No: 18-55367

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs/Appellants,

v.

CITY OF SANTA MONICA

Defendant/Appellee.

On Appeal from the United States District Court
for the Central District of California,
Nos. 2:16-cv-06641-ODW-AFM; 2:16-cv-06645-ODW-AFM
Honorable Otis D. Wright, II Presiding

BRIEF *AMICUS CURIAE* OF UNITE HERE INTERNATIONAL UNION IN SUPPORT OF DEFENDANT/APPELLEE CITY OF SANTA MONICA

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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: May 23, 2018

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STATEMENT OF INTEREST[1]

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 and worsening affordable housing crisis, particularly in high-cost metropolitan areas like Los Angeles. The housekeepers, cooks, restaurant servers, and retail workers whom UNITE HERE represents live in destination cities where vacation-rental 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[2] contributes has forced UNITE HERE members to choose between paying an even larger share of their family income on

[1] 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 their counsel has made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

[2] For ease of reference, UNITE HERE will refer only to Airbnb in this brief.

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 field.

Pursuant to Federal Rule of Appellate Procedure 29(a), UNITE HERE submits this brief without an accompanying motion for leave to file or leave of court because all parties have consented to its filing.

INTRODUCTION

UNITE HERE fully supports the City of Santa Monica's arguments demonstrating that its Ordinance does not violate the Communications Decency Act ("CDA"), regulates only economic transactions rather than commercial speech, and does not violate the California Coastal Act. UNITE HERE submits this brief to make the following additional points.

First, Airbnb has contributed greatly to the housing affordability crisis afflicting Santa Monica and other popular destination cities, by converting residential housing units into transient accommodations. Airbnb's effect on housing availability and rents is well-documented, and supports reasonable efforts

like Santa Monica's to regulate the market for short-term rentals ("STRs"). Airbnb functions not merely as a "platform" for commercial transactions taking place on its website, but as an active participant in the STR rental market.

Second, the premise on which Airbnb bases its Section 230 claims is factually baseless. The Ordinance does not require Airbnb to "monitor" third-party postings on its website. In fact, Airbnb *prohibits* STR operators from disclosing the actual address for a listing until the booking transaction has been completed. The only the information that Airbnb needs to determine whether an STR is registered exists *offline*, and Airbnb's Data Science and Analytics Department is more than capable of making the small-batch data comparison necessary to determine whether an STR rental transaction is illegal.

Third, Airbnb's First Amendment argument is that economic transactions like vacation bookings are constitutionally protected because they are preceded by commercial advertising. But no court has ever adopted such a theory, which would undo most forms of economic regulation.

Finally, Airbnb has it wrong about who was required to go before the California Coastal Commission. It is Airbnb's product that has resulted in the intensification of use that it claims implicates the Coastal Act. If anything, it was this "development" that required a Coastal Act permit.

BACKGROUND

I. Airbnb Contributes to the Housing Affordability Crisis.

Since its inception, Airbnb's business model has been predicated on violating local zoning laws regulating short-term rentals ("STRs"). The company's carefully crafted public image—and the rhetoric that it uses to describe its business model, such as "hosts"[3] and the "sharing economy"[4]—convey the sense that those who list STRs through it are ordinary homeowners sharing a room or a couch with a visitor. But in fact, while such home-sharing listings do exist, they represent a miniscule amount of Airbnb's revenues in places like Los Angeles. Instead, Airbnb is dominated by property owners renting out entire units of housing as commercial, transient accommodations. Much of this revenue is generated by owners listing multiple units, including large, commercial property-management companies. Airbnb's business model has reduced the availability of housing and increased rents.

A 2015 study of Airbnb's impact in the City of Los Angeles, for example, found that Airbnb listings for shared rooms accounted for less than one quarter of

[3] The term "host" inaccurately suggests that Airbnb listings typically involve property owners who are present during the visitor's stay. UNITE HERE uses the more neutral terms Airbnb "listers" or "operators" throughout this brief.

[4] *See* Abbey Stemler, "The Myth of the Sharing Economy and Its Implications for Regulating Innovation," 67 EMORY L.J. 197, 198 (2017)

one percent of Airbnb's Los Angeles revenue. Instead, ninety percent of Airbnb revenue came from listings of entire housing units. Fully thirty-five percent of Airbnb revenue came from leasing companies renting more than one entire unit of housing.[5] Commercial property management companies listing multiple units for rent—sometimes using fake pseudonyms like "Shawn and Sal" to convey an impression that they were individual homeowners—earned the lion's share of Airbnb revenue.[6] A subsequent study conducted by CBRE Hotels' Americas Research found that multi-unit Airbnb listings increased by 87% in Los Angeles between 2015 and 2016, and represented fully 81% of Airbnb revenue in 2016.[7]

Southern California trends are mirrored in other destination cities. A study conducted by McGill University researchers found that 66% of revenue ($435

[5] 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.

[6] 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.; *see also* Dayne Lee, "How Airbnb Short-Term Rentals Exacerbate Los Angeles's Affordable Housing Crisis: Analysis and Policy Recommendations, 10 HARV. L. & POLICY REV. 229 (2015).

[7] 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.

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.[8] The CBRE study mentioned earlier found that multi-unit, entire-home operations were the fastest growing Airbnb segment in terms of the number of listers, 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 listers nationally, generating $175 million in revenue.[9]

Sub-industries supporting commercial Airbnb operations have emerged. Airbnb STR operators hire property management services that promise to maximize revenues, offer professional photography of listed units, perform maintenance services, and restock household items.[10] Airbnb operators hire

[8] 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.

[9] 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", at p. 4.

[10] *See*, *e.g*. https://www.airconcierge.net/; https://guestable.com/los-angeles/.

cleaning services specializing in STRs,[11] and companies like AirDNA and Everbooked offer commercial Airbnb operators data analytics designed to help them identify optimal price points and occupancy targets.[12]

The large-scale conversion of housing units to more or less permanent, commercial 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 like Brooklyn.[13] A study of Boston found that each standard deviation increase in Airbnb listings was associated with a 0.4% increase in asking rents.[14]

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

[11] *See, e.g.*, https://maidthis.com/Airbnb-cleaning/; https://www.tidy.com/Airbnb/.

[12] *See, e.g.,* https://www.airdna.co; https://www.everbooked.com/.

[13] David Wachsmuth *et al.*, *supra*, at p. 2.

[14] 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.[15] While this might not sound like much, consider that Airbnb *rentals* increased by an average 27% *annually* in Santa Monica between 2010 and 2018 according to data analytics company AirDNA,[16] and that the City's median move-in rent was $3,000 per month for a two-bedroom unit in 2017.[17] Applying NBER's formula and conservatively assuming a 27% increase in *listings* annually, Airbnb listings were responsible for nearly 10% of the median rent increase for a two-bedroom apartment in Santa Monica between 2010 and 2017, or approximately $1,100 per year in additional rent payments.[18] 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

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[15] 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.

[16] https://www.airdna.co/market-data/app/us/california/santa-monica/overview.

[17] Santa Monica Rent Control Board, 2017 Annual Report, at p. 14, at https://www.smgov.net/uploadedFiles/Departments/Rent_Control/Reports/Annual_Reports/2017%20Annual%20Report%20FINAL.pdf.

[18] *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 (median monthly rental for two-bedroom apartment in 2010 was $2,000).

2017, meaning that "renters citywide paid a whopping $616 million in additional rent in 2016 due to the exponential growth of Airbnb listings."[19]

The NBER study mentioned earlier found robust evidence that increases in Airbnb listings were linked to the growth of short-term rental markets, "consistent with absentee landlord[s] switching from the long- to the short-term rental market."[20]

II. Airbnb Is More Than A "Platform" For Buyers and Sellers.

Airbnb has not been some passive by-stander to the impacts described above. It takes a percentage of each booking on its site and, as a profit-making enterprise, has an interest in expanding the number of STRs in destination cities like Santa Monica.

Except when disclaiming responsibility for the consequences of large-scale housing conversion, however, Airbnb has not been satisfied with the role of a mere "platform" for third-party transactions. Airbnb actively partners with listers in many ways, and uses the data that it gleans from participants in its venture to target

[19] 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/.

[20] Barron *et al*., *supra*, at p. 6.

marketing, expand its services, and increase its listers' 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."[21] Airbnb enters into other commercial relationships with listers, 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"[22] to more complex business offerings such as "Airbnb at Work," through which Airbnb has partnered with major business travel management companies to "consolidate[d] travel info and expensing in one place."[23]

Airbnb is also active in monitoring and analyzing the listings on its website, as well as the physical units that Airbnb operators rent. It offers "Airbnb Plus": "a new selection of only the highest quality homes" that "benefit from top placement,

[21] https://www.Airbnb.com/host-protection-insurance.

[22] https://www.Airbnb.com/professional_photography.

[23] https://www.Airbnbforwork.com/resources/the-Airbnb-dashboard-your-travel-management-success-tool?CO=N-CO-3-2-1&leadId=0.

in-home services such as design consultation and expert photography, and premium support."[24] In order to be accepted, the STR operator must permit Airbnb to "complet[e] a home visit with a third-party inspector"[25] in which the STR is subject to "a 100+ point quality inspection[.]"[26]

Airbnb maintains a dedicated 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 listers.[27] Using listing addresses, Airbnb can conduct sophisticated analyses of optimal search results, based on guests' searches and their ultimate booking decision.[28] Airbnb conducts "offline" tests of listing

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[24] https://www.Airbnb.com/plus.

[25] https://www.Airbnb.com/help/article/2195/Airbnb-plus-program-terms-and-conditions.

[26] https://www.Airbnb.com/plus.

[27] 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.

[28] Maxim Charkov, Riley Newman, & Jan Overgoor, "Location Relevance at Airbnb"(May 1, 2013), at: https://medium.com/Airbnb-engineering/location-relevance-at-Airbnb-12c004247b07.

data—location, price, listing style, architecture—to develop the search tools that personalize results for the website's users online.[29]

So Airbnb is not a mere "platform" for the exchanges of buyers and sellers. It actively shapes the market for STR bookings in which it profits and participates directly. Increasingly, the operators with which it partners are commercial property owners that have converted what used to be residential housing into short-term rentals for travelers.

III. Santa Monica and Other Cities Have Acted Reasonably to Protect Their Residents.

Given the gravity of its threat to affordable housing in destination cities like Santa Monica, local legislative responses to Airbnb have been, if anything, measured. While cities could simply ban STRs—or ban STRs in particular neighborhoods most at risk of housing conversion—they have largely taken a different path, recognizing the value that true "home-sharing" can play while targeting the abusive violation of their local planning systems.

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[29] *See, e.g.*, Mihajlo Grbovic *et al.*, "Listing Embeddings in Search Ranking" (March 13, 2018) (describing offline testing of "embedding" technique for search personalization), at https://medium.com/Airbnb-engineering/listing-embeddings-for-similar-listing-recommendations-and-real-time-personalization-in-search-601172f7603e.

San Francisco requires that STRs only be rented out by the permanent resident of the unit—a person who resides in the unit for at least 275 days per year—and limits the rental of an STR unit without the permanent resident present to 90 days during a calendar year. S.F. Admin. Code § 41A.1 *et seq*. Like Santa Monica, San Francisco requires that STR operators register with the City, and prohibits "hosting platforms" like Airbnb from completing a booking transaction unless it has exercised "reasonable care" to determine that the unit is registered. S.F. Admin. Code § 41A.5(g)(4). Other California cities have adopted similar measures. *See, e.g*, Pasadena Municipal Code § 17.50.296; Santa Cruz Municipal Code 24.12.1700 *et seq*.

These California trends match a national trend: city residents are increasingly becoming fed up with Airbnb's impacts and are pressing for meaningful legislative protections. Santa Monica's Ordinance is a reasonable response to the damage that mass conversion of housing to traveler accommodations has done in the City.

ARGUMENT

I. Airbnb Seeks to Extend Section 230 Beyond Its Language and Purpose.

A. The Ordinance does not require Airbnb to monitor or remove any content placed on its interactive computer service.

Two district courts, the City and the other *amici* have compellingly explained why the Ordinance's prohibition against Airbnb engaging in economic

transactions to rent illegal STR units does not violate the CDA. But two additional points make Airbnb's Section 230 argument completely untenable: (1) determining whether a particular listing is on Santa Monica's registry does not, indeed *cannot*, require Airbnb to "scrutinize" listings on its interactive computer service because Airbnb *prohibits* listers from revealing the unit's actual address until booking occurs; and (2) prohibiting the booking of illegal STRs does not require Airbnb to take any extraordinary steps remove unbookable listings, as the market will resolve any mismatch.

1. The Ordinance does not "treat" Airbnb as the "publisher or speaker of information provided by another information content provider" by requiring it to "monitor" listings.

Airbnb argues repeatedly that by prohibiting it from carrying out (and profiting from) illegal booking transactions, the Ordinance violates Section 230 by requiring it "to monitor the content of a third-party listing and compare it against the City's short-term rental registry before allowing any booking to proceed." AOB, at 18; AOB, at 21. Two district courts have correctly found that the Ordinance does not regulate Airbnb in its role as a publisher because it "creates no obligation on [Airbnb's] part to monitor, edit, withdraw or block the content supplied by hosts." ER-10 (*quoting Airbnb, Inc. v. City & County of San Francisco,* 217 F.Supp.3d 1066, 1072-73 (N.D. Cal. 2016)).

Indeed, no court has held that the regulation of an economic transaction—including one that is consummated online—"treats" a provider of an interactive computer service as a publisher merely because the owner of an interactive computer service might decide to modify its website or edit third-party listings in response to the economic regulation. Instead, this and other courts have made clear that regulating economic transactions and contracts is not the same as 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'").

The fact that purely economic regulation might be a "but for" cause of the websites decision to engage in subsequent publishing functions—such as monitoring listings—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*.; *Fair Housing Council v. Roommates.com LLC*, 521 F.3d 1157. 1163 (9th Cir. 2008) (en banc).

But there is an even more fundamental flaw in Airbnb's argument: Airbnb's third-party listings *do not contain the addresses of the units for rent as a matter of Airbnb policy*. Airbnb could "scrutinize" its third-party listings as much as it wanted, but it would not find the information necessary to determine whether the listing is registered. Instead, Airbnb maintains STR addresses and identifying information *offline*.

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."[30] 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[.]"[31] Instead, a "host" provides Airbnb with the listing's actual address when it is creating the listing.[32]

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[30] "Is my listing's address visible on Airbnb?" at https://www.Airbnb.com/help/article/1502/is-my-listing-s-address-visible-on-Airbnb.

[31] "What is Airbnb's Content Policy?" at https://www.Airbnb.com/help/article/546/what-is-Airbnb-s-content-policy.

[32] *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.

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 concern for "personal safety risk[s] to an Airbnb community member"[33] but anyone with a credit card can access the address and operator of an STR.

Airbnb maintains data on the addresses of its listings offline, and uses this information to perform sophisticated analyses of booking trends, which help it to optimize its search and personalization functions.[34] Its Data Science and Analytics Department is more than able to perform the small-batch data comparison between STR listing addresses and Santa Monica Registry units that compliance with the Ordinance requires.

The conduct at issue—comparing addresses contained in two data sets to determine overlap—thus takes place outside of the interactive computer service that Airbnb claims gives it expansive CDA immunity. *See Doe v. 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

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[33] https://www.Airbnb.com/help/article/546/what-is-Airbnb-s-content-policy.

[34] 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.

that to "provide immunity every time a website uses data initially obtained from third parties would eviscerate [the statute]").

2. The Ordinance does not require Airbnb to remove listings.

Airbnb's other argument is that "in operation and effect, [the Ordinance] forces Airbnb and Homeaway to *remove* third-party content." AOB, at 22. Airbnb's argument is based entirely on what it claims will be its business reaction to having a website that is "chock-full" of illegal STRs that cannot be booked. *Id*. 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 uncompelled business decision to remove content from its website in response. Airbnb admits that its argument is based on its own "common sense" rather than on any precedent. AOB, at 23.

The fact that Airbnb may decide to restructure its website in response to Santa Monica's zoning regulation does not create immunity. Airbnb's claim that "Section 230 bars attempts to regulate a website's 'overall design and operation' with respect to third-party content" is absurdly overstated and incompatible with this Court's precedent. The case on which Airbnb bases this argument, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 22 (1st Cir. 2016), held only that the particular features of the Backpage.com website's posting rules—its permission for anonymous postings and acceptance of modified search terms like "brly legal" for

example—did not permit liability for 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 postings to solicit discriminatory criteria. *Roommates.com*, 521 F.3d at 1164.

But none of this is relevant here, because the justification for Santa Monica's Ordinance is not based on a claim that Airbnb is deliberately structuring its website to facilitate illegal conduct. Instead, Santa Monica is regulating the ultimate economic transaction that takes place through Airbnb's website (in which Airbnb participates). The First Circuit did not hold that Section 230 immunized Backpages.com from liability for actually *booking transactions* for underage prostitutes. Nor does Section 230 reach the regulation of illegal STR bookings here.

Ultimately, Airbnb's "removal" argument betrays a lack of faith in the market. The only purpose of listing STRs on Airbnb is so that they will be rented. If it is clear to listers that they do not stand to make any money by posting their illegal STRs on Airbnb because the booking transaction will not go through, they won't continue to do so.

B. Congress did not intend Section 230 as a blanket shield of "e-commerce" from the impacts of economic transactions.

In the end, Airbnb is 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. Section 230 was passed in 1996—long before the growth of "platform"-based e-commerce ventures—in response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y.Sup.Ct. May 24, 1995). *See Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). *See Batzel v. Smith*, 333 F.3d 1018, 1026–30 (9th Cir. 2003). There is nothing in the legislative history of the Act or in its language that demonstrates an intent to shield economic transactions from regulation "magically" when they are consummated online. *See Roommates.com*, 521 F.3d at 1164.

Airbnb claims that its CDA preemption argument follows from the Supreme Court's decision in *National Meat Association v. Harris*, 565 U.S. 452, 464 (2012), which it claims held that California's sales ban on slaughtered meats was preempted because the sales ban "would as a practical matter, regulate the very slaughterhouse activities subject to [Federal Meat Inspection Act ("FMIA")] preemption." AOB, at 26. But in addition to the other reasons for distinguishing this case that the City presents, the FMIA's express-preemption clause is a broad *field preemption* provision, barring states from enacting any marking, ingredient, or labeling requirements "in addition to, or different than, those made under this chapter." 21 U.S.C. § 678. Section 230, by contrast, was expressly intended to co-exist with the myriad state laws that affect conduct that takes place online. 47

U.S.C. § 230(e)(4) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section.").

II. There is No First Amendment Obstacle to Santa Monica's Regulation.

A. Airbnb's First Amendment theory would undo most forms of economic regulation.

Airbnb's constitutional argument boils down to the proposition that because an economic transaction was preceded by advertising—or even just the expression of offer and acceptance—any regulation of that economic transaction implicates the First Amendment. Nothing remotely like this theory has ever been accepted and doing so would undo most forms of economic regulation.

Airbnb argues that the Ordinance violates the First Amendment because it places a "content-based financial burden on speech by requiring the Platforms to screen advertisements, which are not illegal on their face, to avoid severe penalties." AOB, at 43. But even if the Ordinance forced Airbnb to screen "advertisements" on its website—a specious claim, as UNITE HERE has demonstrated—the ultimate commercial transaction would not be transmuted into First Amendment speech.

Santa Monica is not regulating commercial speech; it is regulating the economic transaction of renting an STR unit. "'[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by

means of language, either spoken, written, or printed.'" *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (*quoting Giboney v. Empire Storage & Ice Co.*, 336 U. S. 490, 502 (1949). "Commercial speech" is speech that "*propose*[*s*] a commercial transaction." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976) (emphasis added). It is a precursor to the commercial transaction itself, and courts have always distinguished between regulating the economic transaction and regulating the advertising that led to it.

This Court has recognized, for example, that regulating an offer to sell firearms or ammunition involves commercial speech—a *proposition* to engage in a commercial transaction—but "the act of exchanging money for a gun is not 'speech' within the meaning of the First Amendment." *Nordyke v. Santa Clara Cty.*, 110 F.3d 707, 710 (9th Cir. 1997). Similarly, a bar association rule regulating the content of a lawyer's unsolicited advice might implicate protected speech, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977), but "proscrib[ing] the acceptance of employment resulting from such advice" does not. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 458 (1978). A "ban on race-based hiring may require employers to remove 'White Applicants Only' signs" because such advertising is only incidental to the prohibition on the discriminatory hiring. *Rumsfeld*, 547 U.S. at 62. A law requiring New York delis to charge $10 for

sandwiches would "regulate the sandwich seller's conduct" regardless of the fact that "in order to actually collect that money, a store would likely have to put '$10' on its menus or have its employees tell customers that price." *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150 (2017). "[T]he law's effect on speech would be only incidental to its primary effect on conduct." *Id*.

Accepting Airbnb's First Amendment theory would undo all sorts of economic regulations. Rent-control laws prescribing maximum rents could be challenged on First Amendment grounds because they limited the landlord's ability to advertise the unit for whatever price she wished. Laws prohibiting the sale of alcohol to minors would have new constitutional implications because they limit liquor companies' ability to target advertising to children. The regulation of any economic transaction that was initiated by advertising or other commercial speech would become constitutionally suspect.

The lead case that Airbnb relies upon is *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). But there, the economic transaction being regulated was a payment *for expression*—a publishing contract for a book written by the Son of Sam. *Id*. at 116 (holding the law unconstitutional because it "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content"). The economic transaction being regulated here has no expressive

content; it is the exchange of money for the use of rental housing. Santa Monica is not singling out income derived from expressive activity, but rather non-expressive rental bookings.

The other cases that Airbnb cites also involved the regulation of transactions for expressive activity. In *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 562 (2011), the Vermont law "prohibit[ed] pharmacies and other regulated entities from selling or disseminating prescriber-identifying information *for marketing*." It regulated the future expressive use of the subject of exchange. In *Pitt News v. Pappert*, 379 F.3d 96, 109 (3d Cir. 2004), the state prohibited a newspaper from receiving income from alcoholic-beverage *advertising* (not from the sale of alcoholic beverages themselves). And *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1119 (11th Cir. 1992) and *Eimann v. Soldier of Fortune Magazine, Inc.*, 880 F.2d 830, 831 (5th Cir. 1989) both addressed whether Soldier of Fortune magazine could be held liable in wrongful-death actions based solely on advertisements they published that led to the hiring of hit men. Needless to say, Soldier of Fortune magazine didn't broker and insist on a percentage share of the murder-for-hire transaction itself.

B. Offers to engage in unlawful commercial transactions are not protected.

Given the elemental conduct/speech distinction here, Airbnb's remaining commercial-speech arguments are beside the point. But Airbnb's attempt to

expand the First Amendment to cover purely economic transactions based on the fact that they were preceded by advertising is even more extreme, since the only advertising in question proposes an illegal transaction.

"For commercial speech to come within [the First Amendment], it at least must concern lawful activity." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Commercial speech is not protected if "the transactions proposed in the forbidden [communication] are themselves illegal in any way." *Va. State Bd. of Pharmacy*, 425 U.S. at 772; *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that . . . proposes an illegal transaction . . . ."); *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1312 (9th Cir. 1997) ("Shilon's contention that his offer to sell counterfeit Levi's components is protected by the First Amendment is specious. For commercial speech to come within the protection of the First Amendment, it must concern lawful activity."); *Washington Mercantile Ass'n v. Williams*, 733 F.2d 687, 691 (9th Cir. 1984) ("Sale or delivery of drug paraphernalia is illegal in Washington, so advertisements for sales in or mail orders from Washington are unprotected speech.") (internal citation omitted); *Nordyke*,110 F.3d at 710.

Airbnb attempts to avoid these cases by claiming that the legality of STR listings is not clear "on the face" of its website's listings. AOB, at 47 (*citing Braun,* 968 F.2d at 1118-19 and *Eimann*, 880 F.2d at 831). But as UNITE HERE has explained, the inability to compare Santa Monica Airbnb listings and the City's registered STR database exists only because Airbnb, as a policy, does not permit listers to include the unit's address in the listing. Airbnb is perfectly able to make this comparison using data that exists outside of any advertisement (and in fact, offline). This comparison does not involve any act of judgment, analysis, or interpretation, just the comparison of two data points. The situation is nothing like the ambiguous advertisements that turned out to be offers of hit-men services in the Soldier of Fortune cases.

III. The Ordinance Does Not Violate the Coastal Act.

A. Airbnb's business constitutes "development" of the coastal zone and it—not the City—was obligated to obtain a permit from the Coastal Commission.

Airbnb says that the City should have obtained a permit from the Coastal Commission but it is really the other way around. Airbnb has greatly increased the intensity of use in Santa Monica's coastal zone. Through the facility it offers, the number of STR units has increased exponentially and so has the frequency of rental. That is its business plan. In fact, its very complaint against the City is that the Ordinance restricts this intensification of use.

Any person "wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit," in addition to any other permits required by law. Cal. Pub. Res. Code § 30600(a). Development is defined in § 30106 and includes a "change in the density or intensity of use of land." The undeniable effect of the increased number of short term rental units and rapid turnover of rentals is to increase vehicular and pedestrian traffic. This is a change in the intensity of the use of the land within the meaning of § 30106. *Stanson v. San Diego Coast Regional Commission*, 101 Cal.App.3d 38, 47 (1980).

In *Stanson*, a landowner remodeled an existing business to add a restaurant on the second floor. *Id*. at 41. The San Diego Regional Commission, sustained by the Coastal Commission, concluded that this was an intensification of use due to increased traffic in the area and the lack of additional parking to accommodate restaurant patrons. Therefore, a permit was required. *Id*. at 42. The Court of Appeal found that the interpretation of the term "development" to include "increases in intensity of use resulting from increased automobile or pedestrian traffic" is "consistent with the legislative policy of the Act found in section 30001.5." *Id*. at 47. The court also concurred that the Commission can consider future similar uses so that it can evaluate cumulative impact before approving a project. *Id*. at 48. The Coastal Act was subsequently amended without any alteration of these conclusions. "Thus, the Legislature has acceded to this

interpretation of the statutory language." *Electric Pointe, LLC v. The California Coastal Comm.*, 2009 WL 3808354 (Cal.App. 2 Dist. 2009) (unpublished).

Airbnb should have applied for permits to organize this extreme intensification of the use of residential property in the coastal zone not just in Santa Monica but all up and down the coast. It is consistent with the "disruptive" business plan of ignoring regulatory laws that it did not do so. There is an argument that each person listing on Airbnb should have requested a permit to allow a more intense use of the lister's property. ER 626. But this burden rightly fell on Airbnb, which deliberately created the means for this *en masse* change in use. The fact that Airbnb does not control the buildings it rents and that its part in the business does not involve it in physical changes to the buildings does not prevent its service from being "development." The definition of this term extends beyond physical changes. *California Coastal Comm. v. Quanta Investment Corp.*, 113 Cal.App.3d 579, 609 (1980) (conversion of apartments into stock cooperative constitutes development); *see also La Fe, Inc. v. Los Angeles County*, 73 Cal.App.4th 231, 241-242 (1999) (lot line adjustments which did not increase the overall size of the landholding or the number of parcels within it was nevertheless a "development").

Airbnb thus comes to court with unclean hands. It upbraids the City for not taking the action which it should itself have taken, when the City's action was only

a response to Airbnb's own illegal conduct. *See Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985).

B. Airbnb fails to show that its rentals are "lower cost," the factual basis for its Coastal Act argument, and it unduly emphasizes this policy in derogation of the other policies of the Act.

Airbnb asserts that it should get an injunction because the STRs it brokers comport with the objective of the Coastal Act to permit "lower cost" access. But it does not point to anything in the record to support this claim factually. AOB at 3, 52. The only "evidence" it submitted to the District Court was the statement of its Head of Policy Strategy that its listings are "economical." ER 394. It claims in its brief that its offerings are "lower cost," but lower cost than what? Luxury beachfront hotels? Traditional, modest beach-area motels, which abound in Santa Monica and its vicinity? Are all of the rentals advertised by Airbnb cheap or are some of them for extremely expensive units in prime locations? In the absence of any evidence that Airbnb' rentals in the coastal zone are actually lower than other places for transients to stay, and don't merely represent an expansion of the market for transient occupancy at the expense of genuine residential use, it would have been improper for the District Court to grant the Platform's injunction on Coastal Act grounds, even accepting the tenets of Airbnb's arguments.

Even if Airbnb had given the courts any reason to believe that its rental units cost less than alternatives, it is a vast overreach for Airbnb to claim that anything

that interferes with "lower cost" access to the coastal zone is within the Commission's power. Building and fire codes obviously affect the cost of residential units. Moreover, it would not be extreme to extend Airbnb's argument to any attempt by coastal municipalities to regulate such things as overnight parking of RVs or camping in beach areas, which are cheaper yet. Proper analysis under the Coastal Act requires a balance which is completely missing from Airbnb' absolutist approach that if its service costs less than other alternatives, it must be allowed.

Airbnb elevates public access to a primacy it does not deserve. This is only one of the policies of the Coastal Act and not even the leading one. The first and most important one is to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and manmade resources." Cal. Pub. Res. Code § 30001.5(a). The second one, very pertinent here, is to "[a]ssure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state." Cal. Pub. Res. Code § 30001.5(b). Airbnb's very essence is to profit from *disorder*, by disrupting the conventional, regulated market for transient occupancy. In Airbnb's business model, anyone can rent out coastal property to anyone else for any length of time for almost any reason—including party houses. Deliberate disorder inevitably affects the first value, the quality of the coast and

our enjoyment of it. That enjoyment includes residential use, particularly low-income housing availability. *Quanta Investment Corp.*, *supra*, 113 Cal.App.3d at 588. Airbnb's behavior is destructive of this value, and the Ordinance advances it. Airbnb's organization of large-scale, commercial STRs turns residential areas into commercial areas afflicted with the comings and goings of strangers with no connection with or concern for the lives of ordinary people who are trying to live there.

C. At most, if Airbnb's Coastal Act argument were sound, only application of the Ordinance to the coastal zone could be enjoined.

As Airbnb must recognize, its Coastal Act arguments could never result in the invalidation of the entire Ordinance. The Ordinance covers the entirety of the City. The coastal zone is only 1000 feet wide. Cal. Pub. Res. Code § 30103. Airbnb estimates that only about thirty percent of its Santa Monica listings are in this zone. ER 394. The most Airbnb could accomplish with this argument would be to prevent enforcement in the narrow coastal zone. *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174–75 (9th Cir. 2018) ("While '[a] successful challenge to the facial constitutionality of a law invalidates the law itself,' a successful as-applied challenge invalidates 'only the particular application of the law.'" (*quoting Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998)); *see Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 861–62 (9th Cir. 2017). Nevertheless, it persists in

its argument that the entire Ordinance should have been enjoined on these grounds. AOB, at 57. An injunction properly confined would actually make matters worse for Airbnb if its allegations about the amount of work it must do to comply with the Ordinance were true. It would have to determine which units were within the coastal zone instead of just keeping track of unregistered addresses within the City. This points to the hollowness of Airbnb's entire legal endeavor.

CONCLUSION

The district court properly denied Appellants' request for an injunction. Its decision should be upheld.

Dated: May 23, 2018

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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