c)(1). The CDA has allowed platform providers like *amici* to flourish and innovate by providing millions of users, individuals and small businesses access to services that have transformed how people work, travel, and live. *Amici* have a substantial interest in this appeal because local laws that attempt to create a backdoor for content-based liability (here, by purporting to regulate online “booking transactions”) not only contravene the CDA’s express terms, but harm internet commerce and undermine congressional policies for the reasons stated in this brief.¹

I. SUMMARY OF ARGUMENT

Congress enacted the CDA to promote the development of internet commerce and allow online services to flourish by making clear that platforms cannot be held liable for content posted by users. *See* 47 U.S.C. § 230(b)-(c).

This worked. Relying on the CDA’s broad protections, platforms like Airbnb, Homeaway.com, and *amici* have unlocked innovation and become important economic drivers. Their services have enabled individuals to find new ways to earn a living and balance work-life demands that do not exist in many

¹ Both parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(4)(d). 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 preparing or submitting this brief; and no person other than *amici* contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(e).

brick-and-mortar businesses. And they have provided users access to sharing and monetizing resources like housing. By reducing transaction costs and providing services at scale, platforms have displaced traditional barriers to entry for new businesses posed by geographic and financial constraints. Consistent and broad application of the CDA has enabled online activities on platforms like *amici* to fuel commercial development based on collaboration and decentralized networks, helping to drive economic growth.

Local ordinances that attempt to penalize platforms for facilitating internet “transactions,” like the one the City of Santa Monica (the “City”) seeks to enforce, run afoul of the CDA because they effectively require platforms to police their sites based on objectionable content (here, listings of unlicensed properties). As this Court explained, section 230 of the CDA “shields from liability all publication decisions, whether to edit, to remove, or to post, with respect to content generated entirely by third parties,” and insulates both “affirmative acts of publication [and] . . . the refusal to remove . . . material.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 & n.11 (9th Cir. 2009).

In this case, the City’s ordinance penalizes “hosting platforms” for “complet[ing]” unlawful “booking transactions.” Santa Monica Mun. Code §§ 6.20.050, 6.20.100. The district court erroneously ruled that the ordinance does not implicate the CDA on the theory that it does not on its face regulate *publishing*

activities by requiring platforms to police listings at the point of transaction. *See Homeaway.com, Inc. v. City of Santa Monica*, Case Nos. 2:16-cv-06641-ODW (AFM), 2:16-cv-06645-ODW (AFM), 2018 WL 1281772, at *5-6 (C.D. Cal. Mar. 9, 2018) (stating that the ordinance “regulates conduct, not speech”). But the ordinance’s purported regulation of *conduct* actually targets *content* provided by third parties – in this case, user submissions republished by Airbnb and Homeaway.com – by penalizing appellants for failing to monitor and remove unlawful user listings, which is quintessentially a *publishing* activity. The ordinance seeks to hold these platforms liable for evaluating and removing that content as it flows through transactions. Accordingly, the lower court gave an impermissibly narrow reading to the CDA, which this Court has held should be construed broadly. *See Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1269 (9th Cir. 2016). The City’s ordinance cannot escape preemption by the CDA by “creative” drafting (*id.*) because “what matters is not the name of the cause of action” or activity but whether it “inherently . . . treat[s] the defendant as the ‘publisher or speaker’ of content provided by another.” *Barnes*, 570 F.3d at 1102. Here, the ordinance would penalize appellants for failing to monitor and remove unlawful user listings, which is quintessentially a *publishing* activity. Where, as here, a cleverly worded regulation purports not to regulate content, it is nonetheless preempted by the CDA

where inevitably it is focused on a platform's publication (e.g., content-monitoring), and refusal to remove, third-party material.

The City's ordinance is also bad policy. If upheld, it would put website companies – both small and large – in the position of interpreting and enforcing laws on behalf of local jurisdictions. Such platforms are ill-equipped to police every form of speech that may or may not contravene tens of thousands of potentially conflicting municipal regulations.² Doing so necessarily would have a chilling effect on speech – as platforms would have an incentive to err on the side of over-regulation to avoid liability. It would also deter innovation by dramatically increasing costs for existing platforms and barriers to entry for new ones, undermining the CDA's core policy objective of promoting internet commerce. Platforms that facilitate user transactions could be forced to scale back services, and potential new entrants will be deterred from starting new businesses. This would ultimately harm the thousands of small businesses empowered by online and mobile platforms *and* the millions of users who rely on those same platforms to build lawful businesses that contribute to the communities around them. Without the shield Congress deliberately provided in the form of the CDA, some platforms and the small businesses that rely on them would be forced out by local

² Per Census data, there are 19,519 municipalities in the U.S. Carma Hogue, *Government Organization Summary Report: 2012*, United States Census of Governments, 1 (Sept. 26, 2013), https://www2.census.gov/govs/cog/g12_org.pdf.

enforcement actions and the crushing cost of litigation. Further, the future growth of internet commerce—the very thing that the CDA intended to promote—would be stunted as potential new entrants opt not to incur these substantial costs.

Amici respectfully request that the Court reverse the lower court ruling.

II. ARGUMENT

A. Congress Enacted the CDA To Promote a Vibrant Free Market for e-Commerce and Online Interaction—Policy Objectives That Remain Important Today

Internet commerce exists in large part because of section 230 of the CDA, which Congress enacted to “promote the continued development of the internet and other interactive computer services”; and “preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b). The statute’s statement of findings and policy expresses the fundamental belief that the freedom of enterprise and development unhindered by governmental interference creates diversity in innovation and opportunities. *See id.* §§ 230(a)-(b). By shielding websites from liability originating from third-party content, Congress also sought to encourage, and not penalize, self-regulation and “voluntary monitoring” by intermediaries. *Barnes*, 570 F.3d at 1110-11; *see also Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330-31 (4th Cir. 1997) (holding that the CDA reflects Congress’s intent “not to deter harmful online speech through the separate route of

imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages”); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 56 (2006) (observing that the “provisions of section 230(c)(1), conferring *broad immunity* on internet intermediaries, are themselves a strong demonstration of legislative commitment to the value of maintaining a free market for online expression” (emphasis added)).³

Consistent application of the broad immunity provided under the CDA has enabled extraordinary commercial growth, innovation, and collaboration.⁴ “Internet

³ To further the goals articulated by Congress, section 230 mandates that:

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

47 U.S.C. § 230(c)(1). Section 230 further states that:

No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

Id. § 230(2)(3). The language by its terms applies to local ordinances.

⁴ See David Post, *A bit of Internet history, or how two members of Congress helped create a trillion or so dollars of value*, Wash. Post (Aug. 27, 2015), <https://www.washingtonpost.com/news/volokhconspiracy/wp/2015/08/27/a-bit-of-internet-history-or-how-two-members-of-congress-helped-create-a-trillion-or-so-dollars-of-value> (reporting that “[v]irtually every successful online venture that emerged after 1996 — including all the usual suspects, viz. Google, Facebook, Tumblr, Twitter, Reddit, Craigslist, YouTube, Instagram, eBay, Amazon — relies in large part (or entirely) on content provided by their users, who number in the hundreds of millions, or billions” and that “[t]he potential liability that would arise from allowing users to freely exchange information with one another, at this scale, would have been astronomical, and it is impossible . . . to imagine, say, an

intermediaries, in particular e-commerce platforms . . . [are] enablers of the creation of micro-enterprises.”⁵ Facilitating user transactions at the scale offered by platforms like *amici* has led to “economic empowerment and social change.”⁶ For example, websites like Airbnb and Homeaway.com give travelers more choices in accommodations while providing homeowners (often individuals whose sole asset is their home) ways to supplement their income or defray the costs of homeownership. eBay and OfferUp have enabled ordinary users and entrepreneurs to start businesses without capital, loans, or other costs that impede competition in the physical world. Websites like Upwork, Thumbtack, TaskRabbit, and Glassdoor help small businesses, sole proprietors, freelancers, and professionals to find work opportunities that might not otherwise be available to them. And ride hailing

investor providing funds for any of these ventures in a world without Section 230”).

⁵ Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 40 (2010), <http://www.oecd.org/dataoecd/49/4/44949023.pdf> (“[O]ver one million people ran one-person firms online in the United States in mid 2009. . . 120[,]000 people sell full time on eBay, 500,000 do so part time, and 500,000 earn advertising revenues from blogs. . . .”).

⁶ Devin Wenig, *The Sharing Economy Pays it Forward* (Mar. 24, 2016) (explaining that marketplaces “are driving utilization and using technology to unlock hidden value—the hidden value in unused inventory, empty rooms and shared transportation”), <https://www.ebayinc.com/stories/news/the-sharing-economy-pays-it-forward/>.

mobile applications allow consumers to obtain on-demand access to transportation, while providing drivers with flexible ways to earn money.

Platforms like *amici* have also enabled broad market participation and access at a scope that exceeds traditional economic models.⁷ “Internet intermediaries lower the barriers to starting and operating businesses, particularly small businesses, and help spur innovation”⁸ For example, millions of users on Thumbtack each year are finding professionals to help them complete projects in nearly 1,000 categories across all 50 states. Similarly, Upwork, a freelancing website, has millions of registered users offering over 5,000 specialized skills. Upwork has also contributed to local economic growth by enabling small businesses outside of major metropolitan areas to find clients and obtain the skills they need to compete, whereby 96% of its transactions have occurred between

⁷ See, e.g., Kevin Wright, *Along for the ride: Tracking the sharing economy’s impact on GDP*, Ten Magazine, The Federal Reserve Bank of Kansas City (November 15, 2017) (“Industry analysts say the popularity of sharing services has grown because they are simple to use and provide customers options that traditional industries have made more difficult to obtain or use”), <https://www.kansascityfed.org/publications/ten/articles/2017/fall/ridesharing>; Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 40 (2010), <http://www.oecd.org/dataoecd/49/4/44949023.pdf> (“[O]nline platforms are more efficient at matching supply and demand than their offline counterparts.”).

⁸ Organization for Economic Co-operation and Development, *The Economic and Social Role of Internet Intermediaries*, 39 (2010), <http://www.oecd.org/dataoecd/49/4/44949023.pdf>.

parties more than fifty miles apart. Likewise, Glassdoor assists employers and candidates in making informed hiring and career decisions by providing effective recruiting solutions, including job advertising, reviews, and other insights for more than 770,000 companies spanning over 190 countries. Further, OfferUp's website provides a mobile marketplace that allows millions of users to buy and sell items locally.

Current trends confirm that the CDA's policy objectives remain valid today and are backed by hard numbers. A 2016 Pew Research Center report found that in the context of the freelance economy "nearly one-in-ten Americans (8%) have earned money in the last year using digital platforms" to find work, "nearly one-in-five Americans (18%) have earned money in the last year by selling something online, while 1% have rented out their properties on a home-sharing site," and of these users combined "some 24% of American adults have earned money in the 'platform economy' over the last year."⁹ Another study estimated that platform-

⁹ Pew Research, *Gig Work, Online Selling and Home Sharing* (2016), http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/11/17161707/PI_2016.11.17_Gig-Workers_FINAL.pdf. See also Internet Association, *Here They Come: A Look At The Future Of Cities In The Internet Age*, 8 (2018), https://cdn1.internetassociation.org/wp-content/uploads/2018/01/IA-NLC_Here-They-Come-The-Future-Of-Cities-In-The-Internet-Age.pdf ("Nationally, the internet sector contributed approximately \$1 trillion, or about 6 percent, of US GDP, about 3 million jobs (3 percent), and over 231,000 establishments (aka businesses) (3.1 percent) in 2014.").

based markets could generate global revenues up to \$335 billion by 2025.¹⁰ This evidence confirms that platform-enabled services contribute to economic growth, improve lives, and promote internet commerce.¹¹ These successes caution against scaling back protections that are expressly aimed at future growth. *See, e.g., Jones v. Dirty World Entm't Recordings, LLC*, 755 F.3d 398, 408 (6th Cir. 2014) (“The protection provided by § 230 has been understood to merit expansion. Congress has extended the protection of § 230 into new areas. . . . And courts have construed the immunity provisions in § 230 broadly.”); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010) (“The purpose of the CDA is to encourage open, robust, and creative use of the internet.”).

B. The District Court’s Ruling Should Be Reversed Because It Narrowly Construes *Publishing* Activities by Penalizing Appellants for Failing to Enforce a Municipal Regulation and Remove User Content

The lower court erroneously ruled that the City’s ordinance “falls outside the scope of the CDA protections” because it does not on its face purport to regulate

¹⁰ PricewaterhouseCoopers, *The sharing economy – sizing the revenue opportunity* (2015), <http://www.pwc.co.uk/issues/megatrends/collisions/sharingeconomy/the-sharing-economy-eizing-the-revenue-opportunity.html>.

¹¹ The CDA continues to foster a myriad of new platforms offering diversity in resources and discourse. These include platforms ranging from peer-to-peer marketplaces for luxury designer goods (e.g., Tradesy) to online neighborhood watch groups (e.g., Nextdoor). *See* About Tradesy, TRADESY, <https://www.tradesy.com/about/>; Nextdoor, CRUNCHBASE <https://www.crunchbase.com/organization/nextdoor>.

publishing activities. *Homeaway.com*, 2018 WL 1281772, at *5-6. The district court's holding fails to heed this Court's directive that "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a publisher or speaker. If it does, section 230(c)(1) precludes liability." *Barnes*, 570 F.3d at 1102. Put differently, the district court erred because it did not look beyond the ordinance's face as this Court's precedent requires. Because the ordinance in its operation and effect imposes liability on websites like Airbnb and Homeaway.com by virtue of their status as a "hosting platform" and publisher of rental listings that the City deems unlawful, the ordinance violates the CDA.

This Court has construed the CDA to broadly immunize platform providers from liability arising from content originating with third-party users. *See Barnes*, 570 F.3d at 1101 (holding that "the language of the statute does not limit its application to defamation cases," and that the CDA's scope applies to "many causes of action [that] might be premised on the publication or speaking of what one might call 'information content'"); *Roommates.com*, 521 F.3d at 1170-71 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230."); *Kimzey*, 836 F.3d at 1270 (broadly construing CDA immunity to apply to Yelp's rating system "which is based on rating inputs from third parties"). Although the

lower court purported to distinguish conduct from content, numerous courts have recognized that *conduct*, on internet and mobile platforms, is often inextricably intertwined with *content*, and thus efforts to impose liability on online businesses for alleged user misconduct (or to require those businesses to prevent such conduct) often amount to treating a platform as the publisher or speaker of user content.¹² That is exactly what has happened here, with Santa Monica attempting to

¹² See, e.g., *Doe v. MySpace, Inc.*, 528 F.3d 413, 420 (5th Cir.), *cert. denied*, 555 U.S. 1031 (2008) (holding MySpace immune for failing to implement measures that would have prevented a minor from being contacted by a predator where the plaintiff's "allegations are merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace's role as a publisher of online third-party-generated content"); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123-29 (N.D. Cal. 2016) (dismissing plaintiffs' claim under the Anti-Terrorism Act, 18 U.S.C. § 2333(a), with prejudice, holding that (1) liability for providing an account amounts to an allegation that Twitter failed to prevent ISIS from disseminating content through the Twitter platform; and (2) Twitter acted as a publisher of Direct Messages sent by users because the term *publisher* under the CDA should be broadly construed), *aff'd on other grounds*, 881 F.3d 739 (9th Cir. 2018); *M.A. v. Village Voice Media Holdings LLC*, 809 F. Supp. 2d 1041, 1052-53 (E.D. Mo. 2011) (holding claims by the victim of sex trafficking against a provider of sexually oriented classified ads preempted); *Inman v. Technicolor USA, Inc.*, Civil Action No. 11-666, 2011 WL 5829024, at *7 (W.D. Pa. Nov. 18, 2011) (granting eBay's motion to dismiss claims for strict product liability, breach of the implied warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, negligence *per se* arising from defendants' alleged violation of the Toxic Substances Control Act, 15 U.S.C. §§ 2601 *et seq.* and various related regulations, and breach of express warranty based on an eBay seller's sale of vacuum tubes that allegedly injured the plaintiff by causing mercury poisoning because "the alleged sale of vacuum tubes in this case was facilitated by communication for which eBay may not be held liable under the CDA"); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967-69 (N.D. Ill. 2009) (granting defendant's motion for judgment on the pleadings because the CDA preempted claims alleging

impose liability on Airbnb and Homeaway.com because of the content of short term rental listings posted by third-party users.

Likewise, the distinction drawn by the lower court between platforms like Airbnb and Homeaway.com and websites like Craigslist, ““which do not charge for booking services,”” *Homeaway.com*, 2018 WL 1281772, at *2, is irrelevant under the CDA. Receiving payments does not deprive a website of CDA immunity—or provide a hook for regulating publication where there would otherwise be none. *See Godard v. Google, Inc.*, No. C 08-2738 (PVT), 2008 WL 5245490, at *3 (N.D. Cal. 2008) (“[T]he fact that a website elicits online content for profit is immaterial; the only relevant inquiry is whether the interactive service provider ‘creates’ or ‘develops’ that content.”); *see also Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75 (9th Cir. 2008) (en banc) (holding Roommate.com partially immune under the CDA, even though it collected revenue from advertisers and subscribers). The relevant consideration is publication of third-party content, not a platform’s financial model.

that Craigslist facilitated prostitution through illegal ads posted by users on the website and constituted a public nuisance); *Doe II v. MySpace Inc.*, 175 Cal. App. 4th 561, 574-75 (2d Dist. 2009) (holding MySpace exempt from claims based on minors who allegedly were abused by people they met on MySpace); *see generally* Ian C. Ballon, *Defamation, Torts and the Good Samaritan Exemption* (47 U.S.C.A. § 230), E-Commerce and Internet Law 2d Ed., § 37.05[3][B][ii] (West 2018) (concluding that the CDA has been broadly applied where “conduct . . . online . . . takes the form of content . . .”) (collecting cases).

Where a platform publishes third-party content, this Court has recognized that the CDA establishes “broad federal immunity to any cause of action that would make service providers liable for information originating with a third-party user” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir. 2007) (citation and internal quotation marks omitted).

Those few instances when the CDA was found inapplicable by this Court involved unique fact patterns – not judicial exceptions to the broad sweep of the CDA, which is what the City of Santa Monica seeks in this case. *See, e.g., Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003) (remanding to district court on whether CDA immunity applied where a communication that was republished online may not have been intended for publication); *Barnes*, 570 F.3d at 1105, 1109 (affirming dismissal of plaintiff’s negligence claims but not her promissory estoppel claim based on the service provider’s alleged affirmative undertaking to provide assistance in removing material that it would not otherwise have been required to remove under the “baseline rule” of CDA); *Doe No. 14 v. Internet Brands, Inc.*, 824 F.3d 846, 851 (9th Cir. 2016) (ruling that the CDA did not bar negligence claim where defendant failed to warn a customer about the risks of being raped by a user of Model Mayhem, where the information that formed the basis for

plaintiff's failure to warn claim was allegedly acquired by the defendant offline, and was not based on monitoring of user content posted on the website).¹³

Here, the activity regulated by the City's housing ordinance falls squarely within CDA immunity. Penalizing "hosting platforms" for enabling third-party booking transactions that violate the ordinance necessarily requires that these websites monitor and remove or de-activate listings that violate this ordinance. The district court's ruling runs counter to the prevailing body of caselaw declining to permit regulation of conduct that, regardless of how characterized, regulates third-party content published by interactive computer services (or requires a service to remove it). As explained in *Barnes v. Yahoo!, Inc.*, the terminology of a given regulation or claim is irrelevant because if liability "derives from the defendant's status or conduct as a publisher or speaker," then "section 230(c)(1) precludes liability." 570 F.3d at 1101-2. Although the City's ordinance purports to impose liability on appellants by virtue of their status as a "hosting platform" that conducts "booking transaction[s]," its operation and effect imposes liability on appellants as a publisher of rental listings. The ordinance thus violates the CDA which protects both "affirmative acts of publication [and] . . . the refusal to remove . . . material."

Id. at 1105 n.11.

¹³ See also *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 239 (2012) (concluding that of "approximately 300 reported decisions" addressing the CDA, "[a]ll but a handful . . . find that the website is entitled to immunity from liability").

In addition, “[c]ourts have repeatedly described publishing activity under section 230(c)(1) as including decisions about what third-party content may be posted online.” *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1123 (N.D. Cal. 2016) (holding that “providing accounts to ISIS is publishing activity, just like monitoring, reviewing, and editing content”), *aff’d on other grounds*, 881 F.3d 739 (9th Cir. 2018); *see also Batzel* 333 F.3d at 1031 (“the exclusion of ‘publisher’ liability necessarily precludes liability for exercising the usual prerogative of publishers to choose among proffered material”). For that reason too, in attempting to impose requirements on what kind of content can and cannot be published, the Santa Monica ordinance runs afoul of section 230. Attempts to regulate internet commerce as physical world businesses have been held impermissible where, as here, they amount to treating a platform as the publisher or speaker of user content. *See supra* n.13.

Because Homeaway.com and Airbnb cannot be held liable for listings by users in municipalities that may seek to regulate short term rentals, nor required to police local laws, this Court should reverse the district court’s ruling.

C. Narrowly Construing the CDA to Allow Cities to Compel Platforms Under Threat of Penalty to Enforce Local Laws Will Undermine Congressional Objectives and Thwart Internet Commerce

Allowing municipalities to require platforms to enforce local laws requiring content removal not only contravenes the CDA, but undercuts legislative intent to

promote the growth of internet commerce. It would substantially burden websites like *amici* if they were required to tailor their verification processes to exactly match the (potentially conflicting) laws of thousands of jurisdictions.

Platform providers likewise are not in a position to police activity for municipal violations across the country. Indeed, they typically are not even parties to the user transactions they facilitate. Local governments, by contrast, know what user content may evidence proscribed conduct and can initiate enforcement against their own residents. While the CDA was not intended to create a “lawless no-man’s land on the internet,” *Roommates*, 521 F.3d at 1164, it also does not permit the nation’s 19,519 municipalities to deputize private companies to enforce a myriad of potentially conflicting municipal regulations. *See, e.g., CCBill*, 488 F.3d at 1118 (construing section 230’s carve-out for “intellectual property” claims to mean “federal intellectual property” based on the rationale that “[b]ecause material on a website may be viewed across the internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes”).¹⁴

¹⁴ This is especially true where local regulations on this issue vary dramatically. For example, while Santa Monica regulates short term rentals, other L.A.-area

By contrast, here there is a straightforward way that the City of Santa Monica can undertake enforcement of its own laws. It can simply search for potential violations on the appellants' websites (indeed, the City admitted that it did just that during peak tourist seasons). Municipalities would know better than platforms which listings actually violate their laws and the open nature of most platforms makes it easier for municipalities to readily identify violations, and where necessary, follow up with the platforms for additional information. There is therefore no justification for shifting the responsibility of enforcing local laws onto platforms.¹⁵

Creating a de facto judicial exception to the CDA by allowing municipalities to require platforms to enforce their local regulations would create barriers to entry

municipalities have enacted different laws or decided against regulation. See Kevin Smith, *Report: Airbnb restrictions could cost LA thousands of jobs and millions in revenue*, San Gabriel Valley Tribune (Nov. 6, 2017), <https://www.pasadenastarnews.com/2017/11/06/report-airbnb-restrictions-could-cost-la-thousands-of-jobs-and-millions-in-revenue/>.

¹⁵ Platforms, which are run by private companies, also should not be required to police complex societal issues that are within the purview of local governments. “While sharing [economies] . . . ha[ve] the potential to address long-term societal challenges such as making cities more inclusive and building social connections between groups that might otherwise never have interacted[,] . . . cities will also have to be agile in addressing externalities and disruption to their planning processes, policy formulation and regulatory structures.” Yann Zopf, *How Can Cities Leverage The Potential of the ‘Sharing Economy’?* (quoting Cheryl Martin, Head of Industries, World Economic Forum), <https://www.weforum.org/press/2017/12/how-can-cities-leverage-the-potential-of-the-sharing-economy/>.

for potential internet commerce businesses, force out smaller existing platforms, and harm the millions of users who have created small businesses in municipalities where these activities are fully lawful. But for the statutory immunity, platforms like *amici* would be required to either contend with enforcement actions in multiple jurisdictions based on independent and varied regulatory regimes or err on the side of censoring speech. The costs and complexities associated with deputizing platforms to enforce local laws requiring content removal also would be detrimental to internet commerce, including the small businesses that are built on platforms such as those operated by *amici* and their millions of users. Those individuals, in thousands of municipalities that do not impose similar regulations, depend on online and mobile platforms to earn a living and pay their rent or mortgages. Smaller platforms and entrepreneurs would be shut out by the crushing cost of litigation and compliance with local regulatory schemes across all 50 states. It would simply be easier for many to cease operations. Narrowing the CDA would result in a worse outcome than reversal in this case, which would leave responsibility for enforcing Santa Monica's housing ordinance to the local governing body, as Congress anticipated when it enacted the CDA.

D. CONCLUSION

For the foregoing reasons, the Court should overrule the district court's ruling and hold that the Santa Monica ordinance violates section 230 of the CDA.

Dated: April 25, 2018

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eBay Inc., Glassdoor, Inc., Lyft, Inc.,
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Inc., and Upwork Inc.

STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending before the court.

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(a) AND LOCAL RULE 32-1**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Local Rule 32-1, I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5400 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: April 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* EBAY INC., GLASSDOOR, INC., LYFT, INC., OFFERUP INC., TASKRABBIT, INC., THUMBSTACK, INC., UBER TECHNOLOGIES, INC., AND UPWORK INC. IN SUPPORT OF PLAINTIFFS-APPELLANTS** 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 April 25, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 25, 2018

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