

Case No. 18-55113

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

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La Park La Brea A LLC, *et al.*,

*Plaintiffs-Appellants,*

v.

Airbnb Inc., *et al.*,

*Defendants-Respondents.*

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Appeal from a Decision of the United States District Court  
for the Central District of California  
No. 2:17-cv-04885-DMG-AS  
Hon. Dolly M. Gee

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**BRIEF OF NATIONAL MULTIFAMILY HOUSING COUNCIL  
AND NATIONAL APARTMENT ASSOCIATION  
AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

In compliance with Rule 26.1 of the Federal Rules of Appellate Procedure, the National Multifamily Housing Council (“NMHC”) and the National Apartment Association (“NAA”) make the following disclosures:

The NMHC is a non-profit trade association that advocates on behalf of member firms.

The NAA is a non-profit federation consisting of state and local affiliates and multifamily housing companies.

Neither the NMHC nor the NAA is a publicly held corporation or other publicly held entity. Neither the NMHC nor the NAA has a parent corporation. No publicly held corporation or other publicly held entity owns ten percent or more of either the NMHC or the NAA.

Dated: June 29, 2018

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### **INTEREST OF AMICI CURIAE<sup>1</sup>**

The National Multifamily Housing Council (“NMHC”) is a national nonprofit association that represents the leadership of the \$1.3 trillion per year apartment industry. NMHC’s members engage in all aspects of the apartment industry, including ownership, development, management, and finance in order to provide homes for the 39 million Americans who live in apartments. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living.

The National Apartment Association (“NAA”) serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of nearly 160 affiliates, NAA encompasses over 75,000 members representing more than 9.25 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity, and innovation.

Amici write to share their concerns about the consequences of the district court opinion for the nation’s apartment industry. The activities of Airbnb and other short-term rental platforms occur, in no small part, through the country’s rental apartment communities.

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<sup>1</sup> Amici affirm that no counsel for any party authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than amici and their members contributed money that was intended to fund preparing or submitting this brief. Counsel for plaintiffs-appellants and defendants-appellees have consented to the filing of this brief.

And so the implications of the district court opinion for amici and their members are sweeping. Amici represent entities that, collectively, have bought and built rentable housing for millions of families in the United States, and have attracted their residents based on the quality of their apartment properties and the terms that govern those communities.

Amici respectfully ask this Court to reach a decision that enables the owners and operators of these properties to choose whether to permit their residents to engage in short-term subletting in their buildings, and to have a meaningful opportunity to enforce that decision. A number of amici's members have chosen to take part in the short-term rental market. Others have chosen not to. Amici fully support the right of apartment communities to allow short-term sublets, as long as they comply with existing laws and regulations. Amici also believe, however, that owners must retain the ability to restrict the use of short-term sublets within their property if they so choose. The district court opinion runs contrary to this principle, one that lies at the heart of the fundamental right to property—the principle of owners' choice.

## **BACKGROUND**

The apartment industry plays a central role in the U.S. economy. Over one-third of U.S. households rent, and nearly 16 percent of households do so in an apartment home, the term for a rented unit in a building with five or more such units.<sup>2</sup> The industry contributes

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<sup>2</sup> U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Tenure; U.S. Census Bureau, 2016 American Community Survey 1-Year Estimates, Tenure by Units in Structure.

\$1.3 trillion annually to the national economy.<sup>3</sup> Apartment communities offer essential, practical housing options to a broad range of people, including students trying to make ends meet, recent graduates moving to a new city to start their careers, immigrants seeking their first home in their new country, families saving money to purchase a house, downsizing seniors looking for a quiet and safe place to live, and the many other Americans of all ages and circumstances who are drawn to the convenience and flexibility of rental housing.

The appeal of rental housing is ancient. At the height of the Roman Empire, apartment complexes soared to ten stories, offering rental units in areas where the population was dense and the land was expensive.<sup>4</sup> In the modern era, apartment housing first emerged in the 18th century in Paris and other European cities, where stacks of flats were rented to middle-class tenants.<sup>5</sup> And by the turn of the 20th century, the apartment building as we know it today was becoming a fixture in cities across the United States, a response to urbanization, the expense of one-family homes, and the emergence of modern amenities such as elevators and central heating that residents could share in common.<sup>6</sup>

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<sup>3</sup> See Stephen S. Fuller, National Multifamily Housing Council and National Apartment Association, *The Trillion Dollar Apartment Industry* (2013); We Are Apartments, available at <https://www.weareapartments.org/data>.

<sup>4</sup> See, e.g., P.D. Smith, *City: A Guidebook for the Urban Age* 198 (2012).

<sup>5</sup> See, e.g., Elizabeth C. Cromley, *Alone Together: A History of New York's Early Apartments* 40 (1990); Encyclopedia Britannica, *Apartment House*, July 20, 1998, available at <https://www.britannica.com/technology/apartment-house>.

<sup>6</sup> See, e.g., Gunther Barth, *City People: The Rise of Modern City Culture in Nineteenth-Century America* 52 (1980); Encyclopedia Britannica, *supra* note 5.

Across much of this history, apartment owners (as well as governments) often banned or restricted the subletting of apartments by residents.<sup>7</sup> And in recent years, the vast majority of lease agreements—both in multifamily buildings and smaller rental properties—prohibit residents from subletting without the consent of the owner or operator of the property.<sup>8</sup> Many reasons explain this preference, among them the desire to avoid security or financial issues from unknown residents, minimize unexpected property damage and wear and tear, avert the need for a double eviction or other legal entanglements should issues with a subtenant arise, and maintain a quality of life that appeals to current and prospective residents.

The emergence of short-term rental platforms about a decade ago—including Airbnb’s launch in August 2008—was a disruptive moment in the apartment economy. Airbnb offered residents the ability to sublet their units quickly and privately, and to do so with a new subletter every single day if they so chose. Airbnb did not inform the owners and operators of apartment communities that it was brokering sublets on their properties, even though the sublets violated the owners and operators’ lease terms. As a result, short-term subletters quickly began to appear in apartment communities without the knowledge of the owners and

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<sup>7</sup> See, e.g., Stephen L. Kaufmann, *The Right to Sublease in New York: Application of Real Property Law Section 226-B*, 10 Hofstra L. Rev. 527, 529-30 (1982); Robert Hunter, *A Dissertation on the History of the Lease* 55 (1860); J. Bedford, *A compendious and impartial view of the principal events in the history of Great Britain and Ireland* 202 (1820).

<sup>8</sup> For instance, the NAA Click and Lease agreement, which is the most widely used standardized lease form in the United States, used in more than 5 million apartment units across the country, provides that “[r]eplacing a resident, subletting, or assignment is allowed only when we consent in writing.” Click and Lease Agreement ¶ 30. This provision resembles the terms most leases use to prohibit unauthorized rentals by authorized tenants.

operators, let alone their consent. And although Airbnb has the ability to block transactions or even remove parties who use its brokerage services to complete short-term rentals that breach a lease, the company reliably refused to exercise those powers when owners and operators reported that a rental is unsanctioned. Resident complaints, security problems, property damage, and a host of other issues began to accumulate.

Amici's members weighed carefully the advantages and disadvantages of participating in the short-term rental economy through Airbnb and other platforms. They have adopted an array of practices.

Most owners and operators choose not to allow their residents to offer short-term sublets through Airbnb and other platforms. They have adopted that policy for a number of reasons.<sup>9</sup> *First*, the introduction of short-term subletters can jeopardize the safety of residents and the security of the apartment community. The subletters have full access to the hallways and other common areas of the building, and duplicate keys can enter into circulation through complete strangers. It can be a challenge for owners and operators to screen short-term subletters with the same rigor as they screen their own residents, especially when the subletters are admitted without their knowledge or consent. The flexibility and secrecy of short-term rentals can even attract criminal activity.<sup>10</sup>

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<sup>9</sup> For instance, in a 2018 survey of NMHC members, a majority of respondents (61.5%) said that listing units on short-term rental sites is a lease violation at all of their communities and that they enforce this policy.

<sup>10</sup> *See, e.g.*, Dana Sauchelli & Bruce Golding, *Hookers turning Airbnb apartments into brothels*, New York Post, Apr. 14, 2014.

*Second*, short-term sublets can lead to property damage that ranges from wear and tear of common areas to outright destruction of units and the broader apartment community. Usually, short-term subletters are not listed on a lease, and only stay for a matter of days, minimizing their connection to the community and their sense of responsibility for its well-being. They often are unfamiliar with the fixtures in the units and the rules of the apartment community, which increases the risk of an accident. The added traffic from frequent short-term subletting also can lead to degradation of common areas. Reports of property damage due to short-term subletters are common, and in the most serious cases, have included damage to nearly all of the property in a unit, the defacement of hallways and other common areas, and the breakage of elevators and other infrastructure of the building.<sup>11</sup>

*Third*, short-term sublets can lead to significant compliance issues for the owners and operators of apartment communities. Municipalities have made clear that they will hold owners responsible for a sublet in their building, even if they were unaware of the sublet and took steps to prevent them.<sup>12</sup> As a result, the owners and operators of apartment communities have been exposed to sweeping civil liability—and even criminal sanctions—under local laws.<sup>13</sup> Short-term sublets also can give rise to possible compliance issues under the Fair

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<sup>11</sup> See, e.g., Sage Lazzaro, *Airbnb Bribes Host with Cash Under NDA After 200 Partiers Destroy Apartment Complex*, Observer, Mar. 29, 2017; Lara Williams, *When Airbnb rentals turn into nuisance neighbours*, The Guardian, Sept. 18, 2016.

<sup>12</sup> Rebecca Baird-Remba, *How the City Nails Landlords for their Tenants' Illegal Airbnb Rentals*, Commercial Observer, Aug. 16, 2017.

<sup>13</sup> See *id.*

Housing Act. Finally, short-term rentals can conflict with the language in loan and insurance agreements, and whether such claims are meritorious or not, can be used by lenders and insurers to pressure amici's members.

*Finally*, without property owner consent, choice and involvement, short-term sublets can lead to quality-of-life issues and diminish the residential character of an apartment community. A short-term subletter has no existing relationship to the community or their neighbors, making it more likely that they will engage in conduct that is inconsistent with the quality of life that the owners and operators carefully cultivated for the current and future residents of their community. A resident in one apartment community reported people wrestling outside her apartment and someone trying to kick in her door; another in a separate community complained that a partygoer had fallen from one floor up onto the resident's balcony and was pounding on his window to get back in; and neighbors elsewhere endured a night of blaring music and people passed out in hallways.<sup>14</sup> The frequent traffic of short-term and unknown visitors through an apartment community also can lead residents to complain that the property loses its residential character.<sup>15</sup>

The proliferation of short-term rentals can give rise to particular challenges for apartment communities, as opposed to single-family homes. Monitoring the violations of a

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<sup>14</sup> Lazzaro, *supra* note 11; Williams, *supra* note 11; James Dean, *Riot police called to Airbnb party*, *The Times*, May 14, 2016.

<sup>15</sup> *See, e.g.*, Robert McCartney, *Airbnb becomes flash point in the District's hot debate over gentrification*, *Wash. Post*, Nov. 21, 2017.

lease's core terms might be relatively easy for the owner of a single-family home: a house's unique façade is easy to spot in an online listing, and neighbors can readily see an unrecognized subletter coming and going, both of which make unauthorized rentals easy to detect. Apartment communities cannot monitor improper sublets so easily. The large number of units and residents, the similar outward appearance of many units, and the frequent traffic of residents in and out of an apartment building all make it more difficult to discern whether a person entering a building with a suitcase is a resident or an unscreened subletter.

Although most owners and operators, for some or all of these reasons, do not permit short-term subletters, others have made the decision to allow them in their apartment communities, at least subject to certain conditions. As with those owners who disallow these rentals, many reasons can drive this decision. *First*, a policy of allowing short-term sublets can attract prospective residents who are interested in participating the sharing economy. This feature can be a particular draw for the incoming generation of residents, who represent the future of the apartment industry. According to one recent survey of more than 270,000 apartment residents, 26 percent of respondents under the age of 25 say that an ability to participate in the short-term rental economy would positively affect their opinion of a rental community, the highest percentage of any age group.<sup>16</sup>

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<sup>16</sup> See 2017 NMHC/Kingsley Associates Renter and Preferences Report, available at <https://www.nmhc.org/research-insight/research-report/2017-nmhc-kingsley-apartment-renter-preferences-report/>.

*Second*, short-term sublets can build awareness of an apartment community. The traffic of short-term sublets can help to increase word-of-mouth business about the community. The short-term rental platforms themselves allow users to post reviews of where they stay, which could steer prospective residents to that property.<sup>17</sup> A short-term rental also can serve as a “test drive” of a residential community. A happy short-term subletter could soon become a long-term resident.

*Third*, owners and operators see an opportunity to partner with short-term rental platforms or residents who wish to offer short-term sublets. A partnership of this sort might allow the owner and operator to share revenue from a short-term sublet, or even to offer short-term rentals themselves in the event of a vacancy, to defray the cost of operating the community. It also can allow the owners and operators to work with the platforms and the residents to adopt measures that mitigate the security concerns and other issues that can accompany short-term sublets. For the above reasons, owners and operators are increasingly open to the promise of short-term rentals.<sup>18</sup> However, owners and operators also wish to decide for themselves how to use their properties.

Over the last couple of years, the short-term rental economy has evolved in a manner that offers a glimpse into the possibilities of a market where owners and operators are

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<sup>17</sup> *See id.*

<sup>18</sup> For example, in one recent survey of NMHC members, 17 percent of respondents said they use a third-party short-term rental management company to handle short-term rentals in their community from platforms such as Airbnb, and another 36 percent said they would consider doing so.

empowered to choose whether and how to allow short-term rentals. A wave of new start-ups has emerged that seek to provide owners and operators with a degree of insight and control over how their residents offer short-term sublets.<sup>19</sup> And through an initiative known as the Friendly Buildings Program, Airbnb has started to negotiate agreements with owners and operators in which it offers protections in areas such as transparency, security and insurance, and a share of revenue, in exchange for the owners and operators agreeing to allow sublets in their communities through Airbnb.<sup>20</sup> Airbnb actively enforces the protections in this program and will decline to broker short-term rentals that violate these measures.<sup>21</sup>

However, Airbnb declines to protect the owners or operators who choose not to allow short-term sublets, and therefore decline to enroll in the Friendly Buildings Program. Airbnb refuses to make these owners or operators aware of residents who are offering short-term

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<sup>19</sup> Among their options, these platforms offer short-term background checks, additional insurance coverage, and the ability to limit short-term rental. Often, these companies also are able to fully manage the process of short-term rentals from providing lease addendums to handling maintenance and service requests to streamlining revenue management.

<sup>20</sup> See, e.g., Laura Kusisto, *Airbnb Enlists San Francisco's Biggest Landlord*, Wall St. J., Nov. 5, 2017 (describing agreement between Airbnb and San Francisco's largest building owner to allow short-term rentals in five of their buildings, in exchange for measures including a revenue share, the opportunity to track short-term rentals, and insurance); Lisa Xing, *Toronto condo signs on to 1st agreement in Canada to regulate Airbnb rentals*, CBC News, Oct. 25, 2017 (describing agreement tailored to a Toronto condominium that includes a revenue share, transparency into who is hosting and to whom they are subletting, and a requirement that short-term subletters provide government-issued IDs that are kept on file with Airbnb).

<sup>21</sup> See, e.g., Decl. of Kenneth A. Diamond in Supp. of Pls.' Mot. for Prelim. Inj. ¶¶ 6-20, No. 2:17-cv-04885 (C.D. Cal. Dec. 1, 2017); Decl. of Alex Ward in Supp. of Defs.' Opp. to Pls.' Mot. for Prelim. Inj. ¶30, No. 2:17-cv-04885 (C.D. Cal. Dec. 8, 2017); Xing, *supra* note 20.

rentals on their property. Airbnb does not allow the owners to search the site for their property or residents. Airbnb refuses to provide the owners, even after a written request, with lists of the owners' properties that are being rented unlawfully on Airbnb. And when the owners and operators reach out to notify Airbnb that the sublets the company is brokering violate their leases, or to alert Airbnb to other problems, Airbnb usually fails to respond, or sends a boilerplate answer, and declines to take any meaningful action.

### **ARGUMENT**

Owners and operators should be able to choose who may reside in their apartment communities, subject to the terms of their leases and the requirements of the law. This is a critical choice for owners and operators, one made in careful consideration of their business needs and the well-being of the apartment community. The district court opinion allows Airbnb to countermand this choice, by immunizing Airbnb from liability when it brokers short-term rentals that violate owners and operators' lease agreements. In so doing, the opinion sweeps aside the principle of owners' choice that lies at the heart of the right to property, and will lead to a host of serious consequences in the apartment industry.

#### **I. The district court opinion is flatly at odds with the property rights of owners and the principle of owner's choice.**

The right of ownership in property is one of the cornerstones of the modern legal system. In particular, the right of an owner to choose how to use her property and to be free from the interference of third parties in that choice is a foundational principle of law that

traces its origins to antiquity.<sup>22</sup> This principle of owner’s choice finds expression in common law doctrines such as the law of trespass,<sup>23</sup> the law of bailments,<sup>24</sup> the law of licenses,<sup>25</sup> and the law of tortious interference with contract.<sup>26</sup> Also, and perhaps most directly relevant for present purposes, this principle appears in the law of landlord and tenant, which among other things provides that a lessor (such as a multifamily household) can place restrictions on the alienability of leasehold interests to third parties.<sup>27</sup>

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<sup>22</sup> See, e.g., A.M. Honoré, *Ownership*, in *The Nature and Process of Law* 370, at 370-71 (Patricia Smith ed., 1993) (describing ownership as “one of the characteristic institutions of human society,” encompassing an “owner’s choice” to use the property as “one wishes”); J.E. Penner, *The ‘Bundle of Rights’ Picture of Property*, 43 U.C.L.A. L. Rev. 711, 717, 741 (1996) (observing that property “depends upon exclusion by law from interference” and “its contours are reflected largely in the duty others have not to interfere with an owner’s use”).

<sup>23</sup> See, e.g., David A. Thomas, *Thompson on Real Property, Trespass* §§ 68.01, 68.06(b)(2)(iii) (3d ed. 2011) (trespass as physical invasion without consent of the owner); Penner, *supra* note 22, at 749 (discussing the duty not to trespass as “not altered in the least if the houses on the block are owned by one person, by many, or are occupied by licensee”).

<sup>24</sup> See, e.g., Romualdo P. Eclavea, *Cal. Jur. 3d, Bailments* § 43 (West Supp. 2018) (discussing how a bailor may bring an action “against a third party to recover damages for injury to, or destruction of, the bailed object”).

<sup>25</sup> See, e.g., Penner, *supra* note 22, at 742 (describing the right to property as encompassing the right “to license it to others (either exclusively or not)” and observing that those “who are not licensed, that is, everyone else, do not gain any duties or lose any rights as a result”).

<sup>26</sup> See, e.g., Note, *Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 Harv. L. Rev. 1510, 1512-13 (1980) (“Under the Blackstonian model, therefore, interference by a third party with the performance of a contract was treated as interference with property . . . . Thus, actions such as trespass and trover could be used by parties to the contract to recover damages from interfering third parties.”).

<sup>27</sup> See, e.g., Robert S. Schoshinski, *American Law of Landlord and Tenant* § 8:15 (1980) (“Such restrictions are justified as reasonable protection of the interests of the lessor as to who shall possess and manage property in which he has a reversionary interest and from which he is deriving income.”); Thomas, *supra* note 23, at § 42.04(b) (discussing permissible restrictions).

The district court opinion trammels the property rights of owners and this principle of owner's choice. It does so with regard to each of three sticks in the bundle of property rights. *First*, the district court opinion overrides the right of property owners to exclude. "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."<sup>28</sup> The right to decide whom to allow on one's property is "valued so highly," that the abolishment often will "result in the offending law being declared unconstitutional."<sup>29</sup> The district court opinion allows Airbnb to broker a short-term sublet into an apartment community against the express wishes of an owner. The implication of the opinion is that an entity can offer a for-profit service premised on the knowing infringement of the decision of a property owner about whom to admit onto and exclude from her property, as long as the entity does so online. Such a sweeping grant of immunity vitiates this essential property right.

*Second*, the district court opinion disregards the right of property owners to administer their property as they see fit. The bundle of property rights encompasses the prerogative of

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<sup>28</sup> *Loretto v. Manhattan Teleprompter CATV Corp.*, 458 U.S. 419, 435 (1982); *see also* *Byrd v. United States*, 138 S.Ct. 1518, 1522 (2018) ("One of the main rights attaching to property is the right to exclude others." (quotations omitted)); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property." (quotations and alterations omitted)).

<sup>29</sup> Jan Laitos, *Law of Property Protection* § 5.16 (1999); *see also, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (describing the right to exclude as "so universally held to be a fundamental element of the property right" that it "falls within this category of interests that the government cannot take without just compensation").

an owner *to use, manage and enjoy the property*.<sup>30</sup> The decision to allow short-term sublets onto one's apartment property presents a series of known and significant risks, including security issues, property damage, exposure to civil and even criminal liability, angry residents, and disruptions to quality of life.<sup>31</sup> Many owners are unwilling to accept these risks, while others choose to do so. But that choice ought to lie with owners; *they* should be able to choose how to use their property. The district court opinion forces reluctant owners to accept the risks posed by short-term sublets, frustrating their right to use their property and manage their communities as they choose.

*Finally*, the district court opinion impairs the *right to dispose*, or the right of apartment owners to choose how to transfer, partition and draw income from their property.<sup>32</sup> Most owners and operators have chosen not to allow sublets without their consent, due to the various concerns discussed above.<sup>33</sup> This choice is embodied in a binding agreement—the lease—that sets out the terms under which a tenant may terminate or assign her rights or

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<sup>30</sup> *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (describing property as denoting “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it”); Honoré, *supra* note 22, at 370, 372 (describing ownership as embracing “the right to use”—“[the right to] use and enjoyment of the thing owned,” as well as the “right to manage”—“the right to decide how and by whom the thing owned shall be used” and the right “to admit others to one’s land . . . [and] to define the limits of such permission”).

<sup>31</sup> See *supra* at text accompanying notes 8-15, *infra* text accompanying notes 41-46.

<sup>32</sup> *General Motors Corp.*, 323 U.S. at 378 (property includes the right “to dispose”); Honoré, *supra* note 22, at 253 (bundle of property rights includes the “right to income”—the right to “rents” and to the “benefit derived from foregoing personal use of a thing and allowing others to use it”).

<sup>33</sup> See *supra* at text accompanying notes 8-15.

sublet the apartment she rents. Airbnb brokers countless transactions each month that violate those agreements. The district court opinion shields Airbnb from any accountability for its participation in these transactions, even when the owner and operator makes Airbnb aware of the existence of such an agreement, and that a transaction violates it. The result below exposes the right to dispose to unconstrained infringements by third parties, aided by Airbnb's for-profit brokerage services.

The district court's opinion frustrates the right to dispose in one final respect. Airbnb has started to negotiate agreements with owners and operators to give them a degree of visibility and control over short-term sublets on their property—provided that they accept short-term rentals through Airbnb. The district court opinion offers the owners and operators a Hobson's choice: accept a flood of Airbnb short-term rentals for which they now have no meaningful legal recourse, or sign an agreement with Airbnb that offers to ease that flood. This places the owners and operators in a vulnerable position in negotiations over the terms of the agreement, and may even sway owners who otherwise would prefer not to allow short-term rentals at all, to accept them on Airbnb's terms. The opinion encumbers, and results in the distortion of, the right to dispose.

The district court premised its opinion on a finding that Airbnb is acting as a publisher or speaker of information provided by another under Section 230 of the Communications Decency Act ("CDA"). But the present intrusion upon so many core property rights is not the result imagined by the CDA. The Ninth Circuit has held that for the CDA to shield a party

from liability, the party must be “(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, *as a publisher or speaker* (3) of information provided by another information content provider.”<sup>34</sup> The district court ruled that it is “Airbnb’s publication” of rentals that users post on its website that is at issue in the case, and therefore Airbnb should be immune from suit.<sup>35</sup>

The CDA, however, is focused on content, not rental activities. If an Airbnb user posted a comment criticizing the cleanliness of a property or the quality of its amenities, Section 230 might insulate Airbnb from liability. Such posts would be appearing on Airbnb in its role as a publisher or speaker. But Airbnb’s central purpose fulfils a second, unrelated role: it is acting as a broker, not a publisher. When Airbnb completes a booking service on the property of an owner without his or her consent, it is engaging in active market behavior that is far removed from the hosting of online posts. Just as Airbnb is not acting as a publisher or speaker of content when it is “providing, and collecting a fee for, Booking Services in connection with an *unregistered* unit” in San Francisco,<sup>36</sup> so too Airbnb is not acting as a publisher or speaker when it provides and collects a fee for booking services in connection with an *unapproved* unit in an apartment community.<sup>37</sup> In both cases, the conduct “does not

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<sup>34</sup> *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1100–01 (9th Cir. 2009) (emphasis added).

<sup>35</sup> *La Park La Brea A LLC v. Airbnb, Inc.*, 285 F.Supp.3d 1097, 1107 (C.D. Cal. 2017).

<sup>36</sup> *Airbnb, Inc. v. City & Cty. of San Francisco*, 217 F.Supp.3d 1066, 1073 (N.D. Cal. 2016) (emphasis added).

<sup>37</sup> *See also Homeaway.com v. Cty. of Santa Monica*, No. 16-cv-06641, 2018 WL 1281772, at \*5-\*6 (C.D. Cal. Mar. 21, 2018).

depend on who publishes any information or who is a speaker,” but instead involves Airbnb as a participant in the rental market.<sup>38</sup>

Airbnb’s conduct belies that it is merely publishing others’ content, as its invocation of section 230 requires. Airbnb actively contracts not only with short-term renters, and residents in multifamily buildings, but (in some cases) with the owners and operators of the communities. Airbnb seeks out partners. It negotiates these contracts. And it plays an active role in implementing these agreements, even refusing to broker certain transactions that are seen to violate them. Airbnb, more than ever, is acting as a full-fledged market intermediary, one that has thrust itself into the market for apartment homes.

The motivating incident for the enactment of Section 230 was famously an instance where Prodigy, an early provider of online services, found itself exposed to liability for postings to its site that disparaged investment banks—pure speech.<sup>39</sup> The position of Prodigy is far removed from that of Airbnb. Prodigy was a bystander in the dispute between the bank and alleged defamer, with no meaningful relationship to the bank or its customers (except inasmuch as some of the customers happened to be the Prodigy members posting the disparaging comments). By contrast, Airbnb has partnered with the willing owners and operators of apartment communities, and every other segment of the supply chain for apartment homes.

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<sup>38</sup> *City & Cty. of San Francisco*, 217 F.Supp.3d at 1073 (quotations omitted).

<sup>39</sup> *See Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1163-64 (9th Cir. 2008) (discussing the history of Section 230).

To our knowledge, this and the other recent cases involving short-term rental platforms are the first time that Section 230 has been interpreted to immunize a defendant for activities that so closely interfere with rights to real property. And a “property owner’s right to exclude another’s physical presence must be tenaciously guarded by the courts.”<sup>40</sup> Airbnb undoubtedly has brought value to users and efficiencies to the rental economy through its market intermediary role. But when its performance of this role imposes injury upon property owners—most conspicuously by completing brokerage services to frustrate an owner’s rights without their knowledge or consent—Airbnb should be accountable for its actions in the same manner as any other middleman.

## **II. The district court opinion will lead to serious consequences for the apartment industry.**

Entirely apart from its dilution of the property rights of owners, the district court opinion will lead to a host of harmful consequences across the apartment economy, by disregarding the choice of owners not to allow sublets on their property. The opinion will expose the owners and operators of apartment communities to sweeping civil and criminal sanctions; frustrate the efforts of owners and operators to protect the well-being and meet the desires of current residents; and compromise the ability of owners and operators to develop a community to appeal to a range of future residents. These consequences are highly disruptive and will do significant harm to a sector that plays not only a central role in the

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<sup>40</sup> *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd.*, 953 F.2d 600, 606 (11th Cir. 1992).

nation's economy, but an indispensable role in providing a safe place to live to millions of families.

*First*, the opinion will place the owners and operators of apartment communities in an untenable position relative to enforcement agencies. Municipalities have made clear that owners and operators will be responsible for the activities of a short-term subletter in their building.<sup>41</sup> This is true even if the owners and operators are unaware the subletter was in their building, prohibit subletters in their lease agreement, and take measures to prevent subletting in their building. One industry source cited cases where owners having “nothing to do with the short-term rental—neither advertising, participating nor profiting—were fined tens of thousands of dollars by the city.”<sup>42</sup> Occasionally, these penalties have been much larger, including even criminal sanctions.

For instance, New York City imposed aggravated civil penalties on AvalonBay Communities for failing to comply with provisions of the safety and building codes that are applicable to transient rather than residential dwellings after Airbnb brokered short-term sublets in one of its apartment communities. It did so even though AvalonBay prohibits short-term sublets and takes active steps to prevent them, and had developed the apartment

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<sup>41</sup> *See, e.g.*, Baird-Remba, *supra* note 12 (“The Mayor’s Office of Special Enforcement (OSE), which leads the charge against illegal hotels, acknowledges that it’s burdensome for landlords to police their own apartments and tenants for short-term rentals. But it also argues that city law still holds owners accountable for what happens inside their buildings.”).

<sup>42</sup> Baird-Remba, *supra* note 12 (quotations omitted).

community to comply with the stringent building codes applicable to residential dwellings. The City even sought to criminally prosecute them for misdemeanor offenses.

This case is but one example of how the actions of short-term rental platforms expose owners and operators to liability for short-term sublets in which the owners and operators played no role and wanted no part.<sup>43</sup> Except now, under the district court opinion, the *platforms themselves* are shielded from any liability for their actions, which will only place the owners and operators in an even tighter bind. And this problem is not confined to New York City. AvalonBay also has received two fines from San Francisco Office of Short-Term Rentals for sublets that Airbnb brokered in its communities without their knowledge or consent, because the sublet was not listed on the city's short-term residential rental registry under laws that went into effect earlier this year.

*Second*, the district court opinion places owners and operators in an untenable position with regard to their current residents. Amici's members have invested enormous sums to obtain and maintain their properties. Residents of apartment communities often choose their properties because of their particular traits, including the rules that the owners and operators of buildings set for the community. The opinion will sanction behavior that undermines those

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<sup>43</sup> *See, e.g., id.* (describing one apartment owner who called the mayor's office to report that a tenant had illegally placed several bunk beds in his apartment and begun to advertise it on a short-term rental platform; the city issued a vacate order against the tenant, but then also fined the building owner).

traits and renders unenforceable those rules, with disruptive and even dangerous consequences for residents.

One short-term subletter hosted a party of 200 people that overflowed out of the apartment, destroyed “nearly every single thing inside the apartment,” played blaring music through the night, left drug paraphernalia and alcohol trash throughout the community, and broke the security gate and elevator.<sup>44</sup> Another short-term subletter hosted a gathering that led other residents in the building to call riot police, with one attendee landing “with a crash on to his balcony from above” and knocking on his window to get back in.<sup>45</sup> Not all incidents are as severe of these, and subletters have no monopoly on poor behavior. Even so, these illustrations reveal the categories of problems that can accompany short-term subletters, who have no enduring connection to the apartment community. Residents grow frustrated with the security issues, disrespectful behavior and similar issues, and the episodes can gravely affect the residents’ satisfaction with their community.

*Finally*, the activities of Airbnb disrupt the ability of owners and operators to appeal to some *future residents* in the apartment marketplace. Amici’s members have devoted substantial resources, time, and care to fostering a residential character for their community that meets the desires and assures the well-being of current residents, and attracts future residents as well. When Airbnb offers short-term rentals in an apartment community without the consent

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<sup>44</sup> Lazzaro, *supra* note 11.

<sup>45</sup> Dean, *supra* note 14.

of owners and operators, the company's actions dramatically alter that character, impairing the ability of amici's members to market the community to prospective residents.

Although short-term rentals are increasingly popular for younger cohorts of residents, *16 percent of all apartment residents and 32 percent of apartment residents over the age of 65* said categorically in one recent survey that they would not lease at a community that included short-term rentals.<sup>46</sup> The district court opinion effectively removes this population from the prospective resident pool against the wishes of the owner or operator where Airbnb or another platform brokers short-term sublets on their property without their consent.

It is no answer for Airbnb to say that building owners can address these issues by taking legal action one by one against their own individual residents. Airbnb declines to provide owners and operators with the addresses of short-term rentals it is brokering. Airbnb does not allow an owner to search for the names or addresses of their residents on the site to determine if there is a lease violation. Airbnb usually does not take any meaningful action at all when apartment owners discover their properties on the site and ask that they be removed from any further subletting (unless the owners first agree to allow Airbnb to broker short-term rentals through the Friendly Buildings Program). And as discussed *supra*, apartment owners are exposed to civil and criminal liability and a host of other problems no matter what precautions or preventive measures they take in their own properties.

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<sup>46</sup> See 2017 NMHC/Kingsley Associates Renter and Preferences Report, *supra* note 16.

These problems are not inherent to short-term rental platforms. They are, however, inherent to short-term rental platforms that operate *without owners' knowledge and consent*. A great many of these complications could be avoided or mitigated if owners were able to choose whether short-term rentals were appropriate for their particular communities, and once they so choose, have the opportunity to develop precautions, safety measures and ground rules that are appropriate to those communities. But that is not the model that Airbnb is pursuing. Instead, it brokers short-term sublets in apartment communities without regard for owners or operators' choice whether to allow short-term rentals. And the district court opinion now throws a cloak of immunity around that unilateral, and quite damaging, business decision.

### CONCLUSION

For the above stated reasons, amici respectfully ask this Court to reverse the district court opinion.

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5), 32(a)(7) and Circuit Rule 32-1(a), because it contains 6,537 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), because it was prepared in Microsoft Word using double-spaced 14-point Perpetua typeface.

Dated: June 29, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 29, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the 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.

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