Case 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*,

On Appeal from the United States District Court
for the Central District of California,
Nos. 2:16-cv-06641-ODW (AFM), 2:16-cv-06645 ODW (AFM)

BRIEF OF *AMICI CURIAE* INTERNET, BUSINESS, AND LOCAL GOVERNMENT LAW PROFESSORS IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the amici are a corporation.

Dated May 23, 2018

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IDENTITY AND INTERESTS OF THE AMICI CURIAE

Amici curiae are a group of Internet, business, and local government law professors with expertise in a wide range of issues related to the regulation of the Internet. Collectively, *amici curiae* have published law review articles, books, and chapters on subjects such as the Communications Decency Act, state and local regulation of new technologies, and legal issues facing platform-based businesses. Based on this expertise, *amici curiae* believe that Section 230 of the Communications Decency Act does not provide blanket immunity for Internet platforms. Instead, Section 230's interpretation and application should be limited to immunizing activities that are directly related to publishing third-party content as contemplated by Section 230's text and purpose.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the parties consent to the filing of this brief.

Pursuant to Rule 29(a) let it be known that 1) *amici curiae*'s counsel authored the brief in part and 2) no party, party's counsel, or person contributed money that was intended to fund preparing or submitting the brief.

This brief is submitted by the persons listed on the following page, all of whom are Internet, business, and local government law professors. Please note that affiliations are for identification only, and that the views expressed within do not necessarily represent the views of the signatories' respective institutions.

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SUMMARY OF ARGUMENT

The Communications Decency Act ("CDA") has rightly been credited as the law that gave us the modern Internet, and its contributions to innovation cannot be overstated. Its main mechanism for doing so is found in Section 230 of the CDA—a provision that grants immunity to providers and users of interactive computer services from certain legal claims. 47 U.S.C. § 230. Section 230 has thereby allowed Internet and platform-based businesses ("platforms") like Appellants, Airbnb and HomeAway, to flourish, with wide-ranging benefits to society. But while the coverage of Section 230 is undeniably broad, it is not unlimited. The City of Santa Monica Ordinance 2535CCS (the "Ordinance") exemplifies the kind of regulations that are outside of Section 230's scope.

Put simply, the CDA does not preempt all regulation of the Internet. Neither does it provide blanket immunity from liability for platforms, like Airbnb and HomeAway, that facilitate transactions between users. What Section 230 *does* preempt is any regulation that imposes liability for the "publishing" function that those platforms perform on behalf of users. Because Airbnb and HomeAway engage in a wide range of transactional services and other activities that do not resemble the publishing of online content, even when that publishing function is broadly construed, they are not automatically immune from regulation as a consequence of Section 230. This is true regardless of the language in the statute's

findings and policy provisions. That language is highly aspirational and can only be understood in light of Section 230's overall statutory structure, substantive terms and text, and the context in which it was enacted. These propositions should be uncontroversial and provide a starting point for answering the questions presented in this case.

The central concept that limits the scope of Section 230 is "publishing activities." Although the statute does not explicitly define "publishing" that does not mean there is no legal basis for distinguishing what constitutes an Internet platform's publishing activities from its non-publishing functions. That basis is found in this Circuit's prior decisions interpreting Section 230, which determined that publishing amounts to "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009).

The district court applied the same standard when deciding that the Ordinance does not impose liability on Airbnb and HomeAway. Specifically, it focused on the two core functions of publishing activity that are relevant for Internet platforms: (a) "monitoring" of third-party content featured on their websites; and (b) "removal" of that same content. Airbnb and HomeAway do not contest that these are the key legal criteria. Instead they argue that the Ordinance requires them to monitor or remove content uploaded by their users. But the

regulation does no such thing. It only prohibits Airbnb and HomeAway from entering into brokering contracts with short-term lessees ("hosts") who are not properly licensed under local law. Because the substantive purpose of the Ordinance is to regulate the non-publishing activities of Airbnb and HomeAway, it does not trigger Section 230's immunity.

A limited scope for Section 230 immunity is not only well-settled as a matter of law, but also common sense as a matter of policy. Platforms such as Airbnb and HomeAway increasingly coordinate and facilitate physical activities in spheres (tourism, transportation, food services, and so on) that fall within the traditional purview of state and local governments. The mere fact that those corporations conduct some of their business on the Internet does not—and should not—immunize them from following regulations that address the market failures and other third-party harms that arise from non-publishing conduct. The principles of efficiency and fault that underpin most forms of business regulation apply with full force to the economic activities that platforms engage in as well. Denying local governments the authority to regulate the business practices of platforms that operate within their jurisdictions threatens the well-being of communities and upsets the proper balance between federal and state power.

ARGUMENT

I. The Scope of Section 230 Is Limited to Publishing Activities.

A. Section 230's Drafters Were Concerned About Issues That Are Unrelated to the Regulation of Platforms.

To understand Section 230's limitations, it is important to understand the context in which it was drafted. When the CDA was enacted in 1996, less than eight percent of Americans had access to the Internet, and those who did went online for just 30 minutes a month. Farhad Manjoo, *Jurassic Web*, Slate (Feb. 24, 2009), http://www.slate.com/articles/technology/technology/2009/02/jurassic_web.html. Users were constrained by dial up modems, limited content, and crude search capabilities.

Among the few, but nonetheless, popular uses of the Internet was finding and viewing online pornography. While many lawmakers were unfamiliar with the actual workings of the Internet, they were deeply concerned about children's access to such obscene material. Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 Fed. Comm. L.J. 51, 53-57 (1996). As a result, Senator James Exon pushed to modify a portion of the US Code through the CDA to *prohibit* the transmission of "obscene or indecent" messages to children through

the Internet. Title 47 U.S.C.A. § 223(a)(1)(B)(ii) (1994 ed., Supp. II); Title 47 U.S.C.A. § 223(d) (1994 ed., Supp. II)).[1]

In response, Congressmen Ron Wyden and Christopher Cox drafted an amendment to temper Exon's version of the CDA, which they and their supporters believed amounted to "government censorship." 141 Cong. Rec. H8471-2 (daily ed. Aug. 4, 1995) (statement of Rep. Goodlatte). Their amendment, which would eventually become Section 230 and entitled "Protection for Private Blocking and Screening of Offensive Material," was premised on the idea that the private sector could solve the problem of obscenity more effectively than the federal government. Therefore, they sought to enlist online companies "to police the use of their systems," *id.* (statement of Rep. Cox), and remove the "smut." *Id.* (statement of Rep. Goodlatte).

Representatives Cox and Wyden also included recitals in the form of findings and policy provisions, which included language about the importance of allowing the Internet to develop to promote the free exchange of ideas and information. 47 U.S.C. § 230(a)-(b). However, those sections, which were essentially toothless, were adopted next to the most extreme Internet regulation provisions ever proposed and passed by Congress. Therefore, while Section 230

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[1] These provisions were ultimately declared unconstitutional by the Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

has greatly contributed to the growth and success of the Internet, the creators did not intend to create a law that immunizes platforms from broad responsibility for activities they facilitate online. Matthew Schruers, *The History and Economics of ISP Liability for Third Party Content*, Note, 88 Va. L. Rev. 205, 213 (2002).

The additional impetus for Section 230 relates to the owner and operator of a computer network, Prodigy. *See* 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox) (asserting that Section 230 would "protect" websites "from taking on liability such as occurred in the *Prodigy* case in New York"). Prodigy's network had over two million subscribers and was a popular forum for exchanging information through online-message boards. In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, a New York state court held Prodigy liable for a user's post because it moderated third-party content and thus exercised "editorial control." 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) (unpublished). Prodigy's liability mirrored the way that traditional publishers, such as newspapers, could be held liable for user content they select and edit.

The supporters of the Cox/Wyden Amendment stressed that if *Prodigy* were to stand, it would encourage service providers to over-censor user content or, worse yet, not censor content at all—thereby exacerbating the growing pile of obscene material on the Internet. Thus, Section 230's language took direct aim at *Prodigy* and "limit[ed] who may be called the publisher of information that

appears online." *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 366 (7th Cir. 2010) (stating that Section 230(c)(1) does not create an "immunity of any kind," but instead simply limits who can be treated as a publisher of information for the purpose of claims that relate to a publishing duty).

B. The Scope of Section 230 Is Expressly Limited to Publishing Activities.

Following its passage, Section 230 took on a significance and breadth that go well beyond overturning *Prodigy* and reducing sexually explicit material on the Internet. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 Fordham L. Rev. 401, 408 (2017). The reasons for the outsized impact of Section 230 are two-fold. First is the fact that Congress did not limit the type of content Section 230 covers and second, the findings and policy portions of the law have overly influenced judicial interpretations. 47 U.S.C. § 230(a)-(b); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). However, these causes cannot trump the substantive text of Section 230, which contains requirements that considerably limit its application.

By its terms, the scope of Section 230 is restricted to precluding a "provider or user of an interactive computer service" from being "treated as the publisher or speaker of any information" that is exclusively "provided by another content provider." 47 U.S.C. § 230(c)(1); *see id.* § 230(f)(3). Thus it is a law that only

targets "certain internet-based actors from certain kinds of lawsuits." *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1099 (9th Cir. 2009).

This Court's caselaw on the CDA is consistent with the plain meaning of Section 230. It has held that Section 230 affords protection only when the duty imposed on a platform "derives from the [platform's] status or conduct as a 'publisher or speaker.'"[2] *Id.* at 1102. Moreover, it gives no protection for online content that a website operator has created or developed—in whole or in part. *Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (en banc) (citing 47 U.S.C. § 230(f)(3)). And, it gives no protection for actions or omissions that are unrelated to its publishing decisions, which this Court has defined as choices "to edit, to remove, or to post, with respect to content generated by third parties." *Barnes*, 570 F.3d at 1105; *accord Doe v. Internet Brands, Inc.* 824 F.3d 846, 851 (9th Cir. 2016) (finding that a message board operator cannot be required to "monitor postings" or "remove any user content"). If Congress wishes to update Section 230 to provide immunity for these platforms' non-publishing activities, it is well within its right to do so, but until it does, interpretations of Section 230 should stay true to the statute's history and text.

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[2] Since the caselaw has been thoroughly analysed in Appellee's brief, we do not engage in a detailed parsing of the text of Section 230.

C. Airbnb and HomeAway Are Platforms that Perform Brokering Activities, which Extend Well Beyond Publishing Third-Party Content.

Airbnb and HomeAway are a new breed of Internet-based platforms that did not exist as of Section 230's passage in 1996. Since Section 230 only protects publishing activities and duties, determining the limits of Section 230 as it relates to Airbnb and HomeAway's businesses requires a realistic view of how their businesses actually operate. Once their business model is placed in proper context, it becomes clear that they engage in many activities outside the publishing functions that cabin the scope of Section 230.

Airbnb and HomeAway are two leading short-term rental companies that epitomize the ingenuity of the United States' tech sector. They are sophisticated multinational corporations, and key players in the global economy. Most important, for purposes of this case, their services reach into communities in concrete ways—with armies of tourists disturbing local neighborhoods and hosts causing a decrease in the available housing stock for residents of communities. *See* Nestor M. Davidson & John Infranca, *The Place of the Sharing Economy*, *in* Cambridge Handbook on the Law of the Sharing Economy (Nestor M. Davidson et al. eds., 2018) (forthcoming Dec. 2018) (manuscript at 5-6), http://ssrn.com/abstract=3099564. They do not resemble the Prodigy message

boards that simply facilitated the exchange of information and were the focus of Section 230's drafters.

Airbnb and HomeAway are the organizing force behind short-term rental markets. They guarantee quality through feedback systems,[3] insurance,[4] and dispute resolution mechanisms.[5] They act as brokers for producers and consumers, reducing transaction costs through, *inter alia*, search and matching functions, payment processing,[6] and marketing.[7] They also hold payments in escrow[8] and remit appropriate taxes to authorities in some jurisdictions. These services are all unrelated to the exchange of information or the publishing of third-party content. And to provide them, Airbnb and HomeAway already comply with many

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[3] *See, e.g.*, Airbnb, Host and guest reviews, https://www.airbnb.com/help/article/2059/host-and-guest-reviews.

[4] *See, e.g.*, Airbnb, Host Protection Insurance, https://www.airbnb.com/host-protection-insurance.

[5] *See, e.g.*, Airbnb, What is the resolution center?, https://www.airbnb.com/help/article/767/what-is-the-resolution-center.

[6] ECF No. 12 (Appellants' Br.) at 6-7.

[7] In 2016, Airbnb spent $65 million on paid media in the US. Patrick Coffee, *Rapidly Expanding Airbnb is Seeking a New Global Creative Agency of Record*, Adweek, May 4, 2017, http://www.adweek.com/brand-marketing/rapidly-expanding-airbnb-is-seeking-a-new-global-creative-agency-of-record/.

[8] *See, e.g.*, Airbnb, When am I charged for a reservation?, https://www.airbnb.com/help/article/92/when-am-i-charged-for-a-reservation; Airbnb, When will I get my payout?, https://www.airbnb.com/help/article/425/when-will-i-get-my-payout.

regulations both online and offline—from regulations related to payment system rules and privacy obligations to terms of services and design choices. As this Court, sitting en banc, explained, when conduct or speech would be "unlawful when [conducted] face-to-face or by telephone, they don't magically become lawful when [done] electronically online." *Roommates*, 521 F.3d at 1164. Indeed, "Congress has not provided an all purpose get-out-of-jail free card for businesses that publish user content on the internet[.]" *Doe*, 824 F.3d at 853.

As business enterprises, much of what Airbnb and HomeAway do falls outside of the category of publishing activities that define the ambit of Section 230, no matter how broadly that category is construed. As a consequence, the Section 230 issue raised in this appeal cannot be resolved by a presumption that Section 230 provides a blanket, unfettered immunity for businesses that operate on the Internet.

II. The Ordinance Is Not Pre-empted by Section 230 Because the Ordinance Does Not Target Publishing Activities.

The Ordinance, like its sister rule issued by the City of San Francisco, imposes a number of legal obligations on Airbnb and HomeAway, only one of which they challenge. That obligation is provided in subsections 6.20.050(c)-(d) of the Ordinance, which forbid Airbnb and HomeAway from completing booking transactions with hosts who are not properly licensed. The legal question this raises is whether the Ordinance targets publishing activities or non-publishing

activities. Despite some potential vagueness of Section 230's "publishing" concept, which is not defined in the statute itself, Airbnb and HomeAway adopt the same criteria that were used by the district courts on this question, both of which found publishing activities to consist of either monitoring or removing third-party user content. *Homeaway.com, Inc. v. City of Santa Monica*, No. 16 Civ. 06641, 2018 WL 1281772, at *5 (C.D. Cal. Mar. 9, 2018) (citing *Airbnb, Inc. v. City & Cty. of San Fran.*, 217 F. 3d 1066, 1072-73 (N.D. Cal. 2016)). Thus, the crux of this case is really about understanding what these kinds of local ordinance command, rather than any high-level dispute over the abstract legal standard that must frame the analysis.

The district court decided that the Ordinance was not preempted by Section 230, and that decision should be affirmed on this appeal, because the legal duty that Santa Monica has placed on Airbnb and HomeAway is unrelated to the monitoring or removal of user content on its website. Instead, the Ordinance directly regulates Airbnb and HomeAway's ability to enter into contracts for brokering services with unlicensed parties who are legally prohibited from upholding their end of the contract. Airbnb and HomeAway contend that this view elevates form over substance. ECF No. 12 (Appellants' Br.) at 24. But that complaint gets things exactly backwards. The thrust of the Ordinance is to regulate aspects of the platforms' back-end intermediation infrastructure. The

notion that it targets the content of user listings is what requires extensive linguistic somersaults.

A. The Ordinance Does Not Require the Monitoring of User Content.

The "monitoring" required by the Ordinance has little to do with speech. It has everything to do with whom Airbnb and HomeAway contract for their brokering services. For instance, Airbnb and HomeAway could comply with the Ordinance without ever looking at user provided content by simply collecting payment up front for any listing services. *Airbnb, Inc. v. City & Cty. of San Fran.*, 217 F. 3d at 1075 (finding that a similar San Francisco ordinance would not "inevitably or perforce require [Airbnb and HomeAway] to monitor, remove or do anything at all to the content that hosts post"). And even if Airbnb and HomeAway do adopt compliance strategies that slightly interfere with the design of their platforms, prior interpretations of Section 230 have made it clear that some forms of monitoring are permissible. For example in *StubHub!, Inc.*, the Seventh Circuit held that local tax collection requirements were not preempted by Section 230, even though determining tax obligations may require the monitoring of user-generated prices. 624 F.3d at 365-66.

A notable regulation in the Ordinance that Airbnb and HomeAway do not challenge is found in SMMC §6.20.050(a). That subsection requires Airbnb and HomeAway to remit taxes to the City of Santa Monica based on the fees they

receive when entering into booking transactions with hosts. Certainly, Airbnb and HomeAway can monitor the revenue that is taxed under the Ordinance the hard way—by requiring hosts to type in the tax amount they owe for each booking transaction and then have the platform verify it. Or they can comply with it the easy way, with the same technology they use to electronically process the payment of those fees.

Likewise, the licensing provision of the Ordinance only requires Airbnb and HomeAway to monitor whether or not they follow the law by collecting information about hosts' status as authorized providers of short-term rentals in Santa Monica, which they would have to obtain regardless of whether they operate online or not. In either case, Airbnb and HomeAway would only be "monitoring" user-generated content in the most tortured sense of that term, and one that is entirely foreign to Section 230's concern about liability for traditional publishing activity.

B. The Ordinance Does Not Require the Removal of User Content.

Airbnb and HomeAway also offer an alternative theory of Section 230 preemption, which is: even if what the platforms must monitor are non-publishing activities, the follow up compliance to that monitoring will have the practical effect of interfering with their publishing activities, because it will require them to

remove user content. Simply put, the Ordinance will inevitably force them to take down certain user listings.

This argument also mischaracterizes the substance of what the Ordinance requires Airbnb and HomeAway to do. Again, the Ordinance prohibits those platforms from entering into contracts with hosts that have not obtained the relevant license to rent out their properties. Airbnb and HomeAway can comply with that requirement without modifying a single word or picture on a third-party's listing. While one solution may be to remove a listing when it is associated with a host who is in violation of local licensing mandates, the Ordinance does not compel Airbnb and HomeAway to take such a step. In practice, the Ordinance is no different than an analogous regulation that bars a real estate company from brokering a contract between a buyer and a seller of a new home when the home lacks a certificate of occupancy. If it would be "unlawful" to conduct this transaction "face-to-face" or via fax, it does not "magically become lawful when [done] electronically online." *Roommates*, 521 F.3d at 1164.

Of course, again, there are awkward ways to respond to the demands of the Ordinance that might hit the bottom line of Airbnb and HomeAway's business—such as leaving listings untouched while refusing to complete related transactions.—There are also efficient options that do not. Airbnb and HomeAway could, for example, sell ads or write a disclaimer so that potential guests could see

that certain listings are unbookable (such a statement would be considered content created by them and therefore not subject to Section 230). *See id.* at 1162. Or the they could follow the approach of San Francisco, which again has proven that compliance with the Ordinance is manageable. *See* Brief of *Amici Curiae* City and County of San Francisco et. al. in Support of Defendant-Appellee § III.

Compliance with any regulation imposes at least some burden on the regulated parties, and it will always be true that those costs can be exacerbated by corporate policies that do not address those requirements in a thoughtful way. But those issues are unrelated to the question of whether state or local regulation of internet platforms are preempted by federal law.

An easy dividing line on the removal issue turns on the difference between platforms that function as transactional intermediaries, like Airbnb and HomeAway, and the kinds of message boards, such as Prodigy, that were originally contemplated by Section 230. If an offending listing on Airbnb and HomeAway's websites were copied and pasted verbatim onto a message board like Craigslist, Craigslist would not be in violation of the Ordinance. That is because Craigslist is a passive publisher of user content, rather than a broker that participates as a counterparty in its users' transactions. *See Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (2008).

Airbnb and HomeAway specifically point to the disparate treatment that Craigslist receives as a sign of inconsistency or arbitrariness in the law. In fact, it gets to the crux of what Section 230 is all about. The Ordinance regulates businesses, including Internet platforms, that broker short-term rental transactions, regardless of whether information about the rentals is published online or in a newspaper. For message boards such as Craigslist, which almost exclusively engage in publishing activities, the Ordinance is irrelevant.

III. A Limited Scope for Section 230 Makes Good Sense as a Matter of Public Policy, In Addition To Being Settled as a Matter of Law.

The text, statutory structure, legislative history, and federal caselaw of the CDA all suggest that the Section 230's preemption is limited in scope and does not reach the local Ordinance that is challenged in this case. Because no legal analysis can support the contrary conclusion, Appellants and their *amici* interject a number of arguments as to why the proper legal disposition of this appeal would have dire consequences as a matter of public policy. Collectively, they suggest that upholding the lower court's decision will stifle innovation and destroy the social value that platforms like them are currently able to create. It is important to understand that policy considerations cut in the opposite direction. Rather than threatening to cripple platforms, state and local regulations are essential to making them work better.

First, the apocalyptic tone that often accompanies claims that Section 230 preemption must have an unlimited scope should be put to rest at the outset. Airbnb, HomeAway, and similar platforms choose to operate in commercial realms that have traditionally been regulated at the state and local level. It should come as no surprise that Airbnb and HomeAway may have to navigate a more complex regulatory environment, as each community in which they operate has slightly different needs and values. Offline companies that provide analogous services have proven able to do so, and the platforms themselves have found ways to thrive while complying with similar rules. In fact, the same kind of Ordinance at issue in this case is already in effect for the City of San Francisco, where Airbnb has managed to meet its regulatory obligations without crippling its operations in that jurisdiction. *See, e.g.*, Brief of *Amici Curiae* City and County of San Francisco in Support of Defendant-Appellee § III.

Second, it is critical that some form of regulation for Internet platforms is available. Regulation is vital to protect third-parties from the harms that arise from any economic activity, even when some aspects of that activity are transacted over the Internet. Platforms operate businesses that result in real harms in the real world. Without limitations on the scope of Section 230, a city would never be able to hold a ride-sharing service responsible for drivers that fail background checks, and a state would never be able to hold an online marketplace responsible for

failing to collect sales tax or for engaging in unlawful discrimination online. Moreover, placing some of this regulatory burden on platforms, instead of end users, accords with traditional principles of efficiency and fault that underpin most other areas of business regulation.

A. An Overly Broad Construction of Section 230 Would Mean an Encroachment of Federal Law on Traditional State and Local Powers.

Misconstruing Section 230's limitations to "create a lawless no-man's-land on the Internet," would be the exact opposite of what Congress intended. *Roommates*, 521 F.3d at 1164. Platforms run businesses that coordinate real world activities that give rise to obvious externalities. Passengers of ride-sharing platforms are injured in traffic accidents. Guests on Airbnb are exposed to unsafe housing conditions. Licensing and safety regulations are traditional legal responses to these kinds of harms. And state and local governments are the traditional providers of those restrictions.

Section 230 exists in a broader legal framework that acts to encourage, rather than prohibit, that allocation of regulatory authority. Over the years, the Supreme Court has adopted a set of rules "that protect a broad value of federalism by presuming that absent a plain statement of legislative intent, Acts of Congress cannot intrude upon the usual balance of state and federal power." John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*,

122 Harv. L. Rev. 2003, 2025 (2009). One canon in particular can assist in the proper reading of Section 230: the presumption against constructions that would cause federal encroachment upon a traditional state police power.[9] The presumption in favor of federalism principles has particular force in Airbnb and HomeAway's situation because they affect land use activities (zoning, permitting, etc.), which are traditionally regulated by states and cities.[10] And this federalism principle is consistent with this Court's interpretation of Section 230 that Congress intended "to preserve the free-flowing nature of Internet speech and commerce *without unduly prejudicing the enforcement of other important state and federal laws*." *Roommates.Com*, 521 F.3d at 1175 (emphasis added).

B. The Ordinance Can Be Justified Under Efficiency and Fault Principles.

There are sound public policy reasons why state and local governments are entitled to regulate the business activities that platforms bring into their

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[9] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" (internal citations omitted)).

[10] *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps. of Engineers*, 531 U.S. 159, 174 (2001) (recognizing states' "traditional and primary power over land and water use"); *FERC v. Mississippi*, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.").

jurisdictions. There are equally good reasons for holding platforms themselves accountable when doing so, and not just their end users. Direct regulation of platforms along the lines of the Ordinance is consistent with both of the two main principles that justify a legal response to economic externalities in general. The first principle is efficiency: the party who is the "cheapest cost avoider" of a harm should be made liable for a failure to limit that harm. Guido Calabresi, The Costs of Accidents (1970). Platforms have access to information and logistical capabilities that make them obvious candidates for this role. The second principle is fault: a party who is to blame for the harm caused by an activity should be responsible for the costs it imposes on others. The fault principle attaches to platforms as well, since they not only coordinate the economic activity in question but profit from that activity and are one of its main beneficiaries. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 29–33 (1972) (discussing moral and efficiency theories of negligence rules).

As platforms like Airbnb and HomeAway come to mediate an ever-greater share of economic activity, the relevant legal standards that govern those platforms must be able to keep pace. These two principles—efficiency and fault—can inform how this Court resolves the question that is immediately presented in this case, and do so in a way that is also adaptable to legal challenges against other attempts to regulate platforms going forward. Ben Edelman & Abbey Stemler,

From the Digital to the Physical: Federal Limitations on Regulating Online Marketplaces, Harv. J. on Leg. (2018) (forthcoming).

1. Efficiency—Is the Platform in the Best Position to Address Market Failures?

Platforms do not passively connect their end-users. Instead, they are active participants in the services that are ultimately exchanged. Platforms have access to the information necessary to monitor how users behave. And they have the ability to use that information to develop best practices and policies for users to follow. This means that in many cases, the party that is best situated to protect end users from harm and mitigate externality problems are the platforms themselves.

The publication of user-content is only one small ingredient for platform-based business models. Platforms also impose an elaborate system of incentives, guidelines, and restrictions that influence how users must negotiate and deliver the services that are transacted over the platform. *See* Olivier Sylvain, Intermediary Design Duties, 50 Conn. L. Rev. 1 (2018). And platforms are also constantly developing more sophisticated means to collect and analyze data on user behavior, in order to better optimize those policies. Thus, the rationale for immunizing platforms from the externalities created by its users is limited, and decreasing over time as those platforms become better able to structure the services their users provide in a way that minimizes third-party harms.

It is easy to find examples of sensible regulations that are premised on platforms' unique ability to intervene in user behavior. For instance, California's "zero tolerance" drunk driving policy for ride-hailing platforms, like Uber, places responsibility on the platform to respond to drunk driving complaints. CA Pub. Utils. Comm'n, 13-09045, Decision Adopting Rules and Regulations to Protect Public Safety While Allowing New Entrants to the Transportation Industry (2013), http://docs.cpuc.ca.gov/publisheddocs/published/g000/m077/k192/77192335.pdf. When a ride-hailing platform receives a complaint, it must suspend the driver until further investigation or face a fine. *Id.*[11] Putting the responsibility on ride-sharing platforms to monitor complaints reflects the judgment that the ride-hailing platforms are best-suited to address problems associated with drunk driving. Platforms have the easiest access to information about drivers' performance and can administer punishment mechanisms at the lowest cost. Similar judgments may also apply to Airbnb and HomeAway's short-term rental businesses. The kinds of

[11] In 2017, the California Public Utilities Commission recommended a fine of over $1.3 million against Uber for violating the zero-tolerance rules. San Francisco Pub. Utils. Comm'n, I.17-04-009, Order Instituting Investigation and Order to Show Cause Why the Commission Should Not Impose Appropriate Fines and Sanctions on Raiser-CA LLC (2017), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M182/K872/182872304.PDF.

ordinances in this case recognize Airbnb and HomeAway as important gatekeepers of the rental markets in their jurisdictions, and rightfully so.

2. Fault—Is the Platform Responsible for the Market Failures?

Efficiency turns on a consequential, utilitarian analysis. Fault, by contrast, looks to blameworthiness. From a fault perspective, the key question is whether platforms are in some sense responsible for the harms that a particular regulation is trying to address. If so, it follows that the platforms deserve to bear (at least part of) the burden of liability for those harms.

Platforms share fault with end users for the harms that take place on their systems for two reasons. First, and most directly, platforms are a but-for and proximate cause of those harms. Airbnb guests would not fill apartment buildings and local houses in violation of short-term rental restrictions if the platform did not connect the hosts and guests. Those local restrictions are meant to protect consumers of the rental services provided by Airbnb and its hosts from unsafe conditions on the host properties, among other things. By making the market for those rentals, Airbnb is a root cause behind many of the harms that result from transactions within that market.

Second, platforms are not only the cause but also the beneficiaries of the activities that pose risks to participants in local rental markets. Not only did Airbnb create the market for transactions involving unlicensed listings, with major

consequences for the character of local neighborhoods, they also profited by collecting a fee in connection with each transaction that was finalized on their platform. Common sense fairness principles suggest that Airbnb should bear not only the benefits of its business operations, but also some of its costs.

The principles of efficiency and fault do not just underlie the kinds of state and local regulations at issue in this case. They also are a foundational rationale of business regulation in general. This means that, in the long run, applying the CDA in a way that keeps Section 230 preemption within reasonable bounds is likely to benefit consumers of Internet platforms and society as a whole. Removing those limits would allow Internet platforms to collect economic rents by enjoying a blanket immunity that their offline competitors do not receive. When the profitability of Internet platforms depends on a special legal advantage, rather than the fact that they improve the tools people have to exchange goods and services, innovation suffers. It is possible that extending some traditional forms of business regulations to Internet platforms will expose those policies as unwise or overly burdensome. The solution in that case is to roll back the misguided aspects of existing rules, which have presumably been hindering brick-and-mortar companies as well, not to strip state and local governments of the authority to police what takes place in their own jurisdictions.

CONCLUSION

For the foregoing reasons, the *Amici* respectfully ask the court to affirm the lower court's ruling in this case.

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Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6,113 words.

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Ninth Circuit Case No. 18-55367

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing ***Brief of Amici Curiae Internet, Business, and Local Government Law Professors in Support of Defendant-Appellee and Affirmance of the District Court*** 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 May 23, 2018.

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