No. 17-1656

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEEP CHICAGO LIVABLE, an Illinois not-for-profit corporation, BENJAMIN THOMAS WOLF, SUSAN MALLER, DANIELLE MCCARRON, ANTOINETTE WONSEY, MONICA WOLF and JOHN DOE, individuals **Plaintiffs-Appellants,** **vs.** **THE CITY OF CHICAGO, a Municipal corporation** **Defendant-Appellee**	**Appeal from the United States District Court For the Northern District of Illinois, Eastern Division** **Civ. Action No. 16 cv 10371** **Hon. Sara L. Ellis, Presiding Judge** **Appellants' Opening Brief**

APPELLATE BRIEF
for Plaintiffs-Appellants Keep Chicago Livable, Benjamin Thomas Wolf, Susan Maller, Danielle McCarron, Antoinette Wonsey, Monica Wolf and John Doe

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

On March 30, 2017, Plaintiffs and Plaintiffs' counsel their Rule 26.1 corporate disclosure statement. KCL has no parent corporations or any publicly held companies that own 10% or more of KCL's stock (as a not-for-profit corporation, KCL has no shares or stock). Attorneys Shorge Sato of the law firm Shoken Legal, Ltd. and Robert S. Reda of the law firm Reda & Des Jardins LLC have appeared in this case, and Mr. Sato is Plaintiffs' counsel on this appeal.

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JURISDICTIONAL STATEMENT

A. Basis for District Court Jurisdiction

The United States District Court for the Northern District of Illinois (the "District Court") has federal question subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3) and 42 U.S.C. §1983, because Plaintiffs allege that the Shared Housing Ordinance violates their Constitutional rights guaranteed under the First Amendment, the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. In particular, Plaintiffs allege:

1. That the Shared Housing Ordinance violates their First Amendment guarantee of freedom of speech by operating as a prior restraint on speech [Am. Cmplt., Dkt. No. 29, PageID#464-466];
2. That the Shared Housing Ordinance violates their First Amendment guarantee of freedom of speech by compelling government speech that is non-factual and/or controversial and not for the purpose of consumer protection [*id.*, PageID#466-470];
3. That the Shared Housing Ordinance violates their First Amendment guarantee of freedom of speech as content-based discrimination [*Id.*, PageID#470-471]
4. That the Shared Housing Ordinance violates the Due Process Clause of the Fourteenth Amendment because it is too long, vague and prolix for a person of common intelligence to understand [*Id.*, PageID#471-474];

5. That the Shared Housing Ordinance violates the substantive Due Process Clause of the Fourteenth Amendment which protects the fundamental rights of Americans to both intimate and expressive association [*Id.*, PageID#475-479];
6. That the Shared Housing Ordinance violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally discriminating between "shared housing units" and "guest suites" both of which are defined as "hotel accommodations" under the law [*Id.*, PageID#480-482]; and
7. That the Shared Housing Ordinance violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally discriminating between "shared housing units" and "hotels" both of which are defined as "hotel accommodations" under the law [*Id.*, PageID#483-484]

B. Basis for Court of Appeals' Jurisdiction

28 U.S.C. § 1292(a)(1) confers jurisdiction upon the United States Court of Appeals for the Seventh Circuit. The interlocutory orders being appealed were orders (1) denying Plaintiffs' motions for preliminary injunction (in part), as entered on March 13, 2017 [Dkt. No. 35 and 36], (2) lifting or refusing to extend a temporary injunction against the effective date of the Shared Housing Ordinance as requested in a second motion for preliminary injunction on March 14, 2017 [Dkt. No. 37], and (3) the denial on March 15, 2017 of a motion for

reconsideration filed on March 14, 2017 [Dkt. No. 40] that sought specific findings of fact and conclusions of law as to why the District Court was refusing to enjoin the effective date of the Ordinance or stay the Ordinance pending appeal. [Dkt. No. 41].

C. Filing Dates

The Notice of Appeal was filed on March 28, 2017. [Dkt. No. 42]. This appeal is filed within thirty (30) days of each of these orders. Fed. R. App. P. 4(a)(1)(A). This Appellants' Brief is filed within forty (40) days of the date of the docketing of the Appeal.

D. Interlocutory Appeal

This is not an appeal from a final order or judgment that disposes of all parties' claims, but is an interlocutory appeal from the denial of a motion for preliminary injunction. Appealable interlocutory orders refusing preliminary injunctive relief were entered by the District Court on March 13, 2017, March 14, 2017 and March 15, 2017. This is a civil appeal as a matter of right pursuant to 28 U.S.C. § 1292(a)(1) and Federal Rule of Appellate Procedure 3(a).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court abuse its discretion by failing to extend the agreed injunctive order to make findings of fact or conclusions of law regarding Plaintiffs' new claims that the Shared Housing Ordinance violated Plaintiffs' Freedom of Intimate and Expressive Association and rights to Equal Protection?

2. Did the District Court abuse its discretion by failing to properly analyze Plaintiffs' First Amendment speech claims under any degree of scrutiny?

3. Should this Court enter a limited remand for the District Court to make findings of fact and conclusions of law on the Free Speech, Intimate and Expressive Association and Equal Protection claims, while reinstating the agreed injunction pending a ruling and review?

STATEMENT OF THE CASE

On June 22, 2016, the City of Chicago ("Defendant" or the "City") passed Ordinance O2016-5111 amending Titles 2, 3,4 and 17 of the Municipal Code regarding Shared Housing Units and Vacation Rentals (herein, as amended, the "Shared Housing Ordinance" or the "Ordinance"). Section 19 of this law provided that Section 2 of the Shared Housing Ordinance (regarding a 4% "additional surcharge") would go into effect on July 1, 2016, that the portion of the Ordinance creating Section 4-13-260(a)(9) and Section 4-13-270(c) of the Municipal Code would take effect on July 15, 2016, and that "[t]he remainder of this Ordinance shall take effect 150 days following its passage and publication." [Dkt. No. 1-1, PageID#131].

Upon information and belief, the Ordinance was officially "published" in the City of Chicago Journal of Proceedings for the City Council on or about July 18, 2016, making the effective date on or around December 17, 2016. [Dkt. No. 1, ¶ 37, PageID#9]. On November 4, 2016, the original plaintiffs Keep Chicago Livable, an Illinois not-for-profit corporation advocating for home sharing in Chicago, and Benjamin Thomas Wolf filed their initial complaint against Defendant, alleging that the Ordinance violated their First Amendment rights to free speech, their Fourth Amendment right against warrantless and unreasonable searches of their home, and claims under the Fifth, Eighth and Fourteenth Amendment (void for vagueness), and claims under the Illinois Constitution and that the law violated the federal Stored Communications Act,

18 U.S.C. § 2701, *et seq.* and the Illinois Trade Secrets Act, 765 ILCS 1065/1 *et seq.* [Dkt. No. 1].

On December 1, 2016, the plaintiffs filed their first Motion for Preliminary Injunction against the Shared Housing Ordinance [Dkt. No. 11]. On December 13, 2016, the District Court entered an "Agreed Stay and Scheduling Order," whereby subject to certain provisions that were allowed to take effect, the parties agreed and stipulated "to stay the effective date of the provisions of the Shared Housing Ordinance scheduled to take effect on December 17, 2016 until February 28, 2017, unless otherwise ordered by the Court." [Dkt. No. 19, PageID#210].

On or about January 13, 2017, the City of Chicago published a "Prohibited Buildings List" that identified nearly 1,000 buildings and 100,000 units that would be prohibited from being listed on home-sharing internet sites such as Airbnb. [Dkt. No. 29, ¶ 4, PageID#457]. On February 1, 2017, the District Court entertained oral argument on the legal merits of the first motion, although no witnesses were called and no evidence was presented. [Dkt. No. 27]. On February 22, 2017, the City of Chicago passed certain amendments to the Shared Housing Ordinance, that partially mooted portions of the Complaint. [Dkt. No. 28].

On February 23, 2017, the District Court, over the City's objection, extended the stay on the Ordinance through March 3, 2017, and ordered Plaintiffs to file an amended complaint in response to the amended Ordinance

by February 27, 2017 and ordered Plaintiffs to file an amended motion for preliminary injunction by February 28, 2017. [Dkt. No. 28]. On February 27, 2017, Plaintiffs timely filed their Amended Complaint, dropping certain counts and focusing on the First Amendment and Fourteenth Amendment due process claims, while also adding new claims for violation of the fundamental rights of association and the Equal Protection Clause, and adding five (5) new individual plaintiffs. [Dkt. No. 29].

On February 28, 2017, Plaintiffs timely filed their Amended Motion for Preliminary Injunction and Memorandum in Support. [Dkt. Nos. 30 and 31]. On March 2, 2017, the District Court – again over the City's objections – extended the "stay" on the Ordinance to March 14, 2017 in light of the new pleading and to allow the District Court to finish writing its memorandum opinion on the first motion for preliminary injunction. [Dkt. No. 14]. No briefing schedule was set on the second Preliminary Injunction motion.

On March 13, 2017, the District Court published its Opinion and Order denying the Original Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 11] and denying Plaintiffs' Amended Motion for Preliminary Injunction [Dkt. No. 30] "[t]o the extent [it] seeks an injunction based on their First Amendment and Fourteenth Amendment due process claims." [Dkt. No. 36, PageID#650; Dkt. No. 35]. On March 14, 2017, the District Court "ordered that the stay on the enforcement of the ordinance is lifted," and set a briefing schedule for the City to respond to the Amended Complaint. [Dkt. No. 37]. On March 15, 2017, the

District Court denied Plaintiffs' emergency motion for reconsideration [Dkt. No. 38].

On March 28, 2017, Plaintiffs filed their Joint Notice of Appeal with the Clerk for the District Court. [Dkt. No. 42]. On April 18, 2017, the District Court partially granted the City's motion to stay litigation pending this interlocutory appeal. [Dkt. No. 49].

SUMMARY OF ARGUMENT

This interlocutory appeal arises out of the partial denial of Plaintiffs' motions for preliminary injunctive relief against the City of Chicago's Shared Housing Ordinance, which seeks to regulate the activity of home sharing (inviting guests to stay over in one's own residence) by forcing individuals to preregister with the City before they are allowed to post a listing on the internet on sites such as Airbnb. After the Shared Housing Ordinance was amended by the City, Plaintiffs filed an Amended Complaint that added new claims – in addition to previously asserted First and Fourteenth Amendment due process claims – that argued that the Shared Housing Ordinance, as amended, violated fundamental rights to intimate and expressive association as well as the right to Equal Protection by unfairly and unreasonably discriminating against individuals, as opposed to corporations, engaged in the same activity.

On March 13, 2017, the District Court denied Plaintiffs' motion for preliminary injunction in part by only addressing Plaintiffs' First Amendment and Fourteenth Amendment Due Process claims. The District Court did not address and has never addressed Plaintiffs' new claims that the Shared Housing Ordinance violated the fundamental rights of hosts and guests to intimate and/or expressive association or hosts' right to Equal Protection. In violation of Rule 52(a) of the Federal Rules of Civil Procedure, the District Court did not make any findings of fact or state any conclusions of law with respect to these new claims, other than to assert that such claims could have been brought earlier.

More fundamentally, the District Court erred in failing to address Plaintiffs' First Amendment claims under any standard of review for speech claims. Instead of applying tests for fully protected speech or commercial speech, the District Court concluded, erroneously and without any fact-finding, that a law that directly regulates speech on the internet does not in fact regulate speech. Additionally, the District Court erred by failing to acknowledge that Airbnb hosts' speech is inextricably intertwined with Airbnb's requirement that members who wish to host other Airbnb members list a price term in their listing, meaning that regulation of such speech is be scrutinized under the standard for fully protected speech.

Moreover, the District Court ignored the normative question of whether Airbnb listings should be analyzed under the intermediate standard of scrutiny for commercial speech at all. Given that a substantial number of users of Airbnb are casual hosts who participate on the site as a hobby and not as a for-profit business, the mere fact that their listings may be characterized as "commercial speech" does not necessarily mean that the Constitutional standard for regulating "commercial speech" should apply, where the justifications for lower scrutiny for "commercial speech" – namely, the durability of the commercial speakers and their knowledge of their product and the market – do not apply.

Finally, even if Airbnb listings – even by the casual or occasional host – are viewed as "commercial speech," the District Court erred because the City has not met its burden of showing a "means-end" fit with legitimate interests.

ARGUMENT

I. Introduction

Airbnb – an internet platform that connects local residents with out-of-state guests for short-term accommodations – is a global phenomenon built around the promise to "live like a local."[1] Short-term rentals are also big business: Airbnb, Inc., a privately held company, is valued at $31 billion.[2] Airbnb activity generated $67 million for Chicago hosts in 2016, and in turn stimulated $331 million in economic activity, according to one recent report.[3] Approximately 7,600 Chicagoans used Airbnb as a host in 2016, making an average of $4,100.[4]

For some hosts, Airbnb hosting is like a business: they rent out empty rooms and apartments primarily for an expectation of profit. For other hosts,

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[1] Benner, Katie, "Airbnb Wants Travelers to 'Live Like a Local' With Its App," NEW YORK TIMES (Apr. 19, 2016), *available at* https://www.nytimes.com/2016/04/20/technology/airbnb-wants-travelers-to-live-like-a-local-with-its-app.html?_r=0 (last viewed May 6, 2017). A true and correct copy of this article is reproduced as part of the Appendix hereto.

[2] Thomas, Lauren, "Airbnb just closed a $1 billion round and became profitable in 2016," cnbc.com (Mar. 7, 2017), *available at* http://www.cnbc.com/2017/03/09/airbnb-closes-1-billion-round-31-billion-valuation-profitable.html (last viewed May 6, 2017). A true and correct copy of this article is reproduced as part of the Appendix hereto.

[3] Cheroe, Heather and Ali, Tanveer, "Airbnb Hosts in Chicago Made $67 Million in 2016, Company Says," DNAInfo.com (May 5, 2017), *available at* https://www.dnainfo.com/chicago/20170504/bronzeville/airbnb-home-sharing-economic-impact-2016-hosts (last viewed May 6, 2017). A true and correct copy of this article is reproduced as part of the Appendix hereto.

[4] *Id.*

however, Airbnb is more like social media – they engage in it casually and selectively, not for profit motives *per se*, but to make new friends with fellow travelers who wish to "live like a local." [Am. Cmplt., ¶¶ 30-34, 38, Dkt. No. 29, PageID#463-464]. Although every Airbnb booking could, cynically, be boiled down to a *quid pro quo* exchange of "money-for-a-bed," according to Airbnb, 85% of Airbnb guests in Chicago used Airbnb specifically for the immersive experience of interacting with their Chicago-based host.[5] [Am. Cmplt. ¶¶ 38, 100-101, Dkt. No. 29, PageID#464, 476]. The many sworn statements submitted by Airbnb hosts also confirms that many hosts participate on Airbnb for primarily social reasons. [*See*, e.g., Dkt. No. 23-1, PageID#397-402, 422-424].

In June 2016, the City of Chicago (amongst other municipalities) passed a comprehensive law regulating short-term rentals, referred to herein as the Shared Housing Ordinance. [Dkt. No. 29-1, PageID#486-543]. This law, which was crafted as a compromise with Airbnb, Inc., treats all Airbnb activity as if it were a business. All Airbnb members in Chicago who wish to host are required to register or license with the City before they can maintain a listing on Airbnb. Once they register or license, however, hosts are subject to a laundry-list of onerous regulations – including the City deeming their home to be a "public accommodation" – and registered hosts are personally at risk for fines of up to $5,000 per day per violations. Hosts are also subject to being banned not only from booking short-term guests through Airbnb, but from also maintaining a

[5] *Id.*

listing on Airbnb (or other similar internet-based intermediaries) for years into the future. The Shared Housing Ordinance, which ostensibly seeks to regulate Airbnb activity, operates as a functional ban on communication through Airbnb, and puts Chicagoans to a Hobson's Choice of choosing between exercising their Constitutional rights at the risk of personal bankruptcy.

II. Standard of Review

In cases involving fundamental rights such as those rights protected by the First Amendment, this Court must "make an independent review of the record" to decide whether "a given course of conduct falls on the near or far side of the line of constitutional protection." *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) (finding that the freedom of "expressive association" is rooted in the First Amendment). "On a review of the district court's denial of a preliminary injunction, legal conclusions are reviewed *de novo,* findings of historical or evidentiary fact for clear error, and the balancing of the injunction factors for an abuse of discretion." *Id.* The loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate, and injunctions protecting First Amendment freedoms are always in the public interest. *Id.* When a party seeks a preliminary injunction against a potential violation of the party's fundamental constitutional rights, the likelihood of success on the merits should be the determinative factor. *Joelner v. Village of Washington Park, Illinois*, 378 F.3d 613, 620 (7th Cir. 2004). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable constitutes irreparable injury."" *Id.* at 620 (quoting in part *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion). "[T]he 'quantification of injury is difficult and damages are therefore not an adequate remedy.'" *ACLU v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012).

III. The District Court Abused Its Discretion By Failing To Extend The Agreed Injunction To Make Findings Of Fact Or Conclusions Of Law Regarding Plaintiffs' New Freedom Of Association And Equal Protection Claims.

A. The New Freedom of Association Claims Are Meritorious, Such That Plaintiffs Have A Substantial Likelihood Of Success.

With their Amended Complaint, Plaintiffs raise new and unanswered claims that the Shared Housing Ordinance, as amended, violates the fundamental rights of both hosts and out-of-state guests to intimate and expressive association. In particular, Plaintiffs raised the following examples:

- Plaintiff Monica Wolf, a bourbon consultant from Louisville, Kentucky and a member of Bourbon Women America (a group that promotes bourbon consumption and appreciation amongst women), uses Airbnb to stay with female bourbon enthusiasts in Chicago. Her ability to legally enjoy and appreciate her passion for bourbon with Chicago Airbnb hosts is infringed by the Shared Housing Ordinance, which prohibits Airbnb hosts from "providing alcohol" to their Airbnb guests – even a glass of whiskey. [Am. Cmplt. ¶¶ 23-24, 102, Dkt. No. 29, PageID#461, 476-477; Pls. Mem. In Supp. of Mot. for Prelim. Inj., Exh. E, Dkt. No.31-5, PageID#603-604].
- Plaintiff John Doe, a Canadian national and a chartered accountant,

wishes to move to Chicago in the near future, and uses Airbnb to explore neighborhoods and buildings and meet people in the core downtown area where he wishes to move. His ability to associate with Chicagoans is inhibited by the "Prohibited Buildings List," whereby 1,000 buildings have prohibited over 100,000 condominium unit owners in Chicago from even listing pictures and descriptions of their buildings and condominium units on sites like Airbnb. [Am. Cmplt. ¶¶25, 103, Dkt. No. 29, PageID#461, 477]

- Plaintiff Antoinette Wonsey, a resident of the southside Chicago neighborhood of Englewood, wishes to host out-of-town guests in her immaculately kept home in a neighborhood otherwise publicly maligned as a "war zone" to show them a different side of Chicago, and change "hearts and mind" by having these people experience Chicago for themselves, first person, by living there. [Am. Cmplt. ¶¶9, 21-22, 109, Dkt. No. 29, PageID#458, 461, 478; Pls. Mem. In Supp. of Mot. for Prelim. Inj., Exh. I, Dkt. No.31-9, PageID#615].
- Plaintiff Benjamin Thomas Wolf, a Chicago resident and a Ph.D candidate in international psychology (and president of Keep Chicago Livable), uses Airbnb to meet international guests to further his studies, and also to meet other Airbnb hosts from other cities to discuss the effect of home sharing regulations upon their practices. [Am. Cmplt. ¶¶ 9, 15-16, 106-108, Dkt. No. 29, PageID#458, 460, 477-478; Pls. Mem. In Supp. of Mot. for Prelim. Inj., Exh. H, Dkt. No.31-8, PageID#614].

- The Art Institute of Chicago used Airbnb to invite fans of Vincent Van Gogh to stay overnight in a re-creation of the bedroom famously depicted in his painting, "Bedroom in Arles." [Pls. Mem. In Supp. of Mot. for Prelim. Inj., Exh. G, Dkt. No.31-7, PageID#610-613].
- Additionally, Airbnb has publicly invited its hosts to open their homes to guests affected by natural disasters or to political refugees at heavily discounted or subsidized rates. [Pls. Mem. In Supp. of Mot. for Prelim. Inj., Exh. F, Dkt. No.31-6, PageID#605-609].

These are but some of the myriad of ways that Airbnb is used as a platform to connect Chicago hosts with out-of-state or international guests of their choosing, in order to interact, engage in high-level discourse and make new connections or friends in one of the most intimate settings imaginable: sitting around a dinner table and having a guest sleep over in one's own home.

"[B]ecause the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State… [C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State." *Roberts v. United States Jaycees*, 468 U.S. 609, 618-619 (1984). The Supreme Court recognizes two distinct types of freedom of association: freedom on intimate association, and the freedom of expressive

association. *Id.* at 619.

Although the archetype of "intimate association" is the bond represented by family and marriage, the Supreme Court has "not held that constitutional protection is restricted to relationships among family members." *Bd. of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987). Rather, the Supreme Court recognizes a "spectrum from the most intimate to the most attenuated of personal attachments" based on a relationship's "objective characteristics." *Roberts*, 468 U.S. at 620. In assessing the "objective characteristics" of a given intimate association, a court should consider "attributes [such] as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship." *Roberts*, 468 U.S. at 620.

Here, the "intimate association" claims are brought by two non-Chicagoans: Monica and "John Doe." These claims illustrate that even if the Shared Housing Ordinance could be validly applied to some or even many people, there are a substantial number of people like Monica and "John Doe" to whom this law would be unconstitutional – and that therefore, the Shared Housing Ordinance is facially overbroad. *See Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799-801 (1984).[6]

[6] Particularly concerning, from a "chilling" perspective, is that future plaintiffs may be deterred from ever engaging in these associations because (a) they live in a building that is on the Prohibited Buildings List, (b) they are deterred from even signing up to Airbnb and maintaining a listing for fear of the severe fines or (c) they are guests visiting from out of town, and may not be aware of the laws that prevented them from having more options

Monica's freedom of intimate association is directly and substantially inhibited by the prohibition on service and provision of alcohol when she is an Airbnb guest with a host that lives in Chicago. Monica is unable to share her passion about bourbon whiskey with the one person she hand-picked to develop a close personal bond with during one of her visits to Chicago.

While she is possibly able to make such a friend and share her passion for bourbon whiskey in a public setting such as a tavern or restaurant, the intimacy of a private home is lost. Further, Monica is a member of the Bourbon Women Association: she is attempting to educate and promote the drinking of bourbon by ***women*** – who it can be presumed (just from the very existence of the group, Bourbon Women Association) – need to be educated and marketed to specifically. Again, a drunk stranger at a bar is not the same thing as a member of the Airbnb community.

From John Doe's perspective, the "Prohibited Buildings List" itself directly and substantially interferes with his freedom to associate with like-minded individuals (and even new friends) in the downtown Chicago neighborhood to which he hopes to move. John Doe is inhibited in his ability to get to know local Chicagoans in the downtown area, learn about their favorite places and see their neighborhoods, buildings and apartment units from the inside.

For both Monica and John, each of the "objective characteristics" for "intimate association" are met through their use of Airbnb to connect with local

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in terms of hosts and accommodations.

Chicagoans. First, the "relative smallness" factor is met because Airbnb connects 1 guest (or 1 group of guests) with 1 host. Second, there is a "high degree of selectivity in decisions to begin and maintain the affiliation" because the guest must first "request to book" with the host (and include a narrative description of the purpose of their visit and why the host should choose them) and the host has the option of accepting, declining or seeking further information about the prospective guest before booking (and the host and guest can each review each other's profiles and user reviews). [Am. Cmplt. ¶¶ 100-101, Dkt. No. 29, PageID#476-477]. Third, the host-guest association has the objective characteristic of "seclusion from others," insofar as the guest and host are meeting for the purpose of the guest staying with the host in the host's own private home.

Although the guest pays Airbnb money to request a booking, and that money flows to the host upon the host's satisfaction of his or her member agreement with Airbnb, from the perspective of Monica and John Doe, this is not a purely or eve a primarily commercial transaction, nor is it significant or determinative if it is deemed a booking for a commercial purpose. As the Fifth Circuit Court of Appeals noted, "[o]bviously, business benefit might spring from any association, meeting, or encounter. It is well known that ofttimes it is 'not what you know, but who you know'; and people often prefer, in any event, to do business with friends and acquaintances. But this fact alone cannot be the basis for whether a club receives private association protection under the First Amendment. If it were, no club could be private for purposes of that protection." *Louisiana Debating & Literary Ass'n v.*

City of New Orleans, 42 F.3d 1483, 1494 (5th Cir. 1995).

Accordingly, the City bears a significant burden of meeting the strict scrutiny standard of review because the Shared Housing Ordinance – and in particular, the two aforementioned provisions – directly and substantially interfere with these Constitutionally protected intimate associations.

The second type of associational freedom protected by the Fourteenth Amendment is that of "expressive association," or associations in furtherance of protected First Amendment expression. The two plaintiffs that illustrate the fundamental and substantial overbreadth of the Shared Housing Ordinance are Benjamin Thomas Wolf and Antoinette Wonsey.

The potential for expressive associations through Airbnb is demonstrated by Airbnb's response to recent natural disasters, such as Hurricane Matthew or the San Jose Flood, as well as Airbnb's outreach to immigrants and refugees in the wake of President Donald Trump's executive order. Airbnb does not own any property, *per se*. Airbnb was able to activate its community of hosts to house relief workers, individuals and families affected by these natural and political disasters. In this sense, the ability of Airbnb hosts as a community to act not just as a commercial transaction or a business but as part of a social or political cause cannot be ignored. Airbnb's flexibility as a platform has also allowed for non-political, artistic expressive associations, as can be seen by the Chicago Art Institute's "Van Gogh Exhibit" which recreated a scale model of a bedroom in Van Gogh's paintings and marketed it on Airbnb for people to stay overnight.

If the mere exchange of money removed all constitutional protection for expressive association, there would be so much high value speech that would be lost that our Constitution would be unrecognizable. Obviously, a rule that flattens every association into its commercial components will be over-inclusive and allow far too much regulation that actually infringes upon fundamental liberties. The Shared Housing Ordinance is overbroad because it substantially affects clearly fundamental interests and rights such as the right to expressive association.

B. The New Equal Protection Claims Are Meritorious, Such That Plaintiffs Have A Substantial Likelihood Of Success.

Plaintiffs have also argued that the Shared Housing Ordinance, as amended, violates the Equal Protection Clause without a compelling or rational basis, at least as applied to Susan, Danielle and Benjamin and those similarly situated, as the attached chart shows:

	Shared Housing Unit	Guest Suite	Hotel	Reference
Provides "Hotel Accommodations"	☒	☒	☒	3-24-020(A)(4)
Per Unit Licensing Fee	**$60**[7]	**$0**	**$2.20**[8]	4-5-010(36)
17.4% Hotel Operator Occupancy Tax	☒	☒	☒	3-24-030(A)
4.0% Additional Surcharge[9]	☒	☐	☐	3-24-030(B)
Registration / License Required	☒	☐	☒	4-14-020(a)

[7] Paid for by intermediaries such as Airbnb. Estimated annual fee: $300,000 (assuming 5,000 units),

[8] In Chicago, hotels are required to pay a $185 per establishment licensing fee every two years.

[9] Estimated by City to raise $2 million per year, ostensibly for the homeless.

	Shared Housing Unit	Guest Suite	Hotel	Reference
Must be Natural Person	☒	☐	☐	4-14-020(b)(1) 4-13-260(a)(8)
Attestation required to advertise on internet	☒	☐	☐	4-14-020(c)
Annual Registration review	☒	☐	☐	4-14-020(h) 4-13-260(a)
Required Listing Information	☒	☐	☐	4-14-020(f) 4-14-040(a) 4-14-040(b)(4)
Required police reporting on Mere Suspicion of Guests' criminal activity[10]	☒	☐	☐	4-14-040(b)(3) 4-14-050(a)
Alcohol Prohibited	☒	☐	☐	4-14-050(d)
Maximum occupancy restrictions[11]	☒	☐	☐	4-14-050(b)
Unamplified noise (i.e., conversational noise) restrictions	☒	☐	☐	4-14-080(c)(2)
Liability for off-premises behavior by guests	☒	☐	☐	4-14-080(c)(2) 4-14-080(c)(3)
Duration of license/registration revocation	**2 years**	**N/A**	**1 year**	4-14-090(d) 4-6-180(f)(2)
Min / Max Penalties for Violation (per day	**$1,500 / $3,000 $2,500 / $5,000** for ineligibility	**N/A**	**$250 / $500**	4-14-060(g) 4-14-090(a) 4-4-010 4-6-180(f)(1)

The Equal Protection clause "commands that states treat similarly situated

[10] Business licensee are required to report what they are actually told or observe. Chi. Mun. Code 4-4-306. Hotels can only be held liable if they "knowingly permit" crime in units, and have an affirmative defense if they report. Chi. Mun Code 4-6-180(e)(2).

[11] Shared Housing Units have an "absolute maximum" occupancy limit of 1 person per 125 square feet. By comparison, under Chi. Mun. Code 13-196-480, residential family units require 125 square feet for the first **two** occupants, and at least 100 sq. ft. for the next two occupants, and 75 sq. ft. for each additional occupant. There is no maximum occupancy limit for hotel rooms or guest suites, other than those required for fire code.

people in a similar manner." *Fareem-El v. Klincar*, 841 F.2d 712, 727 (7th Cir. 1988) (en banc). Under the rational basis test, legislation is presumed to be valid, and will be sustained so long as the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). While rational basis is an extremely deferential standard, the Shared Housing Ordinance classifications make absolutely no sense.

"Guest Suites", which are typically owned by the corporate entities that own and control luxury high-rise apartment buildings in Chicago, are wholly unregulated by the Shared Housing Ordinance or any other known short-term rental ordinance. "Guest suites" are dwelling units that are offered for rent or for hire, for transient occupancy and for a fee, to the invitees of residents of the building.

Plaintiff Susan Maller lives in one such building, Atwater Apartments, at 355 E. Ohio Street. [Pls. Mem. In Supp. of Prelim, Inj., Exh. A, Dkt. No. 31-1, PageID#587]. Atwater Apartments own, operates and publicly advertises a "guest suite" as an amenity for its residents. [*Id.*, Exh. B, Dkt. No. 31-2, PageID#592]. The Atwater Apartments Community Policies and Procedures not only do not prohibit guests – they expressly state, "Guests are welcome at our property… Guests of all ages must limit their stay to no more than 14 days per year unless prior written approval from Management has been obtained." [*Id.*, Exh. C., Dkt. No. 31-3, PageID#596].

If Susan wished to host a guest from Airbnb for transient occupancy for a

weekend, Susan's guest would be required by the Shared Housing Ordinance to sleep in the Atwater Apartments "guest suite" instead of in Susan's apartment unit, unless Susan wished to have her private residence deemed a "public accommodation" and be subject to $5,000 per day fines. Any fee collected from the guest would have to be paid to the building. Similarly, Danielle McCarron lives (or until recently, used to live) at Hubbard Place, a building that both (a) advertises and operates a "guest suite" and (b) has placed itself on the "Prohibited Buildings List." [*See* Am. Cmplt., Exh. 3, Dkt. No. 29-3, PageID#556; *see* City of Chicago Data Portal, "Prohibited Buildings List," *available at* https://data.cityofchicago.org/Buildings/House-Share-Prohibited-Buildings-List/7bzs-jsyj/data (last viewed Feb. 28, 2017)]. Unlike Susan, Danielle is prohibited from even ***advertising*** the opportunity for a guest on Airbnb to stay with her – even in the "guest suite".

The City has asserted that its governmental interest is "consumer protection." There is no legitimate governmental interest in the City regulating where Susan's or Danielle's guest might sleep, or who should ultimately get paid for such privilege. In the context of the same guest, same building, same weekend, same fee, the risk that the guest would be defrauded or unsatisfied would be exactly the same, regardless of on which floor the guest slept.

The City has also asserted a vague interest in "public safety." However, there is no reason to believe that Airbnb hosts (or guests) are any more likely to commit crimes endangering property or public safety than any other visitor or guest, or

that they are more likely to commit crimes when staying in a resident's apartment unit as opposed to staying in a guest suite a few floors away.

More fundamentally, the "public safety" rationale ignores that the crimes of rape, murder, theft and assault are already subject to strict criminal penalties – and an Airbnb host, whose name, contact information and place of residence is all disclosed to the guest ahead of time – would be easily caught and prosecuted. As the Supreme Court noted in *United States Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) in rejecting the USDA's restriction on food stamp eligibility to "unrelated persons" because of an apprehension of "fraud," because food stamp fraud was already subject to strict criminal penalties, "[t]he existence of these provisions necessarily casts considerable doubt upon the proposition that the 1971 amendment could rationally have been intended to prevent those very same abuses." *Id.* at 536-537.

The real question is whether it is rational to treat a "stranger" met through Airbnb differently than any other guest or visitor to the Atwater Apartments or Hubbard Place or to any residence in Chicago. There is nothing about an Airbnb guest that makes them any more of a risk than your average person off the street – they may even be more reliable because at least the host has personal information about that person, including their full name, contact information and other personal information (including their credit card number, through Airbnb).

"Discriminations are not to be supported by mere fanciful conjecture. They cannot stand as reasonable if they offend the plain standards of common sense."

See Hartford Steam Boiler Inspections & Ins. Co. v. Harrison, 301 U.S. 459, 462 (1937). "[M]ere negative attitudes, or fear, unsubstantiated … are not permissible bases" for drawing legislative classifications. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

The City has presented no evidence or argument that Airbnb members are in any way more likely to threaten the public health, welfare or morals than any other guest or visitor, nor is it likely that the City could even provide a compelling reason as to why an Airbnb guest, who is vetted, verified, insured and part of a responsible community that shares norms and values, would be any more of a risk to the public or a building than a new friend met through a dating app like Tinder.

Because there is no rational basis for this legislative classification, and especially because further it impinges on fundamental liberty interests such as speech and association, the Shared Housing Ordinance must be enjoined as unconstitutional – and at a minimum, Plaintiffs have raised clearly a fair question as to their substantial likelihood of success on the merits.

Moreover, Plaintiffs Keep Chicago Livable and Benjamin Thomas Wolf, on behalf of himself and those similarly situated, bring an Equal Protection challenge to the legislative classification between "shared housing units" on Airbnb and "hotels." Under the Shared Housing Ordinance, both are defined as purveyors of the same product: "hotel accommodations." SHO § 3-24-020(A)(4).

Hotels and motels are actually subject to very lax regulations. [*See* Am. Cmplt., Ex. 4, Dkt. No. 29-4, PageID#561-562]. While one might be tempted to

think of 5-star luxury hotels as the standard bearer, those luxury standards are dictated by market forces, not law. The same law that governs the Hyatt governs the cheap fleabag motel by the airport.

Again, it would be one thing if "shared housing units" were subject to the **same** laws and taxes as hotels. However, under the Shared Housing Ordinance, individuals (which is the only way a shared housing unit can be owned and operated) are treated worse than corporations (which typically own and operate hotels), even though they "sell" the same "product."

It is true that legislative classifications need not be perfect, and that a legislature may address a problem "one step at a time" or even "select one phase of one field and apply a remedy there, neglecting the others." *Jefferson v. Hackney*, 406 U.S. 505, 546 (1972). However, where the City Council defined "hotels" and "shared housing units" to be the same thing; the City Council cannot then target and isolate "shared housing units" with a 4.0% additional surcharge to fund the homeless, while also imposing onerous regulations backed by $5,000 per day fines (vs. $500 per day fines for hotels) without raising a question as to underinclusiveness. *See Dandridge v. Williams*, 397 U.S. 471, 519 (1970) ("Such underinclusiveness mainfests a 'prima facie violation of the equal protection requirement of reasonable classification, compelling the State to come forward with a persuasive justification for the classification.") "Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the

legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970).

C. The District Court's Failure To Even Address These New Claims Warrants Reversal And Limited Remand To A New Judge, And Reinstatement Of The Agreed Injunctive Order Pending A Ruling.

A district court cannot just ignore a proper motion for preliminary injunctive relief any more than a baseball umpire can simply decline to call a ball or a strike on a thrown pitch received by a catcher. While the line between a denial of a motion and deferral of action on it is not always clear, "when someone asks for something and is refused, the effect is that of denial, and a party's right to appeal a denial of relief must not be nullified by judicial inaction." *IDS Life Ins. Co. v. SunAmerica, Inc.*, 103 F.3d 524, 526 (7th Cir. 1996). Further, it is well-settled that "when the passage of time causes irreparable injury to the person claiming entitlement to relief," a delay is the equivalent of a denial. *Middleby Corp. v. Hussman Corp.*, 962 F.2d 614, 616 (7th Cir. 1992). Regardless, Rule 52(a)(2) requires findings of fact and conclusions of law when interlocutory injunctive relief is merely refused, not only when it is formally denied.

1. The District Court's Refusal To Grant The Interlocutory Injunction Without Making Findings Of Fact Or Conclusions Of Law Is Reversible Error.

Pursuant to Rule 52(a)(2) of the Federal Rules of Civil Procedure, "[i]n granting or refusing an interlocutory injunction, the court must … state the findings [of fact] and conclusions [of law] that support its action." Fed. R. Civ. P.

52(a)(2). "It is of the highest important to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure." *Brown v. Quinlan*, 138 F.2d 228, 229 (7th Cir. 1943) quoting *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940)).

"One of the most important purposes of the Rule 52(a) requirement that a district court make findings of fact is to 'aid review by affording a clear understanding of the ground or basis of the decision.'" *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985). The Seventh Circuit has even stated that "[w]here the district court's findings are inadequate for meaningful appellate review because we are unable to follow its reasoning, … more recently and more frequently we have remanded for a new trial before a different judge." *Id.* at 801.

In Plaintiffs' amended motion for a preliminary injunction, Plaintiffs prayed for the District Court to "extend the stay on the implementation and effective date of the Shared Housing Ordinance, as amended, until an evidentiary hearing can be held on this instant Motion" and to "enter a preliminary injunction against the enforcement and effective date of the Shared Housing Ordinance, as amended, including but not limited to the Prohibited Buildings List and the prohibition on and regulation of the service of alcohol and food, and the 'guest suite' exception, pending a ruling on the merits of the case." [Dkt. No. 30, PageID#572].

Accordingly, the District Court's refusal to extend the "stay" pending a ruling on the second motion for preliminary injunction, and the District Court's decision

to allow the "stay" or preliminary injunction to expire by its own terms on March 14, 2017, or to otherwise be dissolved, is the District Court "refusing an interlocutory injunction" that, pursuant to Rule 52(a)(2), requires express findings of fact and conclusions of law – especially where (as here) there is an amended law, an amended complaint, new plaintiffs, new counts and a pending motion for preliminary injunction.

In fact, despite denying the first motion for preliminary injunction and dissolving the "stay" on enforcement of the law, the District Court has not set a briefing schedule on the second motion for preliminary injunction. The next status date is set for September 14, 2017. [Dkt. No. 37]. These protracted postponements of any ruling on Plaintiffs' second motion for preliminary injunction have the practical effect of a refusal of an interlocutory injunction (in the vein of "justice delayed is justice denied"), because the law remains in effect while proceedings are postponed for extended periods of time. *See United States v. Bd. of School Comm'rs*, 128 F.3d 507, 509 (7th Cir. 1997).

2. The District Court's Stated Reasons For Refusing To Grant Interlocutory Injunctive Relief Are Not Sufficient Findings Of Fact Or Conclusions Of Law.

The District Court provided three arguments in response to Plaintiffs' motion for reconsideration which specifically raised the District Court's failure to make Rule 52(a) findings. First, the District Court argued that the "agreed stay" was not an injunction. [*See* Exh. 13, Tr. of 3/15/17 Hearing, at p. 4, lines 12-22]. Per *Nken v. Holder*, 556 U.S. 418, 428 (2009), the District Court's conclusion is incorrect: a

stay operates upon the judicial proceeding itself; an injunction directs an actor's conduct. The Shared Housing Ordinance was not a judicial order, but the City's law. Thus, the "agreed stay order" was an injunction by agreement.

The District Court also argued that her written Opinion and Order dated March 13, 2017 "itself contains findings of fact and conclusions of law." [*See* Appendix Exh. 2, Tr. of 3/15/17 Hearing, at p. 3, lines 3-5]. However, the Opinion and Order only addressed the Amended Complaint and the second motion for preliminary injunction to the extent those papers discussed the previously briefed and argued First Amendment speech and Fourteenth Amendment due process issues. [Dkt. No. 30, PageID#650]. At the hearing on the motion for reconsideration, the District Court admitted that her Opinion and Order did not address the non-speech, non-due-process arguments raised in the Amended Complaint and Plaintiffs' second motion for preliminary injunction. [*See* Appendix Exh. 2, Tr. of 3/15/17 Hearing, at p. 6, lines 1-10].

Finally, the District Court argued that Plaintiffs had forfeited their right to have a further hearing (and injunction to allow such hearing) on their new claims, because "[t]hese new claims are certainly claims that could have been brought the first time around." [*Id.*, Tr. of 3/15/17 Hearing, at p. 7, lines 21-23].

"There is no rule of law which freezes the further development of the case within the limits of plaintiff's knowledge when she filed the complaint." *Smith v. Piper Aircraft Corp.* 18 F.R.D. 169, 175 (M.D. Pa. 1955). To the contrary, it is well-established that amendment of pleadings – especially at the early stages of a

lawsuit – should be liberally allowed "to ensure that cases will be decided justly and on their merits." *See Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 520 (7th Cir. 2015). The District Court, at the urging (and this with the consent) of the City, ordered Plaintiffs to file a new complaint within four (4) days in light of the City's amendment of the Shared Housing Ordinance. [*See* Exhs. 3 and 4]. Plaintiffs complied by timely filing an Amended Complaint that added new theories, claims, facts and plaintiffs. *See Staren v. Amer. Nat'l Bank & Trust Co.*, 529 F.2d 1257, 1263 (7th Cir. 1976) ("[N]ew parties may be added (or substituted) in an action 'when the new and old parties have such an identity of interest that it can be assumed, or proved, that relation back is not prejudicial.")

Additionally, the District Court's assertion that the Amended Complaint was "nothing unique" ignores the fact that, while the first motion was being briefed, there were three major intervening events: (1) the publication of the Prohibited Buildings List on January 13, 2017, (2) the City's amendment of the Shared Housing Ordinance on February 22, 2017 and (3) five new plaintiffs elected to join the lawsuit, individually. "Leave to amend pleadings should be granted liberally when the law governing a point that is the subject matter of the proposed amendment is revised during the pendency of the litigation." *Teamsters Pension Trust Fund v. CBS Records*, 103 F.R.D. 83, 85 (E.D. Pa. 1984).

The District Court's Opinion and Order does not address the new freedom of intimate and expression association and equal protection claims raised in the Amended Complaint, nor does it operate to deny or explain a denial of the second

motion for preliminary injunction. Plaintiffs – including five new plaintiffs some of whose claims did not become known or ripe until after the original complaint was filed and/or until after the City published the Prohibited Buildings List and amended the Shared Housing Ordinance – have sought to enjoin the Shared Housing Ordinance on grounds that have never been briefed or argued before the District Court. None of the excuses given by the District Court amount to the "findings of fact" or "conclusions of law" that are required by Rule 52(a)(2) of the Federal Rules of Civil Procedure. The District Court's failure to even address these new claims (or give itself time to address these new claims) amounts to an abuse of discretion.

3. This Court Should Reinstate The Agreed Order And Injunction Against The Shared Housing Ordinance Pending The District Court's Findings Of Fact And Conclusions Of Law Regarding The New Claims.

At the outset of this case, the District Court entered an order stipulated and agreed to by the parties that select portions of the Shared Housing Ordinance would not go into effect until the District Court ruled on the pending motion for preliminary injunction. [Dkt. No. 19]. Although the City has attempted to renege from this agreement, this deal was the compromise struck by the City and Plaintiffs (at the urging of the District Court) to avoid a possible imposed preliminary injunctive order of broader scope.[12]

[12] The City conceded this point in its Response to Plaintiffs' Motion to Enjoin The Shared Housing Ordinance Pending Appeal to this Court when it observed that the District Court extended the injunction on the Shared Housing Ordinance over the City's objection because it "located that authority in the parties' agreement."

In dissolving and refusing to extend the end date of the agreed injunctive order, the District Court failed to make required findings of fact and conclusions of law with respect to Plaintiffs' new freedom of association and Equal Protection claims. The City even conceded in its response to Plaintiffs' motion to enjoin pending appeal that "the remedy for the district court's noncompliance with Rule 52(a) was to remand for a new trial." (Resp. at 6).

This Court should enjoin the law and enter a limited remand so that the District Court can finish its analysis. However, this Court should also retain jurisdiction because unless the District Court reverses itself and grants injunctive relief, this matter will return on the substantive questions. *See United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005); *see also* 28 U.S.C. §2106. This matter should be remanded to the District Court to make its required findings and conclusions. *See Aurora Bancshares Corp. v. Weston*, 777 F.2d 385, 387 (7th Cir. 1985). Because a limited remand is necessary (with mandates for guidance), and because the parties and the District Court previously agreed to enjoin and delay the effective date of the Shared Housing Ordinance pending resolution of the preliminary injunction motions on the merits, the injunction must be restored pending remand and further appellate review.

IV. The District Court Abused Its Discretion By Failing To Properly Analyze Plaintiffs' First Amendment Speech Claims Under Any

Degree Of Scrutiny.

A. The District Court's Avoidance Of Any First Amendment Speech Analysis Is Unjustified And Clearly Erroneous.

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), the Supreme Court announced a four-prong analysis for regulations on commercial speech: (1) the speech at issue must be non-misleading and not promoting illegal activity; (2) the speech restrictions must directly advance a substantial governmental interest; (3) the speech restrictions must be "narrowly drawn" such that it extends "only as far as the interest it serves"; and (4) the speech restriction must not be "more extensive than is necessary to serve that interest." *Id.* at 565-566.

The District Court avoided applying the *Central Hudson* factors to the Shared Housing Ordinance (or any First Amendment scrutiny) by finding that "the City may lawfully regulate home sharing to regulation without implicating the First Amendment because the SHO regulates conduct—the temporary rental of property in exchange for money—instead of speech." [Dkt. No. 36, PageID#644]. This finding of fact is contrary to the actual text of the Shared Housing Ordinance, which Plaintiffs argued directly targets speech as the mechanism for its regulation of an underlying "business practice" – and thus, the District Court committed a manifest error of law by failing to complete its analysis of this regulation on "commercial speech" under (at a minimum) the *Central Hudson* test.

Specifically, Plaintiffs alleged in the Amended Complaint that "[a]s set forth in the original Complaint and motion for preliminary injunction, the Shared

Housing Ordinance constitutes an unconstitutional burden on the rights of ordinary Chicagoans to speak or to not speak, by requiring them to register with the government and agree to onerous conditions before they can communicate a simple message on the internet: 'Guests welcome.'" [Am. Cmplt. ¶ 6, Dkt. No. 29, PageID#457].

The "registration" requirement in Section 4-14-020(a) of the Shared Housing Ordinance goes beyond regulating conduct, because the subject of its prohibition is defined in terms of speech ("no dwelling unit listed") and speaker ("shared housing host"). [Dkt. No. 29-1, PageID#523]. The "Prohibited Buildings List" makes it illegal not only to rent a unit or a room on a short term basis in such a building, but to even ***advertise*** the availability of such a unit. Put simply, the Shared Housing Ordinance targets Airbnb activity by regulating Airbnb ***listings***, which are posted by hosts on the internet and include non-commercial speech. This is very distinct from a general business license regulation, that only targets conduct (selling goods on public streets without a license).

The District Court's analysis turned on the finding that "any restriction on speech [is] merely incidental to the valid economic regulation." [*See* Exh. 9, Dkt. No. 36, PageID#641]. The District Court first cites to *Sorrell v. IMS Health, Inc.*, 564 U.S. 552 (2011), for the proposition that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* at 567. However, although the State of Vermont attempted to defend its restriction on the sale of pharmacy records as "mere commercial regulation,"

id. at 566, the Supreme Court held that "[b]oth on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker." *Id.* at 567. Thus, the appropriate method of analysis to look at how the law regulates "on its face" and "in its practical operation." The District Court failed to make any findings of fact or conclusions of law regarding either the text of the Shared Housing Ordinance or its practical operation and burden on the speech of Airbnb hosts.

The District Court also cited to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), where the Supreme Court considered whether the Solomon Amendment, which denied federal funding to higher education institutions that had a policy or practice of prohibiting the military from gaining access to campuses, violated the First Amendment. The Supreme Court held that the Solomon Amendment "neither limits what law schools may do nor requires them to say anything." *Id.* at 60. By contrast, the Shared Housing Ordinance on its face limits what Airbnb hosts may say and compels them to make government-approved disclosures to the public.

The District Court's conclusion that Airbnb listings are merely "incidental" to the underlying business activity is not grounded in any fact in the record, and is the equivalent of declaring that there is no such thing as protected "commercial speech." For example, Plaintiffs alleged:

> 39. An Airbnb listing has inherent value to a host, independent to its booking value. Airbnb provides a simple and easily accessible platform for a person to post pictures of and information about their space (and Airbnb even provides a free professional photographer), and Airbnb

> provides market data, in the form of suggestions as to pricing recommendations that are variable according to the season, neighborhood and demand. Additionally, an active 'host listing' can serve as valuable reputational currency for a person who intends on using Airbnb as a guest, because hosts typically like to provide hospitality to other fellow hosts.
>
> 40. There are also many non-commercial reasons that a guest might browse Airbnb listings, without intending to actually book a room. For example, a visitor to a new city could focus on particular neighborhoods and view actual homes in that neighborhood to get information about market prices, local hotspots, and even to glean aesthetic design or lifestyle information.

[Am. Cmplt. ¶¶ 39-40, Dkt. No. 29, PageID#464]. If a website can be deemed to be non-speech simply because the website contains a button that a guest can click to effect a consumer transaction, then no advertisement on the internet would be protected under the First Amendment. It is one thing to regulate a street vendor's sales activities at the point of sale; it is entirely different to prohibit that same street vendor from maintaining a website or a Yelp review page discussing or promoting the street vendor's business, under the guise of merely regulating business.

Additionally, the District Court ignored a new fact alleged in the Amended Complaint, at paragraph 35, that "[i]t is impossible for a host to create a listing on Airbnb – and thus, impossible for a person wishing to host a guest from this deep, vetted and insured guest pool – without including and maintaining a price term. Accordingly, the ability of a host to meet a guest from this deep, insured, globally popular guest pool is inextricably intertwined with the communication of a price term through an Airbnb listing." [*Id.* ¶ 35].

The District Court then misapprehended Plaintiffs' arguments by claiming

that "Plaintiffs do not suggest, for example, that the SHO falls outside the purview of a pure business regulation because it targets specific speakers or 'the idea or message expressed,'" and the District Court cites to cases such as *Reed v. Gilbert*, 135 S. Ct. 2218, 2224 (2015), *Sorrell*, 564 U.S. at 563-564 and *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991). [Dkt. No. 36, PageID#642]. In each of these cases, government regulations were struck down under the First Amendment because they discriminated against certain speakers and messages based on content. *Reed*, 135 S.Ct. at 2222; *Sorrell*, 564 U.S. at 563-564; *Simon & Schuster*, 503 U.S. at 116.

It is unclear how the District Court could claim that Plaintiffs are not making the argument that the Shared Housing Ordinance, which targets Airbnb listings and bookings, constitutes content-based discrimination against certain messages and speakers. Count III of the Amended Complaint is specifically titled: "First Amendment – Content-Based Discrimination." In this count, Plaintiffs argue:

> "67. The Shared Housing Ordinance violates the First Amendment because it constitutes impermissible 'content-based' discrimination against the message, 'for short term occupancy, private room' as communicated on the internet (through intermediaries such as Airbnb) upon the most popular channels where eager recipients of that message may be found."
>
> "68. The Shared Housing Ordinance constitutes viewpoint- or speaker-based discrimination that is impermissible under the First Amendment because it unfairly targets and burdens ***individual*** speakers of this message as opposed to corporate or commercial speakers, who are allowed to communicate that same 'for short term occupancy, private room' message for their own properties."

[Am. Cmplt., ¶¶ 67-68, Dkt. No. 29, PageID#470]. In the Amended Motion,

Plaintiffs also advance this same content-based speech discrimination argument: "[A]s discussed in prior briefings, the Shared Housing Ordinance, by targeting Airbnb hosts and Airbnb listings, constitutes invidious content and viewpoint based discrimination." [Dkt. No. 31, PageID#583].

Because the Shared Housing Ordinance more than incidentally burdens and impacts speech, at a minimum, the District Court was required to evaluate its constitutionality under the "commercial speech" doctrine. Accordingly, the District Court's analysis of Plaintiffs' First Amendment claims is incomplete at best, because it failed to further analyze the Shared Housing Ordinance under any First Amendment speech factors to ascertain whether the City had met its burden to show a compelling interest, or to establish a substantial governmental interest that this law directly advanced, and whether this law was overbroad as opposed to narrowly tailored to advance that particular substantial governmental interest.

B. The Shared Housing Ordinance Must Be Subject To Strict Scrutiny For Fully Protected Speech.

1. Under the "Inextricably Intertwined Standard."

With respect to Plaintiffs' free speech claims, it is undeniable that other than the fact that Airbnb listings contain a price term, the Airbnb listings themselves would be fully protected speech. Airbnb listings are like a Yelp review or Facebook profile for one's home, as they contain narrative descriptions and pictures of the host and the host's home and reviews from previous guests about a person's hosting abilities. [Am. Cmplt. ¶ 100, Dkt. No. 29, PageID#476].

In the Amended Complaint, Plaintiffs allege that hosts cannot otherwise

find Airbnb guests "for free" because Airbnb (which makes its money off booking commissions) requires that hosts put a price term and charge guests. [Am. Cmplt. ¶¶ 35-37, Dkt. No. 29, PageID#463]. Although it is possible to find guests outside of shared housing intermediaries such as Airbnb, it is not practicable to do so: one cannot simply hang a sign on the bulletin board of a local coffee shop and hope to find an international guest visiting Chicago without a home (because such tourist will already have accommodations, which are necessary to enter this country). Airbnb has the deepest pool of insured, vetted and interesting guests who, due in large part to Airbnb marketing, share a strong set of community norms and values regarding traveling and hospitality. [Am. Cmplt. ¶¶ 29-34, Dkt. No. 29, PageID#462-463].

Thus, Plaintiffs have alleged facts justifying strict scrutiny protection for Airbnb listings, because non-commercial speech is inextricably intertwined with commercial speech, *see Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988), and because there are no "satisfactory" alternative channels to find guests who share the community norms and values of Airbnb members. *Linmark Assocs., Inc. v. Village of Willingboro*, 431 U.S. 85, 93 (1977). There is no plausible argument that the Shared Housing Ordinance could survive strict scrutiny review.

2. Because The Justifications For Intermediate Scrutiny Do Not Exist.

"A long line of Supreme Court cases … confirms that speech does not become

'commercial' simply because it concerns economic subjects or is sold for a profit." *Commodity Trend Srvcs. v. CFTC*, 149 F.3d 679, 684 (7th Cir. 1998). The Supreme Court has long recognized that "not every income-producing and profit-making endeavor constitutes a trade or business.... We accept the fact that to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and the taxpayer's primary purpose for engaging in the activity must be for income or for profit. A sporadic activity, a hobby, or an amusement diversion does not qualify." *IRS v. Groetzinger*, 480 U.S. 23, 35 (1987). In fact, this Court even interpreted the plain meaning of "trade or business" to exclude a person's rental of a spare bedroom over his garage in *Central States, Southeast & Southwest Areas Pension Fund v. White*, 258 F.3d 636 (7th Cir. 2001).

The primary justifications for why regulations of "commercial speech" are afforded a lower (intermediate) degree of scrutiny as compared to the strict scrutiny applied to regulations of fully protected speech is two-fold: first, it is deemed more "objective" or "verifiable" by the commercial speaker, "in that ordinarily the advertiser seeks to disseminate information about a specific product or service that he himself provides and presumably knows more about than anyone else." *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 fn 24 (1976). Second, it is deemed to be "more durable than other kinds" of speech because "advertising is the sine qua non of commercial profits" meaning "there is little likelihood of it being chilled by proper

regulation and foregone entirely." *Id.*

Airbnb listings by casual hosts are vastly different from commercial advertisements by commercial speakers. The average casual Airbnb host does not know more about the market for short term rentals or the hospitality industry than anyone else. They may know more about their specific dwelling unit or neighborhood, but in terms of the purported, fungible "quid pro quo" product being sold, they do not know (a) whether their unit is legally compliant with all building codes, (b) whether their bedding or other accommodations are comparable to commercial hotel standards, or (c) whether their services as hosts are comparable to commercial hotel standards. Further, the average casual Airbnb host – making less than $5,000 per year – is not likely going to risk a fine of $5,000 per day to put up a listing to meet new people. They are more likely than not to not put up a fuss, and quit Airbnb entirely.

The District Court and the City believe that if making $10 forms any part of a person's motivation for doing something, then that person's speech should be regulated as "commercial speech." This is the literal extreme that this Court refused in *Commodity Trend Services*, recognizing that "[i]f the result were otherwise, then even an editorial in The New York Times would constitute commercial speech because the newspaper seeks subscribers through advertisements". 149 F.3d at 684-685. Because the District Court and the City's First Amendment analysis fails this simple "New York Times" test, it must be rejected and reversed, and the Shared Housing Ordinance enjoined.

C. Even Under Intermediary Scrutiny, The Shared Housing Ordinance Fails Because The City Has Failed To Meet Its Burden Of Proving A "Means-End" Fit.

Even if Airbnb listings were deemed to be solely commercial speech such that the *Central Hudson* test for commercial speech should apply, the Shared Housing Ordinance fails this test because its provisions – such as the ban on alcohol and the "prohibited buildings list" – are not narrowly tailored to directly advance substantial municipal interests (such as "consumer protection"). Further, Plaintiffs have alleged that the Shared Housing Ordinance unconstitutionally compels speech and operates as content-based discrimination because it specifically targets shared housing on internet sites such as Airbnb. Plaintiffs are likely to succeed on the merits of their appeal on these other variations – in large part because the District Court failed to address them at all.

The City has argued previously that "commercial speech" is not protected under the First Amendment if it promotes illegal activity, and that the Shared Housing Ordinance passes the commercial speech test because "[t]he only communications arguably restricted by the Ordinance are listings of unregistered or unlicensed units." (Resp. at 11). This argument is incorrect: Section 4-6-300(h)(9) restricts the ability of a ***licensed*** vacation rental operator to list if such person lives in a 3-flat and another resident in that building wants to list his or her unit.[13] The City's argument is also circular: if commercial

[13] *See also* SHO § 4-14-060(e) (restricting registered shared housing hosts).

speech can be regulated without First Amendment scrutiny simply by deeming unregulated speech illegal, there is no such thing as protected commercial speech. The proper inquiry as to illegality is "not whether the speech violates a law or regulation, but rather the conduct that the speech promotes violates the law." *United States v. Caputo*, 288 F. Supp. 2d 912, 920 (N.D. Ill. 2003). The "conduct" here is the perfectly legal activity of hosting an invited guest in one's home. Nobody is advertising the thrill of renting an "unlicensed" or "unregistered" Airbnb accommodation (as opposed to say, a person advertising unpasteurized cheese or raw milk, for instance). The speech being restricted is not limited to that which promotes illegal activity.

The City has argued previously that the incompleteness of the District Court's opinion on First Amendment issues is immaterial because Plaintiffs have not met their burden of establishing that the Shared Housing Ordinance fails under the *Central Hudson* factors. (Resp. at 8). However, the City is mistaken: under the *Central Hudson* intermediate scrutiny standard, the City bears the burden of establishing a narrowly tailored "means-end fit" between the challenged provisions of the Shared Housing Ordinance and the City's substantial interests. *Bd. of Trustees v. Fox*, 492 U.S. 469, 480 (1989). Thus, because the District Court clearly erred in drawing its legal conclusion that the Shared Housing Ordinance only implicates speech incidentally and thus does not require analysis under the First Amendment, a further remand and injunction is necessary.

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court of Appeals should reverse the District Court's Memorandum Opinion dated March 13, 2017, enter a limited remand to a new District Court judge with directions to make findings of fact and conclusions of law as to (1) the First Amendment speech arguments under either the Strict Scrutiny or Intermediate Scrutiny standards of review, because the Shared Housing Ordinance regulates speech; and (2) the new Freedom of Intimate and Expressive Association and Equal Protection claims, and this Court should also enter a preliminary injunction against further enforcement of the Shared Housing Ordinance pending such findings and conclusions on limited remand, and for such other and further relief as is just and equitable.

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Respectfully submitted,
KEEP CHICAGO LIVABLE, *et al.*

\s\ Shorge K. Sato
One of their Attorneys

CERTIFICATE OF SERVICE

Pursuant to 28 U.S.C. § 1746, I hereby declare that I caused two (2) bound copies of Plaintiffs' Appellants' Brief to be sent to defendant THE CITY OF CHICAGO, on this 8th day of May, 2017, before the hour of 5:00 p.m., and via First Class Mail to:

Ellen McLaughlin (ellen.mclaughlin@cityofchicago.org)
Benna Ruth Solomon (benna.solomon@cityofchicago.org)
Stephen G. Collins (stephen.collins@cityofchicago.org)
30 N. LaSalle Street, Suite 800
Chicago, Illinois 60602

with electronic copies delivered via PACER and email to the aforementioned email addresses.

\s\ Shorge Sato

CERTIFICATE OF COMPLIANCE

1. The undersigned counsel has delivered fifteen (15) bound copies of this Appellants' Brief to the Clerk of the 7th Circuit Court of Appeals, by hand delivery, to 219 S. Dearborn Street, Room 2722, Chicago, Illinois 60604 on this 8th day of May, 2017, before the hour of 5:00 p.m.

2. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 7th Cir. Ct. R. 32 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 11,302 words

3. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 using Bookman Old Style, 12 point font size.

\s\ Shorge Sato

Dated: May 8, 2017

No. 17-1656

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEEP CHICAGO LIVABLE, an Illinois not-for-profit corporation, BENJAMIN THOMAS WOLF, SUSAN MALLER, DANIELLE MCCARRON, ANTOINETTE WONSEY, MONICA WOLF and JOHN DOE, individuals **Plaintiffs-Appellants,** **vs.** **THE CITY OF CHICAGO, a Municipal corporation** **Defendant-Appellee**	**Appeal from the United States District Court For the Northern District of Illinois, Eastern Division** **Civ. Action No. 16 cv 10371** **Hon. Sara L. Ellis, Presiding Judge** **Appellants' Opening Brief Appendix**

APPENDIX TO APPELLATE BRIEF
for Plaintiffs-Appellants Keep Chicago Livable, Benjamin Thomas Wolf, Susan Maller, Danielle McCarron, Antoinette Wonsey, Monica Wolf and John Doe

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, December 8, 2016:

MINUTE entry before the Honorable Sara L. Ellis: Motion hearing held on 12/8/2016. Defendant's motion for an extension of time to answer or otherwise plead [8] is granted. Defendant's answer is stayed until after resolution of Plaintiffs#039; motion for preliminary injunction. Parties have agreed to stay enforcement of the ordinance until 2/28/2017. Briefing schedule on motion for preliminary injunction: Defendant's response is due by 12/30/16; Plaintiff's reply is due by 1/17/17. Preliminary Injunction Hearing is set for 2/1/2017 at 1:00 PM. Status hearing set for 1/4/2017 is stricken and reset to 1/26/2017 at 1:30 PM. Mailed notice(rj,)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEEP CHICAGO LIVABLE, et al.	)	
	)	
Plaintiffs,	)	No. 1:16-cv-10371
	)	
v.	)	
	)	Hon. Sara L. Ellis
CITY OF CHICAGO,	)	
	)	
Defendant.	)	

AGREED STAY AND SCHEDULING ORDER

This cause coming before this Honorable Court on Plaintiffs' Motion for Preliminary Injunction [Dkt. No. 11] regarding City of Chicago Ordinance O2016-5111 passed on June 22, 2016 titled an "Amendment of Municipal Code Titles 2, 3, 4, and 17 regarding regulation and licensing of shared housing units and vacation rentals" (hereinafter, the "Shared Housing Ordinance"), and by the agreement and stipulation of the parties, KEEP CHICAGO LIVABLE and BENJAMIN THOMAS WOLF (hereinafter, "Plaintiffs") and THE CITY OF CHICAGO (hereinafter, "Defendant"), it is hereby ORDERED:

1. **Agreed Stay**

Subject to the exceptions listed below in Section 2 of this order, Defendant agrees to stay the effective date of the provisions of the Shared Housing Ordinance scheduled to take effect on December 17, 2016 until February 28, 2017, unless otherwise ordered by the Court. Defendant agrees to this stay in order to allow the parties and the Court to address Plaintiffs' Motion for a Preliminary Injunction in a measured fashion, rather than on an emergency basis. By agreeing to this stay, Defendant does not concede the merit of Plaintiffs' Motion or of any of Plaintiffs' claims.

2. **Provisions Exempted from the Stay**

The effective date of the following provisions is not subject to the stay described in Section 1 of this order, and they may be enforced during the pendency of the stay:

A. The following provisions of Section 4 of the Shared Housing Ordinance:

(i) Section 4-5-010(36)

(ii) Section 4-5-010(37);

B. The following portions of Section 8 of the Shared Housing Ordinance, creating a new Chapter 4-13 to the Municipal Code of Chicago regarding Short Term Residential Rental Intermediaries and Advertising Platforms:

(i) Article I (Definitions) (4-13-100)

(ii) Sections 4-13-200, 4-13-205, 4-13-210 and 4-13-220(a), 4-13-220(b), 4-13-220(c) and 4-13-220(d) of Article II (Short Term Residential Rental Intermediary)

(iii) Sections 4-13-300, 4-13-305, 4-13-310, 4-13-320(a), 4-13-320(b), and 4-13-320(c) of Article III (Short Term Rental Advertising Platform)

(iv) Section 4-13-400 of Article IV (Enforcement);

C. The following provisions of Section 9 of the Shared Housing Ordinance:

(i) Section 4-14-070;

F. The following provisions of Section 10 of the Shared Housing Ordinance:

(i) Section 4-16-300;

G. Section 11 of the Shared Housing Ordinance, creating new Chapter 4-17 of the Municipal Code of Chicago;

H. Section 12 of the Shared Housing Ordinance, amending Section 17-2-0207 of the Municipal Code of Chicago;

I. Section 13 of the Shared Housing Ordinance, amending Section 17-3-0207 of the Municipal Code of Chicago;

J. Section 14 of the Shared Housing Ordinance, amending Section 17-4-0207 of the Municipal Code of Chicago;

K. Section 15 of the Shared Housing Ordinance, amending Section 17-15-0303 of the Municipal Code of Chicago,

L. Section 16 of the Shared Housing Ordinance, creating new Section 17-13-1003-M;

M. Section 17 of the Shared Housing Ordinance, amending Section 17-17-0104S of the Municipal Code of Chicago;

N. Section 18 of the Shared Housing Ordinance.

O. Any of the provisions of the Shared Housing Ordinance, including those not expressly listed above, to the extent that applicants voluntarily wish and seek to apply for licenses or registrations under those provisions after receiving notice of the stay reflected in Section 1 of this order.

3. Ordinance provisions already in effect

Any provision of the Shared Housing Ordinance whose effective date predates this order is not subject to this order and may be enforced. Such provisions include, but are not limited to, Section 2 of the Shared Housing Ordinance, amending and modifying Sections 3-24-020, 3-24-030 and 3-24-035 of the Municipal Code of Chicago.

4. Briefing Schedule:

A. Defendant shall have until December 30, 2016, to file a brief in response to the Motion for Preliminary Injunction;

B. Plaintiffs shall have until January 17, 2017, to file a reply brief in support of the Motion for Preliminary Injunction;

C. A status hearing shall be held on January 26, 2017 at 1:30 p.m.

D. Hearing on the Motion for Preliminary Injunction shall be set for February 1, 2017 at 1:00 p.m.

E. Defendant's date to answer or otherwise plead to the Complaint is stayed until after resolution of Plaintiffs' Motion for Preliminary Injunction, with the response date to be set by the Court at that time.

SO AGREED AND STIPULATED:

KEEP CHICAGO LIVABLE and
BENJAMIN THOMAS WOLF

One of their Attorneys

CITY OF CHICAGO

One of its attorneys

Dated: December 12, 2016

ENTERED:

Hon. Sara L. Ellis

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, February 23, 2017:

MINUTE entry before the Honorable Sara L. Ellis:Status hearing held on 2/23/17. Defendant reports that City Council passed the amendments. Plaintiff to file an amended complaint by 2/27/17. Plaintiff to file preliminary injunction motion by 2/28/17. Stay of implementation of legislation extended through 3/3/17. Next status date set for 3/2/17 at 1:45 PM. Mailed notice(rj,)

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, March 2, 2017:

MINUTE entry before the Honorable Sara L. Ellis: Status hearing held on 3/2/2017. Stay is extended through 3/14/17. Plaintiffs' motion for Federal Rule 23(B) class certification [32] is entered and continued to 3/14/2017 at 9:45 AM. Status hearing set for 3/14/2017 at 9:45 AM for ruling on first motion for preliminary injunction [11]. Mailed notice(rj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, March 13, 2017:

MINUTE entry before the Honorable Sara L. Ellis: Enter Opinion and Order. The Court denies Plaintiffs' motion for a preliminary injunction [11]. To the extent Plaintiffs' amended motion for a preliminary injunction [30] seeks an injunction based on their First Amendment and Fourteenth Amendment due process claims, the Court denies that portion of the amended motion as well. Mailed notice(rj,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEEP CHICAGO LIVABLE, an Illinois not-for-profit corporation, BENJAMIN THOMAS WOLF, SUSAN MALLER, DANIELLE MCCARRON, ANTOINETTE WONSEY, MONICA WOLF, and JOHN DOE, individuals,	)	
Plaintiffs,	)	No. 16 C 10371
v.	)	Judge Sara L. Ellis
THE CITY OF CHICAGO, a Municipal corporation,	)	
Defendant.	)	

OPINION AND ORDER

Proponents of home sharing—both hosts and guests—Plaintiffs Keep Chicago Livable, Benjamin Thomas Wolf, Susan Maller, Danielle McCarron, Antoinette Wonsey, Monica Wolf, and John Doe bring suit against the City of Chicago (the "City"), seeking to prevent the implementation of the Shared Housing Ordinance ("SHO"), which the City passed in June 2016 to regulate the home sharing industry in the City. Only Keep Chicago Livable and Wolf were plaintiffs when they first filed suit in November 2016, alleging that the SHO violates the First Amendment right to freedom of speech, the Fourth Amendment right to be free from unreasonable searches and seizures, the Stored Communications Act ("SCA"), 18 U.S.C. § 2701 *et seq.*, the Fifth Amendment takings clause, the Eighth Amendment excessive fines clause, the Fourteenth Amendment due process clause, the Illinois Constitution, and the Illinois Trade Secrets Act, 765 Ill. Comp. Stat. 1065/1 *et seq.* On December 1, 2016, they sought a preliminary injunction with respect to their First Amendment, due process, and SCA claims [11]. The Court

held oral argument on the motion on February 1, 2017. Thereafter, the City amended portions of the SHO on February 22, 2017, prompting an amended complaint [29] and amended preliminary injunction motion [30]. The amended complaint adds additional parties and changes the claims alleged. The First Amendment and due process challenges remain, but Plaintiffs dropped the remaining original claims in exchange for asserting violations of the Fourteenth Amendment's rights to intimate and expressive association and equal protection. Plaintiffs maintain that their filing of the amended complaint and amended motion for preliminary injunction did not moot their initial preliminary injunction motion but instead expanded upon the reasons for why an injunction should issue. Because the issues raised in the first injunction motion are ripe for decision, the Court addresses those here.[1] The Court finds that Plaintiffs have failed to meet the threshold requirements for issuance of a preliminary injunction with respect to the First Amendment and due process claims and so denies Plaintiffs' motion for a preliminary injunction [11] and the amended motion for a preliminary injunction [30] with respect to those claims.

BACKGROUND[2]

In recent years, home sharing has become a popular alternative to the typical short-term rental options—hotels, inns, and bed-and-breakfast establishments. Home sharing usually involves individuals renting out their homes or apartments to guests in exchange for compensation. Although the concept of home sharing is not new, its popularity has increased

[1] Because Plaintiffs dropped their SCA claim in the amended complaint, the Court finds Plaintiffs' request for a preliminary injunction based on the SCA claim moot and does not address it further in this Opinion. To the extent that the amended motion for preliminary injunction [30] incorporates or expands on arguments related to the claims raised in the initial preliminary injunction motion, the Court addresses them here, with this Opinion operating as an adjudication of that motion as it relates to those claims.

[2] The Court takes the following facts from the complaint, briefs, and exhibits filed with the Court. To the extent the amended complaint adds allegations relevant to the Court's disposition of the motion for a preliminary injunction, the Court takes them into consideration. Similarly, the Court takes into account the February 22, 2017 amendments to the SHO.

due to the proliferation of internet platforms like Airbnb, VRBO, and HomeAway, which allow hosts to post listings of their units and connect easily with guests who would like to rent those units online.

As home sharing has increased in popularity with little oversight, cities across the country have sought to regulate the industry. The City's approach is the SHO, enacted on June 22, 2016 and further amended on February 22, 2017.[3] At a high level, the SHO requires hosts to register with the City in order to list and rent their units on sites like Airbnb or VRBO and subjects hosts to various restrictions and regulations. Additionally, the SHO requires listing platforms, like Airbnb, to obtain licenses and to provide the City with information on the units listed on their platforms.

More specifically, the SHO applies to two types of short-term rentals: "vacation rentals" and "shared housing units." The SHO defines a "vacation rental" as:

> a dwelling unit that contains 6 or fewer sleeping rooms that are available for rent or for hire for transient occupancy by guests. The term "vacation rental" shall not include: (i) single-room occupancy buildings or bed-and-breakfast establishments, as those terms are defined in Section 13-4-010; (ii) hotels, as that term is defined in Section 4-6-180; (iii) a dwelling unit for which a tenant has a month-to-month rental agreement and the rental payments are paid on a monthly basis; (iv) corporate housing; (v) guest suites; or (vi) shared housing units registered pursuant to Chapter 4-14 of this Code.

SHO § 4-6-300(a).[4] The SHO defines a "shared housing unit" similarly as:

> a dwelling unit containing 6 or fewer sleeping rooms that is rented, or any portion therein is rented, for transient occupancy by guests. The term "shared housing unit" shall not include: (1) single-room occupancy buildings; (2) hotels; (3) corporate housing; (4) bed-

[3] The implementation of the SHO's provisions, except those delineated in the agreed order for the stay, Doc. 19, is stayed until March 14, 2017 pending the Court's ruling on this motion.

[4] The SHO can be found at Doc. 1-1, Doc. 20-2, or Doc. 29-1. The amendments to the ordinance are found at Doc. 29-2.

> and-breakfast establishments, (5) guest suites; or (6) vacation rentals.

Id. § 4-14-010.[5] "Transient occupancy" means "occupancy on a daily or nightly basis, or any part thereof, for a period of 31 or fewer consecutive days." *Id.* § 4-6-290.

In order to list units for rental, individuals must obtain a license or registration number from the City and include that number in their listing. *Id.* §§ 4-6-300(h)(1), 4-14-040(a)(4). To obtain the registration number, shared housing hosts must attest that they have reviewed a summary of the SHO's requirements and "acknowledge that the listing, rental and operation of shared housing units in the City are subject to those requirements." Doc. 29-2 § 4-13-215. Additionally, as part of the licensing and registration process, the City ensures that the rentals meet various requirements, such as location restrictions, set forth in the SHO. For example, in buildings with over five units, no more than six dwelling units, or 1/4 of the total dwelling units in the building, whichever is less, may be used as vacation rentals or shared housing units, unless the commissioner allows an adjustment. SHO §§ 4-6-300(d)(1), (l), 4-14-060(f). Single family homes may only be rented if the home is the licensee or host's primary residence, unless certain exceptions apply. *Id.* §§ 4-6-300(h)(8), 4-14-060(d). The SHO allows buildings to prohibit shared housing units in those buildings, creating a "prohibited buildings list" that, at the time of

[5] Although the definitions for both "vacation rental" and "shared housing unit" appear almost identical, the difference between the two appears to lie in the status of the occupant of the dwelling unit seeking to rent out the property. A close reading of the SHO suggests that only owners of dwelling units (defined to include those who lease units in a cooperative building) may obtain licenses for vacation rentals, SHO § 4-6-300(a), (b), while a "shared housing host" may be either an owner or tenant of the dwelling unit, *id.* § 4-14-010. But the City's counsel did not make this distinction clear during the hearing on the preliminary injunction hearing, instead suggesting that to the extent that someone wished to rent out their second bedroom (regardless of whether that person rented or owned the dwelling unit) not on Airbnb or another online platform but instead using the classified advertisements in a newspaper, that form of rental would be considered a vacation rental. For purposes of this Opinion, the Court generally treats vacation rentals and shared housing units interchangeably because the requirements and regulations of the two generally align but highlights the differences where appropriate.

the filing of the amended complaint included over 1,000 buildings.[6] *Id.* § 4-14-020(d). The SHO also provides for restricted residential zones, in which new or additional shared housing units or vacation rentals would be ineligible for licensing. *Id.* Ch. 4-17.

Once a vacation rental or shared housing unit is licensed or registered, the SHO imposes additional requirements on the licensee or host in listing and operating the rentals. For example, the SHO requires licensees and hosts to maintain guest registration records, including the name, address, signature, and date of accommodation of each guest, and to keep such records for three years.[7] *Id.* §§ 4-6-300(f)(2), (3), 4-14-040(b)(8), (9). Licensees and hosts must post their license number, as well as the name and telephone number of a local contact person, in a conspicuous place near the entrance of the unit. *Id.* § 4-6-300(f)(7), 4-14-040(b)(6). Other requirements include: providing guests with soap and clean linens; sanitizing cooking utensils and disposing of food, beverages, and alcohol left by previous guests; complying with all food handling and licensing requirements if food is provided to guests; and notifying police of illegal activity. *Id.* §§ 4-6-300(f), 4-14-040(b). Licensees and hosts are subject to fines and penalties for allowing criminal activity, egregious conditions, or public nuisances in their rentals. *Id.* §§ 4-6-300(g)(4), 4-14-050(a). The SHO gives the City suspension and revocation powers if egregious or objectionable conditions occur. *Id.* §§ 4-6-300(j), 4-14-080.

The SHO also targets the platforms on which short-term rentals are listed. Again, the SHO creates two categories: "short term residential rental intermediaries" and "short term

[6] The entire list can be found at https://data.cityofchicago.org/Buildings/House-Share-Prohibited-Buildings-List/7bzs-jsyj/data.

[7] The City amended the SHO so that, instead of requiring that a licensee or host make the records available for inspection by an authorized city official upon request, the records are now only subject to disclosure to an authorized city official pursuant to a search warrant, subpoena, or other lawful procedure to compel the production of records, unless the licensee or host consents to disclosure. *See* Doc. 29-2 §§ 4-6-300(f)(3), 4-14-040(b)(9).

residential rental advertising platforms." A "short term residential rental intermediary," such as Airbnb, is "any person who, for compensation or a fee: (1) uses a platform to connect guests with a short term residential rental provider for the purpose of renting a short term residential rental, and (2) primarily lists shared housing units on its platform." *Id.* § 4-13-100. Intermediaries must bulk register all shared housing units listed on their platform with the City and remove listings without valid registration numbers. *Id.* § 4-13-230(a). The SHO also requires intermediaries to provide reports to the City regarding rental activity on their platforms, typically in anonymized formats. *Id.* § 4-13-240(f).

A "short term residential rental advertising platform," such as HomeAway or VRBO, is "any person who, for compensation or a fee: (1) uses a platform to connect guests with a short term residential rental provider for the purpose of renting a short term residential rental, and (2) primarily lists licensed bed-and-breakfast establishments, vacation rentals or hotels on its platform or dwelling units that require a license under this Code to engage in the business of short term residential rental."[8] *Id.* § 4-13-100. The SHO requires these platforms to provide unit registration data to the City, but the reporting requirements are not as extensive as for intermediaries because the vacation rental licensees register themselves. *Id.* § 4-13-040.

After the City passed the SHO, Keep Chicago Livable and Wolf filed this suit, seeking to enjoin its implementation. Keep Chicago Livable is a non-profit formed by Chicago residents who participate in home sharing as hosts to "educate other Chicago owners and renters as to their rights and duties to participate in home sharing and to assist them with compliance with both state and local law as well as internally developed 'best practices' for responsible home sharing

[8] At the preliminary injunction hearing, the parties disputed whether the term "short term residential rental advertising platform" encompasses only online platforms or also offline platforms, such as newspapers. The Court need not resolve the issue at this time, although it notes that the confusion may stem from the definition of "platform" and how that term is subsequently used in the definitions for "short term residential rental intermediary" and "short term residential rental advertising platform" in § 4-13-100.

and assist homeowners with compliance with applicable regulations." Doc. 29 ¶ 13. The individual Plaintiffs, and others like them, use Airbnb for social interactions and for the sense of community it provides. As hosts, they claim to charge a fee because "[i]t is impossible for a host to create a listing on Airbnb – and thus, impossible for a person wishing to host a guest from this deep, vetted and insured guest pool – without including and maintaining a price term." Doc. 29 ¶ 35; *see also id.* ¶ 38 ("The primary purpose for many hosts on platforms such as Airbnb is not necessarily to obtain a profit. Hosts enjoy sharing their homes with guests for many reasons that have nothing to do with making a profit, such as making new friends, learning about different cultures, showing off one's home and city to a newcomer or simply out of empathy for a traveler who could not otherwise afford to stay in a downtown hotel.").

In reply to the original preliminary injunction motion, Keep Chicago Livable and Wolf included several affidavits from Airbnb hosts, some of whom have since become named Plaintiffs in the litigation. Wolf, a Chicago resident who has served as an Airbnb host and guest since 2012 but recently took down his listing because of this litigation, states that Airbnb has allowed him to meet a diverse group of people while in Chicago, "underscor[ing] the importance of cultural exchange." Doc. 23-1 at 2. Aside from the social benefits, without Airbnb, he would not have been "able to afford the cost of living in [his] building and as a graduate student." *Id.* His building is subject to the SHO's maximum cap provision, and he believes there may be over six Airbnb listings in his building. Adam Fried owns a single family home in Bucktown, which he lists "sporadically" on Airbnb. *Id.* at 4. He says he does not use Airbnb "solely or even primarily for profit-motivated reasons" but instead for security reasons when he is out of town because he would "prefer to be paid rather than to pay for 'house sitting' services." *Id.* Valerie Landis indicates that she used Airbnb "[d]uring a period of temporary unemployment" when she

"enjoyed the company of [her] hand-picked guests." *Id.* at 7. She has vocally opposed the SHO, which she claims resulted in harassment from her Alderman's office and caused her condominium association to fine her for violating its rules by having Airbnb listings for her second bedroom. Ron Sattar, who owns a single family home in Chicago, had a complaint filed against him by the City for operating an unlicensed bed-and-breakfast in July 2016. The City allegedly brought the complaint based on reports from his neighbor that he was booking guests through Airbnb but dropped the complaint provided he fix some minor electrical issues with his home. Sattar claims his neighbor has repeatedly harassed him and his guests without cause or justification. Antoinette Wonsey owns a single family home in Englewood and lists rooms for rent on Airbnb, using the money she earns to renovate her home and support herself. She uses a pseudonym on Airbnb, allegedly "to avoid harassment from City of Chicago police officers," harassment which has led her to file a federal lawsuit.[9] *Id.* at 29. Both David Boyd and Susan Maller live in an apartment building at 355 E. Ohio Street, where their landlord changed the locks on their units, allegedly based on rumors that they had listings on Airbnb in violation of their leases. Finally, after the condominium association learned of his activities on Airbnb, Waseem Gorgi was fined for renting out his condominium on Airbnb in violation of the condominium association rules.

LEGAL STANDARD

The party seeking a preliminary injunction must first show: (1) it is reasonably likely to succeed on the merits, (2) it will suffer irreparable harm absent an injunction before final resolution of its claims, and (3) it has no adequate remedy at law. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of the U.S.A., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). If the

[9] That lawsuit, *Wonsey v. City of Chicago*, No. 16 C 9936, makes no mention of the fact that the alleged harassment occurred because of Wonsey's Airbnb activities.

moving party fails to demonstrate any of these three requirements, the Court will deny the motion. *Id.* But if the moving party meets this threshold showing, the Court attempts to "minimize the cost of potential error" by "balanc[ing] the nature and degree of the plaintiff's injury, the likelihood of prevailing at trial, the possible injury to the defendant if the injunction is granted, and the wild card that is the 'public interest.'" *Id.* "Specifically, the court weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief." *Id.* (citing *Abbott Labs. v Mead Johnson & Co.*, 971 F.2d 6, 11–12 (7th Cir. 1992)). The Seventh Circuit has described this balancing test as a "sliding scale" in which "[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor." *Id.* (quoting *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 389 (7th Cir. 1984)).

ANALYSIS

I. Likelihood of Success

"[T]he threshold for demonstrating a likelihood of success on the merits is low," with Plaintiffs needing only to demonstrate that their chances of prevailing are "better than negligible." *D.U. v. Rhoades*, 825 F.3d 331, 338 (7th Cir. 2016). The Court addresses whether Plaintiffs have met this low threshold on their First Amendment and due process claims. With respect to the First Amendment claims, "the likelihood of success on the merits will often be the determinative factor" in determining whether a preliminary injunction should issue. *Joelner v. Vill. of Washington Park, Ill.*, 378 F.3d 613, 620 (7th Cir. 2004).

A. First Amendment Claims

Plaintiffs bring three claims under the First Amendment, arguing that the SHO (1) constitutes an unconstitutional prior restraint on speech; (2) constitutes unconstitutional compelled speech, even if viewed as commercial speech; and (3) amounts to impermissible content-based regulation of speech because it specifically targets internet-based home sharing. The City argues, however, that the Court need not consider the substance of Plaintiffs' arguments on these claims because Plaintiffs will not be able to establish that the SHO regulates speech. It contends that the SHO does not implicate the First Amendment's protections on speech because the SHO instead regulates the business activity of the short-term rental industry, an economic transaction, with any restriction on speech merely incidental to the valid economic regulation. The SHO, according to the City, is just the latest exercise of the City's authority to license and regulate businesses, adding a new type of commercial activity—short-term rentals—to a long list of regulated business activities.

"[R]estrictions on protected expression are distinct from restrictions on economic activity or, more generally, on nonexpressive conduct." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). "[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.*; *see also Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 60, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (statute did not violate First Amendment because it affected what law schools "must *do* . . . not what they may or may not *say*"). The First Amendment protects speech and conduct but extends "only to conduct that is inherently expressive." *Rumsfeld*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive

conduct, a regulated party could always transform conduct into 'speech' simply by talking about it.").

Here, Plaintiffs have not demonstrated that they are likely to succeed in establishing that the SHO targets expressive conduct or speech instead of economic activity. Plaintiffs do not suggest, for example, that the SHO falls outside the purview of a pure business regulation because it targets specific speakers or "the idea or message expressed." *Cf. Reed v. Town of Gilbert*, --- U.S. ----, 135 S. Ct. 2218, 2224, 2227, 192 L. Ed. 2d 236 (2015) (invalidating a municipal code that imposed different restrictions on outdoor signs based on the message of the signs); *Sorrell*, 564 U.S. at 563–64 (striking down statute that "disfavor[ed] marketing, that is speech with a particular content" and "disfavor[ed] specific speakers, namely pharmaceutical manufacturers," by restricting the "sale, disclosure, and use of prescriber-identifying information"); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (statute restricting a criminal's right to profit from literary or other works based on crime fell within the First Amendment's protections because it addressed "income derived from expressive activity" and was "directed only at works with a specified content," i.e., those concerning the reenactment of a crime).

Instead, Plaintiffs contend that the SHO cannot be considered a business regulation because home sharing is not purely a commercial undertaking. They provide examples of non-commercial reasons for signing up as a host, "such as making new friends, learning about different cultures, showing off one's home and city to a newcomer or simply out of empathy for a traveler who could not otherwise afford to stay in a downtown hotel." Doc. 29 ¶ 38. In essence, Plaintiffs argue that home sharing does not provide a fungible good or service but rather a personalized experience, taking it outside the realm of economic conduct. Accordingly,

Plaintiffs contend that the SHO regulates expressive conduct by mandating that hosts or licensees include a registration number in their listings, for example. But Plaintiffs must admit that, regardless of whether they also derive some social benefit from home sharing, they receive money in the process of renting their units to guests and guests receive a place to stay in exchange.[10] Despite Plaintiffs' best efforts to creatively argue otherwise, home sharing does provide something fungible, establishing, at base, a commercial relationship between a host and guest.[11] *See* SHO § 4-14-010 (defining a shared housing unit as "a dwelling unit . . . that is rented . . . for transient occupancy by guests").

The City points out that, following Plaintiffs' logic, any business license requirement would involve First Amendment protections because most businesses or individuals subject to licensing engage not only in commercial activity but also have social interactions with customers or others. Indeed, Plaintiffs' position is untenable and has recently been rejected: "regulation of conduct may proceed even if the person who wants to violate the legal rule proposes to express an idea" where the regulation applies to economic transactions, such as peddling, and applies to all sales alike. *See Left Field Media LLC v. City of Chicago, Ill.*, 822 F.3d 988, 990 (7th Cir. 2016) (affirming denial of preliminary injunction challenging ban on peddling outside Wrigley

[10] A number of the affidavits submitted in connection with Plaintiffs' reply to the preliminary injunction motion underscore the fact that hosts engage in home sharing not only for its social benefits but also because they derive income from doing so. For example, Wolf stated that "[b]ut for Airbnb," he would not have been "able to afford the cost of living in my building, among other things. Doc. 23-1 at 2. Fried indicated that he used Airbnb while he was away from his house because he "would prefer to be paid rather than to pay for 'house sitting' services," revealing an economic calculus behind his decision. *Id.* at 4. Wonsey states that she uses the money she earns through Airbnb to "restore and renovate [her] historic home and to otherwise pay the costs of living in Chicago." *Id.* at 29.

[11] Plaintiffs argue in reply, without citation, that "the Ordinance is presumptively unconstitutional unless it is true that ***every*** host on Airbnb is doing so as a 'business activity.'" Doc. 23 at 3. Plaintiffs then try to analogize to tax and ERISA definitions for determining whether an activity constitutes a trade or business. *See Comm'r of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S. Ct. 980, 94 L. Ed. 2d 25 (1987); *Cent. States, Se. & Sw. Areas Pension Fund v. White*, 258 F.3d 636, 642 (7th Cir. 2001). But these cases have not been applied in the First Amendment context nor does the Court find it appropriate to extend them to the situation here.

Field where plaintiff wanted to sell magazines, finding that regulation of peddling on sidewalk did not regulate speech but rather conduct). Like with peddlers who hawk their goods but are lawfully subject to a regulation as to where they sell those goods, the City may lawfully subject home sharing to regulation without implicating the First Amendment because the SHO regulates conduct—the temporary rental of property in exchange for money—instead of speech. *See id.*; *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408 (9th Cir. 2015) (minimum wage ordinance did not implicate First Amendment protections because it was "plainly an economic regulation that does not target speech or expressive conduct," with the "decision of a franchisor and a franchisee to form a business relationship and their resulting business activities" having no characteristics of expressive conduct); *Airbnb, Inc. v. City & County of San Francisco*, --- F. Supp. 3d ----, 2016 WL 6599821, at *6–7 (N.D. Cal. Nov. 8, 2016) (in denying preliminary injunction that claimed short-term rental regulations violated the First Amendment, finding that Airbnb facilitated "business transaction[s] to secure a rental, not conduct with a significant expressive element"); *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third, & Fourth Dep'ts, App. Div. of the Sup. Ct. of the State of N.Y.*, 118 F. Supp. 3d 554, 569 (S.D.N.Y. 2015) (laws preventing law firm from seeking non-lawyer equity investors were merely "restriction[s] on a commercial practice" that "fall outside the purview of the First Amendment even if they impose 'incidental burdens on speech'" (alteration in original)). That some hosts or licensees also derive a social benefit from home sharing makes no difference to the dispositive question of whether the SHO regulates economic activity. *Int'l Franchise Ass'n*, 803 F.3d at 408 (acknowledging that ordinance was "not wholly unrelated to a communicative component, but that in itself does not trigger First Amendment scrutiny").

Because the SHO does not target speech but rather the business practices associated with home sharing, only incidentally burdening speech if at all, the SHO falls outside the purview of the First Amendment. Thus, the Court finds that Plaintiffs are unlikely to prevail on the merits of their First Amendment claims and need not delve into the specifics of the three substantive claims they bring under the First Amendment.

B. Due Process Vagueness Claim (Count VIII)

Plaintiffs also argue that the Court should enter a preliminary injunction because the SHO is void for vagueness in violation of the Fourteenth Amendment's due process clause. Although Plaintiffs set forth numerous bases for their void for vagueness challenge in their original and amended complaints, broadly complaining that the SHO "is too long, vague and prolix for a person of common intelligence to understand" and then more specifically alleging issues with the definition of "guest suites" and what it means for a host to provide food to a guest, *see* Doc. 1 ¶¶ 226–243, Doc. 29 ¶¶ 75–89, in their preliminary injunction, they highlight only the alleged difficulties in implementing the law as it relates to the maximum caps provision. Plaintiffs' failure to develop any substantive argument as to these other provisions, instead attempting to merely incorporate the allegations of the complaint by reference, waives those challenges. *United States v. Hook*, 471 F.3d 766, 775 (7th Cir. 2006) ("We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)." (quoting *United States v. Lanzotti*, 205 F.3d 951, 957 (7th Cir. 2000))). And even their vagueness challenge to the maximum caps provision fails on similar grounds because Plaintiffs do not set forth the legal or factual basis for why they are likely to succeed on this aspect of their claim, and the Court is not obligated to construct Plaintiffs' arguments for them. *See Nelson v. Napolitano*, 657 F.3d

586, 590 (7th Cir. 2011) (the court is not "obliged to research and construct legal arguments for parties, especially when they are represented by counsel").

Even so, Plaintiffs have not demonstrated a likelihood of success, for they have not suggested how the maximum caps provision is impermissibly vague in all its applications. "[L]aws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012). A regulation may be found "impermissibly vague if it fails to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and it fails to establish standards to permit enforcement in a nonarbitrary, nondiscriminatory manner." *Fuller ex rel. Fuller v. Decatur Pub. Sch. Bd. of Educ. Sch. Dist. 61*, 251 F.3d 662, 666 (7th Cir. 2001).

In evaluating Plaintiffs' facial challenge to the maximum caps provision, the Court first considers "whether the enactment reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). But because the Court has already found that the SHO does not implicate the First Amendment,[12] Plaintiffs' vagueness challenge survives only if the SHO "is impermissibly vague in all of its applications."[13] *Id.* at 495.

[12] The Court notes that, in their amended complaint, Plaintiffs also assert that the SHO infringes on their right to intimate and expressive association and right to equal protection. But because Plaintiffs did not develop those claims at the time of the preliminary injunction hearing nor do they connect the issues in their amended motion and instead have agreed to the Court's deciding the void for vagueness challenge without addressing their newly asserted constitutional claims, the Court proceeds to address the due process challenge under the assumption that it does not reach a substantial amount of constitutionally protected conduct.

[13] In reply, Plaintiffs briefly state that they do not have to show that the SHO is impermissibly vague in all its applications because the overbreadth of the SHO implicates the First Amendment. But the Court cannot take into account arguments raised in a reply brief, particularly undeveloped ones concerning overbreadth, as here. *See Dexia Credit Local v. Rogan*, 629 F.3d 612, 625 (7th Cir. 2010) ("[A]rguments

The City argues that Plaintiffs cannot show that the SHO is impermissibly vague because the SHO is an economic regulation that imposes civil penalties for noncompliance. *See id.* at 498 ("[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." (footnotes omitted)). The City also argues that the challenged provisions have not yet gone into effect and could be further clarified, and, indeed, Plaintiffs indicate that they have sought clarification, albeit to no avail. *See id.* ("[T]he regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process."). But even setting this aside, Plaintiffs' challenge fails at this stage because they have not provided the Court with an explanation for why the maximum caps provision is vague in all of its applications.[14] Instead, they themselves make only vague references to the simplicity of the argument and how it needs

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raised for the first time in a reply brief are waived."). Plaintiffs also disclaimed any overbreadth argument during oral argument on the motion.

[14] Instead of addressing the maximum caps provision during oral argument, Plaintiffs' counsel focused on the definition of guest suites in the SHO. The City Council since amended the definition of "guest suite" to read: "a dwelling unit that is available for rent or for hire for transient occupancy solely by the invitees or family members of residents of the building which contains the dwelling unit, and is not offered, advertised or made available for rent or hire to members of the general public." Doc. 29-2 § 4-6-300(a). Originally, the definition used the term "guests" instead of "invitees," which Plaintiffs argued made the SHO nonsensical because the SHO also used "guest" in the definition of "vacation rental" and "shared housing unit," thus making it impossible to determine what the difference was between a "guest suite," which was unregulated, and a "vacation rental" or "shared housing unit," which was regulated. But regardless of whether the term "guest" or "invitee" is used, Plaintiffs' argument that the definitional sections render the SHO void in all its applications fails because, as the City pointed out at the preliminary injunction hearing and Plaintiffs demonstrate by way of attachments to their amended complaint, certain condominium or apartment buildings offer guest suites as amenities for their tenants, which are available only to guests or invitees of residents of the building. *See, e.g.*, Doc. 29-3 at 4–6 (booking page for Eugenie Terrace guest suite, providing that the suite "can only be reserved by current Eugenie Terrace residents" and that the submission of the form must be made by "a current resident of Eugenie Terrace whose lease is valid through the requested reservation dates"). As such, these guest suites are not available for rent to members of the general public, differentiating them from vacation rentals or shared housing units. The Court rejects Plaintiffs' argument, made during oral argument, that sites like Airbnb do not offer listings to the general public because any individual can browse the listings without having created a profile and those listing may be booked by anyone who creates an Airbnb account.

no further explanation. But such a conclusory explanation does not suffice to carry Plaintiffs' burden of demonstrating likelihood of success on the due process claim.[15]

II. Irreparable Harm and Inadequate Remedy at Law

Having found that Plaintiffs have not demonstrated a likelihood of success on the merits, the Court also finds that they have not sufficiently established irreparable harm or an inadequate remedy at law. Indeed, Plaintiffs' arguments on these points, at least with respect to their First Amendment claims (having made no argument on these requirements with respect to their due process claim), depended on a showing of success on the merits. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury, and the quantification of injury is difficult and damages are therefore not an adequate remedy." (internal quotation marks omitted) (citations omitted)). Without any additional arguments as to these issues, the Court finds that Plaintiffs have not made the threshold showing required for issuance of preliminary injunctive relief. *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1204 (7th Cir. 1996) (finding it to be an abuse of discretion to issue an injunction "based on nothing but speculation and conjecture").

III. Balance of Hardships

Although the Court need not address the balance of hardships because Plaintiffs have failed to make the required threshold showing, *see Girl Scouts*, 549 F.3d at 1086 ("If the court determines that the moving party has failed to demonstrate any one of these three threshold requirements, it must deny the injunction."), the Court finds it prudent to briefly address the balance of hardships, *id.* at 1087 (encouraging district court "to conduct at least a cursory examination" of the balance of hardships where the court "decides that a party moving for a

[15] The Court notes that it raised several vagueness concerns with the SHO with the parties during oral argument on the preliminary injunction motion. The Court does not address those here, however, as they are outside the scope of Plaintiffs' motion.

preliminary injunction has not satisfied one of the threshold requirements," noting that "[d]oing so expedites [appellate] review and helps to protect the interests of the parties"). The Court notes that Plaintiffs again failed to meaningfully develop an argument on the issue, raising substantive arguments only in their reply brief. Such failure is unacceptable, particularly because Plaintiffs have the burden of demonstrating an injunction's necessity. *Ind. Forest Alliance v. McDonald*, No. 1:16-cv-03297-JMS-MPB, 2017 WL 131739, at *11 (S.D. Ind. Jan. 13, 2017 (finding plaintiffs would not prevail at the balancing phase where, among other things, they did not address the effects of an injunction on the public interest). To the extent the balance of hardships comes into play, using the sliding scale approach, the balance would have to weigh heavily in Plaintiffs' favor where the Court has found they are unlikely to succeed on the merits of their claims. *Girl Scouts*, 549 F.3d at 1086 (describing sliding scale approach). It is true that, in First Amendment cases, "if the moving party establishes a likelihood of success on the merits, the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." *ACLU of Ill.*, 679 F.3d at 590; *see also Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("[I]njunctions protecting First Amendment freedoms are always in the public interest."). But here, the Court has found that the SHO does not implicate First Amendment concerns. In reply, Plaintiffs raise concerns of harassment by the City and others (landlords, neighbors, condominium associations) if hosts lose their anonymity by having to register and comply with the SHO. The City responds that the affidavits submitted to support such concerns demonstrate that hosts are already widely recognizable, meaning that claims of harassment arising from the SHO should not be countenanced and that instead the SHO's

registration requirements would allow the City to cut down on any claimed harassment issues and putting into place a more orderly system for the home sharing industry.

The City also maintains that because the SHO imposes commonplace regulations on business activity and does not restrict speech or social interaction between hosts and guests, any harm to Plaintiffs in denying the injunction is minimal. The City claims that, on the other hand, delays in implementation harm the City and the public because the City has a substantial interest in regulating the short-term rental market, ensuring its safety, and protecting the residential character of the buildings and neighborhoods in which short-term rentals are occurring. The delay in implementing the SHO deprives citizens of their elected representatives' solution to issues surrounding the emerging short-term rental industry. *See Maryland v. King*, --- U.S. ----, 133 S. Ct. 1, 3, 183 L. Ed. 2d 667 (2012) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury."). This, the City argues, harms the public interest. Taken together, the arguments before the Court on the balance of hardships weigh against an injunction.

CONCLUSION

For the foregoing reasons, the Court denies Plaintiffs' motion for a preliminary injunction [11]. To the extent Plaintiffs' amended motion for a preliminary injunction [30] seeks an injunction based on their First Amendment and Fourteenth Amendment due process claims, the Court denies that portion of the amended motion as well.

Dated: March 13, 2017

SARA L. ELLIS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, March 14, 2017:

MINUTE entry before the Honorable Sara L. Ellis: Status hearing held on 3/14/17. Defendant appears for status hearing; Plaintiff fails to appear. It is hereby ordered that the stay of the enforcement of the ordinance is lifted. Briefing schedule on motion to dismiss: Defendant's motion to dismiss is due by 4/21/2017; Plaintiff's response is due by 5/22/2017; Defendant's reply is due by 6/12/2017. Next status date set for 9/14/2017 at 1:30 PM for ruling on motion to dismiss. Mailed notice(rj,)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KEEP CHICAGO LIVABLE, et al., Plaintiffs, vs. THE CITY OF CHICAGO, Defendant.	No. 16 C 10371 Chicago, Illinois March 15, 2017 9:45 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. SARA L. ELLIS

APPEARANCES:

For the Plaintiffs: MR. SHORGE K. SATO
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PATRICK J. MULLEN
Official Court Reporter
United States District Court
219 South Dearborn Street, Room 1412
Chicago, Illinois 60604

THE CLERK: 2016 C 10371, Keep Chicago Livable versus City of Chicago.

MR. SATO: Good morning, Your Honor. Shorge Sato on behalf of plaintiffs.

10:15:28 MR. WORSECK: Good morning, Your Honor. Andrew Worseck for the city.

MS. McLAUGHLIN: Ellen McLaughlin for the city.

THE COURT: All right. Good morning.

MR. SATO: Your Honor, I apologize for missing

10:15:34 yesterday's date. I miscalendered the time. I was fully prepared to come. It was just a mistake on my part. That said, our motion today raises an issue of Rule 52 with respect to both the order entered yesterday which allowed the agreed injunction to be dissolved or expire as well as our second

10:16:04 motion for preliminary injunction which requested an additional injunction pending a ruling on that second motion for preliminary injunction.

My reading of Rule 52 is that there needs to be written or at least express findings of fact and conclusions of

10:16:20 law so that the Appellate Court can understand the basis for the refusal to enter those injunctions.

THE COURT: So there are two issues, actually three.

MR. SATO: Three.

THE COURT: One, if you were here yesterday --

10:16:36 MR. SATO: Which I apologize for.

THE COURT: -- we could have dealt with all of this, number one. Number two, it wasn't an injunction. It was an agreed stay. So it wasn't an injunction. Number three, I issued a written opinion, and the opinion itself contains findings of fact and conclusions of law. So the Seventh Circuit, if and when you decide to take it upstairs, has a full record of what I found and what the basis was for my decision. But if the city would like to file a response in writing, you're more than welcome to.

10:16:58

10:17:26

MR. WORSECK: Well, Your Honor, I think we can address the motion to reconsider piece today. I mean, I think we would agree with everything Your Honor said. The March 13th opinion and order contains findings of fact and conclusions of law and explains the Court's rationale for denying injunctive relief. To the extent plaintiff says Rule 52 requires something like that, the March 13th order does exactly that.

10:17:48

We also think that the plaintiff is proceeding from sort of an improper premise, and that is that there was a formal proper injunction in place that if the Court wanted to depart from that it would have to explain full reasoning for doing so. That never was the case. There was a voluntary stay for most of the period. Then there was an extension of that by direction of the Court, I believe, so that the Court could take a little bit of extra time to resolve the motion for the PI. But there was never a series of findings by the Court that the

10:18:07

10:18:25

plaintiff had satisfied its burden to establish entitlement to injunctive relief. Perhaps if that had taken place and then the Court were departing from that, the Court would have to provide reasons, but there was never that sort of an injunction
10:18:44 in place so the Court didn't have to provide reasons for departing from that.

In fact, getting to where we are now with the stay being lifted is the proper posture of the case in terms of viewing it in terms of injunctive relief which the case has
10:18:57 always been in. There has never been a showing from the plaintiff that injunctive relief is proper in this case.

THE COURT: And this was a voluntary stay. The language that the city included in the agreement for the stay was that the stay would remain in place until the Court ruled.
10:19:23 The city objected to the extension of the stay, but that was the spirit of the agreement and the language of the agreement, the express language of the agreement. That express language of the agreement did not convert the agreed stay into an injunction. I had never made a finding that an injunction was
10:19:51 appropriate, and it was based on an agreement between the parties that allowed the Court to extend the stay in order to issue a ruling.

I issued a ruling yesterday. I denied the motion, the original motion for preliminary injunction, and thereby lifted
10:20:18 the stay. So we are back to square one. Now, as to the second

motion for preliminary injunction and the additional bases, is there a hearing required, do you think?

MR. SATO: I believe so. First of all, there has not been a response to it. The findings of fact and conclusions of law in your original --

10:20:46

THE COURT: My question, because the last time you were here you said essentially that you didn't think that we needed a separate hearing and that you were going to rely on basically your papers and that we wouldn't need live testimony or anything along those lines, so my question is: On the second motion for preliminary injunction, do the parties think that you need a hearing?

10:21:11

MR. SATO: Let me clarify what I meant. I meant it's unclear whether we need an evidentiary hearing. I certainly believe we need additional oral argument because there are new claims, new plaintiffs, and a new motion. I cannot say whether or not an evidentiary hearing is necessary because I don't know if the city is contesting any of the facts which would require testimony or their position as it appears a position as a matter of law, which is why the city wishes to file a motion to dismiss on a 12(b)(6) basis.

10:21:29

10:21:54

So if it's just a simple question of law, then I think we can have an oral argument, but I do think we need to brief and argue and resolve that because your memorandum opinion was expressly limited to the First Amendment speech issues, even

10:22:11

though there was an amended motion that was -- it was to the extent the amended motion supplemented those First Amendment speech issues. So it didn't address the rest of the second motion.

10:22:25 THE COURT: I know. I wrote it.

MR. SATO: Yeah. So I just wanted to make sure that from a Rule 52 perspective there haven't been findings of fact and conclusions of law with respect to those non-First Amendment, non-vagueness-related issues in the second

10:22:39 preliminary injunction motion.

MR. WORSECK: Your Honor, we don't think a hearing is necessarily required. As we said maybe two hearings ago, we think that the proper course at this point would be for the city to be afforded the chance to move to dismiss the amended

10:22:56 complaint. We think it's defective on its face as it fails to state claims under 12(b)(6), so do that before proceeding to any further preliminary injunction motion hearings.

I would note with respect to the amended motion for preliminary injunction, the plaintiff has the burden in seeking

10:23:13 injunctive relief to satisfy three threshold requirements: likelihood of success, irreparable harm, and inadequate remedy of law. As to those latter two, irreparable harm and inadequate remedy at law, there is not even an argument on the face of the motion that those two requirements are satisfied as

10:23:33 to the non-First Amendment pieces of the amended complaint, the

new claims that were brought in. The plaintiffs are not even arguing that they've satisfied the thresholds for injunctive relief as to those two pieces. We think the motion could be denied on its face for that reason.

10:23:45 Certainly, the plaintiff has not presented papers indicating any sort of emergency, any sort of irreparable harm with respect to the new claims that admittedly have not been yet adjudicated by the Court. Given that posture, we think it's entirely appropriate to now treat this case about four

10:24:06 months in as cases should normally be developed, and that is the defendants have a chance to move to dismiss. If plaintiffs can somehow survive that and there's some claim or claims that survive, then the plaintiff can try and show an entitlement to injunctive relieve.

10:24:25 We're past the point of giving plaintiff innumerable chances to try to cobble together a preliminary injunction case. The new claims could have been brought earlier. They weren't. That is what it is, and we should not be put in the position any longer of having to fend off repeated attempts at

10:24:40 injunctive relief.

THE COURT: And I tend to agree. These new claims are certainly claims that could have been brought the first time around. We did have a hearing, and it became apparent in the hearing that some of the claims that were brought and some of

10:25:04 the arguments that were brought were not developed and were

abandoned. There is nothing unique about the new claims that have been brought that demonstrate that these claims became apparent after the filing of the original complaint.

I think what happened is that after the hearing it 10:25:39 became apparent that some of the claims that had been brought were not going to survive and that there would not be an injunction entered on the basis of those claims, and then there was kind of a reconfiguring of the litigation strategy and the claims to be brought.

10:26:10 So none of the new claims are based on any particularly new evidence. In fact, the associational claims that were brought, these new ones, one is brought by one of the original plaintiffs, Mr. Wolf. So those claims certainly could have been brought in the original complaint.

10:26:42 I think at this point it makes sense to continue on the track that we're on, which is the motion to dismiss. We'll then see what claims survive that process, and at that point plaintiffs can then move forward, if you are still so inclined, on the motion for preliminary injunction on whatever claims are 10:27:19 there, and you can develop any arguments on irreparable harm or inadequate remedy of law.

So I will see you back here on September 14th. The motion to reconsider is denied, and I think that takes care of all outstanding issues.

10:27:51 MR. SATO: The other request is under Federal Rule of

Appellate Procedure 8, I made a request for a stay pending appeal. Obviously I haven't filed an appeal, but I will be. I'm supposed to move the district court to state any reasons. I presume that your reasons are as you've just explained.

10:28:07 THE COURT: They are.

MR. SATO: Okay. So I just wanted to clarify that for the record.

THE COURT: So that motion is denied.

MR. SATO: Okay. Thank you.

10:28:14 MR. WORSECK: Thank you.

THE COURT: You're welcome.

(Proceedings concluded.)

C E R T I F I C A T E

I, Patrick J. Mullen, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the Honorable SARA L. ELLIS, one of the judges of said Court, at Chicago, Illinois, on March 15, 2017.

/s/ Patrick J. Mullen
Official Court Reporter
United States District Court
Northern District of Illinois
Eastern Division

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, March 16, 2017:

MINUTE entry before the Honorable Sara L. Ellis: Motion hearing held on 3/15/2017. Plaintiffs' emergency motion to reconsider or stay pending appeal [38] is denied for the reasons stated of record. Mailed notice(rj,)

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF LIVE, Ver 6.1.1
Eastern Division

Keep Chicago Livable, et al.

Plaintiff,

v.

Case No.: 1:16−cv−10371
Honorable Sara L. Ellis

City of Chicago, The

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, April 18, 2017:

MINUTE entry before the Honorable Sara L. Ellis: Motion hearing held on 4/18/2017. Defendant's motion to stay District Court proceedings pending interlocutory appeal [46] is granted in part. Status hearing set for 5/24/2017 at 9:30 AM. Mailed notice(rj,)

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The New York Times | https://nyti.ms/20UtjCq

TECHNOLOGY

Airbnb Wants Travelers to 'Live Like a Local' With Its App

By KATIE BENNER APRIL 19, 2016

SAN FRANCISCO — The home-sharing app Airbnb is pushing into local reviews and recommendations, putting it increasingly into competition with services like Lonely Planet, Yelp and local tourism websites.

The company, based in San Francisco, on Tuesday began offering Guidebooks, a feature that lets those who rent out their homes on Airbnb share information about their neighborhood's best restaurants, bars and attractions, including local spots that might not be found on travel websites or guides, all in the Airbnb app.

Guidebooks' aim is to let people "live like a local," Brian Chesky, the chief executive of Airbnb, said in an interview.

People who use Airbnb previously had to leave the app to find local event and dining information using search engines, travel websites and local review services. But Airbnb's new feature means people can now eschew Yelp, Facebook, Google and other sites that have all longed to control the connection between consumers and local businesses.

Guidebooks also helps Airbnb address one of its biggest puzzles — how best to match hosts and guests so that both want to continue using the home-sharing

service. That puzzle is increasingly something Airbnb wants to solve, especially as it tries to appeal to business travelers and families who have vastly different needs from the younger travelers who slept on sofas and in spare rooms when the start-up began.

Personalization and matching are important because the Internet gives customers an overwhelming amount of information. "The importance of matching is even more specific to the travel industry, where people traveling to an entirely new destination are making particularly uninformed choices," Mr. Chesky said.

The app clusters listings by neighborhood, and Guidebooks will characterize each area for people who may prefer a family-friendly neighborhood or one near a central business district to one that is filled with late-night revelers.

Airbnb, which is privately held, has been valued at more than $24 billion by investors. That valuation is predicated on the idea that many more people will use the service, which lists more than two million homes in more than 190 countries. More than 80 million people worldwide have stayed with an Airbnb host.

Some Airbnb hosts, like Paul Schirmer in suburban Cincinnati, say they already provide guests with a binder that includes basics like the Wi-Fi password of their home, along with information on popular local restaurants, parks and shops.

Mr. Schirmer said having that sort of information in the Airbnb app could make his listing more attractive because many people like to stay in an Airbnb "to live in a neighborhood, relax, make dinner and not feel pressure to eat out every night."

A version of this article appears in print on April 20, 2016, on Page B6 of the New York edition with the headline: Airbnb App Offers Guides to Learn the Neighborhood.

Airbnb just closed a $1 billion round and became profitable in 2016

Lauren Thomas | @laurenthomasx3

Thursday, 9 Mar 2017 | 10:45 AM ET

Airbnb has closed on a more than $1 billion round of funding, a source close to the company told CNBC. The round was confirmed in an SEC filing that dropped on Thursday. It is now worth approximately $31 billion.

The company raised roughly an additional $450 million as part of its Series F round, making the round nearly twice as much as it stood last fall. The total amount raised was $1,003,312,065, according to the filing.

The company also turned profitable in the second quarter of 2016, a person close to the company confirmed with CNBC. The home-sharing giant further expects to be profitable this year, the source said, and has no plans to go public soon. (That's EBITDA profitability, according to the Wall Street Journal, meaning that expenses like taxes are not included.)

Since its start in 2008, Airbnb has raised more than $3 billion.

Airbnb was last reported to be raising cash at a $30 billion valuation, making it the second-most valuable start-up in the U.S., trailing only Uber. This latest round of funding ups the valuation to approximately $31 billion.

Although details weren't provided on how Airbnb plans to use funds, it likely will aim to grow operations globally. With a stronger balance

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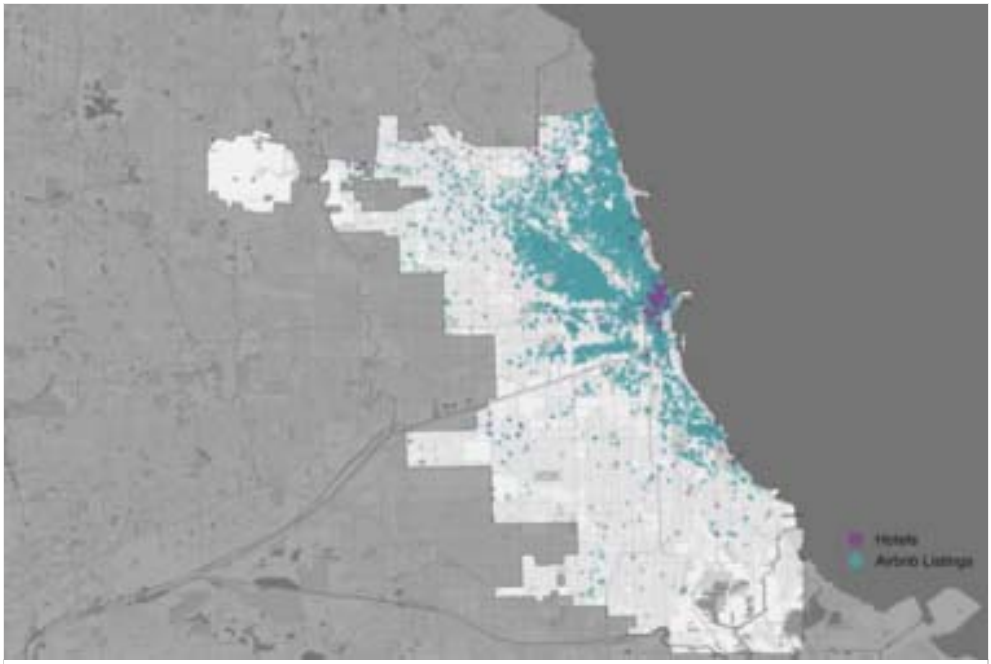
Airbnb Hosts In Chicago Made $67 Million In 2016, Company Says

By Heather Cherone (//www.dnainfo.com/chicago/about-us/our-team/editorial-team/heather-cherone) and Tanveer Ali (//www.dnainfo.com/chicago/about-us/our-team/editorial-team/tanveer-ali) | May 4, 2017 5:57am | *Updated on May 5, 2017 11:33am*



A map complied by Airbnb shows where hotels — represented by purple dots — are located, as compared with blue dots representing listings on Airbr

▲ View Full Caption

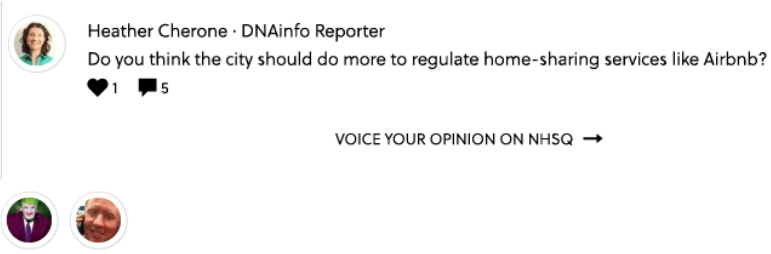
Airbnb

CHICAGO — Chicagoans who rent out their homes and apartments via Airbnb (https://www.dnainfo.com/chicago/tags/airbnb) earned $67 million in 2016, according to a report compiled by the home-sharing service designed to spotlight the boost the firm has given Chicago's economy.

The San Francisco-based company had a total economic impact of $331 million on Chicago in 2016, according to the report.

Typical hosts — who rent out their home or a portion of it — earned $4,100 in 2016, according to the company. In all, 7,600 Chicagoans rented their property through the service used by another 103,000 Chicagoans to find a place to stay, according to the report provided to DNAinfo.

In addition, 390,000 people who traveled to Chicago used Airbnb to find a place to stay for an average of 3.3 nights, according to the company. Eighty-five percent of those who use Airbnb chose it over a hotel in an effort to "live like a local."



(https://neighborhoodsquare.com/n/item/4Acs?utm_campaign=Bronzeville&utm_medium=integration_partner&utm_source=dnainfo&utm_content=hcherone%40dnainfo.com&prompt=top)

"Responsible home sharing is a new engine for Chicago tourism and the economy," according to a statement from the company. "Airbnb grows the tourism pie, attracting many guests who might otherwise not have come, or been able to stay as long."

The company's report highlights Airbnb's impact on Chicago's South Side, where the number of guests who found a place to stay through Airbnb rose 135 percent from 2015 to 2016, company spokesman Ben Breit said.

"Airbnb is disproportionately bringing economics to communities like the South Side that have not typically benefited from tourism due to the lack of hotels," Breit said. "Neighborhoods like Grand Boulevard, Woodlawn and Armour Square are among the fastest growing parts of our host community."

South Side hosts earned $3.7 million in 2016, according to the report.

The most lucrative neighborhood for hosts featured in the report is Bronzeville, where the typical host earned on average $10,900 in 2016, according to the report.

The report compiled by the company was released as new regulations on home-sharing services take effect, forcing hosts to be licensed by the city, pay an extra tax and limit the number of units in buildings that can be rented out.

The new regulations (https://www.dnainfo.com/chicago/20170315/wrigleyville/airbnb-regulations-crackdown-keep-chicago-livable) were delayed for months after

they faced two legal challenges — one in state court filed by the Chicago-based Liberty Justice Center (http://libertyjusticecenter.org/) and another filed in federal court by Keep Chicago Livable (https://keepchicagolivable.com/), a group made up of homeowners who oppose the new rules and have appealed a judge's decision to toss the group's lawsuit.

The revenue from the 4 percent tax is expected to generate $2.5 million to $3 million that is earmarked to fight homelessness in Chicago, and Mayor Rahm Emanuel (https://www.dnainfo.com/chicago/people/rahm-emanuel) said $1 million from that tax would be used this summer to house 100 families (https://www.dnainfo.com/chicago/20170420/austin/city-use-1m-from-airbnb-fees-house-100-families-this-summer).

The owner of a Bronzeville condominium who rents out two spare rooms said she earned $26,000 in 2016. A member of Keep Chicago Livable, the host did not want to be identified by DNAinfo for fear of jeopardizing her application with the city for a license by acknowledging she was using the home-sharing service without permission.

RELATED: Airbnb Crackdown Goes Into Effect After Months Of Delays (https://www.dnainfo.com/chicago/20170315/wrigleyville/airbnb-regulations-crackdown-keep-chicago-livable)

The woman said she used her income from Airbnb to pay off medical bills she racked up when she got sick but did not have insurance.

Most of the people who stay with her are in Chicago to attend conventions at McCormick Place, which is nearby, or students applying to medical school at the University of Illinois-Chicago, which is about 20 minutes away via the CTA Green Line, the Bronzeville host said.

"I was nervous at the beginning, but it has been a great experience," she said. "But I had two spare rooms, and I thought I should do something with them."

The host said she also relishes the role she plays in combating stereotypes about Chicago's South Side by giving people from all over the world a chance to experience it for themselves.

Citing a 2016 survey, the company said the average guest spends $205 per day while in Chicago — 40 percent in the neighborhood where they are staying.

Sixty-two percent of Chicago Airbnb listings are for an entire house, according to the report. Eighty-three percent of Airbnb hosts rent their primary residence, according to the report.

RELATED: Here Are The Buildings Where Airbnb Is Banned In Chicago (https://www.dnainfo.com/chicago/20170113/loop/airbnb-home-share-banned-michele-smith-shared-housing-ordinance)

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(https://www.dnainfo.com/chicago/20170504/jefferson-park/jefferson-park-mansion-

7th CIRCUIT RULE 30(d) STATEMENT

Pursuant to 7th Circuit Rule 30(d), all of the materials required by parts (a) and (b) of 7th Circuit Rule 30 are included herein.

Dated: May 8, 2017

Respectfully submitted,

KEEP CHICAGO LIVABLE, *et al*.

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