Case No. 18-55367

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

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

v.

CITY OF SANTA MONICA,
*Defendant-Appellee*.

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# BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF COLUMBUS, CITY OF OAKLAND, CITY OF SEATTLE, AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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On Appeal from the United States District Court
for the Central District of California
Nos. 2:16-cv-6641, 2:16-cv-6645
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## INTEREST OF AMICI CURIAE

*Amici curiae* the City and County of San Francisco, the District of Columbia, the Mayor and City Council of Baltimore, the City of Columbus, the City of Oakland, and the City of Seattle are cities and districts 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 affordable and available to extremely low-income renters. National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes* at 4 (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 the *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/business/tourism/sd-fi-airbnb-hosts-

[1] Pursuant to Rule 29(c)(5) 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), *amici* attest that all parties to this appeal have consented to the filing of this brief.

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 available 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 interest 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-broad interpretation of the Communications Decency Act ("CDA") urged by

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[2] *See, e.g.*, Kyle Barron, Edward Kung & Davide Prosperio, *The Sharing Economy and Housing Affordability: 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* SF Admin. Code § 41A.5(g)(4)(C); Seattle Mun. Code § 6.600 (2017).

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 ("CDA") 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 2020[4]—seek to use the CDA to shield themselves from liability for their own unlawful commercial conduct. Neither the text nor the intent of the statute supports such a sweeping application. *See* Parts I-II, *infra*.

Accordingly, Appellants and their *amici* fall back on far-reaching policy arguments—claiming that local regulations like Santa Monica's short-term rental ordinance ("Ordinance") will "dramatically set back" e-commerce and "render the modern Internet unrecognizable." Appellants' Opening Br. ("AOB") at 3, 35. But 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

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

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. *See* Part III, *infra*. 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. The Communications Decency Act Allows Local Regulation Of An Online Company's Own Commercial Activity.

Under Section 230 of the CDA, (1) an "interactive computer service" provider is not liable (2) as a "publisher or speaker" of information (3) if the information is "provided by another information content provider." 47 U.S.C. § 230(c)(1); *see also Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009), as amended (Sept. 28, 2009).

In an unbroken line of cases, the Ninth Circuit has interpreted and applied the "publisher or speaker" prong of the CDA test narrowly—carefully circumscribing when an online company will be considered to be acting as a "publisher," and allowing it to be held liable for actions undertaken outside of that role. Under these binding precedents, Santa Monica's Ordinance—and similar state or local laws that regulate an online company's own commercial activity—do not implicate the CDA because they do not seek to hold the companies liable as publishers of third-party content.

#### A. The Ninth Circuit Properly Interprets The "Publisher Or Speaker" Requirement To Permit Liability For An Online Company's Own Commercial Conduct.

Section 230 immunity only applies if the law or cause of action at issue seeks to hold an online company liable for its publishing conduct—*i.e.*, "as the

'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102. The critical question therefore is what constitutes publishing conduct. The Ninth Circuit has answered this question: Online companies may only seek shelter in Section 230's safe harbor when they are facing liability for reviewing, editing, deciding to publish, or removing content created—and therefore controlled—by third parties. *Id.* For an online company's own illegal acts outside of these publishing functions, the CDA provides no protection.

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* ("*Roommates.com*"), 521 F.3d 1157, 1161 (9th Cir. 2008) (en banc), this Court analyzed a discrimination claim against an online company whose that helped apartment dwellers find potential roommates. The company required its subscribers to create profiles before using the service, and the profiles required subscribers to divulge—by selecting a response from a list of answers provided by the website—their "sex, sexual orientation, and whether [they] would bring children to a household." *Id.* Fair housing councils alleged the website violated the federal Fair Housing Act. In an *en banc* decision, this Court held Roommates.com could ***not*** claim a defense under the CDA, and also made clear that a website may be held liable for its direct violation of the law. As the court succinctly explained, "a real estate broker may not inquire as to the race of a prospective buyer, and an employer may not inquire as to the religion of a prospective employee. If such questions are unlawful when posed face-to-face or by telephone, they don't magically become lawful when asked electronically online." *Id.* at 1164.

The following year, in *Barnes v. Yahoo!*, this Court confirmed its narrow interpretation of the "publisher or speaker" requirement and Section 230 immunity. 570 F.3d 1096. In *Barnes*, a woman brought an action against Yahoo for failing to

remove social media profiles posted by her former boyfriend that contained nude photographs of her. *Id.* at 1096. Yahoo promised to remove the profiles, but never did. The woman sued, alleging both negligent undertaking for Yahoo's failure to remove the photographs and promissory estoppel for breach of its promise to do so. *Id.* at 1099.

The Court first emphasized that an entity can only invoke Section 230's safe harbor if "the duty that the plaintiff allege[d] the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Id.* at 1102. It then provided guidance about what this requirement means in practice. The court explained that "a publisher reviews material submitted for publication, perhaps edits it for style or technical fluency, and then decides whether to publish it." *Id.* at 1102; *see also id.* ("[P]ublication involves reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.") (citing *Roommates.com*, 521 F.3d at 1170-71).

Under this "publisher or speaker" test, the Court affirmed that the CDA barred the plaintiff's negligent undertaking claim, because it sought to impose liability on the basis of Yahoo's failure to remove content from its website, which "necessarily involves treating the liable party as a publisher of the content it failed to remove." *Id.* at 1103. The Court, however, reinstated the plaintiff's promissory estoppel claim, because "liability here would not come from Yahoo's publishing conduct," but from Yahoo's own breach of a promise. *Id.* at 1107. Because the legal duty Yahoo allegedly breached did not stem from its publishing activity, Yahoo could not invoke CDA immunity on this claim.

Similarly, in *Doe v. Internet Brands*, 824 F.3d 846 (9th Cir. 2016), this Court held that the CDA did not bar a plaintiff's claim against a social networking website for conduct unrelated to publishing others' content. The plaintiff in

*Internet Brands* alleged that the site negligently failed to warn her and other users of the website that they were at risk of being victimized by individuals who used the website as part of a rape scheme. *Id.* at 848-49. As in *Barnes*, the case turned on whether the plaintiff's claim sought to impose liability on the website proprietor as a "publisher or speaker" of content a third party posted on the site. *Id.* at 851. The Court held that it did not because "[t]he duty to warn allegedly imposed by California law would not require Internet Brands to remove any user content or otherwise affect how it publishes or monitors such content." *Id.*

In sum, under Ninth Circuit case law, online companies are only immune from liability for reviewing, editing, deciding to publish, or removing content created—and therefore controlled—by third parties. The CDA is not implicated when a company faces liability for its own commercial activities. As explained in Part I(B) below, this conclusion is consistent with the views of other courts.

### B. Other Courts Similarly Interpret The "Publisher Or Speaker" Requirement To Permit Liability For An Online Company's Own Conduct.

Appellants contend that the District Court in this case "ignored a well-developed body of case law" interpreting the CDA broadly. AOB 28. Not so.

In support of their assertion, Appellants cite only one circuit court case—*Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017) (cited at AOB 30-31)—but that case is inapposite. There, sex trafficking victims sued classified advertising website Backpage.com for selectively removing certain postings in the "Escorts" section and setting policies for advertisements that allegedly encouraged sex trafficking (*e.g.*, stripping metadata from photographs). *Id.* at 16-17. Contrasting the case to this Court's decision in *Barnes*, the First Circuit held that the plaintiffs' claims challenged

Backpage's editorial decisions about the content and form of advertisements on the website—"choices that fall within the purview of traditional publisher functions." *Id.* at 21-22.

All of the other authorities Appellants cite are district court or state court opinions—the majority of which are unpublished and/or out-of-circuit cases. *See* AOB 28-32.[5] These cases cannot and do not alter or trump the Ninth Circuit precedent discussed above establishing that where, as here, a law seeks to regulate an online company only in its role as a direct market participant, the CDA does not apply.

Nor are this Court's decisions imposing reasonable limitations on the scope of Section 230 immunity "outliers." AOB 39. Far from it.

### 1. This Court's Interpretation Of The CDA Is Consistent With Its Sister Circuits.

In *Federal Trade Commission v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016), the Second Circuit interpreted the CDA in a similar manner. In that case, the FTC and the State of Connecticut brought an action against internet company LeadClick for participating in its affiliates' scheme to use fake websites

[5] Specifically, Appellants cite: *Force v. Facebook, Inc.*, 2018 WL 472807 (E.D.N.Y. Jan. 18, 2018); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685 (S.D. Miss. 2014); *Evans v. Hewlett-Packard Co.*, 2013 WL 5594717 (N.D. Cal. Oct. 10, 2013) (unpublished); *Inman v. Technicolor USA, Inc.*, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (unpublished); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090 (W.D. Wash. 2004); *MDA City Apartments, LLC v. Airbnb, Inc.*, 2018 WL 910831 (Ill. Cir. Ct. Feb. 14, 2018) (unpublished); *Donaher v. Vannini*, 2017 WL 4518378 (Me. Super. Ct. Aug. 18, 2017) (unpublished); *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012); *Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113 (N.J. Super. Ct. Law Div. 2010); *Stoner v. eBay, Inc.*, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000) (unpublished).

to advertise weight loss products. *Id.* at 162. Although LeadClick itself did not create the deceptive websites, it approved of its affiliates' use of such sites and occasionally provided affiliates' content for their fake sites. *Id.* at 164. The Second Circuit held that LeadClick could not claim Section 230 immunity. *Id.* at 172-73, 175. In reaching this decision, the court explained that the FTC and Connecticut did not seek to hold LeadClick liable as the publisher or speaker of third party content. *Id.* at 175. Instead, "LeadClick [was] being held accountable for its *own* deceptive acts or practices." *Id.* at 176. Consequently, Section 230 did not apply. *Id.* at 176-77.

The Seventh Circuit, too, has applied the "publisher or speaker" requirement carefully to narrow the scope of CDA immunity. In *City of Chicago v. Stubhub!, Inc.*, 624 F.3d 363 (7th Cir. 2010), the City of Chicago brought an action against an Internet auction site that resold tickets to entertainment events, asserting that the Internet site was responsible for the city's amusement tax on tickets. *Id.* at 365. The defendant argued that it was immune under the CDA, but the Seventh Circuit disagreed. *Id.* at 366. The court held that the CDA does not create an "immunity" of any kind but rather limits who may be called the publisher of information that appears online. The court explained that while such information might matter to liability for defamation, obscenity, or copyright infringement, "Chicago's amusement tax does not depend on who 'publishes' any information or is a 'speaker.'" *Id.* Accordingly, the court concluded that the CDA was "irrelevant." *Id.*

### 2. This Court's Interpretation Of The "Publisher Or Speaker" Requirement Has Proven Workable And Easily Applied By District Courts.

In *Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 961 (N.D. Cal. 2016), a consumer filed suit under the Telephone Consumer Protection Act to stop Twitter from automatically sending unwanted text messages to her cell phone with "tweets" posted by Twitter users. Twitter attempted to raise Section 230 as a defense against the consumer's claim, but the court rejected this argument. *Id.* at 960. The court held that the CDA was inapplicable because the plaintiff's claim did not seek to impose liability on Twitter as the "publisher" of third-party content, as it did not depend on the content of tweets, or impose a responsibility to "review" or "edit" third parties' tweets. *Id.* at 967-68.

In *Anthony v. Yahoo! Inc.*, 421 F. Supp. 2d 1257 (N.D. Cal. 2006), the Northern District of California denied CDA immunity for tort claims against Yahoo's online dating service platforms. The plaintiff alleged that Yahoo created and distributed fake dating profiles, and that Yahoo circulated the profiles of "actual" former subscribers whose subscriptions had expired to give the misleading impression that these individuals were still available for dates. *Id.* at 1262-63. The court held that for the web platform's *own* tortious conduct manufacturing false profiles, Section 230—by its very terms—provided Yahoo no shield. *Id.* at 1263. Nor could the CDA immunize Yahoo for allegedly distributing profiles of former subscribers whose subscriptions at expired. *Id*. The court observed that while the profiles of former members were created by third parties, the CDA "only entitles Yahoo not to be the 'publisher or speaker' of the profiles. It does not absolve Yahoo from liability for any accompanying misrepresentations." *Id.* Because the user's claim was "that Yahoo!'s manner of presenting the profiles—not the underlying profiles themselves—constitute fraud, the CDA does not apply." *Id.*

### 3. District Courts Outside Of The Ninth Circuit Also Apply The CDA In Accordance With This Court's Interpretation.

In *McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533 (D. Md. 2016), a consumer sued battery manufacturer LG Electronics USA and online retailer Amazon for injuries sustained when the LG battery he purchased on Amazon's website allegedly exploded and caught fire in his pocket. *Id.* at 535. The court concluded that the plaintiff's failure to warn claim was barred because the complaint failed to allege facts that Amazon had any knowledge that third-party sellers used the website to sell dangerous or defective goods. *Id.* at 539. In doing so, it rejected Amazon's Section 230 defense against the plaintiff's remaining negligence and breach of implied warranty claims because they targeted non-publishing conduct. "That is, to the extent that a plaintiff may prove that an interactive computer service played a *direct* role in tortious conduct—through its involvement in the sale or distribution of the defective product—Section 230 does not immunize defendants from all products liability claims." *Id.* at 537.

Similarly, in *800-JR-Cigar, Inc. v. GoTo.com, Inc.*, 437 F. Supp. 2d 273 (D.N.J. 2006), the court held that the CDA provides no defense for websites' own tortious business conduct. There, plaintiff cigar retailer brought fraud and abuse claims against the advertising practices of search engine GoTo.com. *Id.* at 295. Clarifying that the CDA would only apply to third-party content displayed on GoTo.com's search results page, the court held that the website could not claim CDA immunity "because the alleged fraud is the use of the trademark name in the bidding process [for its advertisers], and not solely the information from third parties… It is not the purpose of the Act to shield entities from claims of fraud and abuse arising from their own pay-for-priority advertising business, rather than from the actions of third parties." *Id.*

### C. As Properly Interpreted, The CDA Does Not Prohibit Local Regulations Like Santa Monica's Ordinance.

As the cases discussed above establish, CDA immunity is bounded. It does not provide blanket immunity to online companies. Acts that would otherwise be illegal do not "magically become lawful" simply because they occur online. *Roommates.com*, 521 F.3d at 1164. A company—whether operating online or at a brick and mortar storefront—acts as a publisher when it reviews and edits material and decides whether to publish it. *Barnes*, 570 F.3d at 1102. Even where a statute or ordinance relates to content originally created by third parties, if liability under such law does not turn on who publishes third-party content, CDA immunity cannot defeat governments' regulatory authority. *See City of Chicago*, 624 F.3d at 366; *Nunes*, 194 F. Supp. at 968; *Anthony*, 421 F. Supp. 2d at 1263. And if an online company—even one that primarily acts as a publisher and speaker of third-party content—engages in illegal conduct outside of that role, it cannot hold the CDA up as a shield. *See Internet Brands*, 821 F.3d at 851; *Barnes*, 570 F.3d at 1108-09; *Roommates.com*, 521 F.3d at 1164-65; *City of Chicago*, 624 F.3d at 366; *LeadClick*, 838 F.3d at 176. Such is the case here.

Santa Monica's Ordinance has no bearing whatsoever on Appellants' publishing activity. Hosting platforms like Airbnb and HomeAway typically perform two distinct functions. They post listings for rental units, and they provide booking services in connection with the rental of those units. Although Airbnb and HomeAway *do* act as publishers of third-party content when they post listings created by users seeking to list their residences for short-term rental, the Ordinance "cares not a whit about what is or is not featured on [hosting platforms'] websites." *Airbnb v. San Francisco*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016) (holding that Section 230 does not defeat San Francisco's virtually identical ordinance).

Compliance with the law would not require Airbnb and HomeAway to review or vet or remove any user content. It imposes no obligations on them to change how they review, edit, decide to publish, do publish, or remove from publication any third-party content. *See Internet Brands*, 824 F.3d at 851; *Barnes*, 570 F.3d at 1102. To the contrary, they can publish (and earn publishing fees from) whatever listings they want—both lawfully registered and unregistered short-term rental listings—without violating the Ordinance. They face potential liability *only* if and when they step outside their role as a publisher by completing a "Booking Transaction" for an unregistered unit in return for a fee. A "Booking Transaction" is defined as a "reservation or payment service provided by a person who facilitates a home-sharing or vacation rental transaction between a prospective transient user and a host." Excerpts of Record ("ER") at 32. Providing these services is not a publication function, and the fact third parties created the listings for those units "does not absolve [Appellants] from liability" for providing unlawful booking services. *Anthony*, 421 F. Supp. 2d at 1263.

It is true that Appellants may, at some point, have to determine if a unit is lawfully registered—but only if and when they want to provide booking services in connection with a short-term rental of the unit. No monitoring or screening is required before an account is created or a listing is posted. Indeed, even if a hosting platform determines that a listed unit is not registered, it is under no obligation to remove or alter the listing in any way. Simply put, hosting platforms do not need to monitor, verify, or screen third-party content. They only need to ensure that they themselves do not engage in an illegal booking transaction with an unregistered host.[6]

[6] Appellants protest that as a practical matter, the Ordinance compels them to review and remove unregistered third-party listings because, for their customers'

Thus, the Ordinance does not seek to impose liability on hosting platforms as the "publisher or speaker" of third-party content, as the Ninth Circuit has interpreted and applied that element of the CDA.

By way of analogy, assume that a city or state were to pass a law prohibiting travel agents from receiving a fee for booking clients into a hotel that lacked a proper certificate of occupancy. There is no argument that such a law would treat travel agents as publishers. The mere fact that hosting platforms provide this service online does not render their booking services "publishing activity" and does not make it "magically" lawful. Nor does the fact that these platforms provide separate publishing services immunize their discrete non-publishing activities. The CDA is equally inapplicable to both the hypothetical travel agent regulation and the Santa Monica Ordinance at issue here.

As this Court observed a decade ago, "[t]he Internet . . . has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to . . . give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability." *Roommates.com*, 521 F.3d at 1164 n.15. The Court's remark rings all the more true now.

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sake, they "cannot leave in place a website chock-full of un-bookable listings." AOB at 23; *see also id.* at 21. But the Ordinance demands no such result. *Id.* at 23. It is *a* way for Appellants to comply by taking down unregistered listings—perhaps even the "easy" way—but not *the* way. *See* Brief of *Amici Curiae* Internet and Business Law Professors in Support of Defendant-Appellee at Part II(A). For example, Appellants could publish a disclaimer to accompany third-party listings. *See id.*; *Internet Brands*, 825 F.3d at 851.

## II. Allowing Local Government To Regulate An Online Company's Own Commercial Conduct Is Consistent With The Intent And Goals Of The Communications Decency Act.

The legislative history of Section 230 demonstrates that Congress did not intend to broadly immunize all actions of online companies. Instead, Congress intended to accomplish two main goals: (1) to encourage blocking and filtering technologies that protect minors from objectionable material on the Internet, and (2) to protect the Internet from excessive government regulation. *See Batzel v. Smith*, 333 F.3d 1018, 1026-29 (9th Cir. 2003); 47 U.S.C. § 230(b).

Congress acted in response to *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995), which ruled that an interactive computer service became liable as a publisher of defamatory material where the service deleted some objectionable posts but let others remain. As the House Conference Report states, "[o]ne of the specific purposes of [Section 230] is to overrule *Stratton Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material." H.R. Conf. Rep. No. 104-458, 194 (1996); *see also* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 68 (1996) (stating that the only effect of Section 230 was to overrule *Stratton*).

Given this specific congressional intent, it does not make sense to interpret Section 230 to mean that a defendant is immune from any liability for their own commercial conduct. Indeed, even Chris Cox—co-author of Section 230—has expressed concern that "the judge-made law has drifted away from the original purpose of the statute," which was to "help clean up the Internet, not to facilitate people doing bad things on the Internet." Alina Selyukh, *Section 230: A Key Legal*

*Shield For Facebook, Google Is About To Change*, NPR.com (Mar. 21, 2018), http://wnpr.org/post/section-230-key-legal-shield-facebook-google-about-change.

Nor should this Court assume that Congress intended to allow an end-run around state and local government regulation in areas of traditional state and/or local control simply because business activities occur on the internet. Indeed, it would be improper to make such an assumption.

State and local regulation plays a critical role in fields of traditional state control, such as health and safety, housing, and employment. *See*, *e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (internal citations omitted)); *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 834 F.3d 958, 964 (9th Cir. 2016) (recognizing the "critical role of the state in regulating employment conditions").

Accordingly, the Supreme Court has held that when Congress intends to bar state action in these areas, it must do so clearly and unambiguously. *See*, *e.g.*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("[W]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). Certainly, section 230—which does not declare "a general immunity from liability deriving from third-party content" (*Barnes*, 570 F.3d at 1100), but rather immunizes online

companies only to the extent they act as "speakers or publishers"—does not state a clear and unambiguous intent to displace all such laws.

To the contrary, as this Court has emphasized, in enacting the CDA, Congress intended "to preserve the free-flowing nature of Internet speech and commerce *without unduly prejudicing the enforcement of other important state and federal laws*." *Roommates.com*, 521 F.3d at 1175 (emphasis added). Allowing local government to regulate an online company's own commercial conduct does just this: it presents no obstacle to internet speech or commerce, and allows state and local government to "exercise[] their police powers to protect the health and safety of their citizens." *Medtronic*, 518 U.S. at 475.

## III. 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 assert that regulations such as Santa Monica's Ordinance will usher in a parade of horribles—that they will "dramatically set back" e-commerce and "render the modern Internet unrecognizable." AOB at 3, 35; *see also generally id.* at 35-39. Appellants' *amici* contend that such laws will harm thousands of companies and millions of users by forcing companies out of businesses and "thwart[ing] internet commerce." Brief of *Amici Curiae* eBay Inc., et al. in Support of Plaintiffs-Appellants ("eBay *Amicus* Br.") at 8-9, 20-23; *see also* Brief of *Amici Curiae* Chris Cox and NetChoice in Support of Plaintiffs and Reversal ("Cox *Amicus* Br.") at 19, 23-24 (claiming that such laws will impose a 1990s-era "bulletin board" model on websites, "slow commerce on the Internet,

increase costs for websites and consumers, and restrict the development of platform marketplaces").[7]

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* SF Admin. Code § 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), available at http://www.latimes.com/business/la-fi-airbnb-san-francisco-

[7] Amici Chris Cox and NetChoice also devote substantial effort to detailing terrible consequences they claim would ensue in the absence of Section 230. They suggest that people contending with hurricanes would be unable to find their loved ones and victims of earthquakes would be unable to be matched with life-saving supplies and services. Cox *Amicus* Br. at 7-8. Even assuming, arguendo, that these consequences would actually flow from the elimination of CDA immunity, amici duel with a strawman. Neither the parties nor the district court suggest jettisoning Section 230—just that it be reasonably applied and interpreted in keeping with the text and intent of the statute.

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 basics right."' Katie Benner, *Airbnb Settles Lawsuit With Its Hometown, San Francisco*, NY Times (May 1, 2017), available at https://www.nytimes.com/2017/05/01/technology/airbnb-san-francisco-settle-registration-lawsuit.html.

And 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 horribles 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.[8] 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 Residential Rentals ("OSTR") and amended its Administrative Code to

[8] *See, e.g.*, Kyle Barron, Edward Kung & Davide Prosperio, *The Sharing Economy and Housing Affordability: 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).

require residents to register their homes with the city before making them available as short-term rentals.[9]

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. *San Francisco*, 217 F. Supp. 3d at 1070. Implementation of the SF Ordinance has been a game-changer. Registrations quickly skyrocketed to nearly 2,500. And at the same time that hundreds of permanent residents registered legitimate short-term rentals, hundreds 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 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 complaints about noise, illicit drug use, and other interruption to the quality of life in neighborhoods. Indeed, complaints related to

[9] 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* San Francisco Administrative Code Chapter 41A.

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), available at http://www.socketsite.com/archives/2018/05/complaints-related-to-airbnb-ing-in-san-francisco-have-been-cut-in-half.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 since last year, and none of the "doom and gloom" (*Roommates.com*, 521 F.3d at 1175) Appellants and their *amici* portend has materialized.

Appellants contend that if the Santa Monica Ordinance is upheld and "direct regulation on e-commerce is allowed to stand," e-commerce generally will be undermined and "dramatically set back." AOB 35. 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, are still "expected to grow exponentially." AOB at 38. And Airbnb itself remains as robust as ever. A $30+ billion company with four million listings and over 200 million guest arrivals in ten years, Airbnb boasts that it "is Global and Growing." Press Release, Airbnb is Global and Growing, Airbnb (Aug. 10, 2017), https://press.atairbnb.com/airbnb-global-growing/.

Amici Chris Cox and NetChoice assert that upholding the Santa Monica Ordinance "will open the door to similar requirements by other municipalities." Cox *Amicus* Br. at 25. They point to Seattle's new short-term rental law as

evidence that this proliferation has already begun, and suggest 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 such laws is not, in fact, so onerous.

eBay and other tech companies writing as amici claim that the Santa Monica Ordinance will "have a chilling effect on speech," "deter innovation," and force platforms that facilitate user transactions to "scale back services." eBay *Amicus* Br. at 8. 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 its "Experiences" program and will expand the initiative to include 200 cities in the United States this year,[10] rolled out new features for users with disabilities,[11] and debuted a new premium "Plus" program and new listing categories.[12] Uber introduced several new safety features

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[10] *Bringing Airbnb Experiences to 200 US cities in 2018* (Jan. 26, 2018), https://www.airbnbcitizen.com/bringing-airbnb-experiences-to-200-us-cities-in-2018/

[11] Shaun Heasley, *Airbnb Rolls Out New Features for Those With Disabilities*, DisabilityScoop (Mar. 20, 2018), https://www.disabilityscoop.com/2018/03/20/airbnb-new-features-disabilities/24877/.

[12] 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/

for its app.[13] And countless other online companies have made similar changes to their services. There is absolutely no indication that speech has been chilled, innovation has been deterred, or services have been scaled back among online companies.

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

*Internet Brands*, 824 F.3d at 852-53.

New areas of regulation are frequently met with doom and gloom prophesies 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 workplaces 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).

[13] Dara Khosrowshahi, *Getting Serious About Safety*, Uber Newsroom (Apr. 12, 2018), https://www.uber.com/newsroom/getting-serious-safety/.

## CONCLUSION

This Court should affirm the Order of the District Court.

Dated: May 23, 2018

Respectfully submitted,

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**FILER'S ATTESTATION**

I, Sara J. Eisenberg, certify that all other signatories listed, and on whose behalf this filing is submitted, concur in the filing's content and have authorized the filing.

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## STATEMENT OF RELATED CASES

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

## CERTIFICATE OF COMPLIANCE

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(A)(7)(B) because according to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 6,764 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 using proportionately double-spaced 14 point Times New Roman typeface.

I declare under penalty of perjury that this Certificate of Compliance is true and correct.

Dated: May 23, 2018

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## 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/ECFsystem on May 23, 2018.

**BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO, DISTRICT OF COLUMBIA, MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF COLUMBUS, CITY OF OAKLAND, CITY OF SEATTLE, AND PUBLIC RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE**

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 May 23, 2018, at San Francisco, California.

*/s/ Martina Hassett*
MARTINA HASSETT