

Appeal No. 18-55113

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

LA PARK LA BREA A LLC, et al
Plaintiffs-Appellants,

vs.

AIRBNB, INC., et al
Defendants-Appellees.

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

**BRIEF OF AMICUS CURIAE
LEAGUE OF CALIFORNIA CITIES,
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION,
& CALIFORNIA STATE ASSOCIATION OF COUNTIES
TO ADVOCATE REGARDINDING THE INTERPRETATION
OF THE COMMUNICAIONS DECENCY ACT
AND NEUTRAL AS TO THE PARTIES**

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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

California's housing shortage is serious. And California is not alone. The nationwide critical housing shortage has left at the doorstep of local governments a myriad of problems that must be addressed: homelessness, skyrocketing housing costs, impacts to public health, and decaying overtaxed infrastructure. A lot of political attention has been paid to strategies to add to the housing stock. But a more immediate threat looms in the loss of existing housing, which exacerbates the current crisis.

Maintaining the current inventory of housing is a crucial component of the overall effort to meet the demand for housing. Short term vacation rental (STVR) is a lucrative alternative to residential rentals and Defendant Airbnb, Inc. has created a readily available customer base that makes it easy for property owners (and tenants) to go into the STVR business with Airbnb, Inc.

The so-called sharing economy has its early roots as renegade, even outlaw, enterprises. Private transactions conducted over the internet have evaded tax and regulation. But that is changing. The United States Supreme Court has just acknowledged that internet businesses must be subject to the regulations like other businesses, as

is fair and necessary to provide the services of government in the public interest:

In essence, respondents ask this Court to retain a rule that allows their customers to escape payment of sales taxes—taxes that are essential to create and secure the active market they supply with goods and services. An example may suffice. Wayfair offers to sell a vast selection of furnishings. Its advertising seeks to create an image of beautiful, peaceful homes, but it also says that “[o]ne of the best things about buying through Wayfair is that we do not have to charge sales tax.” Brief for Petitioner 55. What Wayfair ignores in its subtle offer to assist in tax evasion is that creating a dream home assumes solvent state and local governments. State taxes fund the police and fire departments that protect the homes containing their customers’ furniture and ensure goods are safely delivered; maintain the public roads and municipal services that allow communication with and access to customers; support the “sound local banking institutions to support credit transactions [and] courts to ensure collection of the purchase price,” *Quill*, 504 U. S., at 328 (opinion of White, J.); and help create the “climate of consumer confidence” that facilitates sales, *see ibid.* According to respondents, it is unfair to stymie their tax-free solicitation of customers. But there is nothing unfair about requiring companies that avail themselves of the States’ benefits to bear an equal share of the burden of tax collection. Fairness dictates quite the opposite result.

South Dakota v. Wayfair, Inc. (2018) 585 U. S. ____, Slip Op. at 16-17.

The conduct of the businesses needs to be reconciled with community values. That is where local government steps in.¹

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

Government regulation of short term vacation rentals assists in the preservation of affordable housing stock, promotes the value of maintaining zones for residential life, and contributes to a healthy local economy by zoning interdependent tourist-serving businesses in proximity to each other.

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 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 context of the policy implications of the District Court's unnecessarily expansive interpretation 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 also has a substantial interest in the outcome of this case. Airbnb, Inc. attempts to insulate its businesses from liability for its own conduct, which might frustrate reasonable regulation. By applying the CDA in a manner that was not intended, IMLA members' clients may face an insurmountable obstacle in the effort to implement housing policy and prevent the loss of affordable housing to STVRs. 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 League, IMLA, and CSAC'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

²Pursuant to Federal Rule of Appellate Procedure Rule 24(a)(4)(E),

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.

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.

II. INTRODUCTION

Airbnb, Inc. collaborates with tenants and owners of residential property to use those properties like hotel rooms for short term rentals. Both Airbnb, Inc. and the tenants/property owners make money on the transaction. *La Park La Brea LLC v. Airbnb, Inc.*, 285 F.Supp.3d 1097, 1100 (C.D. Cal. 2017). Airbnb, Inc. seeks to avoid responsibility for those transactions from which it profits but which it knows violate the terms of leases. The District Court accommodated Airbnb, Inc. with an expansive interpretation of the Communications Decency Act (CDA). A better reading of the CDA has led other courts to conclude that businesses are accountable for their own commercial conduct, whether they conduct business in storefronts or on-line.

In 1996, Congress enacted the CDA to protect internet service providers from liability for content third parties posted on their websites. In other words, Congress protected the internet providers from the actions of others and insulated their publishing activities from liability. The legislative history of Section 230 demonstrates that Congress did not intend a broad immunity for all actions of online companies. Instead, Congress intended to accomplish two main goals:

(1) to encourage blocking and filtering technologies that protect minors from adult material on the Internet, and (2) to protect the Internet from excessive government regulation. Congress was worried state-law libel lawsuits would threaten the growth of the Internet. *Batzel v. Smith*, 333 F.3d 1018, 1026-29 (9th Cir. 2003);³ 47 U.S.C. § 230(b).

Of course, 1996 was light years behind 2018 in terms of internet business. Today, the internet's infrastructure is well established and access to it widespread. Businesses that conduct their commercial transactions through the internet have no disadvantage to warrant special immunity from liability. Yet Airbnb, Inc. invokes the statute to allow it to profit from transactions that violate local laws or that are tortious. The CDA was not enacted to provide such asylum.

III.
COMMUNICATIONS DECENCY ACT SHOULD NOT BE
EXPANDED TO CREATE IMMUNITY
FOR BUSINESS CONDUCT

The District Court's willingness to immunize Airbnb, Inc. from liability using the CDA is misguided because Airbnb, Inc. is more like a pawnbroker than a bulletin board. Indeed, the District Court

³Unrelated portion of decision superseded by changes in California's Anti-SLAPP statute as noted in *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766 (9th Cir. 2017).

acknowledges that Airbnb, Inc.’s business involves more than just posting content. *La Park La Brea, supra*, 285 F.Supp.3d at 1105. But, to conclude that Airbnb, Inc. is not an “information content provider” (within the meaning of the CDA) such that statutory immunity attaches, the District Court has to turn a blind eye to the fact that Airbnb’s website content proposes the precise commercial transaction from which Airbnb, Inc. itself profits.

Airbnb, Inc. is not merely in the business of processing payments. The company’s name has become nomenclature for short term vacation rental, to wit “*let’s Airbnb on our trip to Los Angeles.*” Airbnb, Inc. may fairly be described as the world’s largest hotelier, with some of its accommodations offered in what would otherwise be desperately-needed affordable housing in California and throughout the country.

The United States Supreme Court overruled the requirement of a “physical presence” for internet businesses to be liable for state sales taxes; and it did so explicitly because it found the notion antiquated. *Wayfair, Inc., supra*, Slip Op. at 14-15 (“Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill.*”) The idea that Airbnb, Inc. needs

immunity from its own business conduct in order for its online business to survive is similarly antiquated.

Airbnb, Inc. may have other defenses to claims that it should be liable for its contribution to the alleged breach of Aimco's leases; but the CDA cannot reasonably be read to immunize that conduct. From the point of view of the League, CSAC, and IMLA, the District Court's interpretation suggests the dangerous proposition that internet commerce can be disguised as third party speech, immunizing the business conduct from liability by a statute never intended for that purpose. Given the particular effect of Airbnb, Inc. on affordable housing, the stakes here are terribly high.

The growing jurisprudence in this area confines the immunity offered by CDA to damages caused by the utterances of third parties and not to the internet businesses' own conduct. *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102 (9th Cir. 2009) (limiting Section 230 liability to publishing activities); *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* 521 F.3d 1157, 1161 (9th Cir. 2008) (denying CDA immunity to online roommate-finding business and noting that if a real estate broker cannot lawfully inquire about a prospective buyer's race, then the same liability attaches to

similarly impermissible inquiries made by an online broker); *Doe v. Internet Brands* 824 F.3d 846 (9th Cir. 2016) (online companies liable for business conduct other than narrow category of publishing third party created content).

By virtue of the CDA, Airbnb, Inc. is not responsible if a “host” describes its dumpy subterranean unit as a palace with sweeping scenic views. However, it remains accountable for its own actions. When Airbnb, Inc. conducts its business to book STVRs in residences, it must conduct business lawfully. This is true whether Airbnb, Inc. conducts business on the internet or from behind a card table at a strip mall storefront.

Internet businesses will find ways to thrive – as good businesses do – within bounds of applicable laws. In this regard, Airbnb, Inc. has 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.

Finally, the District Court distinguishes *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066 (N.D. Cal. 2016) on the ground that San Francisco prohibited the booking of an unlawful STVR while Aimco sought to prevent Airbnb Inc. from soliciting an unpermitted transaction. The District Court makes the distinction to further Congress' purpose of "promoting the development of e-commerce." *Id.* at 1108. First, Congress did not intend to protect solicitation of illegal commercial transactions. Second, the success of e-commerce does not depend on the ability of Airbnb, Inc. to solicit, arrange, and profit from an illegal booking. Between 1996 and 2018, e-commerce has found its footing.

Airbnb, Inc. profits 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. When it enacted the CDA, Congress certainly did not intend otherwise.

**IV.
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 apply the CDA as it was intended and without expanding its immunity from liability to the mere conduct of internet business.

Dated: June 28, 2018

By: *s/ Christi Hogin*

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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 2221 words.

Dated: June 28, 2018

By: *s/ Christi Hogin*

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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.

June 28, 2018

By: *s/ Wendy Hoffman*
WENDY HOFFMAN