

COURT OF APPEAL CASE NO. 18-55113

IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH DISTRICT

LA PARK LA BREA A LLC, et al.
Plaintiffs and Appellants,

v.

AIRBNB, INC., et al
Defendants and Appellees

Appeal from the United States District Court
for the Central District of California,
Case No. CV 17-4885 DMG (AS)
The Honorable Dolly M. Gee

**AMICUS CURIAE BRIEF OF
COMMUNITIES ASSOCIATIONS INSTITUTE
IN SUPPORT OF PLAINTIFFS AND APPELLANTS
LA PARK LA BREA A LLC, AND FOR REVERSAL**

Steven S. Weil, SBN 95564
Dena M. Cruz, SBN 121508
BERDING & WEIL, LLP
2175 N. California Blvd., Suite 500
Walnut Creek, CA 94596
Telephone: (925) 838-2090
Fax: (925) 820-5592
sweil@berdingweil.com
dmacruz@berdingweil.com

Attorneys for Amici Curiae
Community Associations Institute

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by Amicus Curiae, Community Associations Institute, of the following corporate interests:

a. Parent companies of the corporation or entity:

None.

b. Any publicly held company that owns ten percent or more of the corporation or entity:

None.

June 28, 2018

/s/ Dena M. Cruz

Steven S. Weil

Dena M. Cruz

BERDING & WEIL, LLP

ATTORNEY FOR AMICI CURIAE

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT.....	i
INTERESTS OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	6
I. THE CDA DOES NOT IMMUNIZE AIRBNB FROM LIABILITY FOR DAMAGES RESULTING FROM ITS OWN CONDUCT.....	11
II. AIRBNB’S ONLINE TAX PAYMENT PROGRAM IS NOT PROTECTED PUBLICATION OF THIRD PARTY CONTENT.	12
III. HOAS HAVE THE RIGHT TO CONTROL USE AND MANAGEMENT OF COMMON AREAS IN THEIR COMMUNITIES... ..	13
IV. GRANTING IMMUNITY UNDER SECTION 230 UNDERMINES LAND USE POLICIES AND THE QUIET ENJOYMENT OF RESIDENTS WHO BOUGHT IN RELIANCE ON RESTRICTIONS AGAINST STRS.	16
V. ILLEGAL STRS ALSO EXPOSE COMMUNITY ASSOCIATIONS TO ADA ENFORCEMENT ACTIONS.....	18
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Access 4 All, Inc. v. Atlantic Hotel Condominium Association</i> , 2005 U.S. Dist. LEXIS 41600 (S.D. Fla.)	19
<i>Airbnb, Inc. v. City and County of San Francisco</i> , 217 F. Supp.3d 1066,1072 (U.S Dist. Ct, N.D. Cal. 2016)	11
<i>Colony Hill v. Ghamaty</i> , 143 Cal.App.4th 1156, 1164 (2016).....	14
<i>Doe v. Internet Brands, Inc.</i> , 824 F.3d 846,850 (9th Cir. 2016)	6, 11
<i>Greenfield v. Mandalay Shores Community Assn.</i> 21 Cal. App. 5 th 896.....	16
<i>In re Transient Occupancy Tax Cases</i> , 2 Cal. 5th 131 (2016)	12
<i>Ironwood Owners Assn. IX v. Solomon</i> , 178 Cal. App.3d 766	9
<i>Kromenhoek v. Cowpet Bay W. Condo Ass'n</i> , 77 F. Supp.3d 454, 457 (D.V.I. 2014)	19
<i>Laguna Royale Owners Ass'n v. Darger</i> , (1981) 119 Cal.App.3d 670, 680.....	14
<i>Lansing v. Southwest Airlines Co.</i> , 2012 Il App	11
<i>Liebler v. Point Loma Tennis Club</i> , 40 Cal. App. 4 th 1600.....	16
<i>Mission Shores Assn. v. Pheil</i> , 166 Cal. App. 4th 789 (2008)	9
<i>Nahrstedt v. Lakeside Village</i> , 8 Cal. 4th 361	10, 14, 16

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National Federation of the Blind of California, et al., v. Uber Technologies, Inc. et al,
103 F. Supp.3d 1073 (Dist. Court, ND California 2015)18

South Dakota v. Wayfair, Inc. et al.,
2018 U.S. LEXIS 3835, 24 (2018)3

Watts v. Oak Shores Community Assn.,
235 Cal. App. 4th 466, 468.....14

Statutes & Municipal Codes

42 U.S.C. § 12181(7)(A).....19

Americans with Disabilities Act, 1990, Title 42, chapter 126.....17

CA Bus. & Prof. Code § 172004

CA CIV Code § 4515.....15

CA CIV Code § 4740.....15

CA CIV Code § 5975.....14

California Fire Code, 2016,California Code of Regulations, Title 24, Part 9,
<http://www.citymb.info/home/showdocument?id=28089>17

CA Rev. & Tax Code § 7280, et seq.12

Communications Decency Act, 47 U.S.C. § 2304, 11, 16, 19

Mono County Code Section 26.040.....17

Monterey County, Code Section 17.134.040(f).....17

Santa Cruz, Municipal Code Section 4.02.070.....17

Seal Beach Municipal Code § 11.4.05.135 (2013).....7

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AIRBNB.com – Careers at Airbnb – “Open Positions”
<https://www.airbnb.com/careers/departments/photography>4

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<https://www.airbnb.com/help/article/1545/delta-skymiles--airbnb-partnership-program>5

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<https://www.airbnb.com/host-protection-insurance>5

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<https://www.cityofpacificgrove.org/sites/default/files/city-council/2017/10-18-2017/city-council-10-18-2017-13a-airbnb-agreement.pdf> 13

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<https://documents.coastal.ca.gov/reports/2002/11/Th16a-11-2002.pdf>6

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<https://rbgg.com/wp-content/uploads/RBGG-Airbnb-Executed-Voluntary-Agreement-with-Exhibits-9-20-17.pdf>18

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INTERESTS OF AMICUS CURIAE

Community Associations Institute (“CAI”) is an international non-profit organization providing education, resources and advocacy for community association leaders, members and professionals to promote successful communities through effective, responsible governance and management. CAI's more than 39,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. These important voices are not otherwise before the Court, and they well deserve to be heard and accorded their due significance.

Although community associations and apartments differ in many respects, vacationers (“Guests”) frequently violate covenants governing community associations just as they violate apartment leases. CAI has an interest in this matter because it promotes the ability of associations to self-govern, allowing rules specific to Short-Term Rentals (“STRs”) to be established through a well-documented and resident-engaging process that leads to decisions that suit the majority of HOA owners in the community. These rules preserve the residential character of associations, protect the quiet enjoyment of the residents and protect the property values within.

To date, numerous community associations (“HOAs”) have enacted lease restrictions against STRs and apartment owners have beefed up their leases to make it a breach of the lease to even advertise their unit as an STR. Although landlords can bring an action to evict the tenant for the nonmonetary breach of the lease and HOAs can impose fines, the time and expense in doing so does not alleviate the impact on the Host’s neighbors; nor does it ensure that the landlord or HOA will be compensated for the losses it incurs in monitoring, enforcing and remedying the Host’s breach.

We believe the proposed analysis and CAI’s unique perspective will focus the issues before this Court and will simplify the Court’s analysis. CAI’s brief will assist the court in deciding this matter by highlighting the impact the illegal activity has on its members.

INTRODUCTION AND SUMMARY OF ARGUMENT¹

Realtors and developers ...use the Internet to market worldwide the short-term rentals of Encinitas homes. One has only to look at the internet to see how large these commercial operations have become and their potential for future growth. ...Many of us in Encinitas that live in residential areas have seen our neighbor's homes sold and turned into motel-like operations... Once commercialization starts in a neighborhood and reaches the so called "tipping point", your property becomes unattractive to normal home buyers. The only people who will buy your home are those that wish to use it as a rental property- thus "tipping" a residential area into commercial usage.²

In "*South Dakota v. Wayfair Inc.*", ("*Wayfair*")³, the U.S. Supreme Court held that it is unfair to require "a business with one salesperson in each State [to] collect sales taxes in every jurisdiction in which goods are delivered; but not a business with 500 salespersons in one central location and a website accessible in every State," even though they have identical national sales." The same analysis applies here. If brick-and-mortar travel service providers engaged in booking

¹ All parties have consented to the filing of this brief. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money to fund the preparation or submission of this brief.

² Rubenstein, Irwin Letter to Cal. Coastal Commission, October 2006; <https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf>, at pages 71-73.

³ 2018 U.S. LEXIS 3835, 24 (2018)

STRs must defend claims of 17200 violations⁴, online travel service providers should also be required to do so. Section 230⁵ (“CDA”) immunity did not apply in *Wayfair*, and it should not apply here!

Airbnb asserts that under the CDA, it is not an “information content provider” as that term is defined in the CDA⁶ and that any harm caused to Appellants is a result of its publishing conduct, not its other conduct. Thus, no liability may be imposed against it for encouraging and facilitating bookings of known illegal STRs.

Airbnb is wrong! Airbnb should not get a pass simply because one aspect of its conduct is protected under the CDA. Airbnb, like state licensed leasing agents, advertise listings for vacation rentals. Importantly, and just like brick-and-mortar listing agents, it also collects a percentage commission from Hosts and Guests, verifies personal profiles and listings, collects and transfers payments to Hosts, helps set pricing, and sends out its own professional photographers to photograph the STRs.⁷ Airbnb, like Marriott and Hyatt, also partners with airlines

⁴ CA Bus. & Prof. Code § 17200.

⁵ Communications Decency Act, 47 U.S.C. § 230.

⁶ *Id.*, at 47 U.S.C. § 230(f)(3).

⁷ Airbnb, Careers at Airbnb,

<https://www.airbnb.com/careers/departments/photography>.

and credit card companies offering “points” for booking on Airbnb.⁸ Unlike brick-and-mortar real estate brokers, it also obtains insurance (or self-insures) Hosts and Guests⁹ and calculates, collects and remits the Hosts’ transient occupancy taxes (“TOTs”).¹⁰ It is this conduct that is harming our members.

Amicus does not deny that the listing itself creates problems for its members. The larger concern is that the additional services provided by Airbnb are driving the increase in illegal listings and exacerbating an already difficult situation. Its entry into the rental market has created an uneven playing field, robs our communities of affordable housing and turns countless residential properties into deregulated and decentralized motels.

The voices of residents in apartment buildings and in HOAs with restrictions on STRs- those who live every day with the nuisance of “*vacation mania*”- are too often unheard in the debate over CDA immunity. Although those who oppose any regulation of the internet speak of the dangers of regulating online speech, rarely is

⁸ Airbnb.com- Help, “Airbnb Partnership Program”, <https://www.airbnb.com/help/article/1545/delta-skymiles--airbnb-partnership-program>

⁹ Airbnb.com- “Host Protection Insurance”; <https://www.airbnb.com/host-protection-insurance>

¹⁰ Airbnb.com, “Occupancy Tax Collection and Remittance by Airbnb in California”, <https://www.airbnb.com/help/article/2297/occupancy-tax-collection-and-remittance-by-airbnb-in-california>

there discussion about how on-line travel service companies are abusing private property rights, violating local laws, raising rents and interfering with the quiet enjoyment of permanent residents. This omission is unfortunate because property managers and residents are uniquely qualified to speak about how it impacts property rights, privacy, and a sense of safety. This brief presents the voices of the people who are forced to bear the cost and nuisance created by Airbnb’s business model.

Amicus respectfully joins in Appellants’ assertion that the CDA does not give online booking services “an all-purpose get-out-of-jail-free card”¹¹ and requests the Court to overrule the lower court decision granting Airbnb CDA immunity.

ARGUMENT

We live next door to two (2) transient units.... The transient/motel people coming and going every few days is very disruptive to our quiet enjoyment of this residential 4-plex...[L]ots of people in and out every few days at all hours of the day and night. They take up parking...(They often have more than 2 cars & lots of people). Common areas are crowded... These are homes not motel rooms... We want to live in a neighborhood of homes- not a motel....¹²

¹¹ *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016).

¹² Minor, Carolyn, Letter to the Imperial Beach City Council re STRs; <https://documents.coastal.ca.gov/reports/2002/11/Th16a-11-2002.pdf>

Through peer to peer marketplaces, Guests and Hosts access a marketplace from their living room couch. Regardless of the popularity of these sites, laws exist that regulate internet commerce, including STRs. Just as it is impracticable to try and collect sales taxes from individual purchasers of products on the internet,¹³ it is impracticable to expect HOAs and landlords to prevent Guests from arriving when Hosts operate without a license and their identity and location is secret.

Seal Beach, California is a good example; it passed an ordinance banning STRs.¹⁴ However, search “Short Term Rentals Seal Beach” on the internet, and you will find a host of listings: VRBO - 1,147 rentals, Hometogo.com - 51 rentals, Tripping.com - 9, and Airbnb - 232.”¹⁵ Clearly, restrictions against STRs are either blindly ignored or with full knowledge not followed.

Airbnb seeks a regime where it can continue to extract massive profits from its travel services while disclaiming any requirement to comply with restrictions against STRs. Airbnb is the leader in the online STR travel service market. It has

¹³ *Wayfair*; *See*, Note 3, above, at page 10.

¹⁴ *See*, Seal Beach Municipal Code § 11.4.05.135 (2013).

¹⁵ Airbnb does not identify where any home in Seal Beach is located. It refers to it as Coastal Orange County; however, it is happy to give you a list of homes just rented in Seal Beach!

over 3,000,000 properties in 65,000 cities and 191 countries worldwide.¹⁶ It exceeded its financial projections for 2017, with \$93 million in profit on \$2.6 billion in revenue.¹⁷ The sheer number of Airbnb's listings means that it offers quadruple the options of the largest traditional hotel chain, Marriott.¹⁸ Alarming, much of this growth appears to be from multi-unit operators who rent out two or more units and full time operators who rent their unit(s) out most of the year.¹⁹

It is estimated that as of October of 2014 Airbnb had 11,401 listings in the Los Angeles region, generating revenue of \$80 million in 2014 alone.²⁰ Although Airbnb describes itself as a member of the "sharing economy," helping the middle

¹⁶ Hartmans, Avery, "Airbnb Now Has More Listings Worldwide Than the Top Five Hotel Brands Combined," Business Insider, August 10 2017. <http://www.businessinsider.com/airbnb-total-worldwide-listings-2017-8>.

¹⁷ Zaleski, Olivia and Newcomer, Eric, "Inside Airbnb's Battle to Stay Private", Bloomberg, February 2018, <https://www.bloomberg.com/news/articles/2018-02-06/inside-airbnb-s-battle-to-stay-private>

¹⁸ Chafkin, Max, "Can Airbnb Unite the World?", FAST COMPANY (Jan. 12, 2016), <https://www.fastcompany.com/3054873/can-airbnb-unite-the-world>; <https://perma.cc/RZ3W-QJBV>, note 144.

¹⁹ O'Neill, Dr. Joh .W. and Ouyang, Yuxia, "From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb" January 2016, http://3rxg9qea18zhtl6s2u8jammft-wpengine.netdna-ssl.com/wp-content/uploads/2016/01/0000-0000_PennState_AirBnbReport_011916ee_Embargo.pdf .

²⁰ Samaan, Roy, LAANE: "Airbnb, Rising Rent, and the Housing Crisis in Los Angeles", March 2015, <https://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf> .

class earn extra income, a rising share of its revenues in Los Angeles, (42%), comes from commercial operators, not middle class home-sharers.²¹

Despite the impossible task of enforcing restrictions against STRs, HOAs cannot ignore illegal rentals.²² They cannot turn a blind eye on one illegal rental, and thereafter enforce the restriction on another. Airbnb's secrecy model and the fact that the Guest is gone long before the HOA can investigate, mean that HOAs are hard-pressed to prevent illegal rentals before they occur, which is a breach of the promise they made to residents who purchased or rented in reliance on the restrictions.

HOA's have limited tools to enforce compliance with the governing documents, such as imposing a fine, suspending association voting rights or suspending the right to use the common area. Otherwise, a court order is required. As to fines, the reality is that most fines are the \$100 - \$200 range, and the cost is easily absorbed by the Host. As to suspension of right to use the common area, as a practical matter it is difficult for an HOA to monitor pool use. Most HOAs do not have an onsite manager so anyone with a card key can access the pool (or other

²¹ *Id.*

²² *See, Mission Shores Assn. v. Pheil*, 166 Cal. App. 4th 789, 795 (2008); and *Ironwood Owners Assn. IX v. Solomon*, 178 Cal. App.3d 766.

amenities). Hiring staff to monitor the pool or asking for proof of residency is expensive and impractical.

Alternatively, an association can initiate a suit for injunctive relief. Since there is no privity of contract with the Guest, the HOA is limited to bringing an action against the Host. As indicated by the court in *Nahrstedt v. Lakeside Village*, enforcement on a “case by case” basis is inherently inefficient and would impose “great strain on the social fabric” of the development and would “frustrate owners who had purchased their units in reliance on the CC&Rs”²³ The explosion in numbers of illegal STRs is undermining our members’ communities!

*I just want to paint a picture for you what life is like on a Saturday in my neighborhood... At around 8:00 or 9:00, the maids come into the neighborhood, trucks and cars with all their supplies. All the giant SUVs, extra cars, vans etc. who have come to rent for the week are packing up for their so called Check-out time. It's a madhouse, a real zoo... By the time the maids are finished driving around to the RENTAL homes, it's time for Check-In... Then the strangers come in droves. It's party time at the beach in our residential neighborhood, and believe me, these people want to get their money's worth.*²⁴

²³ 8 Cal. 4th 361, 384.

²⁴ Bourgo, Linda, Letter to Cal. Coastal Commission, August 2006, <https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf>, at page 76.

I. THE CDA DOES NOT IMMUNIZE AIRBNB FROM LIABILITY FOR DAMAGES RESULTING FROM ITS OWN CONDUCT.

Ninth Circuit binding precedent establishes that the CDA precludes liability for claims involving “publication”.²⁵ There is no dispute that Appellees have an internet presence or that information on its site is entered by Hosts in drop down menus provided by Airbnb. What is at issue is whether Airbnb’s “non-third party content” on its website and conduct performed by Airbnb separate and apart from its internet presence is immunized under the CDA and whether Appellant has stated a cause of action for each of the alleged state torts.

Again, Appellants are only seeking to hold Airbnb liable for activities traditionally performed by licensed real estate brokers, not for third-party content. Airbnb is perfectly free to publish any listing they receive and to collect publishing fees, whether or not the unit is lawfully registered, whether or not the tenant is allowed under the lease to sublet the apartment, and whether or not the HOA imposes restrictions against STRs. As clearly stated in *Lansing v. Southwest Airlines Co.*²⁶, where Section 230 preemption was not found:

²⁵ *Doe v. Internet Brands, Inc.*, 824 F.3d 846,850 (9th Cir. 2016); *see also, Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp.3d 1066, 1072 (U.S. Dist. Ct, N.D. Cal. 2016).

²⁶ *Lansing v. Southwest Airlines Co.*, 2012 Il App (1st) 101164; 980 N.E.2d 630, 638.

The CDA was not enacted to be a complete shield for ICS users or providers against any and all state law torts that involve the use of the Internet. Such an overly broad interpretation of the CDA is inconsistent with the statutory purpose to encourage the restriction of objectionable or inappropriate online material. Moreover, such a grant of blanket immunity would lead to the anomalous result that occurred in the trial court below, i.e., plaintiff was allowed to proceed with his negligent supervision claim against defendant where the evidence of the employee's threatening and harassing conduct arose from telephone calls, but that same cause of action was barred where the evidence of the very same wrongful conduct arose from e-mails and text messages. The CDA does not bar plaintiff's cause of action simply because defendant's employee used the Internet access provided by defendant as one vehicle to harass and threaten plaintiff.

II. AIRBNB'S ONLINE TAX PAYMENT PROGRAM IS NOT PROTECTED PUBLICATION OF THIRD PARTY CONTENT.

In addition to providing booking and other services to Hosts and Guests, Airbnb also offers its Hosts transient occupancy tax (“TOTs”) services for taxes imposed under CA Rev. & Tax Code § 7280.²⁷ Airbnb collects TOTs from its Hosts and through pre-negotiated agreements with cities/counties, shields the Hosts identity, helps them avoid audits and in some instances, obtains amnesty for unpaid back taxes. When a city signs a “Voluntary Collection Agreement” (“VCAs”) with Airbnb, Airbnb registers as the taxpayer and remits the collected

²⁷ See, Note 10 above and *In re Transient Occupancy Tax Cases*, 2 Cal. 5th 131 (2016), where the City of San Diego filed a putative class action against various booking agents, alleging each such company was liable for the TOT on the amount retained by the booking agent.

tax. Depending upon the negotiating skills of the taxing authority, VCAs may limit the number of audits that can be performed and limit the time period in question.²⁸

Airbnb's tax service is not "publication of third party content." Airbnb's negotiated VCA agreements are a tool to attract large multiple-unit operators who wish to avoid direct tax enforcement and audits. This service creates an un-level playing field, to the disadvantage of brick-and-mortar leasing brokers. It also contributes to the increasing number of residential communities being turned into *de facto* motels.

III. HOAS HAVE THE RIGHT TO CONTROL USE AND MANAGEMENT OF COMMON AREAS IN THEIR COMMUNITIES.

Covenants, conditions and restrictions ("CCRs") create a special relationship between an HOA and its members; prospectively, they "run with the land" and so become part of every owner's sale transaction. The CCRs provide certainty of operations, rights and responsibilities. Deferring to use restrictions contained in an

²⁸ See, Airbnb's agreement with Sonoma County at: http://www.sonoma-county.org/tax/tot/pdf/Signed_Airbnb_VCA.pdf; and, Airbnb's proposed agreement with the City of Pacific Grove at: <https://www.cityofpacificgrove.org/sites/default/files/city-council/2017/10-18-2017/city-council-10-18-2017-13a-airbnb-agreement.pdf>. See also, Dan R. Bucks, "Airbnb Agreements with State and Local Tax Agencies," March 2017, https://www.ahla.com/sites/default/files/Airbnb_Tax_Agreement_Report_0.pdf.

association's governing documents protects the general expectations of the owners that restrictions imposed by the developer or approved by the membership will be enforceable.²⁹

With only two exceptions noted below, an association has the right to restrict the use of property in a community³⁰ and as long as the restrictions are reasonable they will be upheld by the courts. Restrictions are reasonable if: (i) they are rationally related to the protection, preservation or proper operation of the property; and (ii) if they are exercised in a fair and nondiscriminatory manner.³¹

Watts v. Oak Shores Community Assn. (“Watts”)³² is on point. There, the board assessed STR landlords additional fees, limited their use of boats and other watercraft and placed restrictions on parking. STR landlords challenged the restrictions. The court ruled that associations have the right to restrict STRs, boards can impose a reasonable fee to offset expenses associated with STRs, and courts should defer to boards on decisions related to the maintenance, control and

²⁹ CA. Civ. Code § 5975; See *Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361,377.

³⁰ See, *Colony Hill v. Ghamaty*, 143 Cal. App. 4th 1156, 1164 (2016), (Associations have the power to limit room rentals as a commercial enterprise).

³¹ See, *Laguna Royale Owners Ass'n. v. Darger* (1981) 119 Cal. App. 3d 670, 680.

³² 235 Cal. App. 4th 466, 468.

management of common areas.³³ That STRs “cost the Association more than long-term renters or permanent residents is not only supported by the evidence but experience and common sense places the matter beyond debate. Short-term renters use the common facilities more intensely; they take more staff time in giving directions and information and enforcing the rules; and they are less careful in using the common facilities because they are not concerned with the long-term consequences of abuse.”³⁴

While the Davis-Stirling Common Interest Development Act regulates virtually all transactions in an association, only two statutes address access to a common interest development by nonmembers. One deals with the enforcement of rental prohibitions against owners who acquire title to property after enactment of the prohibitions (Civil Code § 4740); the other authorizes association members to invite guests, including public officials, to use meeting space for “social, political, or educational purposes.” (Civil Code § 4515). Neither statute applies in this instance.

The legislature sometimes “overrides” an association’s governing documents to give effect to a public policy, as illustrated by enactment of the two statutes

³³ *Id.*, at 474-477.

³⁴ *Id.*, at 473.

above; however, with the exception of associations within the coastal zone³⁵, there is no public policy that requires HOAs to accommodate the impact of STRs on their communities. In fact, the general rule is that common areas in HOAs are intended for membership use and not public use.³⁶

IV. GRANTING IMMUNITY UNDER SECTION 230 UNDERMINES LAND USE RESTRICTIONS AND THE QUIET ENJOYMENT OF RESIDENTS WHO BOUGHT IN RELIANCE THEREON.

*As a hotel operator within the city, we were very concerned with the unfair competition of lodging within residential zones. We understand the need to have visitor-serving commercial uses within the city, but strongly believe such uses should be in commercial zones. Our investments in the lodging industry are substantial and continuing to allow the proliferation of lodging in residential neighbor[hoods] undermines that investment.*³⁷

Use restrictions contained in CC&Rs are an inherent part of common interest developments and are crucial to the stable, planned environment of any shared ownership arrangement.³⁸ Airbnb's business model undermines the community concept and is partly responsible for our members' complaints, complaints that

³⁵ *Greenfield v. Mandalay Shores Community Assn.*, 21 Cal. App. 5th 896.

³⁶ *Liebler v. Point Loma Tennis Club*, 40 Cal. App. 4th 1600, 1607-1609 (non-residents may be excluded from use of common areas).

³⁷ Georgees, Eddie, Letter to Cal. Coastal Commission, October 2006; <https://documents.coastal.ca.gov/reports/2006/11/T9c-11-2006.pdf>, at page 67.

³⁸ *Nahrstedt v. Lakeside Village*, 8 Cal. 4th 361, 372-374.

must be addressed if a STR violates zoning ordinances, occupancy standards, building and fire codes or the ADA.³⁹

Numerous counties and cities require STRs to meet all applicable building, health, fire and related safety codes and that they be inspected by the fire department before any rental activity can occur.⁴⁰ Higher standards apply for hotels vs. apartments vs. single family dwellings.⁴¹ Converting a residence into an STR often requires the Host to (i) install carbon monoxide and smoke detectors; (ii) make sure stairs, decks and guardrails are structurally sound; (iii) install fire extinguishers; (iv) make sure appliances are in good working condition; (v) install fences or locking covers on hot tubs, pools and spas; (vi) and make sure the rentals are free of pests, including bedbugs.⁴² It is highly unlikely that Hosts are voluntarily complying with the increased standards!

Airbnb enables Hosts to escape complying with these laws. Their business model also undermines the ability of agencies, landlords and/or HOAs to enjoin

³⁹ The Americans with Disabilities Act, 1990, Title 42, chapter 126, of the United States Code beginning at Section 12101.

⁴⁰ *See*, Monterey County, Code Section 17.134.040(f); Mono County Code Section 26.040; and City of Santa Cruz, Municipal Code Section 4.02.070.

⁴¹ California Code of Regulations, Title 24, Part 9;
<http://www.citymb.info/home/showdocument?id=28089>

⁴² *See*, Mono County Code Section 26.040.

illegal rentals before the Guest arrives, resulting in unsafe and unsanitary conditions for Guests and neighbors, alike.

V. ILLEGAL STRS ALSO EXPOSE COMMUNITY ASSOCIATIONS TO ADA ENFORCEMENT ACTIONS.

*None of these Condos are Handicap Friendly. There could be lawsuits if we go Transient Housing Week or Weekend rentals.*⁴³

When residential property is converted into an STR, an argument can be made that the STR, like a motel property, is a “public accommodation” under the ADA.⁴⁴ A decision that a STR is a “public accommodation” exposes an HOA to a claim that the common areas be ADA complaint, the cost of which must be borne by the Host, the property owner, renter, and the other residents in the HOA⁴⁵ and Airbnb.⁴⁶ STRs are considered “public accommodations” under the ADA if they

⁴³ Shipley, Loren Letter to City Council re STRs, *see*, Note 12.

⁴⁴ *See*, Voluntary Agreement and Release entered into by Airbnb at: <https://rbgg.com/wp-content/uploads/RBGG-Airbnb-Executed-Voluntary-Agreement-with-Exhibits-9-20-17.pdf> .

⁴⁵ *See*, Johnson ,Denise, “Why Claims Under Americans with Disabilities Act are Rising,” October 7, 2016, <https://www.insurancejournal.com/news/national/2016/10/07/428774.htm>

⁴⁶ *See*, *National Federation of the Blind of California, et al., v. Uber Technologies, Inc. et al*, 103 F. Supp. 3d 1073 (Dist. Court, ND California 2015).

are “virtually indistinguishable from a hotel⁴⁷ or if they are a “place of lodging, as that term is defined in the statute.⁴⁸

Unfortunately, the sheer number of “secret” listings raises concerns about the ability of current enforcement mechanisms to regulate ADA compliance. Granting immunity under Section 230 for booking services would not only allow Airbnb and its Hosts to continue to defy restrictions against STRs, it would allow Airbnb to avoid its obligation as a “*travel service*” to comply with the ADA and other state and local laws governing access to public accommodations.

CONCLUSION

Airbnb’s travel services are not protected publication of third-party content. Airbnb’s “unprotected” conduct, along with its protected publishing activities, has negatively impacted community associations and has contributed to the rise of housing costs and rents in our communities.⁴⁹ Immunizing all of Airbnb’s conduct because listings are protected speech will undermine local and private governance.

⁴⁷ See, *Access 4 All, Inc. v. Atlantic Hotel Condominium Association*, 2005 U.S. Dist. LEXIS 41600 (S.D. Fla.); *Kromenhoek v. Cowpet Bay W. Condo Ass’n*, 77 F. Supp. 3d 454, 457 (D.V.I. 2014).

⁴⁸ Except if it is located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor. See, 42 U.S.C. § 12181(7)(A).

⁴⁹ Samaan, Roy, LAANE, “*Airbnb, Rising Rent, and the Housing Crisis in Los Angeles*,” March 2015,

It is unfortunate that the short term nature of a Guest's stay creates a culture in which Guests feel entitled to impede the quiet enjoyment of their neighbors to instead promote their vacation "*extravaganzas.*" These issues are not easily deterred or prevented; nor should they be ignored. Broad immunity from liability for tortious conduct is a rarity in our law. We respectfully ask the Court to listen to the voices of those who suffer as a result of Airbnb's non-publishing conduct and reverse the decision of the lower Court.

Respectfully submitted,

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/s/ DENA M. CRUZ

Steven S. Weil

Dena M. Cruz

BERDING & WEIL, LLP

2175 N. California Blvd., Suite 500

Walnut Creek, CA 94596

Telephone: (925) 838-2090

Fax: (925) 820-5592

sweil@berdingweil.com

dmacruz@berdingweil.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B), Fed. R. App. P., because it contains **4,182** words, excluding those parts of the brief exempted by Rule 32(a)(B)(iii), Fed. R. App. P.

2. This brief complies with Circuit Rule 32(b), the typeface requirements of Rule 32(a)(5), Fed. R. App. P., and the type style requirements of Rule 32(a)(6), Fed. R. App. P., because it was prepared in Microsoft Word using Times Roman 14-point type.

/s/ DENA M. CRUZ
Steven S. Weil
Dena M. Cruz
BERDING & WEIL, LLP
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on 28th day of June, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

/s/ DENA M. CRUZ
Steven S. Weil
Dena M. Cruz
BERDING & WEIL, LLP
Attorney for *Amici Curiae*