Appeal No. 18-55367

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HOMEAWAY.COM, INC.; AIRBNB.COM, INC.,

Plaintiffs-Appellants,

vs.

CITY OF SANTA MONICA,

Defendant-Appellee.

On Appeal From the United States District Court
for the Central District of California
The Honorable Otis D. Wright, II
Case No. 2:16-CV-6641; 2:16-CV-6645

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, & CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF CITY OF SANTA MONICA AND TO URGE THE COURT TO AFFIRM THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 26.1 and 29

The League of California Cities it is a nonprofit corporation which does not issue stock and which has no parent corporation, nor is it owned in any part by any publicly held corporation.

International Municipal Lawyers Association and the California State Association of Counties likewise are nonprofit corporations which do not issue stock and which have no parent corporation, nor is either owned in any part by any publicly held corporation.

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I.
STATEMENT OF INTERESTS

Free market capitalism and representative democracy are the great twin pillars of American society. Plaintiffs-Appellees Homeaway.com and Airbnb.com, along with their amicus supporters like Uber and Lyft, represent the innovations of 21st Century entrepreneurs. When the history of this so-called sharing economy gets written, surely its infancy as renegade, upstart, and even outlaw will be prominent in the story. But it is no surprise that adverse impacts have accompanied the internet-driven meteoric rise of some of these businesses. The conduct of the businesses needs to be reconciled with community values. That is where local government steps in.[1] The California Constitution imbues local government with police powers sufficient to enact laws that advance community goals. In his definition of freedom, American Poet Robert Frost depicts well the ideal equilibrium for business in democracy: "the ability to walk easy in the harness." Government regulation of short term vacation rentals promotes the community value of maintaining zones for residential life.

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[1] "The care of human life and happiness, and not their destruction, is the first and only object of good government." –Thomas Jefferson

The League is an association of 474 California cities united in promoting open government and home rule to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys representing the 16 divisions of the League from every part of California. The committee monitors appellate cases affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and state supreme and appellate courts.

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California

counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League, CSAC, and their member cities and counties have a substantial interest in the outcome of this case. Their member cities and counties have enacted a range of regulations addressing the impacts of the sharing economy and in particular the short term vacation rental (STVR) of homes zoned for residential use: some allow STVR and tax the use; some prohibit transient uses like STVR in residential zones; and many local governments, like Appellee City of Santa Monica, impose various limits aimed at assuring the STVR uses are compatible with the residential zones in which they operate. The League and CSAC's perspective on this important matter will provide the Court a broader view of the role of local government and the extent of policy implications of Appellants' proffered interpretations of the California Coastal Act and of the federal

Communications Decency Act (CDA). The League and CSAC urge the Court to consider this context in reaching an appropriate decision in the case at bar.

IMLA has a substantial interest in the outcome of this case. Appellants attempt to insulate their businesses from reasonable regulation by applying the CDA in a manner that was not intended and by re-writing the California Coastal Act in order to assign the Coastal Commission legislative authority that the state Legislature explicitly withheld from the Coastal Commission. Santa Monica's exercise of its police powers did not implicate the CDA or the Coastal Act. IMLA's commitment to understanding the reach and the limits of local lawmaking authority offers a perspective that it respectfully requests this Court consider in deciding the case at bar.

The IMLA, CSAC, and League's counsel is familiar with the issues involved. We believe additional briefing would be useful; and, therefore, we offer this honorable Court the accompanying amicus curiae brief.[2]

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[2]Pursuant to Federal Rule of Appellate Procedure Rule 24(a)(4)(E), counsel for amici represents that she authored this brief in its entirety and *pro bono* and that none of the parties or their counsel, nor any other person or entity made a monetary contribution intended to fund the preparation or submission of this brief.

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure and Circuit Rule 29-2(a), all parties to the appeal, through their respective counsel, have consented to the filing of this amicus curiae brief.

II.
INTRODUCTION

Appellants collaborate with owners of residential property to use those properties like hotel rooms for short term rentals. Both Appellants and the property owners make money on the transaction. Through this lawsuit, Appellants seek to reject Santa Monica's regulations aimed at making such use compatible with the residential zone in which this business is conducted.

The constitutional power of cities to zone land use in accordance with local conditions is well-established. See, e.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal.4th 729, 737-38 (2013) (acknowledging broad police powers to establish permitted uses in zone districts). Local government's interest in this arena is well-recognized:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs....The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) ; see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 380, 395 (1926) (upholding zoning that excluded apartment buildings from one- and two-family homes zones). Neither the Coastal Act nor the CDA interferes with local government's authority to determine in which zones, if any, short term vacation rentals may operate in their jurisdictions.

III.
COASTAL ACT

While a well-known and powerful agency closely associated with California's commitment to a well-preserved and publicly accessible coastline, the Coastal Commission does not possess policymaking authority and its reach in that regard is commonly exaggerated. In fact, the Coastal Act creates a partnership between state and local government for the purpose of implementing state policies of protecting sensitive coastal resources and assuring maximum public access to the coast [Pub. Res. Code §30210-30265.5]. *See* Pub.Res.Code §30500 (requiring local government to prepare local coastal programs and expressly preserving local government authority to determine "[t]he precise content of each").

Unlike cities that derive zoning authority from their constitutional police power [Cal. Const. art. XI, §7][3] , the Coastal Commission is created by the Coastal Act and its authority derives exclusively from the statute. The California Supreme Court examined this statutory authority in *Marine Forests Soc. v. California Coastal Comm'n,*36 Cal.4th 1, 25-26 (2005); the emphasis below is added:

> The Coastal Act authorizes the Coastal Commission to perform a variety of governmental functions, some generally characterized as "executive," some "quasi-legislative," and some "quasi-judicial." As a general matter, the Commission performs an "executive" function insofar as it carries out programs and policies established by the Legislature, and the Commission is included for administrative purposes in the Resources Agency, a part of the executive branch. (§ 30300.) The Commission performs a "quasi-legislative" function when it engages in rulemaking through the adoption of regulations (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 168, 188 Cal.Rptr. 104, 655 P.2d 306), and a "quasi-judicial" function when it passes upon applications for coastal development permits (*Davis v. California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 700, 707, 129 Cal.Rptr. 417), when it reviews the validity of a local

[3]See *Big Creek Lumber co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 ("Land use regulation in California historically has been a function of local government under the grant of police power contained in Article XI, Section 7 of the California Constitution.")

> government's coastal program (*City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 488, 183 Cal.Rptr. 909), and when it issues cease and desist orders with regard to unauthorized development (*Ojavan Investors, Inc. v. California Coastal Com.* (1994) 26 Cal.App.4th 516, 528).

As the Supreme Court catalogues, the Commission has two categories of authority in relation to cities and they are both "quasi-judicial," namely (1) certifying that a local coastal program (LCP) implements Chapter 3 policies [Pub. Res. Code §30512]; and (2) issuing coastal development permits (CDP) for specific development applications until an LCP is certified and, thereafter, determining certain appeals [Pub. Res. Code §§30600(c), 30601, 30603]. Accord *Yost v. Thomas,* 36 Cal.3d 561, 572-573 (1984) ("'[T]he Commission in approving or disapproving [an LCP] does not create or originate any land use rules and regulations. It can approve or disapprove but it cannot itself draft any part of the coastal plan.'"); *City of Malibu v. California Coastal Comm'n*, 206 Cal.App.4th 549, 553-54 (2012) (reaffirming local governments—not the Commission—determine precise content of local policies consistent with state policies).

A. Coastal Act policies are implemented by development permits

The Coastal Act is implemented by requiring CDPs for all development (as defined by the Coastal Act) in the coastal zone. Cal. Pub. Res. Code §30600(a); *City of Malibu, supra,* 206 Cal.App.4th at 555. Under the Coastal Act, the Coastal Commission issues CDPs unless and until a local government adopts a local coastal program (LCP) and the Coastal Commission certifies the LCP. Pub. Res. Code §30600(d).

To be clear, the consequence of no certified LCP is that the Coastal Commission issues the CDPs for development within the coastal zone. Once a certified LCP is in effect,[4] permitting authority transfers to the local government. Before a certified LCP is in effect, the Coastal Commission evaluates CDP applications for consistency with the state coastal policies in Chapter 3 of the Coastal Act. Cal. Pub. Res. Code §§ 30600, 30604. After a certified LCP is in effect, CDP applications are evaluated for consistency with the certified LCP. Cal. Pub. Res. Code §§ 30600, 30603.

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[4]An LCP is defined at Section 30108.6 of the Coastal Act as follows: "Local coastal program" means a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level.

When a municipality acts legislatively, the municipal action is outside the Coastal Commission's permitting jurisdiction. Analyzing the statute, the California Court of Appeal found that the Coastal Commission's authority is limited to quasi-judicial permitting functions. *City of Dana Point v. California Coastal Commission*, 217 Cal.App.4th 170, 175, 188 (2013).[5] The Commission does not adjudicate the City's legislative prerogative.

B. Ordinances of general applicability are not development

Appellants misapprehend the Coastal Act and the Coastal Commission's role, suggesting that the Coastal Commission "approves" or issues CDPs for *local zoning ordinances* on an ad hoc basis. AOB at 56-57. The Coastal Commission only certifies LCPs presented to the Commission for certification by local governments that have adopted them in accordance with the procedures and authority granted to local governments by the Coastal Act.

More to the point, the Coastal Commission's certification is for the singular purpose of transferring permitting authority to the local government. In a nutshell, the Coastal Act determines when a permit

[5]The *Dana Point* case involved a nuisance abatement ordinance that, in fact, addressed particular property. The STVR Ordinance is not even remotely adjudicative. It involves no particular property and does not alone change the use of any particular property.

is required (for development in the coastal zone), who issues permits (Commission until LCP is certified, then local government), and which standards apply to permits (Chapter 3 until an LCP is certified).

Zoning laws establish the *potential* use or development of property. CDPs regulate the *actual* development of property.[6] The state policies in Chapter 3 are exclusively implemented by requiring *development* to be consistent with the policies, which is achieved by requiring CDPs for actual proposed development. The Coastal Act does not replace local zoning. The Coastal Act does not establish which uses of land must be required and in which zones they are allowed.

The Coastal Commission's permitting authority provides a backstop for coastal policies where no LCP has been certified. To illustrate, if a city without a certified LCP were to amend its zoning code to permit strip-mining, the Coastal Commission could deny a CDP if it found the proposed development inconsistent with the

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[6]In fact, the definition of "development" does not extend to the adoption of a zoning ordinance of general applicability. Development means an actual "change in the density or intensity of use of land" not a change in local law *governing* the potential or allowable density or intensity of uses of land within a zoning district. *See* Pub. Res. Code § 30106. Indeed, since the enactment of the Coastal Act in 1976, coastal cities have been adopting zoning ordinances without obtaining CDPs and Santa Monica is no exception.

Coastal Act Chapter 3 policies. The Commission cannot prevent that hypothetical (or any) city from adopting its own zoning rules or otherwise exercising its police powers. The Commission may withhold from a property owner a permit for a development incompatible with state policies in Chapter 3 of the Coastal Act. The Commission may not compel a city to allow a use by characterizing zoning as "development;" that is beyond its statutory jurisdiction.

Section 30106 defines "development" to mean "on land, in or under water, the placement or erection of any solid material or structure...or change in the density or intensity of use of land..." A zoning ordinance itself is not a use of land.

Property owners decide how their property will actually be used, in compliance with applicable regulations. The STVR Ordinance did not in itself change the intensity of use of any land. Individual property owners making use of their property could change the intensity of use by selecting among permitted uses. The Coastal Act is absolutely clear that the Coastal Commission does not have authority to set local policy. *Yost, supra*, 36 Cal.3d at 573. The Coastal Commission's job under the Act is to certify that the LCP is

consistent with the State policies and the Commission "limited to its administrative determination." Pub. Res. Code § 30512.2(a).

Zoning laws of general applicability that are not part of an LCP are outside the purview of the Coastal Commission. Appellants' theory would require that all zoning laws for coastal jurisdictions either be certified as part of an LCP or be treated as "development" and issued a CDP. This would confer power on the Commission over local jurisdictions that the Legislature specifically withheld.

C. No Coastal Act policy compels STVR uses in residential zones

Appellants erroneously claim that Santa Monica's zoning ordinance is "substantively invalid" under the Coastal Act. AOB at 53. Appellants assert that the Coastal Act mandates certain policies (*i.e.*, must allow for STVR use in the City's residential zone) for every part of the coastal zone. If this were the case, the California coast would be a homogenous zone with identical policies for every jurisdiction. It is not. Moreover, if the Appellants' argument were accepted that the Coastal Act's policies are explicit directives of policy that local jurisdictions must enact, then Santa Monica would similarly be unable to prohibit the sale of bait or the repair of commercial fishing boats in its residential zones because these are

also policies that are mentioned and encouraged by the Coastal Act. *See* Pub. Res. Code § 30234 ("Facilities serving the commercial fishing and recreational boating industries shall be protected"); Pub. Res. Code § 30234.5 ("[E]conomic, commercial, and recreational importance of fishing activities shall be recognized and protected.").

The California Supreme Court long ago concluded that the Coastal Act does not preempt local zoning regulations. *Yost, supra*,36 Cal.3d at 561 (holding that the Coastal Act does not preempt referendum power and that it leaves "wide discretion" and "autonomy" to local governments in land use planning); see also *City of Dana Point v. California Coastal Commission*, 217 Cal.App.4th 170, 214 (2013) (holding the Coastal Act does not preempt exercise of police power to declare public nuisances); *San Mateo County Coastal Landowners' Assn. v. County of San Mateo,* 38 Cal.App.4th 523, 538 (1995) (finding the Coastal Act did not preempt initiative to amend certified LCP).

The Commission's review of local ordinances is exclusively in connection with certification of an LCP and explicitly limited to determining whether the local policies are consistent with state policies:

§ 30512.2. Land use plan; criteria for decision to certify or refuse certification

The following provisions shall apply to the commission's decision to certify or refuse certification of a land use plan pursuant to Section 30512:

(a) The commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.

(b) The commission shall require conformance with the policies and requirements of Chapter 3 (commencing with Section 30200) only to the extent necessary to achieve the basic state goals specified in Section 30001.5

Pub. Res. Code § 30512.2 (Emphasis added)

Appellants focus their argument on their assertion that Santa Monica's STVR ordinance in particular directly conflicts with the Coastal Act. AOB at 54. Specifically, Appellants claim that the STVR ordinance directly conflicts with a state law policy that "[l]ower cost visitor and recreational facilities shall be protected [and] encouraged." AOB at 54.

Appellants have set themselves an impossible task because they cannot point to any provision of state law that requires "low cost vacation rental housing" nor could they identify any provision of state law that requires a specific use in any particular zone. The reason Appellants cannot is because no such provisions of law exist. Instead, to claim that state law prevents adoption of a particular ordinance, Appellants convert broad policy language into specific mandates.

The Legislature enacted broad state policies in Chapter 3, with the overarching twin (but sometimes conflicting) goals of maximizing public access to the coast and preserving sensitive coastal resources. The Coastal Act authorizes local governments to adopt plans to implement these broad state policies in more specific ways. (*See* Coastal Act §30004, setting out Legislative findings, including "to achieve maximum responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.")

As discussed above, the Coastal Commission is created for the administrative task of certifying that the precise policies in the local programs are within the range of possibilities consistent with the

broad state policies. Also, the Coastal Commission performs the quasi-judicial task of issuing CDPs until a certified LCP is in effect.

Accordingly, the Coastal Act is not structured to be vulnerable to direct conflicts with local laws because its policies are used only to guide and certify LCPs and to evaluate CDP applications for development projects. Nevertheless, Appellants argue that the STVR ordinance conflicts with a general state law that they claim should be interpreted to permit STVRs (and therefore compel local governments to permit STVRs in all zones). AOB at 53-54. Appellants never actually cite language in the Coastal Act that allegedly conflicts with the STVR Ordinance; instead, Appellants claim that the "maximum access" and "recreational opportunities" goals of the Coastal Act conflict with the STVR Ordinance, citing Public Resources Code §§ 30213 and 30222. AOB at 53-54.

The Coastal Act sections Appellants cite are two of the 41 policies covering six subject areas that comprise Chapter 3 of the Coastal Act. As discussed above, these are among the broad state policies that must be considered in connection with CDP applications and the certification of LCPs. Public Resources Code § 30213 provides as follows:

> "Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.
>
> The commission shall not: (1) require that overnight room rentals be fixed at an amount certain for any privately owned and operated hotel, motel, or other similar visitor-serving facility located on either public or private lands; or (2) establish or approve any method for the identification of low or moderate income persons for the purpose of determining eligibility for overnight room rentals in any such facilities."

Public Resources Code § 30222 provides as follows:

> "The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry."

Neither of these provisions requires STVR uses in residential zones and neither preempts Santa Monica from adopting the STVR Ordinance or otherwise choosing the precise policies to implement these state policies that reflect local planning as envisioned by the Coastal Act and affirmed in *Yost*. These policy provisions list various types of land uses (*i.e.*, recreational, low cost visitor serving,

commercial recreational, private residential, agricultural, *etc.*) and provide no support for the idea that STVR use is even preferred. *See* Pub. Res. Code § 30213 ("public recreational opportunities are preferred"); Pub. Res. Code § 30222 ("recreational facilities designed to enhance public opportunities for coastal recreation shall have priority . . . but not over agriculture or coastal-dependent industry").

Appellants just misread the Coastal Act; Santa Monica is not required by state law to allow in its residential zones STVR uses, agricultural uses, or recreational uses (*e.g.*, kayak rentals, parking facilities, public restrooms, etc.). Accordingly, Santa Monica is likewise free to impose reasonable regulations on the conduct of businesses where the regulation advance the City's land use goals.

Appellants are right that the Coastal Act should be liberally construed as to effectuate the purpose of the statute. *See* AOB at 52. However, Appellants ignore the "purpose of the statute" when they propose to "construe" the Coastal Act in a way that fundamentally changes the statute.

Appellants argue that the Coastal Act should be read to totally supersede the police power of a local jurisdiction; but, as quoted above, Coastal Act §30004 explicitly expresses the Legislative intent

to rely on and preserve the local governments' exercise of their police powers. Appellants would cast the Coastal Commission in a greatly expanded role, but also in a role appropriate for a legislative body exercising police powers and not an executive branch agency.

No law of general applicability like the STVR Ordinance has been struck down as preempted by one of the numerous policies addressed by the Coastal Act. Nevertheless, Appellants pluck two specific policies (§§ 30213 and 30222) from among the 41 found in Chapter 3 of the Coastal Act to assert the STVR ordinance is "substantively invalid." But that is just not the way the Coastal Act works. Chapter 3 policies are broad and sometimes conflicting and they serve only to evaluate CDP applications and certify LCPs.

An argument similar to Appellants' and likewise requesting a great expansion of power to the Coastal Commission under the Coastal Act was rejected by the California Supreme Court in *Sierra Club v. California Coastal Com'n*, 35 Cal.4th 839 (2005). In that case, the *Sierra Club* argued that the Coastal Act should be liberally construed—based in part on the general legislative findings—to broaden the scope of the Coastal Act to areas outside of the Coastal Zone. The Supreme Court explained,

> Finally, *Sierra Club* relies on the Legislature's express command that the Coastal Act "be liberally construed to accomplish its purposes and objectives." (§ 30009.) For several reasons, Sierra Club's reliance on these provisions is unavailing. First, these broad statements regarding the general goals of the Coastal Act cannot overcome the express terms of section 30604(d), through which the Legislature has specifically addressed the limits of both the Coastal Act's reach and the Commission's power. Second, Sierra Club's construction would effectively transfer control over proposed development outside the coastal zone from local authorities to the Commission, simply because part of a proposed project happens to be inside the coastal zone, but the general statements Sierra Club cites reflect no legislative intent to effect such a transfer of control.

Id. at 856.

The general goals of the Coastal Act do not override the limited quasi-judicial power granted to the Coastal Commission in relation to local governments. *See* Coastal Act §30512 [certifying LCP]; Coastal Act §§ 30600(c), 30601, 30603 [issuing CDPs prior to LCP certification]. These code sections do not impact Santa Monica's general legislative function. Appellants' request to construe the Coastal Act "broadly" is, in effect, a request to limit the police power

of local jurisdictions, which is decidedly not the intent of the Coastal Act.

IV.
COMMUNICATIONS DECENCY ACT & THE FIRST AMENDMENT

Appellants also invoke both the First Amendment and the CDA in an attempt to shield their businesses from compliance with local zoning laws. Neither provides such asylum.

The United States Supreme Court has unequivocally and consistently held that the First Amendment does not protect commercial speech advertising illegal activity. See *Pittsburgh Press Co. v. Human Relations Comm'n,* 413 U.S. 376 (1973); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York,* 447 U.S. 557 (1980). In *Pittsburgh Press Co.*, the Supreme Court examined a local ordinance that prohibited, among other things, newspapers from publishing help-wanted job advertisements in sex-designated columns (*i*, certain jobs for male and certain jobs for females). *Pittsburgh Press Co., supra*, 413 U.S. at 378-79. The Court rejected a First Amendment challenge to this ordinance and explained:

> Discrimination in employment is not only commercial activity, it is illegal commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally

> could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes....The illegality in this case may be less overt, but we see no difference in principle here.

Id. at 388. The California Supreme Court has confirmed that commercial speech advertising illegal activity is not protected by the First Amendment and can be banned. See *Gerawan Farming, Inc. v. Kawamura*, 33 Cal.4th 1, 22 (2004) (California Supreme Court adopting the *Central Hudson* factors so that commercial speech "must concern lawful activity" to be protected by the First Amendment); *Leoni v. State Bar*, 39 Cal.3d 609, 624-25(1985) ("The United States Supreme Court has stated the principle in broad terms: "The government may ban forms of communication more likely to deceive the public than to inform it [citations] or commercial speech related to illegal activity [Citation]").

Appellants rely on *Reed v. Town of Gilbert, Arizona* _U.S._; 135 S.Ct. 2218 (2015), which they suggest renders Santa Monica's ordinance "presumptively unconstitutional." AOB at 48. However, *Reed* is inapplicable. In *Reed*, the Court examined a city's comprehensive sign regulation that treated certain subsets—temporary, political, and ideological signs—differently based on their

message (*i.e.*, size, shorter temporal limits sign posting, numeric limits on the number of signs per property). *Reed, supra*, 135 S.Ct. at 2224. The Supreme Court held this to be a content-based restriction. *Id.* at 2231-2232. Reed does not discuss commercial speech or mention *Central Hudson* or *Pittsburgh Press Co.* Unlike *Reed*, where the speech at issue was clearly legal and not even commercial, Appellants here claim a First Amendment right to commercially advertise illegal activity. Multiple courts have recognized Reed's inapplicability to commercial speech. See *CTIA-The Wireless Association v. City of Berkeley, California,* 139 F.Supp.3d 1048, 1061 (N.D. Cal. 2015) (nothing in the Supreme Court's "recent opinions, including *Reed*, even comes close to suggesting that the well-established distinction" between commercial and noncommercial speech "is no longer valid"); *Contest Promotions, LLC v. City and County of San Francisco,* 2015 WL 4571564, at *4 (N.D. Cal.2015) ("Reed does not concern commercial speech"); *California Outdoor Equity Partners v. City of Corona* 2015 WL 4163346, at *10 (C.D. Cal. 2015) ("*Reed* does not concern commercial speech . . . [t]he fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even cite *Central Hudson.*").

Plus, the prior restraint doctrine does not even apply to commercial speech. See *Central Hudson, supra,* 447 U.S. at 571, n. 13 ("We have observed that commercial speech is such a sturdy brand of expression that traditional prior restraint doctrine may not apply to it").

Finally, among other reasons, Appellants' attempt to immunize themselves from liability under local zoning laws using the CDA fails because Appellants are more like pawnbrokers than journalists and bulletin boards. The growing jurisprudence in this area confines the immunity offered by CDC to damages caused by the utterances of third parties. So Airbnb.com and Homeaway.com are not responsible if a "host" describes its dumpy subterranean unit as a palace with sweeping scenic views. However, Santa Monica's ordinance holds Appellants accountable for their actions. Appellants have gone into business to book STVRs in residential zones, a business they must conduct within the confines of local zoning laws. This is true whether they conduct business on the internet or from behind a card table at a strip mall storefront.

Appellants' implication that enforcement of reasonable zoning regulations will essentially break the internet is unwarranted. Internet

businesses will find ways to thrive – as good businesses do – within bounds of applicable laws. In this regard, Appellants' businesses have some kinship with pawnbrokers. Pawnshops are a heavily regulated business. The laws aim to prevent the business from transacting in stolen goods. Customers must provide positive identification and a complete description of the merchandise. In most jurisdictions, pawnshops provide local law enforcement with data on all transactions on a daily basis. Nevertheless, the businesses thrive as they come to "walk easy in the harness."

Appellants make money on the booking transactions offered on the websites they control, just as the pawnbroker stands to earn a profit off collateral jewelry it will sell. All businesses should be held responsible for assuring the commercial transactions from which they profit are lawful.

V.
CONCLUSION

For the foregoing reasons, the League of California Cities, the International Municipal Lawyers' Association, and the California State Association of Counties urge this Honorable Court to affirm the decision of the District Court in this case.

Dated: May 21, 2018

By: _____

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

In accordance with Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, I certify that this *Amicus Curiae* Brief is in a proportionally spaced 14-point font; that the brief was produced on a computer using a word processing program; and that the program calculated that the brief including the statement of interests and footnotes (but excluding tables of authorities and contents) contains 4842 words.

Dated: May 21, 2018

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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.

May 21, 2018 By: Wendy Hoffman
WENDY HOFFMAN