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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN FRANCISCO DIVISION
 16

17 AIRBNB, INC. and HOMEAWAY.COM,
 18 INC.,

19 Plaintiffs,

20 vs.

21 CITY AND COUNTY OF SAN
 FRANCISCO,

22 Defendant.
 23
 24

Case No. 3:16-cv-03615-JD

**PLAINTIFFS' JOINT NOTICE OF
 MOTION AND MOTION FOR
 PRELIMINARY INJUNCTION;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Judge: Hon. James Donato
 Courtroom: 11
 Time: Oct. 6, 2016 at 10:00 am

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1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that on October 6, 2016 at 10:00 a.m. or as soon thereafter as
3 they may be heard, Plaintiffs Airbnb, Inc. (“Airbnb”) and HomeAway.com, Inc. (“HomeAway”)
4 will and hereby do move for a preliminary injunction.

5 Plaintiffs respectfully request an order enjoining Defendant City and County of San
6 Francisco (the “City”) from enforcing against them amended sections 41A.5(e) and 41A.5(g)(4)(C)-
7 (E) of the San Francisco Administrative Code (the “Ordinance”).¹

8 **I. INTRODUCTION**

9 In June, the Board of Supervisors passed an ordinance (the “Original Ordinance”) requiring
10 Hosting Platforms to “verify” that short-term rental listings posted on their websites by third parties
11 have valid registration numbers, or risk criminal and civil penalties for their users’ listing of
12 unregistered rentals. Declaration of Jonathan H. Blavin (“Blavin Decl.”), Ex. A at 3-5. Plaintiffs
13 filed this action, asserting the ordinance was preempted by Section 230 of the Communications
14 Decency Act (“CDA”), 47 U.S.C. § 230, and violates the First Amendment. As Supervisor David
15 Campos (a sponsor of the law) said, the City “read [Airbnb’s]” preliminary injunction motion,
16 “said, you make a good point,” and decided “we’re going to modify.” Blavin Decl., Ex. B at 2.

17 The Board passed amendments in August. Supervisor Campos has said the Board made “a
18 very few set of modest revisions,” and the “intent of” the Ordinance remains the same. *Id.*, Ex. C
19 at 1. So does its effect. The Ordinance, like the original law, imposes criminal and civil liability on
20 Hosting Platforms for unregistered short-term rentals listings. It also requires Hosting Platforms to
21 verify that a rental is “lawfully registered ... at the time [it] is rented.” § 41A.5(g)(4)(C). The
22 Ordinance suffers the same defects as the original law (and more) and violates Section 230 and the
23 First Amendment. The Court should therefore enjoin its enforcement.²

24 _____
25 ¹ A copy of the Ordinance as amended is attached as Appendix A. The full version of Chapter 41A,
26 before amendment by the Ordinance, is attached as Appendix B. All citations to sections of Chapter
27 41A refer to the San Francisco Administrative Code as amended by the Ordinance.

28 ² This action is both an as-applied and a facial challenge. It is as-applied in that it seeks only to
prohibit the City from enforcing the Ordinance against Plaintiffs; and it is a facial challenge in that
the Ordinance, on its face, is invalid in certain respects. *See Foti v. City of Menlo Park*, 146 F.3d
629, 635 (9th Cir. 1998).

1 Section 230 prohibits “treat[ing]” websites “as the publisher or speaker of any information
2 provided by another information content provider.” 47 U.S.C. §§ 230(c)(1), (e)(3). In other words,
3 websites cannot be liable based on content provided by third parties. Under settled law, this
4 immunity extends to the processing of third-party transactions resulting from such content. The
5 Ordinance violates this proscription by imposing severe criminal and civil penalties on Hosting
6 Platforms that collect a fee and provide “Booking Services,” defined as reservation or payment
7 services that “facilitate” short-term rental transactions, where the property at issue is not “lawfully
8 registered.” §§ 41A.4, 41A.5(g)(4)(C). The Ordinance thus requires Hosting Platforms to monitor,
9 verify, and effectively block user listings, in violation of Section 230. That platforms accept a fee or
10 provide “reservation” or “payment services” does not mean the CDA does not apply. Indeed, if
11 parties could evade the law in this manner, this would leave a gaping hole in Section 230’s
12 protections and undermine its core objectives, including “the development of e-commerce.” *Batzel*
13 *v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003).

14 The Ordinance also violates the First Amendment. It is a content-based restriction that
15 burdens protected speech, i.e., third-party rental listings, published on Hosting Platforms, and is
16 therefore subject to “heightened judicial scrutiny” under the First Amendment. *Sorrell v. IMS*
17 *Health*, 564 U.S. 552, 570 (2011). To meet this standard, the City must show the Ordinance is
18 narrowly tailored to further a substantial government interest. But the “normal method of deterring
19 unlawful conduct” is to punish the conduct, not prohibit speech about it. *Bartnicki v. Vopper*, 532
20 U.S. 514, 529 (2001). The City cannot show the obvious alternative of enforcing its laws against
21 residents who rent properties in violation of the law would be ineffective or inadequate. Just the
22 opposite: The City *can* (and does) enforce its laws against hosts who violate them. The Ordinance
23 also violates the First Amendment because it imposes criminal penalties on Hosting Platforms
24 without requiring any showing of scienter. The City has impermissibly created a strict-liability
25 crime for providing Booking Services in connection with rentals that are not “lawfully registered,”
26 even if the platform has no knowledge of that fact. But the Supreme Court has rejected efforts to
27 impose strict criminal liability for the publication of allegedly unlawful third-party content because
28 such restrictions chill protected, lawful speech.

1 Absent this Court’s intervention, the Ordinance will cause Plaintiffs irreparable harm. “The
 2 loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes
 3 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). So, too, courts have found
 4 irreparable harm where, as here, a plaintiff faces a threat of prosecution, a substantial disruption to
 5 its business, and erosion of customer goodwill, under a preempted state law. Given this palpable
 6 threat of irreparable harm, the equities tip sharply in Plaintiffs’ favor, and the public interest is
 7 served by enforcing the Constitution and federal law. At the same time, an injunction would not
 8 prevent the City from continuing to enforce its laws against residents who violate them. The Court
 9 should enjoin enforcement of the Ordinance against Hosting Platforms such as Plaintiffs.

10 **II. BACKGROUND**

11 **A. Airbnb and HomeAway**

12 Airbnb and HomeAway provide Internet platforms through which persons desiring to book
 13 accommodations (“guests”) and those listing accommodations available for rental (“hosts”) can find
 14 each other, make arrangements, and enter into agreements for rentals. Airbnb operates Airbnb.com,
 15 and HomeAway operates HomeAway.com, VRBO.com, and VacationRentals.com.³ *See*
 16 Declaration of David Owen (“Owen Decl.”), ¶ 2; Declaration of Bill Furlong (“Furlong Decl.”), ¶ 2.

17 Neither Airbnb nor HomeAway manages, operates, leases or owns the accommodations
 18 listed by third-party hosts, and neither is a party to the agreements between guests and hosts for the
 19 booking of rentals. Owen Decl. ¶ 4; Furlong Decl. ¶ 3. Plaintiffs’ websites provide means by
 20 which hosts can list their accommodations and guests can locate and connect with hosts. Owen
 21 Decl. ¶ 3; Furlong Decl. ¶ 2. Hosts provide the content for listings, such as descriptions and rental
 22 prices, and the dates and lengths of stay their properties are available. Owen Decl. ¶¶ 6-7; Furlong
 23 Decl. ¶ 6. Plaintiffs’ terms of service require hosts to agree they are solely responsible for the
 24 content of their listings. *See* Owen Decl. ¶ 7 & Ex. 1 at 6 (hosts “alone are responsible for any and
 25 all Listings and Member Content [they] post.”); Furlong Decl. ¶ 6 & Ex. B § 8 (“All property
 26 listings on the Site are the sole responsibility of the” owner). Plaintiffs do not review all listings

27 _____
 28 ³ The three websites are referred to collectively as “HomeAway” or the “HomeAway websites.”

1 before they appear on their websites. Owen Decl. ¶¶ 17, 19; Furlong Decl. ¶ 6.

2 Plaintiffs also require hosts (and guests) to comply with local laws in listing and renting
 3 units. Airbnb’s Terms of Service state: “HOSTS SHOULD UNDERSTAND HOW THE LAWS
 4 WORK IN THEIR RESPECTIVE CITIES. SOME CITIES HAVE LAWS THAT RESTRICT
 5 THEIR ABILITY TO HOST PAYING GUESTS FOR SHORT PERIODS.... IN MANY CITIES,
 6 HOSTS MUST REGISTER, GET A PERMIT, OR OBTAIN A LICENSE BEFORE LISTING A
 7 PROPERTY OR ACCEPTING GUESTS. CERTAIN TYPES OF SHORT-TERM BOOKINGS
 8 MAY BE PROHIBITED ALTOGETHER.” Owen Decl., Ex. 1 at 1. HomeAway’s Terms and
 9 Conditions state that hosts “are responsible for and agree to abide by all laws, rules, ordinances, or
 10 regulations applicable to the listing of their rental property ..., including but not limited to laws ...
 11 [and] requirements relating to taxes....” Furlong Decl., Ex. B, § 1. In addition, Plaintiffs
 12 encourage hosts to be aware of the laws in their jurisdictions and provide information on their
 13 websites about San Francisco’s laws specifically. *See* Owen Decl., Exs. 2-3 (Airbnb “Responsible
 14 Hosting” pages, referencing and summarizing San Francisco laws, providing links, and informing
 15 hosts about including registration numbers in listings); Furlong Decl. ¶ 8 (HomeAway information
 16 about San Francisco laws and requirements).⁴

17 Airbnb and HomeAway have different models and provide different options for hosts and
 18 guests to communicate and make arrangements with one another. Airbnb allows guests to make
 19 arrangements with hosts through online booking and enables the provision of payment processing
 20 services to permit hosts to receive payments electronically. Owen Decl. ¶ 3. For use of its services,
 21 including its publication and listing services, Airbnb receives a fee from both guests and hosts,
 22 which is a percentage of the rental fee as set by the host. *Id.* ¶ 8.

23 HomeAway hosts pay for services in one of two ways. First, they may buy subscriptions to

24 ⁴ Also, as part of the Airbnb Community Compact, the company provides solutions tailored to the
 25 needs of cities like San Francisco with historic housing challenges. *See* Owen Decl. ¶ 14 & Ex. 4.
 26 For example, Airbnb voluntarily removes listings that it believes may be offered by hosts with
 27 multiple “entire home” listings or by unwelcome commercial operators. *See id.* ¶ 14. If Airbnb is
 28 alerted to shared spaces or private rooms that appear to be operated by such operators or do not
 reflect the community vision, it generally removes such listings. *See id.* Within the last year, Airbnb
 has removed numerous San Francisco listings as part of its Community Compact. *See id.* ¶¶ 14-15
 & Ex. 5.

1 advertise their properties for a specified period of time, such as a year. Furlong Decl. ¶ 4. Second,
 2 they may choose a pay-per-booking option, paying for the services based on a percentage of the
 3 total cost of a confirmed booking. *Id.* Under this second arrangement, hosts and guests may make
 4 rental arrangements through online booking and online payment services using a third-party
 5 processor. *Id.* ¶ 10. Hosts and guests may also make arrangements by communicating through a
 6 messaging service on HomeAway’s websites or by exchanging phone numbers or personal email
 7 addresses and communicating directly. *Id.* ¶ 9. In instances when hosts and guests arrange rentals
 8 and payments on their own, HomeAway may have no information about whether rentals occurred
 9 or only such information as is reflected in host-guest communications through the website. *Id.*

10 **B. San Francisco’s Regulatory Scheme Governing Short-Term Rentals**

11 **1. Background Regarding Short-Term Rental Regulation in the City**

12 In October 2014, the Board of Supervisors amended Chapter 41A (effective February 2015)
 13 to make short-term rentals lawful in San Francisco, subject to certain limitations and requirements.
 14 “Permanent Residents” who have occupied their units for at least 60 days may offer their homes for
 15 “Short-Term Rental.” §§ 41A.4; 41A.5(g).⁵ Residents must register their properties and “include[]
 16 the Department-issued registration number on any Hosting Platform listing.” §§ 41A.5(g)(1)(F),
 17 (g)(2)(A). In addition, the amendments require Hosting Platforms to notify users of the City’s
 18 short-term rental regulations and collect and remit Transient Occupancy Taxes (“TOT”) required
 19 under the Business and Tax Regulations Code. § 41A.5(g)(4)(A)-(B).

20 To register their properties, hosts must complete a two-step process. First, they must obtain
 21 a Business Registration Certificate from the Treasurer & Tax Collector. Blavin Decl., Ex. D at 4.
 22 Second, they must schedule an in-person appointment with the Office of Short-Term Rentals
 23 (“OSTR”) and provide an application, proof of residency, Business Registration Certificate, and
 24 proof of at least \$500,000 in liability insurance and that the property does not violate any City code.
 25 *Id.* Thereafter, they must submit quarterly reports of all stays. *Id.* at 2. Hosts, unless exempted,
 26 must also obtain a Certificate of Authority from the Treasurer & Tax Collector and file monthly

27 _____
 28 ⁵ There is no limit on the number of days per year a unit may be rented if it is “hosted”; if the host is
 not on site, the unit cannot be rented more than 90 days a year. § 41A.5(g)(1)(A).

1 reports disclosing the rent received and TOT due. *Id.*, Ex. E at 3-4. In addition, earlier this year,
2 the City’s Assessor-Recorder announced that hosts must pay taxes on physical assets, meaning they
3 must report the cost and acquisition year of “each piece of furniture, equipment, and supplies used
4 in renting [their] residence, including furnishings from the kitchen, living room, dining room, and
5 bedroom, such as televisions, computers, bed frames, mattresses, tables, chairs, stoves, fridges,
6 appliances, dish washers, clothes washers and dryers, entertainment units, artwork, and any other
7 property that [they] provide to [their] renters.” *Id.*, Ex. F at 1.

8 To administer and enforce its laws, the City created the OSTR. An April 2016 report of the
9 City’s Budget and Legislative Analyst’s Office (prepared at the request of Supervisor Campos)
10 observed that the OSTR had been active in pursuing enforcement of the City’s short-term rental
11 laws by “levy[ing] fines against hosts found to be non-compliant,” including nearly \$700,000 as of
12 February 2016. *Id.*, Ex. G at 21. The report also stated that the City expected to increase its efforts
13 to promote compliance by hosts when the “OSTR became fully staffed in December 2015,” and
14 predicted this would “further close [the] gap” “between the number of registered hosts and the
15 number of hosts advertising short-term rentals on online platforms.” *Id.*

16 **2. The Original Ordinance Imposing Liability on Hosting Platforms**

17 In June 2016, the Board of Supervisors enacted the Original Ordinance, the City’s first
18 attempt to impose requirements on Hosting Platforms to monitor and block or remove listings
19 allegedly in violation of City law. The Original Ordinance required platforms to verify that all
20 listings had a valid registration number. Hosting Platforms could comply with the requirement by
21 either “[p]roviding the verified registration number on each listing” or “[s]ending the verified
22 registration number, Residential Unit street address (including any unit number), and host name” to
23 the OSTR by email “prior to posting the listing.” Blavin Decl., Ex. A at 4.

24 Supervisor Campos explained the intent of the Original Ordinance was to “hold[] Airbnb
25 and other hosting platforms accountable for advertising illegal short term rentals.” *Id.*, Ex. H at 1.
26 He said it targeted the Hosting Platforms and “change[d] [the methods of] enforcement” for the
27 City’s short-term rental regulations. *Id.*, Ex. I at 2. Supervisor Aaron Peskin (who, with Supervisor
28 Campos, co-sponsored the Original Ordinance) similarly said the City sought to “hold[] the hosting

1 platforms accountable” for listings provided by users. *Id.*, Ex. J at 1. The City Attorney’s Office
 2 acknowledged that the Original Ordinance could raise “issues under the Communications Decency
 3 Act” but claimed it had been drafted “in a way that minimizes” those issues by regulating “business
 4 activities” instead of “content.” *Id.*, Ex. K at 3.

5 **3. The City’s Withdrawal of the Original Ordinance After Airbnb and** 6 **HomeAway Sued**

7 With the Original Ordinance scheduled to take effect July 24, 2016, Airbnb filed its
 8 complaint and a preliminary injunction motion in this action on June 27, 2016. (ECF Dkt. Nos. 1,
 9 3.) HomeAway filed a complaint in intervention five days later. (ECF Dkt. No. 24.) Plaintiffs
 10 contended the ordinance violated, among other laws, the CDA and the First Amendment. In a
 11 telephonic conference on July 1, 2016, the Court set a briefing schedule for the preliminary
 12 injunction motion, with a hearing date of September 7, 2016. (ECF Dkt. No. 19.) The City agreed
 13 to stay enforcement of the Original Ordinance until the Court’s ruling.

14 Faced with Plaintiffs’ challenges, the Board of Supervisors decided to withdraw the Original
 15 Ordinance and pursue an amended ordinance. On July 12, 2016, Supervisor Campos introduced the
 16 Ordinance to the Board. He explained that he offered the Ordinance because the City “read
 17 [Airbnb’s] brief,” “said, you make a good point,” and decided “we’re going to modify” the
 18 ordinance. Blavin Decl., Ex. B at 2. On July 19, the Court granted the City’s request for a stay of
 19 proceedings to allow the Board to consider the proposed amendments. (ECF Dkt. No. 36.)⁶

20 **4. The Amended Ordinance Imposing Liability on Hosting Platforms**

21 The Ordinance passed the Board of Supervisors on August 2, 2016 and becomes effective on

22 ⁶ San Francisco is not the only city to conclude that imposing liability on Hosting Platforms for
 23 users’ listings is impermissible. In July, Airbnb and HomeAway filed suit challenging a similar
 24 ordinance passed by the City of Anaheim. *See* Nos. 8:16-cv-1398, 8:16-cv-1402 (C.D. Cal.).
 25 Unlike the law here, the Anaheim law contained a “savings clause,” which stated the law “shall be
 26 interpreted in accordance with otherwise applicable state and federal law(s) and will not apply if
 27 determined by the city to be in violation of any such law(s).” Anaheim Mun. Code § 4.05.120.030;
 28 *see id.* § 4.05.130.0103. On August 10, 2016, Anaheim’s City Attorney stated in a letter to Airbnb
 and HomeAway that, given “the current state of the law,” the City had determined that its ordinance
 “does not and will not be applied to Airbnb, HomeAway or other hosting platforms,” and “the City
 will not seek to enforce” the law “against hosting platforms.” Blavin Decl., Ex. L at 1. As a
 spokesperson for Anaheim stated, “[a]fter considering federal communications law, we won’t be
 enforcing parts of Anaheim’s short-term rental rules covering online hosting sites.” *Id.*, Ex. M at 1.

1 September 11. According to Supervisor Campos, the amendments made “a very few set of modest
2 revisions,” and the “intent of” the Ordinance remains the same. Blavin Decl., Ex. C at 1. The
3 Ordinance, like the Original Ordinance, imposes criminal and civil liability on Hosting Platforms
4 for short-term rental listings that are not “lawfully registered.” § 41A.5(g)(4)(C). It states:

5 A Hosting Platform may provide, and collect a fee for, Booking Services in
6 connection with short-term rentals for Residential Units [in the City] only when
7 those Residential Units are lawfully registered . . . at the time the Residential Unit
is rented for short term rental.

8 *Id.* A “Hosting Platform” is defined as any entity:

9 that participates in the short-term rental business by providing, and collecting or
10 receiving a fee for, Booking Services . . . usually . . . through an online platform
that allows an Owner to advertise the Residential Unit through a website provided
by the Hosting Platform.

11 § 41A.4. “Booking Services,” in turn, are defined as:

12 any reservation and/or payment service provided by a person or entity that
13 facilitates a short-term rental transaction between an Owner or Business Entity
14 and a prospective tourist or transient user and for which the person or entity
15 collects or receives, directly or indirectly through an agent or intermediary, a fee
in connection with the reservation and/or payment services provided for the short-
term rental transaction.

16 *Id.* In short, the Ordinance bars Hosting Platforms from providing Booking Services or collecting
17 fees in relation to such services without first verifying that every property listed by hosts for rental
18 is “lawfully registered” with the OSTR “at the time the Residential Unit is rented.” The Ordinance
19 states that “any Hosting Platform that provides a Booking Service . . . in violation of the . . .
20 obligations under this Chapter 41A shall be guilty of a misdemeanor,” punishable by a fine of
21 \$1,000, six months in jail, or both. § 41A.5(e). In addition, it provides for “administrative
22 penalties” up to \$484 for initial violations and up to \$968 for subsequent violations. § 41A.6(d)(1).

23 The Ordinance also imposes other obligations on Hosting Platforms that were not called for
24 by the Original Ordinance. It requires a monthly “affidavit to the [OSTR] verifying that the
25 Hosting Platform has complied with subsection (g)(4)(C)” (*i.e.*, the obligations imposed on
26 platforms) “in the immediately preceding month.” § 41A.5(g)(4)(D). It also requires each platform
27 to maintain records of all short-term bookings for a three-year period, § 41A.5(g)(4)(E), and creates
28 new subpoena powers for the OSTR to obtain those records, § 41A.7(b)(2).

1 City officials have indicated that if Hosting Platforms charge “solely an advertisement fee,”
2 or do not charge any fees for rental listings (such as Craigslist), they are not covered by the
3 Ordinance. *See* Blavin Decl., Ex. N at 3 (Deputy City Attorney stating that if platforms charge
4 “solely an advertisement fee,” not subject to law); *id.* at 2 (Supervisor Campos stating if site
5 “simply lists advertisements on its platforms and does not charge a fee, and we have the example of
6 Craigslist,” it is not subject to law); *id.*, Ex. O at 3 (Deputy City Attorney stating Craigslist not
7 subject to law). Supervisor Campos’s office staff stated the Ordinance is intended to cover those
8 sites where there is a “business transaction plus the advertising” of the listing. *Id.*, Ex. O at 2.

9 According to Supervisor Campos, the Ordinance, like the Original Ordinance, is intended to
10 “regulat[e] the business activity of hosting platforms, not website content,” *id.*, Ex. N at 1, by
11 requiring that they “do business with law-abiding hosts,” rather than those who are “out of
12 compliance with the law,” *id.*, Ex. C at 1-2. Supervisor Peskin has said the law aims to target
13 “unscrupulous speculators,” not “mom and pop” hosts. *Id.*, Ex. P at 1; *see also id.*, Ex. O at 1-2
14 (similar statements of Supervisor Peskin). In Supervisor Campos’s view, “it is only fair that Airbnb
15 and others help us enforce the law.” *Id.*, Ex. N at 2.

16 **III. ARGUMENT**

17 **A. Standard for Preliminary Injunction**

18 “A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on
19 the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the
20 balance of equities tips in her favor, and (4) an injunction is in the public interest.” *Farris v.*
21 *Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). Alternatively, ““serious questions going to the merits’
22 and a balance of hardships that tips sharply towards the plaintiff can support issuance of a
23 preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable
24 injury and that the injunction is in the public interest.” *Id.* “[I]n the First Amendment context, the
25 moving party bears the initial burden of making a colorable claim that its First Amendment rights
26 have been infringed, or are threatened with infringement, at which point the burden shifts to the
27 government to justify the restriction.” *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1115-16
28 (9th Cir. 2011). For the following reasons, Plaintiffs have satisfied these standards.

1 **B. Plaintiffs Are Likely To Succeed on the Merits of Their Claims**

2 **1. The Ordinance Violates and Is Preempted By the CDA**

3 **(a) The CDA Provides Broad Immunity to Websites for Third-Party**
4 **Content**

5 The CDA bars the government from imposing liability on websites based on content
6 provided by third parties. It provides: “No provider or user of an interactive computer service shall
7 be treated as the publisher or speaker of any information provided by another information content
8 provider.” 47 U.S.C. § 230(c)(1). The law prohibits liability “under any State or local law that is
9 inconsistent with this section.” *Id.* § 230(e)(3). Section 230 “establish[es] broad ‘federal immunity
10 to any cause of action that would make service providers liable for information originating with a
11 third-party user of the service.’” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1118 (9th Cir.
12 2007) (quoting *Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997)); *see also Nemet*
13 *Chevrolet, Ltd. v. Consumraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“plaintiffs may hold
14 liable the person who creates or develops unlawful content, but not the interactive computer service
15 provider who merely enables that content to be posted online.”).

16 Congress enacted Section 230 to achieve two goals. First, it “wanted to encourage the
17 unfettered and unregulated development of free speech on the Internet, and to promote the
18 development of e-commerce.” *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir. 2003); 47 U.S.C. §
19 230(b)(2) (statute intended to “preserve the vibrant and competitive free market that presently exists
20 for the Internet.”). Second, it sought to encourage online providers to “self-police” for potentially
21 harmful or offensive material by providing immunity for such efforts. *Batzel*, 333 F.3d at 1028; *see*
22 47 U.S.C. § 230(c)(2). Congress recognized the Internet would not flourish if intermediaries could
23 be liable for third-party content, “given the volume of material communicated through [it], the
24 difficulty of separating lawful from unlawful speech, and the relative lack of incentives to protect
25 lawful speech.” *Universal Commc’n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 418-19 (1st Cir. 2007);
26 *see Batzel*, 333 F.3d at 1028 (Section 230 intended to eliminate the “obvious chilling effect” that
27 imposing liability on online providers would cause). The CDA thus “sought to prevent lawsuits
28 from shutting down websites and other services on the Internet.” *Batzel*, 333 F.3d at 1027-28.

1 Courts have interpreted the CDA to establish broad immunity for online providers, as the
 2 Ninth Circuit and nine other circuit courts have held. *See Fair Hous. Council of San Fernando*
 3 *Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75, 1180 (9th Cir. 2008) (en banc) (Section
 4 230 provides a “broad grant of webhost immunity”); *Jane Doe No. 1 v. Backpage.com, LLC*, 817
 5 F.3d 12, 19 (1st Cir. 2016) (courts have recognized “a capacious conception of what it means to
 6 treat a website operator as the publisher or speaker of information provided by a third party”).⁷

7 **(b) Section 230 Provides a Straightforward Test for Website**
 8 **Immunity**

9 Section 230 sets forth a three-part test. The law applies and provides immunity when (1) a
 10 party is a “provider or user of an interactive computer service,” and a law (2) “seeks to treat” the
 11 party “as a publisher or speaker” (3) “of information provided by another information content
 12 provider.” *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100-01 (9th Cir. 2009). Each of these elements
 13 is met here.

14 First, Airbnb and HomeAway unquestionably are “interactive computer service” providers.
 15 47 U.S.C. § 230(f)(2). And, as the Ninth Circuit has held, the “most common interactive computer
 16 services are websites.” *Roommates*, 521 F.3d at 1162 n.6.

17 Second, third parties (*i.e.*, hosts listing their properties) undisputedly create and provide the
 18 online content that the Ordinance targets. Third-party hosts create and provide descriptions of their
 19 listings, set the lengths of any particular rental, decide how many listings to place on platforms, and
 20 are responsible for lawfully registering their short-term rentals, obtaining a registration number
 21 from the City, and including those numbers “on any Hosting Platform listing.” §§ 41A.5(g)(1)(F),

22 _____
 23 ⁷ *See Lycos*, 478 F.3d at 419 (“Section 230 immunity should be broadly construed”); *Almeida v.*
 24 *Amazon.com, Inc.*, 456 F.3d 1316, 1321 (11th Cir. 2006) (“federal circuits have interpreted [Section
 25 230] to establish broad federal immunity”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119,
 26 1123-24 (9th Cir. 2003) (noting “consensus” that “§ 230(c) provides broad immunity for publishing
 27 content provided primarily by third parties”); *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir.
 28 2008) (“Courts have construed the immunity provisions in § 230 broadly”); *Ricci v. Teamsters*
Union Local 456, 781 F.3d 25, 28 (2d Cir. 2015); *Jones v. Dirty World Entm’t Recordings LLC*, 755
 F.3d 398, 407 (6th Cir. 2014); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014);
Johnson v. Arden, 614 F.3d 785, 791 (8th Cir. 2010); *Chi. Lawyers’ Comm. for Civil Rights Under*
Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 672 (7th Cir. 2008); *Green v. Am. Online*, 318 F.3d 465,
 471 (3d Cir. 2003); *Ben Ezra*, 206 F.3d at 985 n.3; *Zeran*, 129 F.3d at 330-31.

1 (g)(2)(A). Airbnb and HomeAway are not the content providers but merely provide the forum for
 2 the listings. Owen Decl. ¶¶ 6-7; Furlong Decl. ¶ 6. The Ordinance acknowledges this, defining a
 3 “Hosting Platform” as “an online platform *that allows an Owner to advertise* the Residential Unit
 4 through a website.” § 41A.4 (emphasis added).

5 Third, as discussed below, the Ordinance imposes requirements and liability on Plaintiffs
 6 for being the “publisher or speaker” of third-party content. Indeed, the express purpose of the
 7 Ordinance is to impose obligations on Hosting Platforms to monitor, review, and, in practice,
 8 block listings (under the threat of potential criminal and civil penalties) to alleviate work the City
 9 would otherwise have to do to administer and enforce its short-term rental laws. These acts are
 10 integral to Plaintiffs’ role as “publishers or speakers” of third-party content.

11 (c) **The Ordinance Treats Hosting Platforms as the Publisher or
 12 Speaker of Third-Party Content, in Violation of Section 230**

13 (i) **The Ordinance Imposes Liability On Hosting Platforms
 14 Stemming From Transactions On Their Sites**

15 The Ordinance imposes liability on Hosting Platforms for transactions among third parties
 16 through their websites—*i.e.*, prohibiting Booking Services for any property that is not “lawfully
 17 registered”—and therefore punishes them for their roles in publishing third-party content. In effect,
 18 the Ordinance does the same thing as the Original Ordinance, just in a different guise—it imposes
 19 significant liability on Hosting Platforms if they “facilitate[] a short-term rental transaction,”
 20 § 41A.4, for listings they publish allegedly in violation of the law (whether knowingly or not).

21 Section 230 immunizes online providers from all liability stemming from “information
 22 originating with a third-party user of the service.” *Perfect 10*, 488 F.3d at 1118 (quoting *Zeran*, 129
 23 F.3d at 330). The law precludes not only claims challenging third-party content on its face (such as
 24 for defamation), but “all claims stemming from their publication of information created by third
 25 parties.” *MySpace*, 528 F.3d at 418; *see also Lycos*, 478 F.3d at 422 (argument that CDA “only
 26 immunizes” websites for “deciding whether to publish, withdraw, postpone or alter” content
 27 “misapprehends the scope of Section 230 immunity,” which also protects sites’ “inherent decisions
 28 about how to treat postings generally”); *Hinton v. Amazon.com.dedc, LLC*, 72 F. Supp. 3d 685, 690
 (S.D. Miss. 2014). “[W]hat matters is not the name of the cause of action,” but whether the law

1 “inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided
2 by another. . . . If it does, Section 230(c)(1) precludes liability.” *Barnes*, 570 F.3d at 1101-02.

3 Thus, as many cases have held, Section 230 immunity protects online providers for
4 transactions and sales of goods and services through their websites—not just their publication of
5 ads. For example, in *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. App. 2012), the court dismissed a
6 plaintiff’s claims that StubHub violated state anti-scalping laws because users offered and sold
7 tickets at more than face value. The court rejected the plaintiff’s arguments that he only sought to
8 hold StubHub liable for its conduct, the transactions it facilitated, and the website’s features and
9 “business model.” *Id.* at 561-62. Section 230 barred these claims, as StubHub “simply functioned
10 as a broker, effectively putting a buyer and a seller into contact with each other in order to facilitate
11 a sale at a price established by the seller.” *Id.* at 563. That StubHub allegedly “‘controlled’ the
12 transaction by acting as an intermediary between buyer and seller,” “‘offered both buyers and sellers
13 certain guarantees and assumed responsibility for handling the mechanics required to complete the
14 transaction,” and charged a “fee” for these services was “irrelevant” to “immunity” under the CDA.
15 *Id.* at 562; *see id.* at 563 (“that [StubHub] may have been on notice that its website could be used to
16 make unlawful sales . . . does not support a decision stripping . . . immunity under 47 U.S.C. § 230”);
17 *see also Milgram v. Orbitz Worldwide, Inc.*, 16 A.3d 1113, 1121-22 (N.J. Super. 2010) (finding
18 website immune under Section 230 for online ticket sales, rejecting state officials’ contention that
19 they were only challenging website’s “commercial” activities and not its role as a “publisher or
20 speaker,” and holding that the website’s conduct “fits squarely within the CDA’s purview,” as the
21 “plain language of § 230 was designed to ‘promote the development of e-commerce’”).

22 Similarly, in *Stoner v. eBay Inc.*, 2000 WL 1705637 (Cal. Super. Ct. Nov. 1, 2000), the
23 court dismissed a plaintiff’s claims seeking to hold eBay liable under the UCL and California
24 criminal statutes for sales of bootleg recordings. The court rejected the plaintiff’s argument that his
25 “suit [did] not seek to hold eBay responsible for the publication of information provided by others,
26 but for eBay’s own participation in selling contraband musical recordings.” *Id.* at *2-3. “Despite
27 plaintiff’s attempt to characterize eBay as an active participant in the sale of products auctioned
28 over its service, plaintiff is seeking to hold eBay responsible for . . . information that originates with

1 the third party sellers who use the computer service.” *Id.* at *2. The fact that eBay offered a forum
 2 for third parties to buy and sell goods rather than a “bulletin board” for online postings, and
 3 “impos[ed] ... a fee—including a fee based in part on the price at which an item is sold,” was
 4 irrelevant, as a “principal objective of the immunity provision is to encourage commerce over the
 5 Internet by ensuring that interactive computer service providers are not held responsible for how
 6 third parties use their services.” *Id.* at *2-3; *see also Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816,
 7 831-32 (2002) (barring claims against eBay for sale of fake sports memorabilia; “substance” of
 8 “allegations reveal [plaintiffs] ultimately seek to hold eBay responsible for conduct” within CDA).

9 *Inman v. Technicolor USA, Inc.*, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011), also rejected
 10 a plaintiff’s argument that the “CDA applies only to communications, while [he sought] to hold
 11 eBay responsible for its conduct, ‘specifically, business transactions’” in facilitating the sale of an
 12 allegedly defective vacuum tube. *Id.* at *6. The court held that online sales transactions were part
 13 and parcel of eBay’s forum and “sales made by a third party are considered information for
 14 purposes of the CDA,” as “the alleged sale of vacuum tubes in this case was facilitated by
 15 communication for which eBay may not be held liable under the CDA.” *Id.* at *7.⁸

16 As in all of these cases, the Ordinance squarely violates Section 230 by imposing liability on
 17 Hosting Platforms for third-party transactions that directly result from their publication of third-party
 18 listings. The Ordinance impermissibly treats Hosting Platforms as “publishers” or “speakers.”

19 In addition, courts have rejected efforts to evade Section 230 by regulating a website’s
 20 receipt of funds stemming from publisher functions. In *Backpage.com, LLC v. Cooper*, 939 F. Supp.
 21 2d 805 (M.D. Tenn. 2013), a challenged statute prohibited the sale of certain sex-related

22 _____
 23 ⁸ Several other cases have held that the CDA immunizes websites for liability based on transactions
 24 and not merely for the content of user posts. *See, e.g., Hinton*, 72 F. Supp. 3d at 689 (Amazon
 25 immune for claims “concerning the sale of defective or illegal items” by third parties); *Almeida v.*
 26 *Amazon.com, Inc.*, 2004 WL 4910036, at *3-4 (S.D. Fla. July 30, 2004) (claim challenging
 27 “Amazon’s sale of” book “preempted by” CDA as Amazon cannot be liable for “acts of non-parties”
 28 who “caused” book “to be sold on Amazon’s website”), *aff’d*, 456 F.3d 1316 (11th Cir. 2006);
Corbis Corp. v. Amazon.com, Inc., 351 F. Supp. 2d 1090, 1118 (W.D. Wash. 2004) (Section 230
 preempted state law claim against Amazon for plaintiff’s images sold by a third-party through the
 Amazon website); *Gibson v. Craigslist, Inc.*, 2009 WL 1704355, at *4 (S.D.N.Y. June 15, 2009)
 (CDA precluded claim against Craigslist for allegedly “fail[ing] to monitor, regulate, properly
 maintain and police the merchandise being bought and sold on its ... website”).

1 advertisements. The government argued the law was “consistent with CDA Section 230 because the
2 state law regulates conduct—the sale of advertisements—and not the speech itself, and therefore
3 does not treat websites as ‘publishers or speakers.’” *Id.* at 823. The court saw through this, holding
4 the “sale of online advertisements regulated by [the statute] derives from a website’s status and
5 conduct as an online publisher of classified advertisements” as the “*transaction of the sale is*
6 *inherent in the classified service’s conduct as a publisher,*” thus “trigger[ing]” the “protection of
7 Section 230.” *Id.* at 824 (emphasis added); *cf. Backpage.com, LLC v. Dart*, 807 F.3d 229, 233-34
8 (7th Cir. 2015) (under CDA, website and credit card companies are protected “intermediaries” in
9 transactions). Likewise here, the act of receiving service fees is inherent in what Hosting Platforms
10 do as publishers of third-party listings. *See Owen Decl.* ¶ 8; *supra* at 4-5.

11 Similarly, in *Goddard v. Google, Inc.*, the plaintiff alleged she was injured as a result of
12 clicking on ads posted on Google created by allegedly fraudulent providers of services for mobile
13 devices. 2008 WL 5245490, at *1 (N.D. Cal. Dec. 17, 2008). She sought to “avoid the application
14 of § 230 by arguing that her UCL claim does not seek to treat Google as the publisher of third-party
15 content,” as it ““stems from Google’s acceptance of tainted funds”” from the ads. *Id.* at *4. The
16 court rejected this as “an impermissible recharacterization.” *Id.* And in *Rosetta Stone Ltd. v. Google*
17 *Inc.*, 732 F. Supp. 2d 628 (E.D. Va. 2010), *aff’d*, 676 F.3d 144 (4th Cir. 2012), the plaintiff argued
18 that its unjust enrichment claim—based on money Google received when users clicked on allegedly
19 infringing Sponsored Links—was independent of any publishing conduct. Rejecting this, the court
20 held that plaintiff’s “claim *turns on Google’s relationship with third party advertisers.* ... The
21 user’s decision to click on a Sponsored Link—the act that triggers the third party advertiser’s
22 payment to Google—*is in fact driven by content provided by the advertiser.*” *Id.* at 633 (emphases
23 added). No different here, a guest’s “decision to click” on a host’s listing and book that listing—
24 which may “trigger” a payment to the platform—is “driven by content provided by” a third party,
25 i.e., the host’s listing.

26 The City cannot parse the services Hosting Platforms offer, assert it is only imposing
27 obligations (and liability) for transactions involving “Booking Services,” and thereby contend it is
28 not challenging or seeking to regulate Airbnb’s and HomeAway’s central roles of providing online

1 forums for third-party listings. “[C]ourts repeatedly have rejected attempts to recharacterize claims
2 fundamentally based on the posting of online information in order to avoid § 230’s prohibition on
3 ‘treat[ing] [the defendant] as a ‘publisher’ of information.” *Goddard*, 2008 WL 5245490, at *4;
4 *see also MySpace*, 528 F.3d at 419-20 (rejecting plaintiff’s assertions that her claims did not treat
5 Myspace as a publisher but instead concerned the site’s conduct as “artful pleading,” because the
6 claims fundamentally were “directed toward MySpace in its publishing, editorial, and/or screening
7 capacities”). If governments or plaintiffs could evade the CDA simply by asserting that they were
8 challenging only websites’ processing of transactions among third parties but not their publication
9 of information that is the basis for the transactions, that would punch a vast hole in the protection
10 offered by the CDA. Thousands of online retailers (from Amazon to eBay to Airbnb and
11 HomeAway) and payment processors (such as PayPal) would risk liability that Section 230
12 expressly precludes, losing the protection for e-commerce that Congress sought to encourage. *See*
13 *Batzel*, 333 F.3d at 1027. The Court should reject that result.

14 **(ii) The Ordinance Obligates Hosting Platforms to Monitor,**
15 **Verify, and Screen Third-Party Listings**

16 The Ordinance also violates Section 230 by requiring Hosting Platforms to monitor, review,
17 and verify third-party listings—and effectively block or remove such listings—to avoid liability.
18 Congress expressly sought to prohibit states from chilling online speech in this way.

19 Again, one of the central purposes of Section 230 was to encourage online providers to
20 voluntarily monitor third-party content by immunizing all such efforts. *See Carafano*, 339 F.3d at
21 1122-23. “[D]ecisions relating to the monitoring” of “content” are “actions quintessentially related
22 to a publisher’s role [and] Section 230 ‘specifically proscribes liability’ in such circumstances.”
23 *Green*, 318 F.3d at 471; *accord MySpace*, 528 F.3d at 420. As the Ninth Circuit has said, “any
24 activity that can be boiled down to deciding whether to exclude material that third parties seek to
25 post online is perforce immune under Section 230.” *Roommates.com*, 521 F.3d at 1170-71. And
26 Section 230 immunity applies not only to an online provider’s decision about whether to allow a
27 given posting, but also decisions about the “construct and operation” of its website. *Lycos*, 478
28 F.3d at 422 (decisions about website policies and features are “as much an editorial decision ... as a

1 decision not to delete a particular posting”); *accord Jane Doe No. 1*, 817 F.3d at 16, 20-21
2 (website’s decision not to provide “phone number verification” for user ads “fall[s] within the
3 purview of traditional publisher functions” protected by Section 230).

4 Cases interpreting Section 230 make clear that an online provider cannot be subject to
5 liability for third-party content even if it receives notice that content is allegedly unlawful. “It is, by
6 now, well established that notice of the unlawful nature of the information provided is not enough”
7 to strip a website of Section 230 immunity. *Lycos*, 478 F.3d at 420; *accord Obado v. Magedson*,
8 2014 WL 3778261, at *7 (D.N.J. July 31, 2014); *Hill*, 727 S.E.2d at 559; *Goddard*, 2008 WL
9 5245490, at *3 (even if site has actual knowledge of alleged unlawful content, it is immune if it
10 fails or refuses to delete it). This is because “[l]iability upon notice would defeat the dual purposes
11 advanced by § 230,” *Zeran*, 129 F.3d at 333, and would subject providers to a “heckler’s veto,” as
12 anyone who objected could provide notice and thereby impose the grim choice of removing content
13 or facing litigation and liability, *Jones*, 755 F.3d at 407-08 (Section 230 “shields service providers
14 from this choice”).

15 Thus, courts have uniformly held that states cannot impose requirements on websites to
16 verify advertisements provided by third-party users. *See, e.g., Backpage.com, LLC v. McKenna*, 881
17 F. Supp. 2d 1262, 1273-74, 1277 (W.D. Wash. 2012) (striking down state statute imposing criminal
18 liability on website operators if they failed to verify ages of individuals depicted in sexually related
19 ads; “by imposing liability on online service providers who do not pre-screen content ... the statute
20 drastically shifts the unique balance that Congress created with respect to the liability of online
21 service providers that host third party content”); *see also Cooper*, 939 F. Supp. 2d at 825 (similar
22 law that would have required websites to screen ads to assure compliance with state law violated
23 CDA where “rather than encouraging unfettered speech,” the state law “impose[d] significant
24 penalties,” and “preventing liability could amount to screening millions of advertisements”); *Doe v.*
25 *Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294-95 (D.N.H. 2008) (“§ 230 bars” claim that
26 defendant “fail[ed] to verify that a profile corresponded to the submitter’s true identity”).

27 The Ordinance seeks to do what Section 230 forbids, by requiring Hosting Platforms to
28 monitor and verify listings to determine if they are “lawfully registered on the Short-Term

1 Residential Rental Registry at the time the Residential Unit is rented for short term rental.”
 2 § 41A.5(g)(4)(C); *see also* App. A, *infra*, at 1 (preface to Ordinance stating that it “require[s]
 3 Hosting Platforms *to verify* that a Residential Unit is on the City Registry” (emphasis added)). That
 4 could require platforms not only to determine if there is a registration number associated with a
 5 listing, but also whether the rental is “lawfully registered,” i.e., whether it complies with other laws
 6 governing short-term rentals (for instance, regarding insurance and taxation). The Ordinance does
 7 this not only once, but at least twice, as it also requires Hosting Platforms to attest under penalty of
 8 perjury they have not provided Booking Services to a host whose property is not “lawfully
 9 registered at the time [it] is rented.” *See* §§ 41A.5(g)(4)(C)-(D).⁹

10 For purposes of CDA immunity, it makes no difference whether the City imposes penalties
 11 against Hosting Platforms if they fail to verify that user listings are “lawfully registered” before
 12 publishing them (as the Original Ordinance provided) or instead if users make reservations for
 13 rentals (as in the Ordinance). The requirement to monitor third-party content triggers the CDA,
 14 even if it is not tied to publication. In *Stoner*, for example, the court noted that “[a]t bottom,
 15 plaintiff’s contention” was “that eBay should be held responsible *for failing to monitor the*
 16 *products* auctioned over its service.” 2000 WL 1705637, at *3 (emphasis added). In rejecting this
 17 claim, the court held that even if “it might be possible” for eBay “identify” unlawful products,
 18 “*Congress intended to remove any legal obligation of interactive computer service providers to*
 19 *attempt to identify or monitor the sale of such products.*” *Id.* (emphasis added); *see also Fields v.*
 20 *Twitter*, 2016 WL 4205687, at *5, 8 (N.D. Cal. Aug. 10, 2016) (dismissing claims Twitter
 21 provided material support to terrorists because it allowed ISIS to obtain accounts; though plaintiffs
 22 argued claims “not based on ‘the contents of tweets, the issuing of tweets, or the failure to remove
 23 tweets,” but rather “‘provision of Twitter accounts to ISIS,” CDA barred suit because it “would
 24 significantly affect Twitter’s monitoring and publication of third-party content by effectively
 25 requiring Twitter to police and restrict its provision of Twitter accounts”).

26 ⁹ Also, given that the Ordinance imposes liability absent “lawful[] registration *at the time the*
 27 *Residential Unit is rented* for short term rental,” § 41A.5(g)(4)(C) (emphasis added), this could
 28 require Plaintiffs to verify “lawful registration” a third time—when occupancy takes place, which in
 most instances will be weeks or months after online bookings. Furlong Decl. ¶ 14.

1 In any event, the practical effect of the Ordinance is the same as the Original Ordinance.
2 Hosting Platforms such as Airbnb and HomeAway (whom the City has admitted were the targets of
3 the law) risk liability if they do not verify “lawful registration” of all listings at the time hosts seek to
4 post them. Assuming the Ordinance reaches HomeAway’s subscription model, the Ordinance might
5 require verification from the point hosts sign up, because this is when HomeAway charges and
6 collects a fee for “Booking Services” (whether or not the property is ever booked or rented). More
7 generally, under the Ordinance, both HomeAway and Airbnb would be at risk if they do not verify
8 listings at the outset, because once a host and guest decide to enter into a transaction, Booking
9 Services and payment services are provided immediately. Owen Decl. ¶ 19; Furlong Decl. ¶ 6.

10 In this manner, the Ordinance also impermissibly attempts to regulate the “overall design
11 and operation” of Hosting Platforms’ websites. *See Jane Doe No. 1*, 817 F.3d at 16, 20-21 (choice
12 by Backpage allegedly “designed to encourage sex trafficking,” such as allowing anonymous
13 payments and failing to verify phone numbers, were protected editorial decisions as to the “overall
14 design and operation of the website”); *Fields*, 2016 WL 4205687, at *7 (CDA protects Twitter’s
15 “decisions to structure and operate itself as a ‘platform ... allow[ing] for the freedom of
16 expression”). Requiring Hosting Platforms to verify whether a listing is “lawfully registered”
17 would require them to make significant modifications to their sites and expend substantial financial
18 and technical resources, introducing substantial delays in the booking process. Owen Decl. ¶¶ 17,
19 19-20; Furlong Decl. ¶¶ 13, 15; *see Chi. Lawyers’ Comm.*, 519 F.3d at 668-69 (website “could hire
20 a staff to vet the postings, but that would be expensive and may well be futile: if postings had to be
21 reviewed before being put online, long delay could make the service much less
22 useful”). Alternatively, such platforms very likely will screen listings from appearing at all on
23 their sites, Owen Decl. ¶ 19, 23-25; Furlong Decl. ¶¶ 13, 15—which is what the Original
24 Ordinance sought to do, and what the City apparently determined was indefensible.¹⁰

25 _____
26 ¹⁰ The Ordinance also attacks websites’ decisions about their structure and operation by penalizing
27 some models, but not others. For example, the City has suggested that platforms that charge upfront
28 fees *solely* for advertising, or sites that do not charge for rental listings at all but earn income through
other channels (e.g., Craigslist), are *not* subject to the law. *See supra* at 9; Blavin Decl., Ex. O at 2-
3. If this is right, then HomeAway’s subscription model may not be covered by the Ordinance.

1 Congress’s intent in passing the CDA was to permit online providers to make decisions on
 2 their own about monitoring, screening or blocking third-party content. Here, and exactly contrary
 3 to that intent, the City seeks to impose liability on Hosting Platforms if they do not monitor,
 4 identify and effectively block or remove third-party listings the City deems to be unlawful. The
 5 Ordinance therefore violates and is preempted by Section 230.

6 **2. The Ordinance Violates the First Amendment**

7 The Ordinance also violates the First Amendment. Because it imposes liability on Hosting
 8 Platforms, the Ordinance is a content-based restriction on speech subject to “heightened judicial
 9 scrutiny” under the First Amendment. *Sorrell*, 564 U.S. at 570. For at least two reasons, the
 10 Ordinance cannot survive this scrutiny. First, the City cannot show that the Ordinance is narrowly
 11 tailored to achieve a substantial governmental objective, *id.* at 572, given the obvious alternative of
 12 enforcing its short-term rentals laws directly against hosts who may violate them. Second, the
 13 Ordinance imposes civil and criminal penalties on Hosting Platforms that publish listings for
 14 properties that are not “lawfully registered,” without any requirement that a Hosting Platform first
 15 have knowledge of the property’s status. *See* §§ 41A.5(e), (g)(4)(C)-(D), 41A.7(b)(3). The Court
 16 should enjoin enforcement of the Ordinance for these independently sufficient reasons.

17 **(a) The Ordinance Is a Content-Based Restriction on Speech that Is** 18 **Subject to Heightened Judicial Scrutiny**

19 The Ordinance seeks to proscribe speech, in the form of rental listings, based on the content
 20 of that speech: whether the listings advertise “lawfully registered” short-term rentals in a manner
 21 contrary to the Ordinance. Such “content-based” restrictions on speech are subject to “heightened
 22 judicial scrutiny” under the First Amendment. *Sorrell*, 564 U.S. at 570.

23 “Government regulation of speech is content based if a law applies to particular speech
 24 because of the topic discussed or the idea or message expressed.” *Reed v. Town of Gilbert*, 135 S.

25

More importantly, these distinctions attack the decisions platforms have made as to the best manner
 26 to structure their websites to allow third-party content to flourish. Instead of charging hosts an
 27 upfront-fee for advertising their listings, which could deter some hosts from publishing listings,
 28 Airbnb and HomeAway’s pay-per-book model charge users a service fee at the time of
 booking. Owen Decl. ¶¶ 8-9; Furlong Decl. ¶ 4. By basing a platform’s obligations and liability on
 this particular model, the Ordinance impermissibly targets these decisions.

1 Ct. 2218, 2227 (2015). The Ordinance is content-based because it seeks to impose liability based
2 on certain short-term rental listings on Hosting Platforms, which, by definition, allow hosts “to
3 *advertise*” their properties “through a website” provided by the Hosting Platform. § 41A.5(e)
4 (emphasis added). Publishing “paid commercial advertisements” constitutes protected commercial
5 speech. *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975).¹¹ That the Ordinance constitutes a content-
6 based restriction on speech is also obvious given the law’s requirement that the City, “on at least a
7 monthly basis,” undertake a “comprehensive review of active Hosting Platform listings” to identify
8 “*potentially non-compliant listings*.” § 41A.7(b) (emphasis added).

9 First Amendment scrutiny is also triggered by the Ordinance’s requirements that Hosting
10 Platforms verify in an affidavit their ongoing compliance with the law and its onerous recordkeeping
11 provisions, which require Hosting Platforms to collect and maintain certain information for three
12 years. *See* §§ 41A.5(g)(4)(D)-(E). In *McKenna*, for instance, the court invalidated a requirement
13 that websites “check identification before publishing an escort ad.” 881 F. Supp. 2d at 1277. The
14 court reasoned that even though “at first blush,” the requirement “seems as commonsensical as
15 requiring bar owners to check identification before allowing patrons to enter the door,” an
16 “identification requirement—imposed by the government and punishable by imprisonment—related
17 to speech” still must survive First Amendment scrutiny. *Id.* at 1277-78; *see also Free Speech Coal.,*
18 *Inc. v. Attorney General*, 825 F.3d 149, 164 (3d Cir. 2016) (applying heightened scrutiny to statute
19 requiring adult entertainment producers to verify age of performers and keep records).

20 The City may argue the Ordinance does not restrict speech but conduct, i.e., the acceptance
21 of money in exchange for what the City nebulously defines as “Booking Services.” § 41A.4. The
22 City is not the first governmental entity to disguise a restriction on speech as a regulation of
23 conduct, and courts reject such transparent attempts to avoid the First Amendment. *See, e.g.,*
24 *Sorrell*, 564 U.S. at 566-67, 570 (rejecting Vermont’s effort to defend law as a restriction on
25 “nonexpressive [commercial] conduct” where “[b]oth on its face and in its practical operation,

26 _____
27 ¹¹ Plaintiffs do not concede that the Ordinance regulates only commercial speech but analyze it as
28 though it does because “the outcome is the same” under the commercial speech or strict scrutiny
tests. *Sorrell*, 564 U.S. at 571.

1 Vermont’s law imposes a burden based on the content of speech and the identity of the speaker”).
 2 In any event, the Supreme Court has made clear that restrictions on accepting monetary
 3 compensation for speech trigger First Amendment scrutiny because they create a “financial
 4 disincentive” to “publish ... particular content.” *Simon & Schuster, Inc. v. Members of N.Y. State*
 5 *Crime Victims Bd.*, 502 U.S. 105, 118 (1991). For example, the First Amendment prohibits the
 6 government from seizing the revenue of works of art published by criminals depicting their crimes.
 7 *Id.* at 123. Nor can the government prohibit its employees from receiving payment for speaking
 8 appearances. *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 468-69 (1995). The City
 9 cannot evade the First Amendment merely by attaching liability to payment rather than publication.

10 **(b) The Ordinance Cannot Survive Heightened Scrutiny Because It Is**
 11 **Not Narrowly Tailored to Serve a Substantial Government**
 12 **Interest**

12 “In the ordinary case, it is all but dispositive to conclude that a law is content-
 13 based.” *Sorrell*, 564 U.S. at 571. Such laws are “presumptively unconstitutional,” *Reed*, 135 S. Ct.
 14 at 2226, even when they pertain to commercial speech. “Under a commercial speech inquiry, it is
 15 the State’s burden to justify its content-based law as consistent with the First Amendment.” *Sorrell*,
 16 564 U.S. at 571-72; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564
 17 (1980). The government must show “the statute directly advances a substantial government interest”
 18 and there is a “fit between the legislature’s ends and the means chosen to accomplish those ends.”
 19 *Sorrell*, 564 U.S. at 572; *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (law must
 20 be “narrowly tailored to achieve the desired objective”); *Cent. Hudson*, 447 U.S. at 564-66.

21 The City cannot demonstrate that the Ordinance is narrowly tailored to achieve a substantial
 22 interest. By its own terms, rather than operate “directly,” *Sorrell*, 564 U.S. at 572, the Ordinance
 23 operates *indirectly*: it aims to regulate the conduct of hosts by targeting the activities of Hosting
 24 Platforms. This approach overlooks the Supreme Court’s admonition that “[t]he normal method for
 25 deterring unlawful conduct is to impose an appropriate punishment on the person who engages in
 26 it”; speech cannot “be suppressed in order to deter conduct by a non-law-abiding third
 27 party.” *Bartnicki*, 532 U.S. at 529-30; *see also, e.g., Village of Schaumburg v. Citizens for a Better*
 28 *Env’t*, 444 U.S. 620, 637 (1980) (invalidating speech restriction where conduct “can be prohibited and

1 the penal laws used to punish such conduct directly”).

2 That principle is especially relevant here, where the City has acknowledged that it can—and
3 does—pursue hosts who fail to comply with the law rather than punish Hosting Platforms that
4 publish listings. The Ordinance requires the OSTR to “actively monitor Hosting Platform listings
5 ... on at least a monthly basis” to identify “potentially non-compliant listings.” § 41A.7(b). As of
6 February 2016, the OSTR had assessed nearly \$700,000 in penalties—equaling almost the entire
7 annual OSTR budget. Blavin Decl., Ex. G at 16, 21. A report noted that the OSTR may be able to
8 “further close” the “gap between the number of registered hosts and . . . hosts advertising short-term
9 rentals on online platforms” after the OSTR became fully staffed in December 2015. *Id.* at 21. The
10 same report acknowledged the City’s own role in frustrating compliance with short-term rental laws,
11 noting that the complicated registration process—which forced residents to obtain certifications
12 from both the OSTR *and* the Treasurer & Tax Collector *in person*—“might deter or confuse
13 otherwise compliant short-term rental hosts.” *Id.* at 26. Supervisor Wiener also recently observed
14 that there has been an “acceleration in the number of hosts registering,” and the City is “moving in a
15 positive direction” in enforcing the law. *Id.*, Ex. Q at 3; *see also id.*, Ex. G at 18 (City report noting
16 “wave of compliant behavior towards the end of 2015”).

17 The City has not even attempted to show that this obvious alternative of enforcing existing
18 law directly against the hosts who violate it (and simplifying the law) cannot accomplish the City’s
19 goals. This shortfall alone invalidates the Ordinance’s provisions that restrict the speech of Hosting
20 Platforms. *See Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826-27 (9th Cir. 2013) (enjoining anti-
21 solicitation law where state did not show ineffectiveness of directly enforcing “preexisting” laws to
22 “address legitimate traffic safety concerns” instead of speech); *McKenna*, 881 F. Supp. 2d at 1284
23 (invalidating law banning publication of ads for commercial sex acts because state had “fail[ed] to
24 demonstrate why a law targeting only the individuals who post ads would not be effective, rather
25 than seeking to impose felony liability on online service providers”).

26 Proponents of the Ordinance have suggested that imposing liability on Hosting Platforms for
27 publishing listings will make the City’s regulatory scheme more effective and efficient in preventing
28 unlawful conduct. *See* Blavin Decl., Ex. J at 1. That contention is both wrong and insufficient

1 under the First Amendment. Enforcement against hosts would more directly advance the City’s
 2 stated goal of punishing “unscrupulous speculators” who list multiple properties in violation of the
 3 law, rather than “mom and pop” hosts. *Id.*, Ex. P at 1. Penalties on Hosting Platforms, by contrast,
 4 will affect *all* hosts. This disconnect between the City’s asserted aims and the speech-restrictive
 5 means chosen dooms the Ordinance. *See Valle Del Sol*, 709 F.3d at 827 (ban on roadside
 6 solicitation not narrowly tailored means of achieving interest in traffic safety).¹²

7 In addition to being overinclusive (*i.e.*, restricting more speech than necessary), the
 8 Ordinance is underinclusive, underscoring that it is not tailored to the City’s asserted interest.
 9 Under the City’s interpretation, the Ordinance would apply to Hosting Platforms that receive a fee
 10 for every booking (such as Airbnb and HomeAway’s pay-per-booking model) but not those with no
 11 fees at all (like Craigslist). Thus, platforms with different business models could still help hosts and
 12 guests find each other (even if hosts’ properties are not “lawfully registered”). This is not only a
 13 problem under the CDA, *supra* at 19-20 & n.10, but the First Amendment. As the Supreme Court
 14 has held, “[u]nder-inclusiveness raises serious doubts about whether the government is in fact
 15 pursuing the interest it invokes, rather than disfavoring a particular speaker[.]” *Brown v. Entm’t*
 16 *Merchants Ass’n*, 564 U.S. 786, 802 (2011); *see Valle Del Sol*, 709 F.3d at 827-28; *City of*
 17 *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424-25 (1993) (invalidating law restricting
 18 commercial publications’ newspaper racks where “[t]he city has asserted an interest in esthetics, but
 19 respondent publishers’ newsracks are no greater an eyesore than the newsracks permitted to remain
 20 on Cincinnati’s sidewalks”).

21 Moreover, even if the Ordinance *would* more efficiently prevent unlawful rentals and help
 22 the City enforce its short-term rental laws, this would be insufficient. The First Amendment

23
 24 ¹² The disconnect between the stated goals of the Ordinance and the speech-restrictive means chosen
 25 is further highlighted by the City’s failure to put forward evidence showing that the Ordinance will
 26 achieve its purported goal of bringing units back to the long-term rental market. On the contrary, a
 27 recent study by the city planning and research organization SPUR states that “[d]ata from Airbnb
 28 suggests that the vast majority of properties listed in San Francisco are not being removed from the
 long-term residential market.” Blavin Decl., Ex. R at 9; *see also* Owen Decl., Ex. 5 at 4 (rentals by
 Airbnb hosts who may list more than one home for short term rental are 0.18% of all units in City);
Memphis Publ’g Co. v. Leech, 539 F. Supp. 405, 411 (W.D. Tenn. 1982) (invalidating commercial
 speech restriction where it was “speculative” restriction would have its intended effect).

1 precludes the government from restricting advertising and speech simply because it may be more
 2 politically or administratively convenient. *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373
 3 (2002) (speech restrictions must be “a necessary as opposed to merely convenient means of
 4 achieving [the government’s] interests”); *Yniguez v. Arizonans for Official English*, 42 F.3d 1217,
 5 1234 (9th Cir. 1994) (“The government cannot restrict the speech of the public ... just in the name
 6 of *efficiency*.”). The City seeks to place the burden of verifying hosts’ compliance with the law on
 7 Hosting Platforms—a burden that is likely to be substantial, given the effort needed to verify each of
 8 thousands of San Francisco rental listings, and the onerous burdens placed on hosts, and one which
 9 could result in the suppression of vast amounts of protected speech. Owen Decl. ¶¶ 23-25; Furlong
 10 Decl. ¶¶ 13-15. The government may not seek to “shift[] the burden of enforcing the law from the
 11 taxpayer” to speakers or publishers of information simply because it is easier to do so. *News & Sun*
 12 *Sentinel Co. v. Bd. of Cnty. Comm’rs*, 693 F. Supp. 1066, 1072-73 (S.D. Fla. 1987) (invalidating law
 13 requiring newspaper to include contractors’ license numbers in all ads published for contractors).

14 (c) **The Ordinance Impermissibly Imposes Strict Liability on**
 15 **Publishers Without Proof of Scienter**

16 The Ordinance also violates the First Amendment because it imposes criminal penalties on
 17 publishers without requiring a showing they know the listings at issue are not “lawfully registered.”
 18 § 41A.5(g)(4)(C). The Supreme Court has long rejected the imposition of strict criminal liability
 19 for the dissemination of information, even where the content itself lacks First Amendment
 20 protection. In *Smith v. California*, 361 U.S. 147 (1960), the Court struck down an ordinance
 21 making it a crime for booksellers to possess obscene books, noting the law would require
 22 booksellers to review every book or face strict criminal liability, which “would tend to restrict the
 23 public’s access to forms of the printed word which the State could not constitutionally suppress
 24 directly.” *Id.* at 153-54. The Court has said the same in later cases—the First Amendment bars
 25 imposing liability on publishers absent proof of *mens rea* that speech is in fact unlawful. *See New*
 26 *York v. Ferber*, 458 U.S. 747, 765 (1982) (“[C]riminal responsibility may not be imposed without
 27 some element of scienter on the part of the defendant”); *cf. United States v. X-Citement Video, Inc.*,
 28 513 U.S. 64, 78 (1994). The Court has made clear that similar principles apply in the civil

1 context. *See, e.g., Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“[A] rule that would
 2 impose strict liability on a publisher for [unprotected speech] would have an undoubted ‘chilling’
 3 effect.”)

4 The Ordinance violates this well-established principle. It imposes severe criminal and civil
 5 penalties on publishers without any *mens rea* requirement. For example, the Ordinance makes it
 6 unlawful for any Hosting Platform to provide “Booking Services” for a short-term rental unless the
 7 property is “lawfully registered” on the City’s registry. § 41A.5(g)(4)(C). It does not matter
 8 whether the platform *knows* the property is unregistered or not. Similarly, the law requires Hosting
 9 Platforms to verify after-the-fact that they provided Booking Services to only properties that were
 10 “lawfully registered,” even if, at the time they provided Booking Services, the platform reasonably
 11 but mistakenly believed the property *was* “lawfully registered.” § 41A.5(g)(4)(C)-(D). That is
 12 precisely the approach the First Amendment forbids. *See, e.g., Cooper*, 939 F. Supp. 2d at 829-30
 13 (invalidating statute that imposed liability for sale of ads for commercial sex acts depicting minor
 14 where law “requires no actual knowledge of the age of anyone featured in the advertisement”).

15 The constitutional defect posed by the lack of a scienter requirement in the Ordinance is
 16 compounded by the law’s multiple ambiguities, which make it even more difficult for Hosting
 17 Platforms to know whether they are complying with the law. For instance, the Ordinance requires
 18 Hosting Platforms to verify that each rental is “lawfully registered” on the City’s registry.
 19 § 41A.5(g)(4)(C). Verifying a rental is “registered” for each of thousands of listings is highly
 20 burdensome. *Supra* at 19.¹³ But verifying that the rental is otherwise “lawful” would be
 21 impossible, as this would penalize Hosting Platforms if they publish a listing for which the rental is
 22 registered, but for which the registration is unlawful—whether because the host does not have
 23 insurance, has not filed monthly tax reports, or has not accurately reported and paid taxes on “each
 24 piece of furniture, equipment, and supplies used in renting [the] residence,” such as “appliances,”

25 ¹³ Indeed, it is unclear *how* a Hosting Platform would even do so, as the City must “redact [from the
 26 Registry] any Permanent Resident names and street and unit numbers from the records available for
 27 public review,” *id.* § 41A.4, and the federal Stored Communications Act prohibits Airbnb and
 28 HomeAway from divulging to the City for verification purposes any “information pertaining to” its
 users, including names and addresses, 18 U.S.C. § 2702(a)(3); *see Telecomms. Regulatory Bd. v.*
CTIA-Wireless Ass’n, 752 F.3d 60, 68 (1st Cir. 2014).

1 “computers,” and “artwork.” Blavin Decl, Ex. F at 1. A Hosting Platform cannot possibly know
2 whether a host has complied with the multitude of laws governing short-term rentals. *See* Owen
3 Decl. ¶ 18; Furlong Decl. ¶ 15. The First Amendment prohibits the imposition of liability on this
4 basis. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 933 (9th Cir. 2004) (“A
5 scienter requirement of knowledge as applied to an unknowable element cannot save a provision
6 from constitutional invalidity.”).

7 The Ordinance’s requirement that Hosting Platforms verify that each rental is “lawfully
8 registered ... *at the time it is rented*,” § 41A.5(g)(4)(C) (emphasis added), further exacerbates this
9 constitutional infirmity. This language suggests that a Hosting Platform may be liable even if a
10 rental is lawfully registered at the time of the reservation, but not at the time of the occupancy. A
11 Hosting Platform can never know when it provides “Booking Services,” i.e., when it publishes the
12 listing and enables a reservation and/or accepts a fee, whether a property will be “lawfully
13 registered” at the time of occupancy. The Ordinance thus would seem to impermissibly impose
14 criminal liability on Hosting Platforms even if they have no way of knowing the listings are not
15 lawfully registered. *See Wasden*, 376 F.3d at 933.

16 These ambiguities, while problematic standing alone, are constitutionally intolerable in an
17 Ordinance that seeks to impose strict criminal liability in connection with the publication of
18 information. *See Brown*, 564 U.S. at 807 (ambiguity “in a law that regulates expression ‘raises
19 special First Amendment concerns because of its obvious chilling effect on free speech’”).

20 **C. Plaintiffs Face Irreparable Harm Unless the Ordinance is Enjoined**

21 For several reasons, Plaintiffs are likely to suffer irreparable harm absent an injunction.

22 *First*, “[t]he loss of First Amendment freedoms, for even minimal periods of time,
23 unquestionably constitutes irreparable injury.” *Elrod*, 427 U.S. at 373; *see also Farris*, 677 F.3d at
24 868. Such harm to free speech is relevant both under the First Amendment and the CDA, which as
25 the Ninth Circuit has held, “sought to further First Amendment ... interests on the Internet.” *Batzel*,
26 333 F.3d at 1028 (citing 141 Cong. Rec. H8469–72 (1995)).

27 *Second*, Plaintiffs face the threat of prosecution under a preempted law, which constitutes
28 irreparable harm. *See Valle del Sol*, 732 F.3d at 1029 (“irreparable harm” where plaintiff

1 “demonstrated a credible threat of prosecution” under preempted law); *Morales v. Trans World*
2 *Airlines, Inc.*, 504 U.S. 374, 381 (1992) (“irreparable injury” where “attorneys general ... made clear
3 that they would seek to enforce” preempted law and plaintiffs faced “Hobson’s choice” between
4 “expos[ing] themselves to potentially huge liability” or “suffer[ing] the injury of obeying” law).

5 *Third*, the risk of criminal penalties, including jail time, also constitutes irreparable harm.
6 *See Backpage.com, LLC v. Hoffman*, 2013 WL 4502097, at *12 (D.N.J. Aug. 20, 2013) (irreparable
7 harm where, “[a]bsent injunctive relief, Plaintiffs may face serious criminal liability”); *Toomer v.*
8 *Witsell*, 334 U.S. 385, 391-92 (1948) (where “defiance would have carried with it the risk of heavy
9 fines and long imprisonment,” “imminence of irreparable injury” shown).

10 *Fourth*, the risk of hefty fines constitutes irreparable harm. The Ordinance authorizes fines
11 of up to \$1,000 for *each* violation, i.e., each time Plaintiffs provide Booking Services for a short-
12 term rental without a “lawful” registration. Given that Airbnb and HomeAway publish thousands
13 of listings in the City, Owen Decl. ¶ 23; Furlong Decl. ¶ 2, this could result in fines in the millions
14 of dollars if even a fraction are not “lawfully registered.” Courts have found irreparable harm based
15 on fines of this magnitude. *See, e.g., Satellite Television of N.Y. Assocs. v. Finneran*, 579 F. Supp.
16 1546, 1551 (S.D.N.Y. 1984) (irreparable harm “readily” shown where plaintiff “faced with a choice
17 of” complying or incurring “fine of \$2,000 a day”).

18 The prospect of criminal and civil penalties is not hypothetical. The Ordinance squarely
19 takes aim at both Airbnb’s and HomeAway’s operations, as evidenced by the public statements by
20 the proponents of the Ordinance. Blavin Decl., Ex. N at 2 (Supervisor Campos: “it is only fair that
21 Airbnb and others help us enforce the law”); *see id.* (Supervisor Wiener noting desire for law to
22 apply to “VRBO or HomeAway”); *id.*, Ex. B at 4; Ex. H at 1. In these circumstances, courts have
23 found irreparable harm. *See Cooper*, 939 F. Supp. 2d at 819 (high likelihood of enforcement where
24 Backpage.com was “direct target” of law); *McKenna*, 881 F. Supp. 2d at 1270 (same).

25 *Fifth*, the Ordinance gives rise to irreparable injury by disrupting Plaintiffs’ operations and
26 threatening a loss of consumer goodwill. Again, the law would force Airbnb and HomeAway to
27 verify each property in a listing is “lawfully registered” before providing Booking Services.
28 § 41A.5(g)(4)(C). Given the volume of listings on Plaintiffs’ websites and the continual addition

1 and modification of listings, this would require Plaintiffs to change their platforms, expend
2 significant resources, and delay the availability of booking and reservation services. Owen Decl.
3 ¶¶ 17-24; Furlong Decl. ¶ 11. Verifying that each listing is associated with a registration number—
4 not to mention determining whether the rental is “lawfully registered” and otherwise complies with
5 the law—would require dedicated teams of employees manually obtaining and reviewing
6 information from users and the City for each listing, requiring substantial financial and personnel
7 resources. Owen Decl. ¶ 17; Furlong Decl. ¶¶ 13, 15. These changes themselves likely would repel
8 users and cause a loss of goodwill. Owen Decl. ¶¶ 20-22; Furlong Decl. ¶¶ 13-15.

9 Given this, Plaintiffs likely would have no choice but to screen and remove listings from
10 their platforms altogether, including lawful ones. Owen Decl. ¶¶ 19, 23-25; Furlong Decl. ¶ 19.
11 The resulting loss of consumer trust and goodwill constitutes irreparable harm. *Am. Trucking*
12 *Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (irreparable harm exists
13 where preempted law will cause “part of” plaintiff’s “business” and “goodwill” to “evaporate”);
14 *Mahroom v. Best W. Int’l, Inc.*, 2009 WL 248262, at *3 (N.D. Cal. Feb. 2, 2009) (“[m]ajor
15 disruption of a business” threatening “goodwill” is “irreparable harm”).

16 Finally, when unlawful regulations create the perception that a company’s activities are
17 illegal, the resulting loss in goodwill is irreparable. *See Aeroground, Inc. v. City & Cnty. of San*
18 *Francisco*, 170 F. Supp. 2d 950, 959 (N.D. Cal. 2001) (irreparable harm where party “is refusing to
19 comply with a rule that it believes is preempted by federal law”). Here, the Ordinance engenders
20 the inaccurate perception that Plaintiffs’ activities may be illegal, creating confusion among
21 potential hosts and guests alike, and driving consumers away from their platforms.

22 **D. The Balance of Equities and Public Interest Favor Plaintiffs**

23 The balance of equities tips decidedly in favor of Plaintiffs. They face deprivation of their
24 constitutional rights, which far outweighs any harm the City might claim. *Klein v. City of San*
25 *Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Harms to Plaintiffs in the form of impending
26 criminal penalties and fines, as well as lost goodwill, also weigh in their favor. The City can claim
27 little harm to outweigh these significant injuries. Indeed, the City does not face disruption of
28 established practices. *McKenna*, 881 F. Supp. 2d at 1286 (“harm to the government [is not] great”

1 where “[n]o prosecutions have yet been [t]aken”).

2 The public interest also strongly favors Plaintiffs. The public interest is served by “the
3 Constitution’s declaration that federal law is to be supreme.” *Am. Trucking*, 559 F.3d at 1059-60;
4 *see Bank One, Utah v. Guttau*, 190 F.3d 844, 847-48 (8th Cir. 1999) (“public interest will perforce
5 be served by enjoining the enforcement of [preempted] state law”). In addition, “it is always in the
6 public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695
7 F.3d 990, 1002 (9th Cir. 2012). It also is in the public interest to protect Plaintiffs from criminal
8 liability and lost consumer goodwill resulting from unlawful regulation. By contrast, an injunction
9 would not prevent the City from enforcing its laws against those non-compliant hosts who directly
10 violate them.

11 **IV. CONCLUSION**

12 For these reasons, Plaintiffs respectfully request that the Court grant their motion for a
13 preliminary injunction.

14
15 DATED: September 6, 2016

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FILER'S ATTESTATION

I, Jonathan H. Blavin, am the ECF user whose identification and password are being used to file this Joint Notice of Motion and Motion for Preliminary Injunction. Pursuant to Civil Local Rule 5-1(i)(3), I hereby attest that the other above-named signatory concurs in this filing.