KOBAYASHI SUGITA & GODA, LLP
Attorneys at Law

Bert T. Kobayashi, Jr.*
Alan M. Goda*

John R. Aube*
Wendell H. Fuji*
Charles W. Gall*
Neal T. Gota
Clifford K. Higa*
Robert K. Ichikawa*
Christopher T. Kobayashi*
Jan M. L. Y. Kutsunai*

David M. Louie*
Jonathan S. Moore
Bruce A. Nakamura*
Kenneth M. Nakasone*
Gregory M. Sato*
Jesse W. Schiel*
Craig K. Shikuma*
Lex R. Smith*
Joseph A. Stewart*
David B. Tongg*
Thao T. Tran

*A Law Corporation

Stephen D. Atwell
Yuko Funaki
Caycie K. Gusman
Charles D. Hunter
Nicholas R. Monlux
Aaron Mun
Gabriele V. Provenza
Anthony Suetsugu
Brian D. Tongg
Maria Y.Y. Wang

Of Counsel:
Kenneth Y. Sugita*
Burt T. Lau*
John F. Lezak*
Larry L.Myers*

July 5, 2016

HAND DELIVERED

Office of the Governor
The Honorable David Y. Ige
Governor, State of Hawaiʻi
Executive Chambers
State Capitol
Honolulu, Hawaiʻi 96813
Phone: (808) 586-0034

Re: H.B. 1850 HD1, SD3 CD1 - Relating to Taxation

Dear Governor Ige:

I write on behalf of my client, the Internet Association, to respectfully urge you to allow H.B. 1850 HD1, SD3 CD1 to become law. The mission of the Internet Association, whose membership includes the country's leading internet companies, is to foster innovation, promote economic growth, and empower people through the free and open internet. H.B. 1850 was included on your recently announced Intent to Veto List. However, there are both many benefits to Hawaiʻi to be gained if H.B. 1850 becomes law - and serious legal vulnerabilities the State could face if it is vetoed. The rationale behind vetoing the bill includes concern that it could interfere with enforcement mechanisms of Act 204. However, you should be aware that significant portions of Act 204 conflict with and are likely preempted by the federal Communications Decency Act, 47 U.S.C. § 230 ("Section 230"), rendering it an unenforceable and invalid law.

H.B. 1850, and Act 204 (SB 519, SD2, HD3, CD1) from the 2015 Legislative Session, both address the issue of regulating home sharing and the growing community of homeowners who generate supplemental income by providing their homes to transient guests. Concerns have been raised about the loss of taxes which should be collected from such transactions. H.B. 1850 addresses a number of legal issues related to Act 204 and provides substantial benefits to the State.

H.B. 1850 will allow home sharing platforms, such as Airbnb, to act as tax collection agents and assume full responsibility and liability for collecting general excise and transient accommodations taxes on behalf of hosts and visitors and remitting those taxes to the Department of Taxation. This is good for the State as it will generate substantial revenue that frequently goes uncollected. Some experts estimate that the State of Hawai'i currently loses over $100 million annually by not collecting the required taxes from vacation rentals. A copy of a recent Hawaii News Now article is enclosed.

H.B. 1850 was supported by the State of Hawai'i Department of Taxation. Under Hawai'i's existing transient accommodations tax law, Haw. Rev. Stat. Chapter 237D, the State has the enormous enforcement burden of ensuring individual tax compliance. As Director Maria E. Zielinski testified, "this bill will ease the burden of reporting and remitting taxes for operators and plan managers, and will facilitate collection at the source for the Department." Testimony of Maria E. Zielinski, Director Department of Taxation on H.B. 1850, H.D. 1, S.D. 1 (Mar. 29, 2016). A copy of that testimony is enclosed.

Importantly, H.B. 1850 addresses and corrects a number of problems inherent with Act 204, which only recently took effect on June 30, 2016. Although the State may regulate in various areas, it must do so in a manner that does not conflict with federal law. Act 204 attempts to regulate internet platforms in an effort to address concerns regarding home sharing. However, Act 204 penalizes internet platforms for the actions of their users. This conflicts with, violates, and therefore is preempted by, Section 230. H.B. 1850 is a practical way to address these legal infirmities *and* effectuate the tax compliance goals of Act 204.

Section 230 is considered the cornerstone of the legal framework that has allowed the internet to thrive, and it "protects websites from liability for material posted on the website by someone else." Doe v. Internet Brands, Inc., No. 12-56638, 2016 WL 3067995, at *3 (9th Cir. May 31, 2016). It does so through two key provisions. First, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230 (c)(1). Second, "[n]o liability may be imposed under any State or local law that is inconsistent with this section." Id. at § 230 (e)(3).

As the United States District Court for the District of Hawai'i observed, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." Sulla v. Horowitz, No. CIV. 12-00449 SOM, 2012 WL 4758163, at *2 (D. Haw. Oct. 4, 2012) (quoting Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003)).

Accordingly, courts across the country have regularly found that Section 230 preempts state laws that attempt to hold websites liable for third-party content. See, e.g., Backpage.com, LLC v. McKenna, 881 F.Supp.2d 1262, 1273 (W.D. Wash. 2012). Section 230 also protects websites from being forced to screen or otherwise verify third-party content. See, e.g., Doe v.

Friendfinder Network, Inc., 540 F.Supp.2d 288, 295 (D.N.H. 2008) ("§ 230 bars the plaintiff's claims that the defendants acted wrongfully by . . . failing to verify that a profile corresponded to the submitter's true identity."); Doe v. MySpace, Inc., 474 F.Supp.2d 843, 850 (W.D. Tex. 2007) (Section 230 barred claims that MySpace was liable for policies relating to age verification); Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1180 (9th Cir. 2008) ("webhosts are immune from liability for . . . efforts to verify the truth of" third-party statements posted on the website); Prickett v. InfoUSA, Inc., 561 F.Supp.2d 646, 651 (E.D. Tex. 2006) ("The Plaintiffs are presumably alleging that . . . the Defendant is liable for failing to verify the accuracy of the content. Any such claim by the Plaintiffs necessarily treats the Defendant as 'publisher' of the content and is therefore barred by § 230."); Mazur v. eBay Inc., No. C 07-3967 MHP, 2008 WL 618988, at *9 (N.D. Cal. Mar. 4, 2008).

Significant portions of Act 204 conflict with and are likely preempted by Section 230. Specifically, Act 204 included language which provides that "[a]ny advertisement, including an online advertisement, for any transient accommodation or resort time share vacation interest, plan, or unit shall conspicuously provide" certain information, such as a registration identification number, and that failure to do so will result in "citations to any person, including operators, plan managers, and transient accommodations brokers" of up to $500 per day, for a first violation, $1,000 per day for a second violation, and $5,000 per day for a third and any subsequent violation. Haw. Rev. Stat. § 237D-4(c), (d). A "transient accommodations broker" means "any person or entity, including but not limited to persons who operate online websites, online travel agencies, or online booking agencies, that offers, lists, advertises, or accepts reservations or collects whole or partial payment for transient accommodations or resort time share vacation interests, units, or plans." Haw. Rev. Stat. § 237D-1.

Act 204 created a strict liability regime for both websites who host third-party content, as well as all platforms on which advertisers of short-term rentals might post, including newspapers such as the Honolulu Star-Advertiser, community publications, websites like Craigslist, real estate brokers' websites, and resort timeshares in Hawai'i such as Disney and Hilton. For example, if a third-party user fails to post any of the required information on a listing, liability would automatically attach to the website operator. As a result, the statute imposes liability on both websites and newspapers by treating them as the "publisher or speaker" of the information (or lack thereof) provided by another in direct contravention of Section 230. This impermissible conflict makes Act 204 likely unenforceable and invalid.

While Act 204 has not yet been challenged, suits have been filed over similar restrictions in other jurisdictions. As an example, Airbnb recently filed a lawsuit against the City and County of San Francisco to invalidate an ordinance that imposes liability on websites if their users post listings without valid registration numbers. Similar lawsuits are expected to follow from other platforms. The Complaint for Declaratory and Injunctive Relief, filed in the United States District Court for the Northern District of California on June 27, 2016 is enclosed. That lawsuit further asserts that the ordinance violates the hosting platform's First Amendment rights as a

content-based restriction on advertising rental listings. San Francisco's ordinance, like the provisions of Act 204, improperly attempts to shift responsibility for any illegal activity related to a short term vacation rental from the party violating the law, i.e. the individual operator, to the platform on which the party listed the rental. Simply put, that is directly contrary to the terms of Section 230 of the CDA and is therefore preempted as a matter of law.

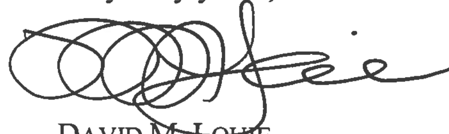
If the State of Hawai'i were to seek to enforce Act 204 against a platform like Airbnb, such challenge would be preempted by federal law. The State would be left with a requirement to investigate every single individual operator to determine compliance, a virtually impossible task. The Legislature provides a practical solution through H.B. 1850 by allowing platforms to act as central agents to collect all state taxes. As such, the goals of the Legislature in passing Act 204 will not be met if H.B. 1850 does not become law, as the State has no realistic method for ensuring that the individual owners pay the appropriate tax. A veto of H.B. 1850 might actually drive the industry further underground, by decreasing platform transparency and discouraging vacation rental owners from paying their taxes and taking the risk of non-enforcement. This is particularly true in the City and County of Honolulu, which requires short term rental permits but has not issued any new ones since 1989. This could cost the State of Hawai'i tens of millions of dollars.

Critics of H.B. 1850 claim that it should be vetoed because there is a housing shortage in Hawai'i and they believe that home sharing takes units out of the available rental market. The housing shortage in Hawai'i is a complex problem with many underlying causes, such as availability of land, zoning and inclusionary housing policies, employment patterns, public investment, and a number of other underlying factors. Individual home sharers and internet platforms should not be scapegoated. Instead, it is important to remember that H.B. 1850 is a State tax bill and should be considered solely on that basis. In looking at its impact, it is undisputed that H.B. 1850 will make it easier for the State to enforce Act 204 and will substantially increase the tax revenue collected.

Home sharing has been an important part of Hawai'i's economy for decades. H.B. 1850 has the potential to put Hawai'i in a better position than ever before to effectively and efficiently

collect taxes from transient rentals, while reducing the potential for legal challenges regarding Act 204. The Internet Association supports H.B. 1850 and encourages you to allow the measure to become law.

Very truly yours,



DAVID M. LOUIE
JOSEPH A. STEWART
AARON R. MUN
for
KOBAYASHI, SUGITA & GODA

Enclosures as referenced.

cc:
Department of the Attorney General
Douglas Chin
Attorney General
425 Queen Street
Honolulu, Hawaiʻi 96813

Department of Taxation
Maria E. Zielinski
Director of Taxation
830 Punchbowl Street, Room 221
Honolulu, Hawaiʻi 96813