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12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN FRANCISCO DIVISION
 15

16 AIRBNB, INC.,
 17 Plaintiff,
 18 vs.
 19 CITY AND COUNTY OF SAN
 20 FRANCISCO,
 21 Defendant.

Case No. 16-cv-03615

**NOTICE OF MOTION AND MOTION
 FOR PRELIMINARY INJUNCTION;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT
 THEREOF**

Time: August 1, 2016 at 9:00 am

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1 **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

2 PLEASE TAKE NOTICE that on August 1, 2016 at 9:00 a.m. or as soon thereafter as may
3 be heard, Plaintiff Airbnb, Inc. (“Airbnb”) will and hereby does move for a preliminary injunction.

4 Airbnb respectfully requests an order enjoining Defendant City and County of San Francisco
5 (“City”) from enforcing against Airbnb amended Sections 41A.5(e), 41A.5(g)(4)(C), and 41A.7(b)
6 (1)–(3) of the San Francisco Administrative Code, effective on July 24, 2016 (the “Ordinance”).¹

7 **I. INTRODUCTION**

8 As designed and drafted by the Board of Supervisors, the Ordinance directly conflicts with,
9 and is preempted by, Section 230 of the Communications Decency Act, 47 U.S.C. § 230 (the
10 “CDA”). According to its own sponsors, the law holds “*hosting platforms accountable* for the
11 hundreds of units (rented by) *unscrupulous individuals*” posting listings on their websites, and holds
12 “*Airbnb Accountable for Listing Illegal Short Term Rentals.*” Declaration of Jonathan H. Blavin
13 (“Blavin Decl.”), Exs. A at 1; B; C at 1 (emphases added). As such, the Ordinance unquestionably
14 treats online platforms like Airbnb as the publisher or speaker of third-party content and is
15 completely preempted by the CDA. In addition, the law violates the Stored Communications Act,
16 18 U.S.C. §§ 2701 et seq. (the “SCA”), by requiring disclosure to the City of customer information
17 without any legal process, and the First Amendment as an impermissible content-based regulation.²

18 The Ordinance fundamentally and impermissibly alters San Francisco’s regulatory scheme
19 for short-term rentals by holding “Hosting Platforms”—defined by the law as entities that provide
20 “a means through which” residents “may offer” and “advertise” their units for rent “through a
21 website” (S.F. Admin. Code § 41A.4)—criminally and civilly liable for their users’ posting of
22 listings without valid registration numbers. Prior to the recent amendments (since February 2015),
23 San Francisco law has permitted residents to rent out their homes on a short-term basis if they

24 ¹ The Ordinance was passed by the Board of Supervisors on June 14, 2016. The Mayor did not sign
25 it, rendering it enacted on Friday, June 24. See Ordinance, § 4. The Ordinance becomes effective
26 30 days after enactment, or July 24. *Id.* A copy of the Ordinance is attached hereto as Appendix A.
The full version of Chapter 41A, before amendment by the Ordinance, is attached as Appendix B.

27 ² This action is both an as-applied and a facial challenge. It is an as-applied challenge in that it seeks
28 only to prohibit the City from enforcing portions of the Ordinance against Airbnb, and it is a facial
challenge in that such provisions, on their face, violate the law and cannot be enforced in any set of
factual circumstances. See *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998).

1 register and obtain registration numbers for their units from the City. Residents are required to
2 include these numbers on any “listing” on a Hosting Platform, and face liability for failing to do so.
3 *Id.* §§ 41A.5(g)(1)(F), (g)(2)(A). The only persons who can list their units and obtain registration
4 numbers are the residents themselves. Hosting Platforms like Airbnb have no property interests in
5 the units listed on their websites and no ability to obtain or create registration numbers.

6 The Ordinance punishes Hosting Platforms for third-party content by (a) requiring them to
7 verify that each active and future listing on their websites has a valid registration number prior to
8 publishing the listing, and (b) subjecting them to criminal and civil penalties for their publishing of
9 listings without verifying the registration number, including up to six months in jail and fines of up
10 to \$1,000 per day for each unverified listing. *See id.* §§ 41A.5(e), (g)(4)(C)–(D); 41A.7(b)(1)–(3).

11 These provisions squarely violate the CDA, which prohibits “treat[ing]” websites who host
12 or distribute third-party content, like the Hosting Platforms at issue here, “as the publisher or
13 speaker of any information provided by another information content provider,” and immunizes
14 them from liability under any “inconsistent” state or local law. 47 U.S.C. §§ 230(c)(1), (e)(3);
15 *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009). A fundamental purpose of Congress
16 in passing the CDA was to shield website operators from compulsory obligations to screen user
17 content upon pain of liability, and instead to provide them with the incentive to build innovative
18 platforms while having the flexibility to experiment with and develop tools to address undesirable
19 content without fear of legal retribution. 47 U.S.C. §§ 230(b)(1), (2), (4). The scope of this
20 immunity is broad, and applies regardless of whether a website may know that third parties are
21 using its services to create or post unlawful content. *Goddard v. Google, Inc.*, 640 F. Supp. 2d
22 1193, 1196 (N.D. Cal. 2009). Since its passage in 1996, the CDA has functioned as the bedrock
23 upon which online services of all kinds and sizes have founded and built their operations. By
24 punishing platforms for failing to verify and screen third-party listings, and for publishing
25 unverified listings, the Ordinance directly conflicts with the CDA and is barred under settled law.

26 The City was not blind to the fact that the Ordinance might run afoul of the CDA and other
27 laws. Following its passage, the Mayor’s office said that the “mayor remains concerned that this
28 law will not withstand a near-certain legal challenge and will in practice do nothing to aid the city’s

1 registration and enforcement of our short-term rental laws.” Blavin Decl., Ex. D at 1. The City
2 Attorney’s Office acknowledged that the Ordinance could raise “issues under the Communications
3 Decency Act” but claimed that it had been drafted “in a way that minimizes” those issues by
4 regulating “business activities” instead of “content.” Blavin Decl., Ex. E at 3. Despite the City’s
5 best efforts to tiptoe around the CDA through such semantic devices, the problem for the City is
6 that the *substance* of what the Ordinance seeks to do violates the CDA. No amount of creative
7 drafting can change that reality. *See, e.g., Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21
8 (1st Cir. 2016) (rejecting claim that site’s “lack of phone number verification” for listings and other
9 “activities” did “not involve traditional publishing” functions, as they fell within site’s protected
10 “decisions about how to treat postings” under CDA); *Goddard v. Google, Inc.*, 2008 WL 5245490,
11 at *4-5 (N.D. Cal. Dec. 17, 2008) (rejecting plaintiffs’ “recharacterization” of claim to avoid CDA).

12 The verification provisions of the Ordinance separately are barred by the SCA. In a futile
13 effort to sidestep the CDA, the Ordinance requires Hosting Platforms to verify listings by disclosing
14 to the City host names and addresses “prior to posting” a listing—and without a subpoena. S.F.
15 Admin. Code §§ 41A.5(g)(4)(C)(ii); 41A.7(b)(2)-(3). But in this failed endeavor to avoid Section
16 230, the Ordinance runs smack into the SCA, which bars state laws that compel online services like
17 Airbnb to release customer information to governmental entities without legal process. *See*
18 *Telecomms. Regulatory Bd. of Puerto Rico v. CTIA-Wireless Ass’n*, 752 F.3d 60, 68 (1st Cir. 2014).

19 The Ordinance also violates Hosting Platforms’ First Amendment rights. The prohibition on
20 the publication of certain rental advertisements—i.e., those listings without verified registration
21 numbers—is a content-based speech restriction subject to “heightened judicial scrutiny” under the
22 First Amendment. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 565 (2011). The City cannot meet its
23 burden of demonstrating that this speech restriction directly advances a substantial state interest and
24 does so in a narrowly tailored way. Even assuming the Ordinance actually advances a substantial
25 state interest (which is questionable), it places a far greater burden on speech than is necessary to
26 achieve that end. The “normal method of deterring unlawful conduct” is to punish the conduct,
27 rather than prohibit speech or advertising regarding it. *Bartnicki v. Vopper*, 532 U.S. 514, 529
28 (2001). The City cannot show that the obvious alternative of enforcing its existing laws against

1 third-party residents who rent properties in violation of the law, rather than against Hosting
 2 Platforms, would be ineffective or inadequate. Just the opposite: it is clear the City *could* enforce
 3 its laws directly against hosts who violate them—as it already has begun to do with increasing
 4 effectiveness and success—rather than indirectly against Hosting Platforms that publish listings.
 5 Further, the law is unconstitutionally overbroad as it punishes platforms for publishing *any* listing
 6 without complying with its “verification” procedures—including those listings that may be lawful.

7 Absent the intervention of this Court, the Ordinance threatens irreparable harm to Airbnb in
 8 several ways. First, Airbnb faces the threat of prosecution and significant criminal and civil
 9 penalties under a preempted state law, which constitutes irreparable harm. *See, e.g., Valle del Sol*
 10 *Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013). The Ordinance impermissibly coerces Airbnb
 11 to comply with its unlawful terms and to screen third-party listings from its site, or face the threat of
 12 imprisonment and staggering monetary liability. Further, the imminent violations of Airbnb’s
 13 constitutional rights “unquestionably constitute[] irreparable injury.” *Farris v. Seabrook*, 677 F.3d
 14 858, 868 (9th Cir. 2012). Airbnb also faces the risk of substantial disruption to its business, and an
 15 erosion of customer goodwill, if it is forced to remove immediately thousands of listings from its
 16 website, including ones that otherwise may be registered and lawful, to comply with the Ordinance.
 17 *See Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009).

18 Given this palpable threat of irreparable harm, the equities tip sharply in Airbnb’s favor.
 19 Moreover, the public interest is served by enforcing the “Constitution’s declaration that federal law
 20 is to be supreme,” *id.* at 1059-60, and preventing the “violation of” Airbnb’s “constitutional rights,”
 21 *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). By contrast, an injunction would not
 22 prevent the City from continuing to enforce its laws directly against those hosts who violate them.
 23 For these reasons and those discussed below, the Court should enjoin enforcement of the Ordinance.

24 **II. BACKGROUND**

25 **A. Airbnb**

26 Founded in 2008, Airbnb provides an Internet platform through which persons desiring to
 27 book accommodations (“guests”), and persons listing unique accommodations available for rental
 28 (“hosts”), can locate each other and enter into direct agreements to reserve and book travel

1 accommodations on a short and long-term basis. Declaration of David Owen (“Owen Decl.”), ¶ 2.

2 Airbnb does not manage, operate, lease or own hosts’ accommodations, and it is not a party
 3 to the direct agreements between guests and hosts for the booking of accommodations offered by
 4 hosts. *Id.* ¶ 4. Airbnb’s platform provides a means by which hosts can choose to list their rentals;
 5 guests can locate those rentals; and hosts and guests can message each other directly on the platform
 6 to determine the terms for their bookings. *Id.* ¶ 3. The platform also provides, through third-party
 7 payment processors, a secure payment-processing service to permit hosts to receive payments
 8 electronically. *Id.* In consideration for use of its platform, Airbnb receives a service fee from both
 9 the guest and host, determined as a percentage of the accommodation fee set solely by the host. *Id.*

10 Hosts, and not Airbnb, decide whether to list their properties and with whom and when to
 11 transact, provide the descriptions of their rentals, set their own lengths of stay, and determine the
 12 prices of their rentals. *Id.* ¶ 6-7. As Airbnb’s Terms of Service state, hosts “alone are responsible
 13 for any and all Listings and Member Content [they] post.” *Id.*, Ex. 1 at 6.

14 Chapter 41A acknowledges that Airbnb hosts, not Airbnb, create their listings, stating that a
 15 “Residential Unit is offered for Tourist or Transient Use [i.e., short-term use] by the *Permanent*
 16 *Resident* of the Residential Unit.” S.F. Admin. Code § 41A.4 (emphases added). By contrast, a
 17 Hosting Platform like Airbnb is a “means through which” an individual “may offer a Residential
 18 Unit” for a short-term rental, providing an “online platform” that “allows an *Owner to advertise the*
 19 *Residential Unit* through a website provided by the Hosting Platform.” *Id.* (emphases added).

20 Airbnb advises its hosts and guests to be aware of and comply with local laws in listing and
 21 renting units listed on Airbnb. The Airbnb Terms of Service reference at their outset parties’
 22 “OBLIGATIONS TO COMPLY WITH APPLICABLE LAWS AND REGULATIONS,” and that

23 IN PARTICULAR, HOSTS SHOULD UNDERSTAND HOW THE LAWS
 24 WORK IN THEIR RESPECTIVE CITIES. SOME CITIES HAVE LAWS
 25 THAT RESTRICT THEIR ABILITY TO HOST PAYING GUESTS FOR
 26 SHORT PERIODS.... IN MANY CITIES, HOSTS MUST REGISTER, GET A
 PERMIT, OR OBTAIN A LICENSE BEFORE LISTING A PROPERTY OR
 ACCEPTING GUESTS. CERTAIN TYPES OF SHORT-TERM BOOKINGS
 MAY BE PROHIBITED ALTOGETHER.

26 Owen Decl., Ex. 1 at 1. Similarly, the Airbnb “Responsible Hosting” page for San Francisco
 27 informs hosts that “it’s important for you to understand the laws in your city,” provides links to the
 28 City’s website describing applicable laws, and notes with respect to “Short-Term Rental

1 Registration,” that “San Francisco requires hosts to register by scheduling an appointment with the
 2 Planning Department and paying a fee of \$50.” *Id.*, Ex. 3 at 1. Airbnb further informs hosts that
 3 “You may include your short-term rental permit number on your listing” in the “‘Other Things to
 4 Note’ field” by “typ[ing] in your permit number following the acceptable permit format for San
 5 Francisco. The format is: STR-xxxxxxx. An example would be: STR-1234567.” *Id.*

6 As part of the Airbnb Community Compact, the company is committed to helping provide
 7 solutions tailored to the needs of cities like San Francisco with historic housing challenges. *See id.*
 8 ¶ 12. For example, Airbnb discretionarily removes listings that it believes may be offered by hosts
 9 with multiple “entire home” listings or by unwelcome commercial operators. *See id.* ¶¶ 12-13. If
 10 Airbnb is alerted to shared spaces or private rooms that appear to be operated by unwelcome
 11 commercial operators or that do not reflect the community vision, it generally will remove such
 12 listings. *See id.* ¶ 13. Within the last year, Airbnb has removed numerous San Francisco listings
 13 from its platform as part of its Community Compact efforts. *See id.*

14 **B. San Francisco’s Regulatory Scheme Governing Short-Term Rentals and the**
 15 **Ordinance’s Amendments to It**

16 The Ordinance amends Chapter 41A of the San Francisco Administrative Code, which
 17 governs short-term rentals in the City. As discussed below, a main feature of the Ordinance is that,
 18 unlike prior San Francisco law, it holds Hosting Platforms liable, on threat of both criminal and civil
 19 penalties, for publishing listings without complying with certain verification procedures.

20 In October 2014, the Board of Supervisors enacted a set of amendments to Chapter 41A that
 21 made short-term rentals generally lawful in San Francisco, subject to certain limitations and
 22 requirements. “Permanent Residents” who have occupied their units for at least 60 days may offer
 23 their homes for “Short-Term Rental.” S.F. Admin. Code §§ 41A.4; 41A.5(g).³ Before offering such
 24 a rental, residents must apply for and register the unit with the Planning Department, which assigns
 25 the unit a registration number and lists it on a registry. *Id.* §§ 41A.5(g)(1)(E), (g)(3)(A). Residents
 26 also are required to “include[] the Department-issued registration number on any Hosting Platform

27 _____
 28 ³ There is no limit on the number of days per year a unit may be rented if it is “hosted”; if the host is
 not on site, the unit cannot be rented more than 90 days a year. S.F. Admin. Code § 41A.5(g)(1)(A).

1 listing,” and face liability for failing to do so. *Id.* §§ 41A.5(g)(1)(F), (g)(2)(A).

2 As part of the October 2014 amendments, the Board also imposed certain duties and
 3 obligations on Hosting Platforms, which must notify users of the City’s regulations regarding short-
 4 term rentals and must collect and remit Transient Occupancy Taxes required under the Business and
 5 Tax Regulations Code. *Id.* § 41A.5(g)(4)(A)-(B). But the amendments did not impose liability on
 6 Hosting Platforms based on the content of listings they publish, nor did it require them to verify the
 7 contents of any listings. These amendments went into effect in February 2015. The City created the
 8 Office of Short-Term Rentals (“OSTR”) in July 2015 to enforce them.

9 At the direction of Supervisor David Campos, one of the Ordinance’s co-sponsors, the City’s
 10 Budget and Legislative Analyst’s Office prepared a report in April of this year regarding the state of
 11 short-term rentals in the City. The report stated that the OSTR “continues to levy fines against hosts
 12 found to be non-compliant” with the law, and while “there still remains a sizeable gap between the
 13 number of registered hosts and the number of hosts advertising short-term rentals on online
 14 platforms,” the “OSTR may be able to further close that gap in coming months as OSTR became
 15 fully staffed in December 2015.” Blavin Decl., Ex. F at 21. The report further noted that OSTR
 16 saw “a wave of compliant behavior towards the end of 2015” and has developed “new strategies to
 17 pro-actively identify non-compliant hosts.” *Id.* at 3, 18. The report proposed four “options” that the
 18 Board of Supervisors could consider to “improve compliance with the City’s short-term rental
 19 laws.” *Id.* at 25. One of those options—to “[s]implify the short-term rental registration process as
 20 the existing system might deter otherwise compliant short-term rental hosts,” *id.* at 4—has been
 21 implemented by the Ordinance, S.F. Admin. Code § 41A.7(a). Another option—requiring “that
 22 online hosting platforms prohibit hosts from advertising on their websites if they have not registered
 23 with the City”—formed the basis of the law’s verification requirement. Blavin Decl., Ex. F at 25.

24 The Ordinance provides that “[p]rior to providing reservation and payment services^[4] for a
 25 listing of a Residential Unit within the City to be rented for Tourist or Transient Use, a Hosting

26 _____
 27 ⁴ The phrase “reservation and payment services” is not defined. The Ordinance, however, sets forth
 28 two exclusive and specific articulations of what a site must do to comply with § 41A.5(g)(4)(C).
See Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228-29 (1957) (“Specific terms
 prevail over the general in the same or another statute which otherwise might be controlling.”).

1 Platform shall verify with the Office of Short-Term Residential Rental Administration and
 2 Enforcement that the Residential Unit is listed on the Registry and has a valid registration number.”

3 S.F. Admin. Code § 41A.5(g)(4)(C). The Ordinance specifies two exclusive ways that platforms
 4 “shall comply with this subsection.” *Id.* Hosting Platforms must:

5 (i) *Provid[e] the verified registration number on each listing* in the area of the listing
 6 dedicated to information verified or compiled by the Hosting Platform about the
 host[;] or

7 (ii) Send[] the verified registration number, Residential Unit street address, ... and
 8 host name to the Office of Short-Term Residential Rental Administration and
 Enforcement by electronic mail *prior to posting the listing on the platform.*

9 *Id.* (emphases added). The Ordinance thus imposes criminal and civil liability on Hosting Platforms
 10 that do not verify the registration number prior to publishing a listing—either by including the
 11 number on each listing or sending the number to the City prior to posting the listing. *See also*
 12 Ordinance Preface (law “require[s] Hosting Platforms verify” that a unit “is on the City Registry
 13 *prior to listing*” (emphasis added)). It provides that “any Hosting Platform that provides a listing ...
 14 in violation of” Chapter 41A is subject to criminal liability, including imprisonment up to six
 15 months, fines up to \$1,000, or both. *Id.* § 41A.5(e). Hosting Platforms that fail to comply also are
 16 subject to civil and administrative penalties of up to \$1,000 a day. *Id.* §§ 41A.5(g)(4)(D);
 17 41A.6(d)(1)-(2). All of these penalties apply to any Hosting Platform that posts a listing without
 18 adhering to the verification procedure described in the statute, *even if* the listing at issue advertises a
 19 rental that is fully in compliance with San Francisco law.

20 The Ordinance also sets forth a monitoring regime. It requires the OSTR to “actively
 21 monitor Hosting Platform listings to ensure that Hosting Platforms are only listing Residential Units
 22 that are listed on the Registry.” *Id.* § 41A.7(b). The agency must undertake this monitoring effort
 23 “on at least a monthly basis,” *id.*, and each time it does so, it must “immediately provide notice to
 24 Hosting Platforms by electronic mail of all listings that do not have valid registration numbers or
 25 are otherwise not in compliance with this Chapter 41A.” *Id.* § 41A.7(b)(1). Upon receiving such
 26 notice, Hosting Platforms must, “within one City business day,” “respond” by “confirming, for each
 27 listing identified in the notice, that the listing has a valid registration number and providing that
 28 number and any other requested information,” including “unit address and host information.” *Id.*

1 § 41A.7(b)(2)-(3). “For each listing that a Hosting Platform fails to provide the requested
2 information” within one day, the platform shall be subject to penalties of up to \$1,000 per day. *Id.*

3 Supervisors David Campos and Aaron Peskin proposed the law. Supervisor Peskin has
4 stated that its purpose is to “hold[] the *hosting platforms accountable* for the hundreds of units
5 (rented by) *unscrupulous individuals* who have taken multiple units of affordable housing off the
6 rental market.” Blavin Decl., Exs. A at 1; B (emphases added). Similarly, a press release from the
7 office of Supervisor Campos states that the “Legislation *Hold[s] Airbnb Accountable for Listing*
8 *Illegal Short Term Rentals*,” and in a Facebook post, Supervisor Campos described it as “hold[ing]
9 *Airbnb and other hosting platforms accountable for advertising illegal short term rentals.*” *Id.*,
10 Exs. C at 1; G (emphases added). Supervisor Peskin also has stated that the law is intended to
11 target the listings of “unscrupulous speculators” and not “mom and pop” hosts. *Id.*, Ex. H at 1.

12 **III. ARGUMENT**

13 **A. Standard for Preliminary Injunction**

14 “A plaintiff seeking a preliminary injunction must show that: (1) she is likely to succeed on
15 the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, (3) the
16 balance of equities tips in her favor, and (4) an injunction is in the public interest.” *Farris*, 677
17 F.3d at 864. Alternatively, “‘serious questions going to the merits’ and a balance of hardships that
18 tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the
19 plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the
20 public interest.” *Id.* Airbnb satisfies both standards. It is overwhelmingly likely to succeed on its
21 CDA, SCA, and constitutional claims, and it is threatened with irreparable harm in light of the
22 substantial penalties it faces under a preempted law, as well as the infringement of its constitutional
23 rights and erosion of goodwill. The balance of equities and public interest also favor an injunction.

24 **B. Airbnb is Likely To Succeed on the Merits of its Claims**

25 **1. The City’s Enforcement of the Ordinance Against Airbnb Violates and Is Preempted By Section 230 of the CDA**

26 The CDA unequivocally bars states and localities from imposing liability on Internet
27 websites premised on their role as a publisher of third-party content. Because this is precisely what
28 the Ordinance does, it violates the CDA and is preempted by federal law.

1 Under Section 230, “[n]o provider or user of an interactive computer service shall be treated
 2 as the publisher or speaker of any information provided by another information content provider.”
 3 47 U.S.C. § 230(c)(1). It bars liability “under any State or local law that is inconsistent with this
 4 section.” *Id.* § 230(e)(3). In providing a “broad grant of webhost immunity,” the CDA “gives
 5 effect to Congress’s stated goals” of “‘promot[ing] the continued development of the Internet and
 6 other interactive computer services,’” and “‘preserv[ing] the vibrant and competitive free market
 7 that presently exists for the Internet and other interactive computer services,’” *Fair Hous. Council
 8 of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174-75, 1180 (9th Cir. 2008) (en
 9 banc) (quoting § 230(b)(1), (2)). And by eliminating the threat of liability based on websites’
 10 efforts to screen user content, the CDA incentivizes the development of innovative platforms while
 11 “encourag[ing] voluntary monitoring.” *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122-
 12 23 (9th Cir. 2003). As courts have held, the “purpose of the CDA is to encourage open, robust, and
 13 creative use of the internet.” *Jurin v. Google, Inc.*, 695 F. Supp. 2d 1117, 1123 (E.D. Cal. 2010).

14 This “broad construction accorded to section 230 as a whole has resulted in a capacious
 15 conception of what it means to treat a website operator as the publisher or speaker of information
 16 provided by a third party.” *Backpage.com*, 817 F.3d at 19. Consistent with this, a long line of cases
 17 have held that Section 230 provides immunity for online marketplaces, classifieds, and other sites
 18 similar to Hosting Platforms from any liability stemming from their role as a publisher of third-party
 19 listings and advertisements.⁵ As the Ninth Circuit has instructed, “close cases ... must be resolved
 20 in favor of immunity, lest we cut the heart out of section 230 by forcing websites to face death by
 21 ten thousand duck-bites” *Roommates.com*, 521 F.3d at 1174.

22 _____
 23 ⁵ See, e.g., *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (2002) (eBay immune from liability for fake
 24 sports memorabilia listings); *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 967 (N.D. Ill. 2009)
 25 (claim that Craigslist adult section listings were public nuisance barred by CDA); *Mazur v. eBay
 26 Inc.*, 2008 WL 618988, at *9 (N.D. Cal. Mar. 4, 2008) (eBay immune from claim it failed to screen
 27 listings); *Hill v. StubHub, Inc.*, 219 N.C. App. 227, 247-48 (2012) (claim that StubHub hosting of
 28 event ticket sales violated law barred by CDA); *Milgram v. Orbitz Worldwide, Inc.*, 419 N.J. Super.
 305, 324 (2010) (CDA barred claim of “misleading ticket listings”); *Inman v. Technicolor USA, Inc.*,
 2011 WL 5829024, at *7 (W.D. Pa. Nov. 18, 2011) (“eBay may not be held liable under the CDA”
 for “facilitat[ing]” sale); *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist,
 Inc.*, 519 F.3d 666, 672 (7th Cir. 2008) (Craigslist immune under CDA; plaintiff “cannot sue the
 messenger just because the message reveals a third party’s plan to engage in unlawful [conduct]”).

1 In applying the CDA, courts look to “whether the duty” the law imposes “derives from the
 2 defendant’s status or conduct as a ‘publisher or speaker.’ If it does, section 230(c)(1) precludes
 3 liability.” *Barnes*, 570 F.3d at 1101-02. There can be no question that the duty and liabilities the
 4 Ordinance imposes on Hosting Platforms here derive from their status as publishers of third-party
 5 content. The law requires Hosting Platforms—who have no property and thus no legal or practical
 6 ability to obtain or create registration numbers—to verify third-party listings’ registration numbers
 7 and, upon penalty of criminal and civil sanctions, to screen such listings prior to publishing them.
 8 In short, if platforms do not engage in government-mandated screening of allegedly illegal
 9 (unverified) listings, they face penalties. No semantic device or interpretative gymnastics can avoid
 10 the fact that the City has directly imposed liability on Hosting Platforms for their role as publishers
 11 or speakers of third-party content. It is well settled that the CDA prohibits such efforts.

12 Section 230 protects (1) a “provider or user of an interactive computer service” from (2) any
 13 “state law” that “seeks to treat” it “as a publisher or speaker” (3) “of information provided by
 14 another information content provider.” *Barnes*, 570 F.3d at 1100-01. Each of these elements is met.

15 **(a) Hosting Platforms Are “Interactive Computer Service” Providers**

16 Hosting Platforms like Airbnb provide information to “multiple users” by giving them
 17 “computer access . . . to a computer server” (47 U.S.C. § 230(f)(2)), and therefore are interactive
 18 computer service providers under the CDA. *Roommates.com*, 521 F.3d at 1162 n.6. Indeed, the
 19 “most common interactive computer services are websites.” *Id.*; see S.F. Admin. Code § 41A.4.

20 **(b) The Ordinance Treats Hosting Platforms as “Publishers”**

21 Under the CDA “[w]hat matters is not the name of the cause of action,” but whether the law
 22 “inherently requires the court to treat the defendant as the ‘publisher or speaker’ of content provided
 23 by another.” *Barnes*, 570 F. 3d at 1101-02. Here, the obligations and liability imposed by several
 24 provisions of the Ordinance plainly derive from Hosting Platforms’ status as publishers or speakers
 25 of third-party content on the Internet, and are therefore barred by the CDA.

26 **(i) The Ordinance Imposes Liability on Hosting Platforms for
 27 Publishing Certain Third-Party Content**

28 The Ordinance violates the CDA by imposing criminal and civil liability for Hosting
 Platforms’ publishing of unverified third-party listings.

1 The Ordinance imposes liability based upon platforms’ publishing conduct in the following
 2 ways: (1) it imposes criminal liability—including imprisonment of up to six months and/or fines of
 3 up to \$1,000—on “any Hosting Platform that *provides a listing ... in violation*” of the Ordinance,
 4 S.F. Admin. Code § 41A.5(e) (emphasis added); (2) it imposes civil penalties of up to \$1,000 per
 5 day where a Hosting Platform publishes a listing without first verifying a registration number,
 6 through either failing to “*provid[e]* the verified registration number *on each listing*” or by failing to
 7 “[s]end[] the verified registration number” to the City “*prior to posting the listing on the platform,*”
 8 *id.* § 41A.5(g)(4)(C)(i)-(ii), (D) (emphases added); and (3) it similarly imposes administrative
 9 penalties of up to \$1,000 per day for “each listing” where the platform has “fail[ed]” to provide the
 10 registration number and other information in response to the City’s request, *id.* § 41A.7(b)(3).

11 In all of these instances, the penalties are imposed for the Hosting Platform’s *publication* of
 12 the unverified listing—either by posting the listing without the registration number on it, or by
 13 posting the listing without first sending the number to the City.⁶ Indeed, if such “listings” were not
 14 published, they would not be “listed” at all and there would be no basis to impose any liability.
 15 This is further confirmed by the law’s prefatory language stating that it “require[s] Hosting
 16 Platforms verify” that a unit “is on the City Registry *prior to listing,*” (emphasis added), and by the
 17 press release from Supervisor Campos’s office describing the law as “*Holding Airbnb Accountable*
 18 *for Listing Illegal Short Term Rentals.*” Blavin Decl., Ex. C at 1(emphasis added); *see id.*, Ex. G.⁷

19 These provisions are squarely barred by the CDA. Section 230 “provides broad immunity
 20 for publishing content provided primarily by third parties.” *Carafano*, 339 F.3d at 1123. Courts
 21 thus repeatedly have enjoined the enforcement of statutes like the Ordinance that impose liability
 22 for websites’ publishing of third-party listings and ads. In *Backpage.com, LLC v. McKenna*, 881 F.
 23 Supp. 2d 1262 (W.D. Wash. 2012), for example, the court preliminarily enjoined a Washington
 24 state statute on the basis that it was likely “inconsistent with and therefore expressly preempted by

25 _____
 26 ⁶ Separately, requiring *Hosting Platforms to publish hosts’* registration numbers in listings is itself
 27 barred by the CDA. “[D]eciding *not* to publish” content is just as protected as the decision to
 28 publish content. *Batzel v. Smith*, 333 F.3d 1018, 1032 (9th Cir. 2003) (emphasis in original).

⁷ *See, e.g., Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1014 (9th Cir. 2010) (“plain text
 of the preamble to” statute “sets forth that Congress had two primary purposes” in law).

1 Section 230” because it “impos[ed] liability” on websites for knowingly “publishing” or “causing to
2 be published” certain prohibited “ads for commercial sex acts” and therefore “treat[ed]” websites as
3 “the publisher or speaker of information created by third parties.” *Id.* at 1273-74 (citing, *e.g.*,
4 *Barnes*, 570 F.3d at 1101-02). Several other courts similarly have enjoined statutes that impose
5 liability based on the publication of third-party ads. *See Backpage.com, LLC v. Hoffman*, 2013 WL
6 4502097, at *6 (D.N.J. Aug. 30, 2013) (enjoining statute that “runs afoul of Section 230 by
7 imposing liability” for “publishing” third-party ads); *Backpage.com, LLC v. Cooper*, 939 F. Supp.
8 2d 805, 824 (M.D. Tenn. 2013) (enjoining statute where “sale of online advertisements regulated by
9 [statute] derives from a website’s status and conduct as an online publisher” and “thus the
10 protection of section 230 is triggered”). No different here, because the Ordinance imposes liability
11 based on platforms’ publication of unverified third-party listings, it is preempted by the CDA.

12 **(ii) The Ordinance Imposes Liability on Hosting Platforms for**
13 **Failing to Verify and Screen Third-Party Content**

14 The CDA not only immunizes Hosting Platforms against any claims based on their
15 publication of host listings, but also provides immunity from any liability for their alleged failure to
16 “verify” listings prior to posting them. S.F. Admin. Code § 41A.5(g)(4)(C); *id.* § 41A.7(b)(2).

17 During a committee hearing on the Ordinance, a Deputy City Attorney claimed that the
18 verification requirement did not violate the CDA because it “regulates the business activities” of
19 Hosting Platforms, instead of the “content of the website.” Blavin Decl., Ex. E at 3. These
20 “activities,” however, are exactly the type of publishing or editorial functions that the CDA protects.
21 In *Jane Doe No. 1 v. Backpage.com*, the plaintiffs challenged several “choices that Backpage has
22 made about the posting standards for advertisements” that they claimed were “designed to
23 encourage sex trafficking,” including most relevant here, the lack of “phone number verification”
24 for numbers in ads, as well as the “option to anonymize e-mail addresses,” the “stripping of
25 metadata from photographs uploaded to the website,” and the site’s “acceptance of anonymous
26 payments.” 817 F.3d at 16, 20-21. The First Circuit rejected the plaintiffs’ argument, similar to the
27 City’s here, that such conduct was “distinguishable from publisher functions,” holding that “section
28 230(c)(1) extends to the formulation of precisely the sort of website policies and practices that the

1 [plaintiffs] assail.” *Id.* at 20. The court emphasized that the plaintiffs’ claims “address the structure
2 and operation of the Backpage website, that is, Backpage’s decisions about how to treat postings,”
3 and “challenge features that are part and parcel of the overall design and operation of the website.”
4 *Id.* at 21. “Features such” as the “lack of phone number verification” reflect “choices about what
5 content can appear on the website and in what form,” and are “editorial choices that fall within the
6 purview of traditional publisher functions” protected by the CDA. *Id.*

7 Numerous other courts similarly have held that any alleged obligation to verify information
8 associated with third-party content prior to publishing it, including, for example, an individual’s
9 identity or age, or a posting’s accuracy, regulates publisher activity that is protected by the CDA.
10 *See, e.g., Doe v. Friendfinder Network, Inc.*, 540 F. Supp. 2d 288, 294-95 (D.N.H. 2008) (“§ 230
11 bars the plaintiff’s claims that the defendants acted wrongfully” by “failing to verify that a profile
12 corresponded to the submitter’s true identity”); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 850
13 (W.D. Tex. 2007), *aff’d*, 528 F.3d 413 (5th Cir. 2008) (claims that “MySpace liable for ineffective
14 ... policies relating to age verification” were “barred under” the CDA); *Roommates*, 521 F.3d at
15 1180 (“web[sites] are immune” for any “efforts to verify the truth of” statements).

16 No different here, the Ordinance by its plain terms holds Hosting Platforms liable for failing
17 to verify information associated with a third-party listing—its registration number, which *hosts* are
18 required to include on their listings. Indeed, the Ordinance effectively requires platforms to screen
19 listings prior to publishing them. Before posting, Hosting Platforms must determine whether hosts
20 have provided a registration number, whether it is valid, and if no number is provided, whether the
21 listing has a number and what it may be. It is well settled that “[s]creening” a listing “is akin to
22 deciding whether to publish” and thus a website “is immune under section 230 for its screening
23 decisions.” *Mazur*, 2008 WL 618988, at *9 (eBay immune for alleged failure to screen listings); *see*
24 *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1322 n.3 (11th Cir. 2006) (CDA “clearly inconsistent
25 with state law that makes” sites “liable based on their efforts to screen” third-party content).

26 These types of screening and verification requirements violate the CDA and undermine its
27 core policies. In *Cooper*, for example, a Tennessee law required a website to show, as a defense to a
28 claim that it published third-party sex ads depicting a minor, that “prior to publication” of the ad, it

1 obtained the minor’s “driver license” or “other governmental” identification, which the court found
 2 amounted to “in-person identification verification.” 939 F. Supp. 2d at 824-25. In holding that the
 3 law violated the CDA and enjoining its enforcement, the court emphasized that to avoid “significant
 4 penalties for certain ads,” websites would need to “screen[] millions of advertisements” which
 5 “would likely undermine” the “goals supporting CDA immunity,” as sites would “likely be forced to
 6 eliminate user postings” rather “than face possible liability,” and would “relax their current self-
 7 policing.” *Id.* Similarly, in enjoining a near-identical provision under Washington law, the
 8 *McKenna* court held that the “statute conflicts with Congressional intent” under the CDA “because,
 9 by imposing liability on online service providers who do not pre-screen content,” the “statute
 10 drastically shifts the unique balance that Congress created with respect to the liability of online
 11 service providers that host third party content.” 881 F. Supp. 2d at 1274. Likewise here, the
 12 requirement that platforms verify and screen listings prior to publication is barred by the CDA.

13 **(iii) The Substance and Purpose of The Ordinance to Target
 14 Third-Party Content Confirm the CDA’s Applicability**

15 Notwithstanding the City’s efforts to tiptoe around the CDA in drafting the Ordinance, its
 16 preemptive effect is further cemented by the fact that the substance and purpose of the law
 17 indisputably is to impose liability based upon the content of certain third-party listings. As
 18 Supervisor Peskin put it, the Ordinance seeks to hold the “*hosting platforms accountable for the*
 19 *hundreds of units (rented by) unscrupulous individuals*” posting listings on their sites. Blavin Decl.,
 20 Exs. A at 1; B (emphases added). Similarly, a press release from the office of Supervisor Campos
 21 describes the law as “*Holding Airbnb Accountable for Listing Illegal Short Term Rentals.*” *Id.*, Ex.
 22 C at 1 (emphasis added); *id.*, Ex. G (same). Indeed, the law provides for enforcement through a City
 23 “review of active Hosting Platform listings” posted by third parties. S.F. Admin. Code § 41A.7(b).

24 Courts repeatedly have applied CDA immunity where the clear substance of the claim is to
 25 impose liability on websites based on third-party content. In *Goddard*, the plaintiff similarly argued
 26 that her claim was “independent” of any publishing role by Google because it “stem[med] from
 27 Google’s acceptance of tainted funds from fraudulent mobile content providers.” 2008 WL
 28 5245490, at *4. The court rejected this as an “impermissible recharacterization” as the plaintiff
 “claim[ed] in essence that she was harmed because Google hosted certain online content,” in

1 “contravention of § 230.” *Id.* at *4-5; *see also Gentry*, 99 Cal. App. 4th at 831 (“substance” of
 2 “allegations reveal [plaintiffs] ultimately seek to hold eBay responsible for conduct falling” within
 3 CDA and rejecting claim they were “seek[ing] to enforce eBay’s independent duty” to “furnish a
 4 warranty,” not “as a publisher”); *MySpace, Inc.*, 528 F.3d at 418-19 (rejecting as “artful pleadings”
 5 that claim “predicated” on “failure to implement” safety measures, not “publisher” role). The CDA
 6 applies here as the Ordinance plainly seeks to hold platforms “accountable” for third-party content.

7 **(c) Listings Without Verified Registration Numbers Are Provided By**
 8 **“Another Information Content Provider”**

9 Section 230 encompasses “*any information* provided by another information content
 10 provider.” 47 U.S.C. § 230(c)(1) (emphasis added). Here, listings without verified registration
 11 numbers are content provided by “another information content provider”—third-party hosts.

12 Third parties, not Hosting Platforms, create and provide the relevant information for their
 13 listings. As the Ordinance acknowledges, Hosting Platforms like Airbnb are “*a means through*
 14 *which*” residents “*may offer a*” rental, providing an “online platform” that “*allows an Owner to*
 15 *advertise the Residential Unit* through a website.” S.F. Admin. Code § 41A.4 (emphases added).
 16 Third-party hosts create and provide descriptions of their listings, set the lengths of any particular
 17 rental, decide how many listings to place on Airbnb, and as most relevant here, are responsible for
 18 registering their short-term rentals, obtaining a registration number from the City, and including
 19 their registration numbers “on any Hosting Platform listing.” *Id.* §§ 41A.5(g)(1)(F), (g)(2)(A). As
 20 noted, Airbnb also expressly tells hosts that they are required to register their units with the City
 21 and obtain registration numbers, and provides instructions as to how they may include their
 22 numbers in their listings. *See supra* at 5. Hosting Platforms like Airbnb have no property interests
 23 in the units listed on their sites and no ability to obtain or create registration numbers, which can
 24 only come from the host. Imposing liability on platforms for failing to verify registration numbers
 25 and publishing unverified listings thus treats them as the publisher of content provided by others.

26 That a website provides third parties with “neutral tools to create web content, even if the
 27 website knows” they “are using such tools to create illegal content,” does not render the site a
 28 “content provider.” *Goddard*, 640 F. Supp. 2d at 1198 (“Keyword Tool” that “does nothing more

1 than provide options” protected); *Carafano*, 339 F.3d at 1124-25 (“menu” of “pre-prepared
 2 responses” protected). Nor does a site lose immunity if it “fails to take action despite notice of the
 3 problematic content.” *Black v. Google Inc.*, 2010 WL 3222147, at *3 (N.D. Cal. Aug. 13, 2010).
 4 Further, that sites like Airbnb may enable the processing of transactions, impose fees for their
 5 services, and offer additional functionality does not affect the CDA’s applicability. *Backpage.com*,
 6 817 F.3d at 16-17, 21.⁸ Finally, although not relevant to Airbnb here, the law is clear that “features”
 7 of a website that are purportedly “designed to encourage” or “facilitate” unlawful content are also
 8 protected by the CDA. *Id.*; see also *Jones v. Dirty World Entm’t Recordings LLC*, 755 F.3d 398,
 9 414-15 (6th Cir. 2014) (websites that “not only allow but also actively invite and encourage users to
 10 post particular types of content” immune under CDA); *Roommates.com*, 521 F.3d at 1174 (CDA
 11 applies where sites allegedly “promoted or encouraged . . . illegality of third parties”).

12 2. The Disclosure Provisions Conflict With and Are Preempted by the SCA

13 In a futile attempt to avoid the CDA, the Ordinance requires, as one method of verification,
 14 that Hosting Platforms “[s]end[] the verified registration number, Residential Unit street address,”
 15 and “host name” to the City “prior to posting the listing.” S.F. Admin. Code § 41A.5(g)(4)(C)(ii).
 16 Similarly, in response to a notice from the City that a listing does not have a registration number,
 17 platforms must verify the listing by providing to the City the number and “any other requested
 18 information,” including “unit address and host information.” *Id.* § 41A.7(b)(2)-(3). Not only do
 19 such provisions violate the CDA, but they also conflict with and are preempted by the SCA.

20 The SCA was enacted “to update and clarify Federal privacy protections and standards in
 21 light of dramatic changes in new computer and telecommunications technologies.” S. Rep. No. 99–
 22 541, at 1–2 (1986). It restricts the ability of “electronic communication service” providers, which
 23 include online services like Airbnb that allow users to connect and communicate with one another,⁹

24 _____
 25 ⁸ See *StubHub*, 219 N.C. App. at 245-46 (that StubHub “‘controlled’ the transaction by acting as an
 26 intermediary between buyer and seller” and offered “certain guarantees and assumed responsibility
 for handling the mechanics required to complete the transaction,” irrelevant under CDA).

27 ⁹ An ECS provider is “any service which provides to users thereof the ability to send or receive wire
 or electronic communications.” 18 U.S.C. § 2510(15). Websites that “provide private messaging
 28 or email” or bulletin board-type services to users, such as Airbnb, constitute ECS providers.
Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 980, 982 (C.D. Cal. 2010) (Facebook and

1 to divulge certain information to governmental entities about their users. Most relevant, the “SCA
 2 clearly prohibits communications providers from disclosing to the government basic subscriber
 3 information—including a customer’s name [and] address ...—without a subpoena.” *Telecomms.
 4 Regulatory*, 752 F.3d at 68; *see* 18 U.S.C. § 2702(a)(3) (ECS “shall not ... divulge a record or other
 5 information pertaining to a subscriber to or customer of such service ... to any governmental entity”
 6 without legal process). Indeed, “[t]hat Congress intended [the SCA] to restrict the ability of a
 7 service provider to turn over even a list of customers to a governmental entity” is “abundantly clear.”
 8 *Telecomms. Regulatory*, 752 F.3d at 67. Because the Ordinance “requires” Airbnb to “disclose” its
 9 “customers’ names” and “addresses” to a “governmental entity without a subpoena—or any process
 10 whatsoever,” it “directly conflict[s]” with and is “thus preempted by the SCA.” *Id.* at 68 (holding
 11 that SCA preempted similar disclosure provisions under Puerto Rico “Registry Act”; law enjoined).

12 **3. The Ordinance Violates the First Amendment Because It Is a Content-
 13 Based Restriction on Speech that Is Not Narrowly Tailored to Serve a
 14 Substantial Government Interest and Is Overbroad**

14 Airbnb is likely to succeed in demonstrating that the Ordinance violates the First
 15 Amendment. The Ordinance seeks to proscribe and punish speech, in the form of advertisements
 16 and online rental listings, based on the content of that speech: whether the listings advertise short-
 17 term residential rentals without a verified registration number and in a manner contrary to the
 18 Ordinance. The City cannot justify that restriction under the First Amendment.

19 There is no question that the Ordinance seeks to punish speech. It imposes “[c]riminal
 20 [p]enalties” on “any Hosting Platform that *provides a listing ... in violation*” of the Ordinance. S.F.
 21 Admin. Code § 41A.5(e) (emphasis added); *see id.* § 41A.5(g)(4)(C)-(D); § 41A.7(b)(3) (penalties
 22 of up to \$1,000 per day for “each listing” not in compliance). Publishing or posting listings
 23 advertising products or services constitutes protected speech. *See, e.g., Rubin v. Coors Brewing Co.*,
 24 514 U.S. 476, 481-82 (1995). There also is no question that the Ordinance imposes a “content- and
 25 speaker-based” restriction, which “requires heightened judicial scrutiny.” *Sorrell*, 564 U.S. at 570;
 26 *see Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A restriction is content-based if, to

27 _____
 28 MySpace are ECS providers). Airbnb also is a remote computing service (“RCS”) provider as it
 maintains on its systems communications in “electronic storage.” *Id.* at 989-90.

1 enforce it, the government “must necessarily examine the content of the message that is conveyed.”
2 *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Obviously, to enforce the law,
3 the City must examine the content of Hosting Platform listings, as the Ordinance itself recognizes by
4 ordering a City agency to undertake a “comprehensive review of active Hosting Platform listings” to
5 identify potentially unverified listings. S.F. Admin. Code § 41A.7(b). Similarly, the restriction is
6 speaker-based because it applies only to a certain category of speakers, “singl[ing] out” Hosting
7 Platforms “for disfavored treatment.” *Brown v. Entm’t Merchants Ass’n*, 564 U.S. 786, 802 (2011).

8 The verification provision similarly regulates speech. As *McKenna* held with respect to the
9 Washington law’s requirement that websites “check identification before publishing an escort ad,”
10 while “[a]t first blush,” this “seems as commonsensical as requiring bar owners to check
11 identification before allowing patrons to enter the door,” because it “is an identification
12 requirement—imposed by the government and punishable by imprisonment—related to speech,” the
13 court must consider that such a “pre-screening mechanism ... would limit the amount of content
14 available” to that which “publishers had the time and money to screen.” 881 F. Supp. 2d at 1277-78.

15 “In the ordinary case, it is all but dispositive to conclude that a law is content-based.”
16 *Sorrell*, 564 U.S. at 571. Such laws are “presumed invalid” under the First Amendment, and “the
17 Government bear[s] the burden of showing their constitutionality.” *Ashcroft v. ACLU*, 542 U.S.
18 656, 660 (2004). This presumption of invalidity applies even in the context of commercial speech.¹⁰
19 “Under a commercial speech inquiry, it is the State’s burden to justify its content-based law as
20 consistent with the First Amendment.” *Sorrell*, 564 U.S. at 571-72. The government must show
21 “that the statute directly advances a substantial government interest” and that there is a “fit between
22 the legislature’s ends and the means chosen to accomplish those ends.” *Id.* at 572; *see also, e.g.*,
23 *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995) (in commercial speech context, a
24 regulation must be “narrowly tailored to achieve the desired objective”); *Central Hudson Gas &*
25 *Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980) (government must show that regulation

26 _____
27 ¹⁰ Airbnb does not concede that “all speech hampered by [the law] is commercial,” but proceeds
28 under a commercial-speech analysis because “the outcome is the same whether a special commercial
speech inquiry or a stricter form of judicial scrutiny is applied.” *Sorrell*, 564 U.S. at 571.

1 is “not more extensive than is necessary” to serve interest at stake). There also is an efficacy
 2 component to the test: the government must establish that the challenged restriction advances the
 3 asserted interest “in ‘a direct and effective way.’” *Edenfield v. Fane*, 507 U.S. 761, 773 (1993).
 4 “[M]ere speculation or conjecture” will not suffice to carry the government’s burden. *Id.* at 770.

5 The City is highly unlikely to be able to demonstrate either that the Ordinance is a narrowly
 6 tailored means of achieving any substantial government interest or that the Ordinance is a direct and
 7 effective way of doing so. With respect to narrow tailoring, even assuming that punishing the
 8 publication of listings without a verified registration number serves a substantial government
 9 interest (which is far from clear),¹¹ the City cannot show that a *restriction on speech* is necessary to
 10 achieve that interest. “The normal method of deterring unlawful conduct is to impose an appropriate
 11 punishment on the person who engages in it,” not to punish those who engage in speech regarding
 12 the conduct. *Bartnicki*, 532 U.S. at 529; *see also, e.g., Village of Schaumburg v. Citizens for a*
 13 *Better Env’t*, 444 U.S. 620, 637 (1980) (invalidating restriction on commercial solicitation because
 14 unlawful conduct “can be prohibited and the penal laws used to punish such conduct directly”).

15 That principle is especially relevant here, where the City has acknowledged that it could
 16 directly target hosts who fail to comply with the law rather than punishing Hosting Platforms that
 17 publish listings. The Ordinance requires the OSTR to “actively monitor Hosting Platform listings
 18 ... on at least a monthly basis” to identify “potentially non-compliant listings.” S.F. Admin. Code
 19 § 41A.7(b). And existing San Francisco law requires hosts to include their registration numbers on
 20 their listings. *Id.* § 41A.5(g)(1)(F). Having identified allegedly unlawful rentals in this manner, the
 21 City could initiate enforcement proceedings directly against those hosts for those rentals.

22 Indeed, the City *already has begun doing so*: The OSTR has assessed nearly \$700,000 in
 23

24 ¹¹ The sponsors of the Ordinance have articulated a variety of rationales for it, many of which do not
 25 constitute substantial government interests. For instance, the sponsors have stated that the law’s
 26 approach of imposing liability on Hosting Platforms rather than hosts themselves is justified because
 27 of the need for “corporate accountability.” Blavin Decl., Ex. C at 1. But the government cannot
 28 justify its decision to proscribe *speech* on the ground that certain speakers are less popular than other
 actors. Such targeting of unpopular speakers is exactly what the First Amendment is meant to
 prevent. *See, e.g., Brown*, 564 U.S. at 802; *Florida Star v. B.J.F.*, 491 U.S. 524, 540 (1989) (state
 “must demonstrate its commitment to advancing [its] interest by applying its prohibition [against
 speech] evenhandedly, to the smalltime disseminator as well as the media giant.”).

1 penalties against hosts, and as the Budget and Legislative Analyst’s Office report noted, may be able
2 to “further close” the “gap” between the number of registered hosts and hosts “advertising short-
3 term rentals on online platforms” in “coming months as OSTR became fully staffed in December
4 2015.” Blavin Decl., Ex. F at 21. The report further stated that the City can “simplify the short-
5 term rental registration process as the existing system might deter otherwise compliant short-term
6 rental hosts,” *id.* at 4, and the Ordinance requires the OSTR to promulgate rules accomplishing that
7 goal, S.F. Admin. Code § 41A.7(a). Supervisor Wiener also recently observed that there has been
8 an “acceleration in the number of hosts registering,” and the City is “moving in a positive direction”
9 in enforcing the law. Blavin Decl., Ex. I at 3; *see also id.*, Ex. F at 18 (City report noting “wave of
10 compliant behavior towards the end of 2015”). The City has not even attempted to demonstrate that
11 this obvious alternative of enforcing existing law directly against hosts who violate it is insufficient
12 to accomplish the City’s purpose. This dooms the Ordinance under the First Amendment. *See, e.g.*,
13 *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 826-27 (9th Cir. 2013) (enjoining anti-solicitation law
14 where state did not show ineffectiveness of directly enforcing “preexisting” laws to “address
15 legitimate traffic safety concerns” instead of speech); *McKenna*, 881 F. Supp. 2d at 1284 (invalidating
16 law banning publication of ads for sexual encounters because state had “fail[ed] to demonstrate why
17 a law targeting only the individuals who post ads would not be effective, rather than seeking to
18 impose felony liability on online service providers”); *Cooper*, 939 F. Supp. 2d at 840 (similar).

19 The proponents of the Ordinance have suggested that imposing liability on Hosting
20 Platforms for publishing listings will make the City’s regulatory scheme more effective and efficient
21 in preventing unlawful conduct. *See* Blavin Decl., Ex. A at 1. That contention is both wrong on its
22 own terms and insufficient to sustain the Ordinance under the First Amendment. In reality, not only
23 is direct enforcement of the Ordinance against hosts technically feasible, *see supra* at 7, but it would
24 also be *more effective* in achieving the sponsors’ stated goal of punishing “unscrupulous
25 speculators” who list multiple properties in violation of the law, rather than “mom and pop” hosts.
26 *Id.*, Ex. H at 1. The law’s punishing of Hosting Platforms for publishing listings, by contrast, will
27 affect *all* hosts where the platform cannot verify the registration numbers, including “mom and pop”
28 hosts the City professes to want to protect. This disconnect between the City’s asserted aims and the

1 speech-restrictive means chosen also dooms the Ordinance. *See City of Cincinnati v. Discovery*
2 *Network, Inc.*, 507 U.S. 410, 424-25 (1993) (invalidating law restricting newspaper racks as it was
3 not tailored to achieving city’s asserted aesthetic interest); *Valle Del Sol*, 709 F.3d at 827 (similar).

4 Moreover, even if it were true that the Ordinance would be a more efficient or effective way
5 of preventing unlawful short-term rentals than direct enforcement against hosts who violate the law,
6 that would not be an adequate basis for upholding the Ordinance. The First Amendment precludes
7 the government from restricting advertising and speech simply because it may be more politically or
8 administratively convenient than a direct regulation of conduct. *See Thompson v. W. States Med.*
9 *Ctr.*, 535 U.S. 357, 373 (2002) (speech restrictions must be “a necessary as opposed to merely
10 convenient means of achieving [the government’s] interests”); *Yniguez v. Arizonans for Official*
11 *English*, 42 F.3d 1217, 1234 (9th Cir. 1994) (“The government cannot restrict the speech of the
12 public ... just in the name of *efficiency*.”). The City seeks to place the burden of verifying each
13 host’s compliance with the law on Hosting Platforms—a burden that is likely to be substantial,
14 given the effort needed to verify all of the thousands of San Francisco rental listings on Airbnb.
15 Owen Decl., ¶¶ 16-17. But the government may not seek to “shift[] the burden of enforcing the law
16 from the taxpayer” to speakers or publishers of information simply because it is easier to do so. *See*
17 *News & Sun Sentinel Co. v. Bd. of Cnty. Comm’rs*, 693 F. Supp. 1066, 1072 (S.D. Fla. 1987).

18 For similar reasons, the City will be unable to establish that the Ordinance achieves the
19 City’s interests in ““a direct and effective way.”” *Edenfield*, 507 U.S. at 773. By its own terms, the
20 Ordinance operates in an *indirect* way: it targets the behavior of “unscrupulous speculators” and
21 other third-party hosts by imposing liability on Hosting Platforms. Blavin Decl., Ex. H at 1.
22 Further, the City has not put forward any evidence showing that the Ordinance will achieve its
23 purported goal of bringing units back to the long-term rental market. Indeed, a recent study by the
24 city planning and research organization SPUR states that “[d]ata from Airbnb suggests that the vast
25 majority of properties listed in San Francisco are not being removed from the long-term residential
26 market.” Blavin Decl., Ex. J at 9; *see also* Owen Decl., Ex. 5 at 4 (rentals by Airbnb hosts who may
27 list more than one home for short term rental are 0.18% of all units in City). Courts have invalidated
28 restrictions on commercial speech where, as here, the argument that a restriction will serve a

1 substantial government interest is “speculati[ve]” at best. *Edenfield*, 507 U.S. at 770-71 (restriction
 2 invalidated where state presented no “studies” or other “evidence” that law would achieve aims);
 3 *Memphis Publ’g Co. v. Leech*, 539 F. Supp. 405, 411 (W.D. Tenn. 1982) (same).

4 Finally, the Ordinance is unconstitutionally overbroad as it punishes Hosting Platforms for
 5 publishing *any* listing without complying with its “verification” measures—even those listings that
 6 may be registered and lawful. *See McKenna*, 881 F. Supp. 2d at 1280 (law overbroad where it
 7 “encompasses [ads] that are not illegal”). Indeed, the “Constitution gives significant protection from
 8 overbroad laws that chill speech,” and that concern “is especially strong where” the “statute imposes
 9 criminal sanctions.” *Doe v. Harris*, 772 F.3d 563, 577-78 (9th Cir. 2014). Here, in the face of
 10 substantial criminal and civil penalties for non-compliance, and a burdensome verification process,
 11 platforms likely would over-remove or not publish lawful listings. *See Owen Decl.* ¶¶ 18-20.

12 **C. Airbnb Faces Irreparable Harm Unless the Ordinance is Enjoined**

13 For several reasons, Airbnb is likely to suffer irreparable harm absent an injunction.

14 *First*, Airbnb faces the threat of prosecution and significant penalties under a preempted law,
 15 which the Ninth Circuit and other courts have recognized constitutes irreparable harm. *See Valle del*
 16 *Sol*, 732 F.3d at 1029 (“irreparable harm” exists where plaintiff “demonstrated a credible threat of
 17 prosecution” under preempted law); *Georgia Latino Alliance for Human Rights v. Governor of*
 18 *Georgia*, 691 F.3d 1250, 1269 (11th Cir. 2012) (irreparable harm exists where “Plaintiffs are under
 19 the threat of state prosecution for crimes that conflict with federal law”); *Morales v. Trans World*
 20 *Airlines, Inc.*, 504 U.S. 374, 381 (1992) (“irreparable injury” exists where “attorneys general ...
 21 made clear that they would seek to enforce” preempted law and plaintiffs face “Hobson’s choice” of
 22 “expos[ing] themselves to potentially huge liability” or “suffer[ing] the injury of obeying” the law).

23 *Second*, Airbnb’s loss of First Amendment freedoms, even for minimal periods of time,
 24 “unquestionably constitutes irreparable injury.” *Farris*, 677 F.3d at 868.

25 *Third*, the risk of criminal penalties, including possible jail time, if the City is permitted to
 26 enforce the Ordinance additionally constitutes irreparable harm. *See Hoffman*, 2013 WL 4502097,
 27 at *12 (irreparable harm where, “[a]bsent injunctive relief, Plaintiffs may face serious criminal
 28 liability”); *Toomer v. Witsell*, 334 U.S. 385, 392 (1948) (where “defiance would have carried with it

1 the risk of heavy fines and long imprisonment,” “imminence of irreparable injury” shown).

2 *Fourth*, the risk of fines reaching into the millions of dollars or more per day constitutes
3 irreparable harm. The Ordinance authorizes fines of up to \$1,000 per day for *each* violation, and the
4 proponents of the Ordinance have claimed that there are approximately 6,000 unregistered Airbnb
5 listings in San Francisco, Blavin Decl., Ex. K at 1—amounting to fines of \$6,000,000 per day.
6 Courts have found irreparable harm based on fines of this magnitude. *See, e.g., Satellite Television*
7 *of N.Y. Assocs. v. Finneran*, 579 F. Supp. 1546, 1551 (S.D.N.Y. 1984) (irreparable harm “readily”
8 shown where plaintiff “faced with a choice of” complying or incurring “fine of \$2,000 a day”).

9 The prospect of Airbnb facing criminal and civil penalties, moreover, is not just speculative
10 or hypothetical. The Ordinance squarely takes aim at Airbnb’s business operations, and indeed its
11 proponents explicitly labeled and promoted it as a measure targeted at Airbnb. Blavin Decl., Exs. C;
12 K. In these circumstances, courts have not hesitated to find irreparable harm based on the high
13 likelihood of enforcement. *See Cooper*, 939 F. Supp. 2d at 819 (high likelihood of enforcement
14 where Backpage.com was “direct target” of law); *McKenna*, 881 F. Supp. 2d at 1270 (same).

15 *Fifth*, the Ordinance also gives rise to irreparable injury by being highly disruptive to
16 Airbnb’s operations and threatening a loss of consumer goodwill. There are approximately 9,600
17 listings presently on Airbnb in San Francisco, and listings are continuously being added to (and
18 removed) from the site. Owen Decl., ¶ 15. For each listing, Airbnb would need to verify the
19 existence of a valid registration number, but the Ordinance does not provide any specific procedures
20 for Airbnb to accomplish that. Airbnb likely would need to create a dedicated team of employees
21 devoted full time to verifying listings manually, and would need to re-design its website. *Id.* ¶¶ 16-
22 17. Implementing such procedures likely would take a significant period of time. *Id.* As such, the
23 only way Airbnb could avoid the law’s substantial criminal and civil penalties would be to remove
24 thousands of listings from its site. *Id.* ¶ 18. This would include the removal of listings that may
25 otherwise be in compliance with the law as Airbnb will not have the ability to confirm the validity
26 of their registration numbers prior to the effective date. *Id.* ¶¶ 19-20. As a result of this significant
27 disruption to its business and a loss of consumers who may never return to the platform even if the
28 law is ultimately overturned, Airbnb faces the serious risk of an erosion in consumer trust and

1 goodwill. *Id.* ¶ 20. This constitutes irreparable harm. *Am. Trucking*, 559 F.3d at 1058 (irreparable
 2 harm exists where enforcement of preempted law will cause “part of” plaintiff’s “business” and
 3 “goodwill” to “evaporate”); *Mahroom v. Best W. Int’l, Inc.*, 2009 WL 248262, at *3 (N.D. Cal. Feb.
 4 2, 2009) (“[m]ajor disruption of a business” threatening “goodwill” is “irreparable harm”).

5 Additionally, when unlawful regulations create the perception that a company’s activities are
 6 illegal, the resulting loss in customer goodwill is irreparable. *See Aeroground, Inc. v. City & Cnty.*
 7 *of San Francisco*, 170 F. Supp. 2d 950, 959 (N.D. Cal. 2001) (irreparable harm to goodwill where
 8 party “is refusing to comply with a rule that it believes is preempted by federal law”). Here, the
 9 Ordinance engenders the inaccurate perception that Airbnb’s activities may be illegal, creating
 10 confusion among potential hosts and guests alike, and driving consumers away from the platform.

11 **D. The Balance of Equities and Public Interest Favor Airbnb**

12 The balance of equities tips decidedly in favor of Airbnb. Airbnb faces deprivation of its
 13 constitutional rights, which far outweighs any harm the City might claim. *Klein v. City of San*
 14 *Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009). Harms to Airbnb in the form of impending criminal
 15 penalties and fines, as well as lost goodwill, also weigh in its favor. The City can claim little harm
 16 to outweigh these significant injuries: The Ordinance does not become effective until July 24, so the
 17 City does not face disruption of established practices. *McKenna*, 881 F. Supp. 2d at 1286 (“harm to
 18 the government [is not] great” where “[n]o prosecutions have yet been [t]aken”).

19 The public interest also strongly favors Airbnb. The public interest is served by “the
 20 Constitution’s declaration that federal law is to be supreme.” *Am. Trucking*, 559 F.3d at 1059-60;
 21 *see Bank One, Utah v. Gutttau*, 190 F.3d 844, 847-48 (8th Cir. 1999) (“public interest will perforce
 22 be served by enjoining the enforcement of [preempted] state law”). In addition, “it is always in the
 23 public interest to prevent the violation of a party’s constitutional rights.” *Melendres*, 695 F.3d at
 24 1002. It also is in the public interest to protect Airbnb from criminal liability and lost consumer
 25 goodwill resulting from unlawful regulation. By contrast, an injunction would not prevent the City
 26 from enforcing its laws against those non-compliant hosts who directly violate them.

27 **IV. CONCLUSION**

28 For the foregoing reasons, the Court should grant the motion for a preliminary injunction.

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