# No. 18-55367

**IN THE**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

*v.*

**CITY OF SANTA MONICA,**
*Defendant-Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
OTIS D. WRIGHT II, DISTRICT JUDGE • CASE NO. 2:16-CV-6641, 2:16-CV-6645

# AMICUS CURIAE BRIEF OF CALIFORNIA APARTMENT ASSOCIATION, APARTMENT INVESTMENT AND MANAGEMENT COMPANY, AVALONBAY COMMUNITIES, INC., AND COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF DEFENDANT AND APPELLEE CITY OF SANTA MONICA

**HORVITZ & LEVY LLP**
JEREMY B. ROSEN
ERIC S. BOORSTIN
RYAN C. CHAPMAN
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800

**WHEELER TRIGG O'DONNELL LLP**
MICHAEL T. WILLIAMS
ALLISON R. MCLAUGHLIN
370 SEVENTEENTH STREET, SUITE 4500
DENVER, COLORADO 80202-5647
(303) 244-1800

**KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.**
DAVID C. FREDERICK
BRENDAN J. CRIMMINS
RACHEL P. MAY
1615 M STREET, N.W., SUITE 400
WASHINGTON, D.C. 20036
(202) 326-7900

**ATTORNEYS FOR AMICUS CURIAE**
**APARTMENT INVESTMENT AND MANAGEMENT COMPANY**

HEIDI PALUTKE
980 NINTH STREET, SUITE 1430
SACRAMENTO, CALIFORNIA 95814
(916) 449-6425

**ATTORNEY FOR AMICUS CURIAE**
**CALIFORNIA APARTMENT ASSOCIATION**

EDWARD M. SCHULMAN
BALLSTON TOWER
671 N. GLEBE ROAD, SUITE 800
ARLINGTON, VIRGINIA 22203
(703) 317-4639

**ATTORNEY FOR AMICUS CURIAE**
**AVALONBAY COMMUNITIES, INC.**

**KULIK GOTTESMAN SIEGEL & WARE LLP**
GARY S. KESSLER
15303 VENTURA BLVD., SUITE 1400
SHERMAN OAKS, CALIFORNIA 91403

**ATTORNEY FOR AMICUS CURIAE**
**COMMUNITY ASSOCIATIONS INSTITUTE**

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amici curiae of the following corporate interests:

California Apartment Association:

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.

Apartment Investment and Management Company:

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:

The Vanguard Group, Inc. and Cohen & Steers Capital Management Inc.

AvalonBay Communities, Inc.:

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:

The Vanguard Group, Inc. and BlackRock, Inc.

Community Associations Institute:

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.

# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page(s)**

## Cases

**Statutes**



**Miscellaneous**

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

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

*v.*

**CITY OF SANTA MONICA,**
*Defendant-Appellee.*

# AMICUS CURIAE BRIEF OF CALIFORNIA APARTMENT ASSOCIATION, APARTMENT INVESTMENT AND MANAGEMENT COMPANY, AVALONBAY COMMUNITIES, INC., AND COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF DEFENDANT AND APPELLEE CITY OF SANTA MONICA

## INTEREST OF AMICI CURIAE

The California Apartment Association ("CAA") is the largest statewide rental housing trade association in the country, representing more than fifty thousand owners and operators who are responsible for nearly two million rental housing units throughout California. CAA's mission is to promote fairness and equality in residential housing rental

and to promote the availability of high quality rental housing in California.

CAA has an interest in protecting peace and quiet enjoyment of residential rental housing. As part of its efforts to encourage all members of the rental housing industry to provide high quality rental housing, CAA's Code of Ethics endorses the use of written contracts and calls for compliance with all applicable laws and regulations. To further these principles, CAA provides forms for use in residential rental housing throughout California. CAA's form rental and lease agreements, which are widely used throughout California, prohibit the rented premises from being used for short-term rentals and also require compliance with all applicable laws. In addition, CAA sponsored Senate Bill 761 in 2015, the legislation that resulted in section 22592 of the California Business and Professions Code, which required hosting platforms like Plaintiffs to provide a notice to hosts that if they are tenants there may be restrictions in their rental agreement on using the premises for short-term rental purposes. CAA supported a similar bill in 2016—Senate Bill 1092—which required hosting platforms to warn hosts to review any restrictions on

coverage under their insurance policies related to short-term rental activities.

Apartment Investment and Management Company ("Aimco") is a real estate investment trust that owns many apartment communities throughout the United States. Aimco is dedicated to ensuring that every aspect of its communities is run professionally with the utmost respect for its residents' happiness and safety.

Short-term rentals have caused numerous disturbances in Aimco's communities and generated many complaints from its full-time residents. To address those concerns, leases for Aimco's communities prohibit residents from renting out apartments to third parties, including through short-term rental services such as those operated by Plaintiffs.

In another action in the Central District of California, Aimco subsidiaries sued Airbnb for, among other things, intentionally interfering with their leases and trespass by brokering prohibited short-term rentals. That complaint was erroneously dismissed based on the district court's misinterpretation of section 230 of the Communications Decency Act ("CDA") and Aimco's appeal is currently pending in this Court, with Aimco's opening brief due June 22. *See LA Park La Brea A LLC v. Airbnb,*

*Inc.*, 285 F. Supp. 3d 1097 (N.D. Cal. 2017); *LA Park La Brea A LLC v. Airbnb, Inc.*, No. 18-55113 (9th Cir. appeal docketed Jan. 26, 2018).

AvalonBay Communities, Inc. owns and manages apartment communities in leading metropolitan areas throughout the United States. AvalonBay is committed to providing its customers with comfortable, convenient, and distinctive apartment living experiences. As of March 31, 2018, AvalonBay had approximately 78,000 apartment homes in operating communities and an additional 6,000 apartment homes in communities under development.

Despite AvalonBay's efforts to enforce prohibitions on short-term rentals in many of its communities, they have persisted. Unfairly, the numerous short-term rentals brokered by Plaintiffs have led to AvalonBay being civilly and criminally cited for not complying with certain safety regulations applicable to transient occupancy buildings, and AvalonBay is then burdened with the expense and effort of defending against and settling these citations. AvalonBay has an interest in ensuring that the decision in this appeal does not undermine its ability to: (i) control the types of occupancies and uses in its own buildings; (ii) comply with local

laws and regulations; and (iii) provide the residential experience that the vast majority of its residents have chosen.

Community Associations Institute ("CAI") is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI serves the interests of more than 69 million homeowners who live in more than 380,000 community associations in the United States.

Community associations and apartments differ in many respects; however these online booking agencies violate covenants governing community associations just as they violate apartment leases creating similar adverse effects from the significant increase in short-term vacation rentals. CAI promotes the ability for community associations to self-govern, allowing rules specific to short-term rentals to be established through a well-documented and resident-engaging process that leads to a decision that suits the majority of the residents in the community. Thus, the neighborhood rules will preserve the character of their developments,

protecting the quiet enjoyment of their residents and protecting the property values of their owners' homes.

## STATEMENT OF COMPLIANCE WITH RULE 29(a)

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 amici curiae, their members, or their counsel contributed money to fund the preparation or submission of this brief.

## SUMMARY OF THE ARGUMENT

Short-term rentals bring large numbers of travelers into places that were not designed to accommodate them. Cities, multifamily housing owners, and community associations, as well as their residents and tenants, therefore have an interest in setting reasonable short-term rental policies to promote the overall well-being of their communities.

Plaintiffs Airbnb and HomeAway.com seek a regime where they can continue extracting massive profits from their short-term rental brokering services while disclaiming any responsibility for the significant costs and

burdens their services impose on the community at large. They claim that section 230 of the CDA immunizes them from all liability for brokering short-term rentals that convert residential living spaces into hotel rooms, even if the applicable local regulations or leases expressly prohibit it.

Plaintiffs are wrong. The CDA was enacted to encourage "Good Samaritan[s]" to address the undesirable third-party content on their websites, 47 U.S.C. § 230(c) (2012), not to give online business "an all purpose get-out-of-jail-free card," *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 853 (9th Cir. 2016), for all aspects of their business models no matter the terms of relevant state and local laws or contracts that generally govern a community. The CDA by its terms preempts *only* claims where a website operator is "treated" as the publisher or speaker of information provided by another, 47 U.S.C. § 230(c)(1), not all claims where third-party content is a but-for cause of a harm, or all claims that might cause a website operator to remove third-party content as a practical matter.

This Court has recognized the limited scope of the CDA, cautioning that it "must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts." *Fair Hous. Council of San Fernando Valley*

*v. Roommates.com, LLC*, 521 F.3d 1157, 1164 n.15 (9th Cir. 2008) (en banc). Accordingly, this Court has recognized that claims are not preempted unless they "*inherently* require[ ] the court to *treat* the defendant as the 'publisher or speaker' of content provided by another." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009) (emphases added).

Plaintiffs enter into contracts to broker short-term rental transactions that are regulated by Santa Monica's ordinance, as well as provide travel support (like any other travel agent), guarantees, payment systems, rental rate setting, and other related services, which are integral to the transaction's success. For all these services, Plaintiffs collect substantial fees from the rental transactions, not from advertising the rental listings. These are not the activities of a publisher, so regulating these activities does not treat Plaintiffs as publishers. The CDA therefore does not preempt Santa Monica's ordinance, or any other attempt to hold Plaintiffs accountable for the state or local laws and rules (such as lease restrictions on short-term rentals) they violate in providing short-term rental services.

## ARGUMENT

### I. The Communications Decency Act bars only those laws and claims that inherently treat a website as the publisher or speaker of third-party information.

### A. The CDA was enacted to encourage "Good Samaritans" to remove undesirable third-party content, not shield website operators from their own nonpublishing activities.

Section 230(c) of the CDA is titled "Protection for 'Good Samaritan' blocking and screening of offensive material," and declares that "[n]o provider or user of an interactive computer service shall be held liable" for efforts to self-regulate obscene or offensive material, or "be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1), (2).

Congress passed section 230 in direct response to *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063194, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995), which held that a web service was liable for the defamatory posts of its users if that service imposed content standards or any other means of control. If service providers could be liable for their imperfect efforts to control their users, they would be discouraged from self-regulating at all—thereby relegating the internet to a wild west adults-only zone. *See* 141 Cong. Rec. H8469 (daily ed. Aug. 4, 1995)

(statement of Rep. Cox) ("[T]he existing legal system provides a massive disincentive for the people who might best help us control the Internet to do so."). *Stratton Oakmont* thus ran counter to "the important federal policy of empowering parents" to protect their children from obscenity. H.R. Rep. No. 104-458, at 194 (1996) (Conf. Rep.), *reprinted in* 1996 U.S.C.C.A.N. 10, 208; *accord* S. Rep. No. 104-230, at 194 (1996).

The solution was a bipartisan bill drafted by Representatives Christopher Cox and Ronald Wyden, which ultimately became the CDA. *See Roommates.com,* 521 F.3d at 1163 n.12 (overruling *Stratton Oakmont* "seems to be the principal or perhaps the only purpose" of section 230). On the day this bill was approved, Mr. Cox described the proposed law's narrow focus as Congress "want[ing] to encourage people like [the web providers] to do everything possible for us, the customer, to help us control . . . what our children see" instead of the federal government's taking on that burden for itself. 141 Cong. Rec. H8470. By protecting the efforts of providers who self-censored, Congress hoped to preserve decency on the internet without imposing a "Federal computer commission" that would assume direct control of the internet. 141 Cong. Rec. H8471; accord 47 U.S.C. § 230(b)(2) (declaring a policy goal to preserve "the vibrant and

competitive free market" on the internet). Of the eight legislators who spoke that day in favor of section 230, seven praised its goal of encouraging self-censorship so as to safeguard children. None spoke of the near-absolute immunity being sought by Plaintiffs for the business practices of online companies that broker unlawful transactions. *See* 141 Cong. Rec. H8469-72 (statements of Reps. Cox, Wyden, Barton, Danner, White, Lofgren, Markey, and Fields).

Indeed, nothing in the legislative history of section 230 indicates it was ever intended to provide the sweeping immunity for nonpublishing acts that Airbnb and HomeAway claim here. The Conference report described the law's purpose as "protect[ing] [providers] from civil liability . . . *for actions to restrict or enable restriction of access* to objectionable online material." H.R. Rep. No. 104-458, at 194 (emphasis added); *accord* S. Rep. No. 104-230, at 194. That understanding comports with the goal of overturning *Stratton Oakmont*'s "backward" reasoning, by ensuring that those who tried to remove undesirable content and failed would have the same protections as those who never tried at all. 141 Cong. Rec. H8469-70 (statement of Rep. Cox).

In seeking to protect Good Samaritans from liability, Congress recognized that when websites have millions of users and generate "thousands of pages of information every day," it would be unreasonable to expect them to enforce content standards if doing so would make them liable if an obscene or defamatory post slipped by. 141 Cong. Rec. H8471 (statement of Rep. Goodlatte). Congress sought to encourage providers to assume "the responsibility to edit out information that is . . . coming in to them." *Id.* Section 230 was aimed to "cure that problem." *Id.*

To the extent Mr. Cox's amicus brief relies on additional statements he is now making as a former Congressman, it is "of scant or no value." *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) (disregarding letter from legislators written thirteen years after the law was passed). Pre-enactment committee reports and floor statements can be helpful to "shed light on what legislators" understood the statutory text to mean at the time the bill was passed into law. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011). But "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Id.* Courts normally "give[ ] little weight to statements, such as those of the individual legislators, made *after* the

bill in question has become law." *Barber v. Thomas*, 560 U.S. 474, 486 (2010). Indeed, the intent Mr. Cox attempts to inject into the CDA after the fact is contrary to what he communicated at the time; Mr. Cox's entire floor statement focused on the fight to protect children from exposure to obscene or pornographic material. *See* 141 Cong. Rec. H8469-70.

The Supreme Court's skepticism of postenactment history is especially applicable where the purported history is recounted decades after the statute was enacted, at a time when the former legislator may have other incentives for setting forth his or her views of what the statute means. Mr. Cox serves as outside counsel to NetChoice, which is a trade association of e-commerce companies that includes Airbnb and Homeaway, and a signatory to Mr. Cox's brief. *About Us*, NetChoice, https://netchoice.org/about/ (last visited May 22, 2018). In addition, Morgan, Lewis & Bockius LLP, the law firm in which Mr. Cox is a partner and which prepared the amicus brief, represents HomeAway in other litigation, including litigation involving the CDA. *See Chris Cox*, Morgan Lewis, http://www.morganlewis.com/bios/chriscox (last visited May 16, 2018); *Hiam v. HomeAway.com, Inc.*, 887 F.3d 542 (1st Cir. 2018); *Arnold v. HomeAway, Inc.*, No. 17-50088, 2018 WL 2222661 (5th Cir. May 15,

2018); *Meyer v. HomeAway.com, Inc.*, No. 3:17-CV-02243 (S.D. Cal. dismissed Dec. 7, 2017). The arguments in Mr. Cox's brief should be viewed for what they are: advocacy by a lawyer advancing the interests of a client rather than the independent views of a legislator.

## B. CDA immunity applies only if a claim or law treats the website as the speaker or publisher of third-party content, not where third-party content is only a partial cause of the underlying harm.

### 1. Ninth Circuit authorities

Airbnb and HomeAway argue that Santa Monica's ordinance is preempted by 47 U.S.C. § 230(c)(1), which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Section 230(e) provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." This Court has interpreted the CDA in accordance with its plain meaning, cautioning that it "must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts." *Roommates.com,* 521 F.3d at 1164 n.15.

Section 230(c)(1) protects from liability "only" those providers of interactive computer services "whom a plaintiff seeks to treat, under a state law . . . , as a publisher or speaker . . . of information provided by another information content provider." *Barnes*, 570 F.3d at 1100-01 (footnote omitted).

> [W]hat matters is whether the cause of action *inherently* requires the court to *treat* the defendant as the "publisher or speaker" of content provided by another. To put it another way, courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a "publisher or speaker."

*Id.* at 1102 (emphases added).

In *Barnes*, this Court explained that even where a harm originates from third-party content posted on a website, claims for redress against the website operator are not preempted unless they treat the operator as a publisher or speaker of that content. *Id.* at 1107-08. There, Barnes's ex-boyfriend posted profiles of her with an open solicitation to engage in sexual intercourse on a Yahoo website, which led to harassment from strangers. *Id.* at 1098. After Barnes contacted Yahoo, Yahoo eventually promised to remove the unauthorized profiles. *Id.* at 1099. When Yahoo failed to do so, Barnes brought claims for negligent undertaking and promissory estoppel. *Id.*

*Barnes* held that the claim based on the negligent failure to remove the indecent profiles treated Yahoo as a publisher because "removing content is something publishers do." *Id.* at 1103. By contrast, the promissory estoppel claim was not barred because Barnes sought to hold Yahoo liable for nonpublishing activity "as the counter-party to a contract," even though Yahoo's promise "happen[ed] to be removal of material from publication." *Id.* at 1107.

In *Internet Brands*, 824 F.3d at 853, this Court again confirmed that "the CDA does not provide a general immunity against all claims derived from third-party content" or a "get-out-of-jail-free card for businesses that publish user content on the internet," even if "claims might have a marginal chilling effect on internet publishing businesses." Accordingly, the Court refused to "stretch the CDA beyond its narrow language and its purpose." *Id.* It held that a claim based on a website's failure to warn its users about the threat of a known sexual predator using its website was not preempted by the CDA. *Id.* at 851. Even though the hosting of third-party content was a "'but-for' cause" of the plaintiff's injuries, her claims were not barred because they did not seek to hold the website liable as the "publisher or speaker" of user content. *Id.* at 853.

### 2. Additional authorities

The CDA's text and the above Ninth Circuit authorities compelled the result in *Airbnb, Inc. v. City & County of San Francisco*, 217 F. Supp. 3d 1066 (N.D. Cal. 2016). In *San Francisco*, like here, a city ordinance made it unlawful "to provide booking services for unregistered rental units." *Id.* at 1069. Even though the rental listings on Airbnb and HomeAway's websites originated with third parties, the fact that the ordinance targeted Airbnb's provision of "booking services"—i.e., "reservation and/or payment service[s] . . . that facilitate[ ] a short-term rental transaction"—meant that the ordinance regulated the website operators' "own conduct as Booking Service providers," not their actions as publishers or speakers of information provided by others. *Id.* at 1069, 1071, 1074. Plaintiffs might "voluntarily choose to screen listings" in response to the ordinance, but that did not mean that the ordinance imposed penalties for their publication activities. *Id.* at 1075. Although Plaintiffs argue that *San Francisco* was wrongly decided, they cite no conflicting Ninth Circuit authority. (*See* AOB 39-42.)

Other authorities have similarly refused to stretch the CDA beyond its narrow language and purpose.

In *City of Chicago v. StubHub!, Inc.*, 624 F.3d 363, 365-66 (7th Cir. 2010), the Seventh Circuit held that the CDA did not preempt Chicago's ordinance requiring an online broker of third-party-owned tickets to collect and remit Chicago's taxes on tickets sold above face value. The court was not swayed by StubHub's argument that "[i]t would be extraordinarily difficult, if not impossible, for StubHub to look behind the sale prices of tickets posted by persons using its site to determine whether (and by how much) those prices have been marked up (or down)," to comply with the ordinance. Brief of Defendant-Appellee StubHub!, Inc., *Chicago*, 624 F.3d 363 (No. 09-3432), 2010 WL 3950593, at *46. The court instead held the ordinance was not preempted because the tax "does not depend on who 'publishes' any information or is a 'speaker.'" *Chicago*, 624 F.3d at 366.

*NPS LLC v. StubHub, Inc.*, No. 06-4874-BLS1, 25 Mass. L. Rptr. 478, 2009 WL 995483, at *1-*2, *13 (Super. Ct. Jan. 26, 2009), held that the CDA did not preempt the New England Patriots' intentional interference with advantageous relations claim where StubHub invited its users to resell Patriots tickets, contrary to the contractual terms the Patriots had imposed on their tickets. The court reasoned that StubHub, by knowingly inviting ticket holders to transfer nontransferable tickets for prices greatly

in excess of face value, "materially contributed to the illegal 'ticket scalping' of its sellers." *Id.* at *6, *10, *13.

*McDonald v. LG Electronics USA, Inc.*, 219 F. Supp. 3d 533, 535, 537 (D. Md. 2016), held that the CDA did not preempt plaintiff's claims for negligence and breach of implied warranty against Amazon.com, where plaintiff purchased batteries from a third-party seller on Amazon's website and was injured when the batteries exploded. This was because a website operator may be held liable for playing a "*direct* role in tortious conduct" through its "involvement in the sale or distribution of the defective product." *Id.* at 537.

*Nunes v. Twitter, Inc.*, 194 F. Supp. 3d 959, 961 (N.D. Cal. 2016), held that the CDA did not preempt plaintiff's claims against Twitter alleging violation of the Telephone Consumer Protection Act, which makes it unlawful to make certain calls to cell phones using an automatic dialing system without the recipient's consent. The court reasoned that the lawsuit did not seek to treat Twitter as the "publisher" of information provided by another because it "merely seeks to stop the nuisance" of unwanted text messages that were received without the recipient's consent. *Id.* at 967.

*Lansing v. Southwest Airlines Co.*, 980 N.E.2d 630, 639-41 (Ill. App. Ct. 2012), held that the CDA did not preempt plaintiff's negligent supervision cause of action against an employer that did not stop its employee from sending harassing emails and texts to the plaintiff using the employer's electronic systems. The court reasoned that holding the defendant liable for failing to investigate plaintiff's complaint about the employee's wrongful conduct did not treat the defendant as if it were the publisher or speaker of the emails and texts because the "duty to supervise its employee is distinct" from publishing activities. *Id.* at 639.

*Daniel v. Armslist, LLC*, No. 2017AP344, 2018 WL 1889123, at *11 (Wis. Ct. App. Apr. 19, 2018), held that the CDA did not preempt the plaintiff's claim that the defendant's "own alleged actions" encouraged transactions in which prohibited purchasers acquired firearms, leading to a mass shooting. The court rejected the proposition that the CDA "provides general immunity for all activities that consist of designing or operating a website that includes content from others." *Id.* at *10.

The lesson from these authorities is that even if the practical effect of recognizing the viability of a claim or law is that the website operator may remove or supplement third-party content (e.g., as in *Barnes*, *Internet*

*Brands, San Francisco, NPS*, *McDonald*, *Armslist*), change the way an automated system responds to third-party content (*Chicago*, *Nunes*), or otherwise act in response to third-party content (*Lansing*), claims that do not "*inherently* require[ ] the court to *treat* the defendant as the 'publisher or speaker' of content provided by another" are not barred by the CDA. *Barnes*, 570 F.3d at 1102 (emphasis added).

## II. The CDA does not preempt the City of Santa Monica's ordinances and other claims based on providing booking services for short-term rentals.

### A. Plaintiffs provide extensive services to facilitate short-term rental transactions, for which they collect substantial fees.

The services Plaintiffs provide to broker short-term rental transactions extend far beyond marketing users' listings about available space. Rather, Plaintiffs participate in every step of the rental transaction, including but not limited to:

- entering into contracts with residents to induce them to make their leased apartments or homes available to travelers;[1]

[1] In a Florida state action by Aimco against Airbnb, Aimco has obtained evidence that Airbnb sent emails directly to some of Aimco's Miami Beach residents soliciting them to offer their apartments as short-term rentals through Airbnb.

- entering into contracts with travelers to facilitate their access to others' property;
- providing 24/7 travel support to facilitate bookings and stays, including directing travelers to apartment communities where the travelers are trespassing, calling properties to seek access for travelers who have been denied access to accommodations by a building's owner or managers, and resolving disputes between tenants and travelers;
- providing guarantees and insurance coverage to residents and travelers to build trust and encourage them to book properties;
- providing payment systems, including accepting payments from travelers, holding the payment until the unit is occupied, and then delivering the payment (minus any fees Plaintiffs charge and taxes Plaintiffs remit) to the party supplying the unit;
- providing a way to book and pay for rentals without revealing the property's address or the identity of the party renting the property, which has the intentional effect of making it more difficult for multifamily property owners to enforce their leases;
- serving as a payment collection agent for residents;

- in the case of Airbnb, offering free professional photography to enhance the listings so they get booked more often; and
- setting the rental prices for listings—a material term of the listing—with a tool that automatically adjusts prices to match travelers' demand to increase bookings.[2]

*See generally* Airbnb, https://www.airbnb.com/ and https://www.airbnb.com/terms (last visited May 22, 2018); HomeAway, https://www.homeaway.com/ and https://www.homeaway.com/info/about-us/legal/terms-conditions (last visited May 22, 2018). Plaintiffs provide these services without ever asking residents if they own the properties they are supplying for rentals or have permission from owners or their community association to rent the spaces, and without warning travelers when they know the owners prohibit short-term rentals and may deny travelers access to, or escort travelers from, the properties.

For these services—*none* of which involves publishing third-party content—Plaintiffs obtain substantial fees. For instance, Airbnb charges a guest fee of up to twenty percent of the reservation subtotal, and a host

[2] Airbnb also shields the identities of tenants who are violating leases from detection by property owners.

service fee of approximately three percent. *See What are Airbnb Service Fees?*, Airbnb, https://www.airbnb.com/help/article/1857/what-are-airbnb-service-fees (last visited May 22, 2018). This means for a three-night stay at a unit rented at $225 per night, Airbnb may receive over $150 in fees for providing its nonpublishing services.

### B. Santa Monica's ordinance, like private claims that pertain to Plaintiffs' booking services, do not treat Plaintiffs as publishers or speakers of third-party content.

The Santa Monica ordinance at issue here requires that units serving as short-term rentals must be licensed and registered with the city. Santa Monica, Cal., Municipal Code §§ 6.20.020, 6.20.030 (2017). The ordinance prohibits parties, including online platforms such as Plaintiffs', from collecting a fee "for facilitating or providing services ancillary to a vacation rental or unregistered home-share, including, but not limited to, insurance, concierge services, catering, restaurant bookings, tours, guide services, entertainment, cleaning, property management, or maintenance of the residential property or unit" (collectively, "booking services"). *Id.* § 6.20.050(c).

Similarly, a property owner or HOA may bring viable state law claims against entities like Airbnb and HomeAway for brokering

prohibited short-term rentals, including where the entities have been informed that the governing contracts prohibit such rentals at particular properties. Examples of such state law claims include intentional interference with contract and trespass. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1154 (2003) (holding interference claim viable where "defendant knew that the interference was certain or substantially certain to occur as a result of its action"); *Martin Marietta Corp. v. Ins. Co. of N. Am.*, 40 Cal. App. 4th 1113, 1132 (1995) (holding trespass claim viable where defendant causes the wrongful entry of some other person).

Santa Monica's ordinance—and civil tort and statutory claims based on the same conduct regulated by the ordinance—do not "inherently require[ ] the court to treat the defendant as the 'publisher or speaker' of content provided by another." *Barnes*, 570 F.3d at 1102. Entering into contracts to facilitate prohibited short-term occupancies of properties is not the role of a publisher. *See id.* at 1107-1109 (distinguishing nonpublishing acts, such as contracting, from the act of publishing). Likewise, providing travel support, guarantees, payment systems, rental rate setting, and other rental services is not the role of a publisher. *Id.* By

its plain terms, the CDA does not preempt Santa Monica's ordinance or private causes of action based on the same conduct.

Plaintiffs argue that the ordinance treats them as publishers of third-party content by requiring them to monitor, review, and remove the rental listings that third parties post to their websites. (AOB 18-24.) Not so. The ordinance does not fine Plaintiffs for the presence of unregistered listings on their website. The ordinance fines Plaintiffs for consummating unlawful rental transactions and providing services to facilitate those transactions. Plaintiffs are perfectly free to leave whatever third-party content is posted to their website untouched, so long as they refrain from providing the nonpublishing services the ordinance regulates.

Plaintiffs argue that the ordinance will require them to review and remove certain third-party listings to avoid disappointing their customers with a website "chock-full of un-bookable listings." (AOB 21, 23.) As a starting point, Plaintiffs' argument that their business models cannot accommodate passive publication of third-party listings absent the accompanying services is a concession that what they do is *not* "publishing." In any event, the district court in *San Francisco*, 217 F. Supp. 3d at 1075, rejected Plaintiffs' factual argument that the ordinance

would "inevitably or perforce require them to monitor, remove or do anything at all to the content that hosts post," a holding the district court here found "persuasive," *HomeAway.com, Inc. v. City of Santa Monica*, No. 2:16-cv-06641-ODW (AFM), 2018 WL 1281772, at *6 (C.D. Cal. Mar. 9, 2018). The district court's factual findings are reviewed for clear error, which Plaintiffs have not shown. *See Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2014); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 514 n.8 (9th Cir. 1985).

But even if Plaintiffs, as a matter of practicality, would *choose* to review and remove some third-party listings in response to the ordinance, that does not mean the ordinance "inherently requires" that Plaintiffs be "treat[ed]" as a publisher. *Barnes*, 570 F.3d at 1102. Rather, the ordinance treats Plaintiffs as rental booking service providers and holds them responsible for their own conduct in providing booking services to encourage and facilitate illegal rentals that deprive cities of substantial tax revenue while disrupting the lives of full-time residents in those communities.

This is consistent with the weight of authority interpreting the CDA. The promissory estoppel claim in *Barnes* required the defendant to remove

third-party content, and it was not preempted. *Id.* at 1107. The city ordinance in *Chicago* required as a practical matter that the defendant's system be configured so that it would monitor the prices of tickets listed by third parties so as to collect the required taxes, and that was not preempted. *See Chicago*, 624 F.3d at 365-66. And the employer in *Lansing* was required to investigate and remedy its employee's use of the employer's computer systems to send illegal content. *Lansing*, 980 N.E.2d at 639-41.[3]

### C. Fundamental preemption principles support affirmance.

Plaintiffs propose an "effects-based test" for preemption that the Supreme Court has rejected. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 435 (2005). *Bates* addressed a federal statute preempting states from imposing pesticide labelling requirements "in addition to or different from"

[3] *Hill v. StubHub, Inc.*, 727 S.E.2d 550 (N.C. Ct. App. 2012) is not to the contrary. There, the statute made it unlawful to "sell" a ticket for too high a price, and the defendant allowed third parties to list tickets for sale on its website. *Id.* at 553. In rejecting the argument that the seller was an "information content provider" of the listings, the court concluded that because the third-party seller had "complete control over the price," which was the only part of the transaction that was unlawful, the defendant was not an "information content provider" and the CDA preempted the plaintiff's claim. *Id.* at 557, 562. Here, by contrast, Plaintiffs control the booking services that are made unlawful by the ordinance.

federal requirements. *Id.* at 444. The Court rejected as "unquestionably overbroad" an "effects-based test" under which the statute would preempt any state law claim that would "induce [a manufacturer] to alter [its] label." *Id.* at 444-45. Similarly, here, the fact that Santa Monica's ordinance might induce Plaintiffs to remove listings does not, as Plaintiffs argue, trigger preemption under the CDA.

The contrast between *Bates* and two cases on which Plaintiffs rely—*National Meat Ass'n v. Harris*, 565 U.S. 452 (2012), and *Wos v. E.M.A.*, 568 U.S. 627 (2013)—demonstrates the error in their preemption theory. In *Wos*, the federal statute generally preempted states from imposing liens on Medicaid beneficiaries' tort recoveries, but contained an exception for the portion of the recovery representing payments for medical care. *See* 568 U.S. at 630. The Court held that a state law that arbitrarily designated a third of each tort recovery as payment for medical care was preempted because "a proper analysis requires consideration of what the state law in fact does." *Id.* at 637.

Similarly, here, the relevant question is "what the state law in fact does"—that is, whether it "inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another,"

*Barnes*, 570 F.3d at 1102—not whether imposing liability for the defendant's nonpublishing conduct might encourage it to perform some publishing or editorial function.

In *National Meat*, the federal statute preempted state regulation of the "premises, facilities and operations" of slaughterhouses. 565 U.S. at 458 (quoting 21 U.S.C. § 678 (2012)). The Court held that the statute preempted a state law that imposed a series of requirements for how slaughterhouses had to treat so-called "non-ambulatory pigs" (that is, pigs that cannot walk). *See id.* at 455, 460-63. The state's prohibition on sales of non-ambulatory pig meat did not escape preemption because, the Court explained, "[t]he sales ban is a criminal proscription calculated to help implement and enforce each of the [state law's] other regulations" on the treatment of non-ambulatory pigs; thus, "the sales ban regulates how slaughterhouses must deal with non-ambulatory pigs on their premises." *Id.* at 463-64.

*National Meat* recognizes that a court can look beyond labels to determine what a statute actually regulates—i.e., the behavior it requires or prohibits. But it does not support Plaintiffs' theory that regulating one activity (booking services) becomes a regulation of a different activity

(publishing) because the regulation may prompt the provider to take actions that could be characterized as publishing. And *Bates* foreclosed that theory when it rejected the "inducement test" for preemption as "unquestionably overbroad" and explained that "[t]he proper inquiry calls for an examination of the elements of the common-law duty at issue." 544 U.S. at 445. As this Court explained in *Barnes*, "courts must ask whether the duty that the plaintiff alleges the defendant violated derives from the defendant's status or conduct as a 'publisher or speaker.'" 570 F.3d at 1102.

This Court should also reject Plaintiffs' reliance (AOB 32-39) on the doctrine of implied conflict preemption to expand the scope of the CDA's express preemption provision beyond its textual limits. Implied preemption cannot be used to supplement an express-preemption provision when "the level of generality at which the statute's purpose is framed" is overly broad and Congress has not provided "a complete remedial framework." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2188 (2014). That is the case here: Plaintiffs frame Congress's supposed purposes in extraordinarily broad terms, yet the CDA's language is "narrow," *Internet Brands*, 824 F.3d at 853, and it "leaves untouched," *Waldburger*, 134 S. Ct.

at 2188, vast swaths of state law, *see Internet Brands*, 824 F.3d at 853 ("Congress could have written the statute more broadly, but it did not."). Where most state regulation is left undisturbed, this Court has cautioned that "we must be careful not to exceed the scope of the immunity provided by Congress." *Internet Brands*, 824 F.3d at 853. That includes rejecting any argument that state laws that are outside the scope of the CDA's preemption provision nonetheless "pose an unacceptable obstacle to the attainment of [the CDA's] purposes," *Waldburger*, 134 S. Ct. at 2188, simply because they regulate an internet company. Moreover, the CDA's text and purpose are entirely consistent with regulating Plaintiffs' nonpublishing conduct.

### D. *LA Park La Brea* was wrongly decided.

Amici disagree with Santa Monica's characterization of the district court's decision in *LA Park La Brea A LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097 (N.D. Cal. 2017), a case that Aimco has appealed to this Court, as "utterly unremarkable." (AB 29-30.) In fact, that decision was quite remarkable in that the district court disregarded this Court's precedents interpreting the CDA and radically expanded the preemptive scope of that provision far beyond its textual bounds. To give one example, the district

court ignored this Court's holding in *Internet Brands* that CDA preemption does not turn on whether "[p]ublishing activity is a but-for cause" of the plaintiff's injuries. 824 F.3d at 853. That fundamental legal error, as well as the district court's reliance on a superseded complaint and its mischaracterizations the operative complaint's contents, led the court to misconstrue Aimco's claims as "tak[ing] issue" with Airbnb's "publication" of user-generated "content." *LA Park La Brea*, 285 F. Supp. 3d at 1107.

In holding that the listings on Airbnb's website were enough to shield Airbnb from liability for all of its nonpublishing conduct in brokering unlawful short-term rentals, the district court provided Airbnb with "a general immunity against all claims derived from third-party content," in violation of this Court's decisions in *Internet Brands*, 824 F.3d at 853, and *Barnes*. The district court's errors will be explained more fully in the appellants' forthcoming brief in that appeal.

### E. Prohibiting any regulation of Plaintiffs' booking services will harm multifamily housing owners and their residents.

Just as Santa Monica is tasked with balancing the interests of various constituencies and promoting the overall welfare of its residents and visitors, multifamily housing owners are also charged with protecting

the interests of their residents and providing the living environment they promised. Many owners, including Aimco and AvalonBay, have chosen to offer their prospective residents opportunities to live in communities of residential apartments, not hotels for unvetted, transient tourists. Those property owners have made the reasoned decision—within their right as the property owner—to forbid short-term rentals. Plaintiffs' booking, financial, and customer support services interfere with the owners' decisions on how best to manage their properties and undermine the very nature of the residential community expected by residents who choose to live in those apartments.

There are a number of reasons why the vast majority of multifamily housing owners have made this decision, including that many permanent residents do not want to live in a transient community and landlords are without any ability to vet travelers coming for vacation stays or control their behavior. Indeed, many buildings are located in urban areas near busy nightlife, and tourists are often more likely to cause disturbances or property damage than full-time residents who know and must live with their neighbors. Landlords have little ability to enforce reasonable community rules on anonymous vacationers who arrive, create a

disturbance, and leave, only to be replaced by different anonymous vacationers the next day. The short-term rentals actively encouraged and facilitated by Plaintiffs have required Aimco to hire extra security and even install expensive new technology to control access to some of its residential communities, and have required AvalonBay to defend and settle civil and criminal citations for not complying with certain safety regulations applicable to transient occupancy buildings.[4]

To be sure, some property owners choose to authorize their tenants to rent out their apartments for short-term stays (e.g., in exchange for revenue sharing and other agreements) or choose to use Plaintiffs' brokerage services to rent out otherwise unoccupied units. Those owners believe that some short-term rentals may be an "amenity" for their full-time residents and that their building characteristics, security procedures, and vetting procedures can accommodate some travelers alongside full-time residents. But even owners who authorize some short-term rentals need to be able to place reasonable limits on them to ensure that the short-

[4] *See* Chris Regalie & Ryan Gallagher, *Short-Term Rentals Get the 3rd Degree in NYC*, Decoder (Dec. 16, 2014), http://www.decodernyc.com/short-term-rentals-get-3rd-degree-from-nyc/ (outlining New York City building code and zoning requirements of transient dwellings and how they differ from requirements of residential dwellings).

term rentals do not overwhelm the building's resources or unduly impair the interests of their full-time residents.

At the core of this litigation is who gets to decide the appropriate short-term rental policy for a community: cities and the parties to lease or homeowner agreements, or Airbnb and HomeAway. Plaintiffs seek a regime where no effective regulation is possible. Plaintiffs know that the services they provide make enforcing a community's rules difficult or impossible, and would rather have an owner evict tenants and deny property access to travelers who improperly use their services instead of changing how they operate. Plaintiffs profit massively from inducing people to break the rules and evade detection, without assuming any responsibility for the social and remunerative costs their services impose on a city's housing affordability or safety policies or tax revenues, or on a multifamily housing owner's business and its residents' quality of life.

Properly read, the CDA does not exempt Plaintiffs from complying with reasonable municipal regulations on their nonpublishing conduct. Nor does it immunize them from having to respond on the merits to lawsuits from property owners, just as a brick-and-mortar brokerage engaged in the same tortious conduct would have to do.

## CONCLUSION

Santa Monica has decided what short-term rental rules appropriately balance the interests of travelers and residents. The CDA does not prohibit this. The Court should affirm.

May 23, 2018

**HORVITZ & LEVY LLP**
JEREMY B. ROSEN
ERIC S. BOORSTIN
RYAN C. CHAPMAN
**WHEELER TRIGG O'DONNELL LLP**
MICHAEL T. WILLIAMS
ALLISON R. MCLAUGHLIN
**KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.**
DAVID C. FREDERICK
BRENDAN J. CRIMMINS
RACHEL P. MAY

By: s/ Eric S. Boorstin

Attorneys for Amicus Curiae
**APARTMENT INVESTMENT AND MANAGEMENT COMPANY**

May 23, 2018

HEIDI PALUTKE

By: s/ Heidi Palutke

Attorney for Amicus Curiae
**CALIFORNIA APARTMENT ASSOCIATION**

May 23, 2018 EDWARD M. SCHULMAN

By: s/ Edward M. Schulman

Attorney for Amicus Curiae
**AVALONBAY COMMUNITIES, INC.**

May 23, 2018 **KULIK GOTTESMAN SIEGEL & WARE LLP**
GARY S. KESSLER

By: s/ Gary S. Kessler

Attorney for Amicus Curiae
**COMMUNITY ASSOCIATIONS INSTITUTE**

## CERTIFICATE OF COMPLIANCE

This brief contains 6,993 words (as counted by the word-processing program used to prepare the brief), which is less than the 7,000-word limit established by Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a). The format of this brief (including its type size and typeface) complies with the pertinent sections of the Fed. R. App. P. 32(a).

May 23, 2018 s/ Eric S. Boorstin

9th Circuit Case Number(s) 18-55367

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

**********

## CERTIFICATE OF SERVICE
## When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 23, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Eric S. Boorstin

**********

## CERTIFICATE OF SERVICE
## When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 23, 2018.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format) s/