

3-21-2023

## Federal Protection of Illegal Short-Term Rentals: How the Protecting Local Authority and Neighborhoods Act Will Hold Airbnb Liable, Enforcing Local Regulations

Nicole Schaeffer

*The Catholic University of America, Columbus School of Law*, [schaeffer@cua.edu](mailto:schaeffer@cua.edu)

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Communications Law Commons](#), [Property Law and Real Estate Commons](#), and the [Science and Technology Law Commons](#)

---

### Recommended Citation

Nicole Schaeffer, *Federal Protection of Illegal Short-Term Rentals: How the Protecting Local Authority and Neighborhoods Act Will Hold Airbnb Liable, Enforcing Local Regulations*, 72 *Cath. U. L. Rev.* 127 (2023).  
Available at: <https://scholarship.law.edu/lawreview/vol72/iss1/9>

This Comments is brought to you for free and open access by Catholic Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of Catholic Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

---

# Federal Protection of Illegal Short-Term Rentals: How the Protecting Local Authority and Neighborhoods Act Will Hold Airbnb Liable, Enforcing Local Regulations

## Cover Page Footnote

J.D. Candidate, May 2023, The Catholic University of America, Columbus School of Law; B.A. 2020, The University of Scranton. The author wishes to thank Adjunct Professor Christopher Darby and Note and Comment Editor Christina Makarova for their dedicated assistance in the drafting of this paper. I am also extremely grateful for Christopher Huff and Heather Steele for their constant support and valuable perspectives.

# FEDERAL PROTECTION OF ILLEGAL SHORT-TERM RENTALS: HOW THE PROTECTING LOCAL AUTHORITY AND NEIGHBORHOODS ACT WILL HOLD AIRBNB LIABLE, ENFORCING LOCAL REGULATIONS

Nicole Schaeffer<sup>+</sup>

Section 230 has come under scrutiny from academics and politicians, leading to calls on lawmakers to limit, or even end, Section 230's immunity for Internet corporations; however, less attention has been given to the effects of Section 230 on the legal landscape in local, off-line communities. Online providers of short-term rental (STR) services such as Airbnb have used Section 230's protection to shift the burden of complying with local laws and lease agreements onto the users listing STRs. By wielding Section 230 as both a sword and shield in litigation over their listings that violate local laws and lease agreements, these providers leave landlords and local governments seemingly without recourse. The PLAN Act (the Bill for Protecting Local Authority and Neighborhoods Act), proposed in the House in the 117th Congress in 2021, would remedy this overlooked and unjust result of Section 230's protection. This article seeks to demonstrate why the PLAN Act must be passed to prevent further unfair application of Section 230.

---

<sup>+</sup> J.D. Candidate, May 2023, The Catholic University of America, Columbus School of Law; B.A. 2020, The University of Scranton. The author wishes to thank Adjunct Professor Christopher Darby and Note and Comment Editor Christina Makarova for their dedicated assistance in the drafting of this paper. I am also extremely grateful for Christopher Huff and Heather Steele for their constant support and valuable perspectives.

I. INTRODUCTION .....	128
II. SECTION 230’S LIABILITY SHIELD AND ITS BROAD JUDICIAL INTERPRETATIONS .....	133
A. <i>Section 230 Judicial Decisions: Zeran and its Following</i> .....	135
B. <i>Judicial Decisions Involving STR Websites</i> .....	138
III. SECTION 230: PROBLEMATIC APPLICATIONS, ENACTED AMENDMENTS, AND PROPOSED CHANGES .....	140
A. <i>Issues that Section 230 Drafters Failed to See Coming</i> .....	140
B. <i>Congressional Attempts to Limit Section 230</i> .....	143
IV. CITIES’ ATTEMPTS TO REGULATE SHORT-TERM RENTALS .....	145
A. <i>New York, NY</i> .....	146
B. <i>Washington, D.C.</i> .....	148
C. <i>Baltimore, MD</i> .....	149
V. LOCAL REGULATIONS LACK FEDERAL BACKING FOR ENFORCEMENT AGAINST STR WEBSITES .....	149
VI. CONCLUSION.....	150

## I. INTRODUCTION

Prior to the advent of the Internet, one’s options when traveling to a new place were limited to staying at a hotel or with family and friends. The Internet’s wide-spread capabilities have allowed new markets to flourish and previous ones to adapt to online models, such as the market for short-term rentals (“STRs”).<sup>1</sup> STRs have taken off with the convenience of sites like Airbnb,<sup>2</sup> and many jurisdictions have had to modify and reinterpret their local laws to respond to

---

1. A STR is usually defined as “a property that is rented for less tha[n] 30 consecutive days.” Travel Tech. Ass’n, *Short Term Rental Advocacy Guide: Get The Facts*, THE SHORT TERM RENTAL ADVOC. CTR. 1, 6 <http://www.stradvocacy.org/useruploads/files/STRAC-Guide-v3.pdf> (last visited Sept. 13, 2021).

2. Created in 2008, Airbnb was designed to offer a new unique option for travelers, by allowing hosts to advertise their property after creating a free account on the site; the company now provides “consumers access to more than 7 million unique places to stay in more than 100,000 cities and 191 countries and regions.” *What is Airbnb and how does it work?*, AIRBNB, <https://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work> (last visited Oct. 23, 2021); *Communications Decency Act Section 230 and How the PLAN Act Could Change It*, AIRBNB (Oct. 23, 2019), <https://news.airbnb.com/cda-230-plan-act/> [hereinafter *Communications Decency Act Section 230*]. Airbnb markets their service as “a community built on sharing,” proclaiming that “millions of hosts and travelers choose . . . Airbnb . . . so they can list their space and book unique accommodations anywhere in the world. And Airbnb experience hosts share their passions and interests with both travelers and locals.” *What is Airbnb and how does it work?*, *supra*.

this rapidly changing market.<sup>3</sup> However, with the creation of new online markets, the trend in the United States has been to encourage their expansion by limiting regulations that interfere with their progress.<sup>4</sup>

When it comes to Internet regulations, one naturally thinks about the controversial arguments revolving around giant social media corporations like Meta Platforms, Inc., Twitter, Inc., and Google, LLC.<sup>5</sup> The federal law protecting these online platforms from liability for choosing to censor or not censor their content is also allowing STR platforms, like Airbnb, Inc. and HomeAway.com, Inc., to flout local regulations; these sites dump the burden on hosts to research and comply with their own local laws and rental requirements.<sup>6</sup> For instance, Airbnb does not place warnings on individual listings where STRs are banned by local regulations or violate lease agreements—again, placing this burden on the hosts—resulting in renters unfairly discovering “their weekend home is illegal when they get a knock on the door.”<sup>7</sup>

---

3. Marvin J. Nodiff, *Short-Term Rentals: Can Cities Get in Bed with Airbnb?*, 51 URB. LAW. 225, 225–27 (2021).

4. Christopher Zara, *The Most Important Law in Tech Has a Problem*, WIRED (Jan. 3, 2017, 12:00 AM), <https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/> (explaining how with only twenty-six words in Section 230’s safe harbor provision, “the federal government established the regulatory certainty that has allowed today’s biggest Internet companies to flourish”).

5. Heather Somerville, *Airbnb’s Section 230 Use Underscores Law’s Reach Beyond Facebook*, WALL ST. J. (Jan. 10, 2021, 12:00 PM), <https://www.wsj.com/articles/airbnbs-section-230-use-underscores-laws-reach-beyond-facebook-1161029800> (explaining how Trump argued that Section 230 gives tech companies too much power and should be repealed after his Twitter account was banned); Eric J. Savitz, *Repealing ‘Section 230’ Portion of Internet Law Would Be Terrible For Airbnb. Here’s Why.*, BARRON’S (Jan. 11, 2021, 6:59 PM), <https://www.barrons.com/articles/repealing-section-230-portion-of-internet-law-would-be-terrible-for-airbnb-heres-why-51610409540>; see Exec. Order No. 13925 of May 28, 2020, 85 Fed. Reg. 34,079 (June 2, 2020).

6. Somerville, *supra* note 5; Nodiff, *supra* note 3, at 254; Help Center, *Responsible hosting in the United States*, AIRBNB, <https://www.airbnb.com/help/article/1376/responsible-hosting-in-the-united-states> (last visited Sept. 13, 2021) [hereinafter *Responsible hosting*]. This Airbnb help center article provides a list of links for hosts to view specific local regulations, in areas like New York City, Washington, D.C., Baltimore, and Arlington County, VA, regarding STRs which looks promising at first; however, many of the links are broken and citations to local regulations are outdated. *Id.*

7. Nodiff, *supra* note 3, at 254–55. See also Anna Tims, *During a stay with Airbnb, we were told the let was ‘illegal’*, THE GUARDIAN (July 14, 2022), <https://www.theguardian.com/money/2022/jul/14/during-a-stay-with-airbnb-we-were-told-the-let-was> (quoting Paul Shamplina, founder of Landlord Action, that “[Airbnb] does not ask hosts if they are the owner, or have the landlord’s permission to let, and they won’t change their process to include that”). Airbnb’s community café allows for individuals to start chat threads; one poster explains how his tenant listed his property illegally on Airbnb and “Airbnb refuses to take down the listing even after [he] sent proof [he] own[s] the property and that subleasing is not allowed.” This poster received a response that Airbnb shared his “complaint with the user responsible for the listing and reminded them of their obligations as an Airbnb host,” but this response does not give reassurance that Airbnb notified the Airbnb renters in the property itself. *Illegal Airbnb rentals*,

Airbnb also escapes the responsibility of removing hosts' listings that inadequately comply with these local requirements, as a spokesperson for the company recently established in a statement claiming, "[e]nforcement of the law is the responsibility of [New York] City, and it has the data needed to do so."<sup>8</sup> Unlike the hotel industry, sites like Airbnb remain largely unregulated and circumvent compliance with safety standards meant to keep guests safe.<sup>9</sup> With this rapid growth of an unregulated market, the risk of dangerous incidents increases and therefore stricter regulations are necessary to hold Airbnb accountable.<sup>10</sup> The question then arises: shouldn't the onus to enforce these local regulations be on sites like Airbnb—a \$100 billion company,<sup>11</sup> with a

---

AIRBNB COMMUNITY CENTER, (Apr. 4, 2020, 3:48 PM), <https://community.withairbnb.com/t5/Community-Cafe/Illegal-Airbnb-rentals/m-p/1288419>.

8. Spectrum News Staff & Justine Re, *NYC Sheriff Seizes Vans Police Say Were Used as Illegal Airbnb Rentals*, SPECTRUM NEWS NY1 (Sept. 26, 2021, 1:12 PM), <https://www.ny1.com/nyc/all-boroughs/news/2021/09/26/nyc-sheriff-s-office-seizes-vans-used-as-illegal-airbnb-rentals> (reporting that Airbnb shares its rental listing data with New York City after an agreement made in June 2020, and that the problematic listings are no longer active on the website).

9. Nodiff, *supra* note 3, at 226 ("STRs operate under the radar as some cities do not enforce existing zoning and do not require STRs to comply with health, fire and safety standards."); *Illegal Hotels*, AM. HOTEL & LODGING ASS'N, <https://www.ahla.com/issues/illegal-hotels> (last visited Jan. 17, 2022).

10. Olivia Carville, *Airbnb Is Spending Millions of Dollars to Make Nightmares Go Away*, BLOOMBERG (June 15, 2021, 4:00 AM), <https://www.bloomberg.com/news/features/2021-06-15/airbnb-spends-millions-making-nightmares-at-live-anywhere-rentals-go-away> (explaining how a 2015 sexual assault at an Airbnb rental was contained by the company via a \$7 million payout, remained unreported on for six years, and required the details to be reconstructed from "police and court records and confidential documents, as well as from interviews with people familiar with the case"). These dangerous incidents often go unreported due to Airbnb's effective response team that creates settlement and confidentiality agreements in advance of litigation to keep these incidents under wraps. *Id.* Carville reflects how the "result of all these settlements, combined with the terms of service provisions that prevent lawsuits in the first place, is that the courts have never established the extent to which short-term rental operators might be liable, *if at all*, for crimes that take place in the properties they list." *Id.* (emphasis added).

11. Jeran Wittenstein, *Airbnb Tops \$100 Billion Market Value as Shares Surge to Record*, BLOOMBERG (Jan. 13, 2021, 12:10 PM), <https://www.bloomberg.com/news/articles/2021-01-13/airbnb-tops-100-billion-market-value-as-shares-surge-to-record>; Olivia Carville, Katie Roof & Crystal Tse, *Airbnb Valuation Reaches \$100 Billion in Trading Debut Surge*, BLOOMBERG (Dec. 11, 2020, 2:16 PM), <https://www.bloomberg.com/news/articles/2020-12-10/airbnb-s-47-billion-value-faces-debut-test-in-doordash-s-wake>; *see also Why That Crazy-High Airbnb Valuation is Fair*, CB INSIGHTS (June 22, 2015), <https://www.cbinsights.com/research/airbnb-hospitality-industry-valuation-breakdown/#:~:text=AirBnB%20had%20estimated%20revenue%20of,%20Dover%20year%20revenue%20growth> (reporting in 2015 that Airbnb was valued at \$24 billion and had surpassed the value of other massive hotel and travel companies like Marriott, Starwood, and Expedia).

lity of capable lawyers<sup>12</sup>—and not overburdened local governments relying on taxpayers' money?

STRs are defined as “a residential dwelling that is rented wholly or partially for a fee for a period of less than thirty (30) continuous days and does not include a hotel . . . or a bed and breakfast establishment or a bed and breakfast homestay.”<sup>13</sup> In 2008, Airbnb was the first site to capitalize on the market for these STRs by allowing its users, “hosts,” to advertise their personal property as a place for travelers to stay.<sup>14</sup> Airbnb advertises an easy three-step process by which guests can “Browse, Book, and Go.”<sup>15</sup> Inspired by Airbnb's success in this market, many other online sites such as HomeAway, VRBO, Vacasa, TurnKey, and FlipKey offer similar services to users who are looking to rent out their properties for short-term periods.<sup>16</sup> These sites benefit from the established policy, discussed in detail below, of allowing websites to flourish without heavy federal regulations.<sup>17</sup>

---

12. See Carville, *supra* note 10 (remarking on Airbnb's “elite trust-and-safety team” which in 2015 had Nick Shapiro, previous deputy chief of staff at the CIA and National Security Council advisor to the Obama administration, employed as Airbnb's crisis manager).

13. *Short-term Rental Unit Definition*, LAW INSIDER, <https://www.lawinsider.com/dictionary/short-term-rental-unit> (last visited Oct. 23, 2021). These privately owned residential dwellings can include “a single family dwelling or multiple family building, apartment unit, condominium, duplex . . . or any portion of such dwellings,” and are typically rented out for “occupancy[,] . . . dwelling, lodging, or sleeping purposes.” *Id.*

14. *What is Airbnb and How Does It Work?*, *supra* note 2; see also Rebecca Aydin, *How 3 guys turned renting air mattresses in their apartment into a \$31 billion company, Airbnb*, INSIDER (Sept. 20, 2019, 10:27 AM), <https://www.businessinsider.com/how-airbnb-was-founded-a-visual-history-2016-2>.)

15. *You're just 3 steps away from your next getaway*, AIRBNB, <https://www.airbnb.com/d/howairbnbworks> (last visited Oct. 23, 2021) (describing how guests can explore “Stays or Experiences,” set filters for specific requirements to narrow results, learn about the host and contact them to ask questions or for advice, read reviews, and ultimately “contact Airbnb anytime for additional support”).

16. Aly J. Yale, *Airbnb Alternatives: Where to Make More Money Off Your Short-term Rental or Vacation Home*, MILLIONACRES (Apr. 9, 2021), <https://www.millionacres.com/real-estate-investing/rental-properties/airbnb-alternatives-where-make-more-money-your-short-term-rental-or-vacation-home/> (reporting on other sites that also offer short-term rental listings and other services, such as Booking.com and Hotels.com). Aside from briefly mentioning other similar platforms, this Comment will focus primarily on Airbnb due to its mainstream connection with the STR industry. However, the issues and legal arguments in this Comment apply to all websites that follow Airbnb's model and rely on the immunity from Section 230. See Nodiff, *supra* note 3, at 225 (highlighting how Airbnb leads the way in this billion-dollar global industry of “online platforms [that] enable hosts and travelers to connect, [and] account[] for more lodging transactions than the major hotel chains combined”).

17. *Communications Decency Act Section 230*, *supra* note 2 (emphasizing how Section 230 has “served as the legal foundation of American internet innovation”). These companies put the burden on hosts to make sure their listings comply with local regulations. *Responsible Hosting*, *supra* note 6. Airbnb specifically tells hosts visiting their help center to ensure they look up “any local taxes or business license requirements that may apply[,] . . . any permitting, zoning, safety, and health regulations that may apply[,] . . . [and any] special rules that apply [to rent controlled or stabilized housing].” *Id.* At the end of the page, Airbnb specifically denies “control over the

Twelve years prior to the creation of Airbnb, Congress created the federal protection that STR sites exploit today.<sup>18</sup> In 1996, Congress amended the Communications Act of 1934, which became known collectively as the Communications Decency Act (CDA), to include Section 230, which “sought to allow users and providers of ‘interactive computer services’ to make their own content moderation decisions, while still permitting liability in certain limited contexts.”<sup>19</sup> Congress amended Section 230 specifically “to overrule [the 1995 New York Supreme Court ruling in] *Stratton Oakmont v. Prodigy Services Co.* and any other similar decisions that have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material.”<sup>20</sup> In *Prodigy*, Prodigy Services was “an early provider of online services,” that moderated third-party content on its site, and was held “liable for a defamatory anonymous posting on one of its message boards.”<sup>21</sup> This ruling resulted in “chilling implications” that the young Internet’s growth might be halted by lawsuits over every online post, which prompted the creation of Section 230.<sup>22</sup> Therefore, Section 230 has become known as the “the most important law protecting [I]nternet speech.”<sup>23</sup>

Specifically, Section 230 provides limited federal immunity to interactive computer services like Meta Platforms, Twitter, and Airbnb, because “federal

---

conduct of Hosts and disclaims all liability [and states that] [f]ailure of Hosts to satisfy their responsibilities *may result* in suspension of activity or removal from the Airbnb website.” *Id.* (emphasis added).

18. Valerie C. Brannon & Eric N. Holmes, *Section 230: An Overview*, CONG. RSCH. SERV., R46751 at 1 (2021), <https://crsreports.congress.gov/product/pdf/R/R46751>; see also *Illegal Hotels*, *supra* note 9.

19. Brannon & Holmes, *supra* note 18, at 1; Communication Decency Act, 47 U.S.C. § 230 (2021).

20. Neil Fried, *Fix Section 230 To Hold Online Platforms Accountable*, LAW360 (June 21, 2021, 4:50 PM), <https://www.law360.com/articles/1393878/fix-section-230-to-hold-online-platforms-accountable> (citing Telecommunications Act of 1996, S. Rep. No. 104-230, at 194 (1996) (Conf. Rep.)); Zara, *supra* note 4 (describing how fragile Internet law was prior to the Prodigy case); see also JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 59–60 (2019) (discussing how drafters of Section 230, Chris Cox and Ron Wyden, wrote it specifically in response to Prodigy’s ruling).

21. Zara, *supra* note 4; KOSSEFF, *supra* note 20, at 50 (describing how Prodigy deleted content that violated its guidelines and actively advertised its content moderation).

22. Zara, *supra* note 4; Michael D. Smith & Marshall Van Alstyne, *It’s Time to Update Section 230*, HARV. BUS. REV. (Aug. 12, 2021), <https://hbr.org/2021/08/its-time-to-update-section-230> (explaining Congress’s concern that this ruling would make Internet providers unwilling to police for harmful third-party content and passed Section 230 to encourage review of Internet content without the risk of liability for missing and not removing all potentially harmful content).

23. Bryan Pietsch, et al., *The Facebook whistleblower told Congress it should amend Section 230, the internet law hated by both Biden and Trump. Here’s how the law works.*, INSIDER (Oct. 6, 2021, 11:39 AM), <https://www.businessinsider.com/what-is-section-230-internet-law-communications-decency-act-explained-2020-5>; see also KOSSEFF, *supra* note 20, at 4 (reflecting on the fact that the some of the most popular websites in the United States—YouTube, Facebook, Reddit, Wikipedia, Twitter, eBay, Google and Yahoo—all rely on the content provided by its users and thus would not exist without Section 230).



courts have interpreted Section 230 as creating expansive immunity for claims based on third-party content that appears online.”<sup>24</sup> These massive website corporations rely on the immunity provided by Section 230 to avoid liability in litigation based on content uploaded to their sites by third-parties.<sup>25</sup> Section 230’s twenty-six words grant—with minimal exceptions—that “websites and Internet service providers are not liable for the comments, pictures, and videos that their users and subscribers post, no matter how vile or damaging. The services retain this broad immunity even if they edit or delete some user content.”<sup>26</sup> This Section 230 protection has thus “left online platforms both immune for a wide array of illicit activity on their services and [simultaneously] free to moderate content with little transparency or accountability,” due in large part to the “combination of significant technological changes since 1996 and the expansive interpretation that courts have given Section 230.”<sup>27</sup>

This Comment explores the legal implications of the expansive immunity that Section 230 provides to websites, specifically Airbnb and HomeAway, by allowing them to evade responsibility for the local regulations their listings are subject to and how the PLAN Act could amend Section 230 to hold these sites responsible, thus respecting the authority of these local regulations. It proceeds as follows: Part II discusses Section 230, Congress’ policy for protecting Internet service providers, and the courts’ interpretation of it—specifically as it applies to STR providers like Airbnb. Part III addresses how this broad interpretation of federal immunity for service providers has caused problems in several jurisdictions that led Congress to introduce, consider, and enact legislation to correct the issues perpetrated by Section 230 immunity. Part IV examines local legislation enacted to correct problems caused by STRs. Finally, Part V provides a discussion of the benefits that the PLAN Act will have in correcting this problematic immunity for STR websites.

## II. SECTION 230’S LIABILITY SHIELD AND ITS BROAD JUDICIAL INTERPRETATIONS

Within the first two subsections of Section 230, Congress lays out its findings and policies it hopes to promote through the law’s protections found in subsection (c), which is the core of the law’s liability protection.<sup>28</sup> Congress emphasized the importance of the American policy “to promote the continued

---

24. Brannon & Holmes, *supra* note 18, at 1. See *Zeran v. Am. Online, Inc.* 129 F.3d 327 (4th Cir. 1997) (holding that Section 230 of the CDA barred plaintiff’s complaint that the Internet service provider unreasonably delayed removing a third party’s defamatory messages and failed to establish screens to prevent similar posts afterwards).

25. *Department of Justice’s Review of Section 230 of The Communications Decency Act of 1996*, DEP’T OF JUST., <https://www.justice.gov/archives/ag/departments-justice-s-review-section-230-communications-decency-act-1996> (last visited Nov. 24, 2021).

26. KOSSEFF, *supra* note 20, at 2.

27. Dept. of Just., *supra* note 25.

28. 47 U.S.C. § 230(a)–(c).

development of the Internet and other interactive computer services and other interactive media; [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>29</sup> These policy objectives were established because the drafters of Section 230 “wanted the bill to strongly protect intermediaries, and by doing so they [c]ould [then] protect online speech, allow innovation, and encourage companies to develop their own content moderation processes.”<sup>30</sup> However, the most important part of Section 230—subsection (c)—creates broad immunity for computer service providers by commanding that “[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,”<sup>31</sup> and ensuring that “service providers may not be held liable for voluntarily acting to restrict access to objectionable material.”<sup>32</sup>

Section 230 also defines “interactive computer service” and “information content provider.”<sup>33</sup> An interactive computer service is defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”<sup>34</sup> An information content provider is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.”<sup>35</sup> By distinguishing between service providers and content providers, Section 230 makes it explicit that immunity from suit is intended solely for service providers.<sup>36</sup> Although some entities can be both a service provider and a content provider, the crucial question courts consider when applying Section 230 immunity is: “whether the service provider developed the content that is the basis for liability.”<sup>37</sup> Section 230 does not bar all causes of action against an interactive computer service

---

29. 47 U.S.C. § 230(b)(1)–(2). The final policy intention of Congress, “to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer,” unfortunately does not encompass enforcing the illegality of STR listings. § 230(b)(5); *see also* Dept. of Just., *supra* note 25 (describing how the legislature “originally enacted the statute to nurture a nascent industry while also incentivizing online platforms to remove content harmful to children”).

30. KOSSEFF, *supra* note 20, at 67.

31. 47 U.S.C. § 230(c)(1).

32. Brannon & Holmes, *supra* note 18, at 3. *See* 47 U.S.C. § 230(c)(2).

33. 47 U.S.C. § 230(f)(2)–(3); *see also* Dept. of Just., *supra* note 25.

34. 47 U.S.C. § 230(f)(2).

35. 47 U.S.C. § 230(f)(3).

36. *See* 47 U.S.C. § 230(c), (f).

37. Brannon & Holmes, *supra* note 18, at 3. *See generally*, Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008); Dimeo v. Max, 248 Fed. App’x. 280 (3d Cir. 2007).

provider, but rather, it only bars claims that would require classifying the provider as a publisher of third-party content.<sup>38</sup> Lastly, there are five exceptions to Section 230 that bar defendants from claiming immunity: “[1] a federal criminal prosecution or [2] any lawsuit brought under intellectual property laws [3] state laws that are consistent with Section 230 [4] certain electronic communications privacy laws, or [5] certain sex trafficking laws.”<sup>39</sup>

A. *Section 230 Judicial Decisions: Zeran and its Following*

The judicial interpretations of Section 230 over the past twenty-five years have given Internet service providers broad immunity from suits for content on their websites as the courts paved the way for “Internet exceptionalism.”<sup>40</sup> In 1997, the first federal appellate decision that considered Section 230’s immunity was *Zeran v. America Online, Inc.*, which has largely shaped the way subsequent courts interpret the broad scope of Section 230.<sup>41</sup> One commentator explained how *Zeran*’s rule has had uniform application in every federal circuit court and in many state courts, and that “it has never been rejected in any precedential opinion.”<sup>42</sup>

In *Zeran*, an unknown user of America Online (AOL) posted a message on its site advertising t-shirts with slogans related to the Oklahoma City bombing and directed interested buyers to call the provided phone number, which was the plaintiff’s personal number.<sup>43</sup> *Zeran*, being bombarded by incessant angry phone calls, informed AOL, which assured him that the account would be terminated to block the messages libeling him on the site, but it ultimately failed to terminate the account.<sup>44</sup> *Zeran* subsequently sued AOL for negligence, alleging that once he notified AOL of the defamatory advertisement, “AOL had a duty to remove the ads, notify users that the ads were deceptive, and screen for similar postings.”<sup>45</sup> *Zeran*’s theory of negligence rested on “distributor liability,” a common law precedent that “vendors and distributors of defamatory publications are liable for the content of those publications if they know or have reason to know of the illegal or tortious content,” and he strengthened his claim

---

38. Chi. Lawyers’ Comm. for Civ. Rts. Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666, 669–72 (7th Cir. 2008) (affirming the lower court’s decision that although Section 230 is not a general prohibition of civil liability for web-site operators, Craigslist was protected from liability for the housing advertisements, posted on its site by a user, which violated the Fair Housing Act).

39. Brannon & Holmes, *supra* note 18, at 24; *see* 47 U.S.C. § 230(e).

40. Brannon & Holmes, *supra* note 18, at 8; KOSSEFF, *supra* note 20, at 78.

41. Brannon & Holmes, *supra* note 18, at 10.

42. Ian C. Ballon, *Zeran v. AOL and Its Inconsistent Legacy*, L. J. NEWSLS, <https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/12/01/zeran-v-aol-and-its-inconsistent-%20legacy/> (last visited Oct. 24, 2021) (noting however that different federal circuit courts have differing approaches to how *Zeran*’s precedent is applied, although “[m]ost circuits [still] construe [Section 230] broadly”).

43. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 329 (4th Cir. 1997).

44. *Id.*

45. Brannon & Holmes, *supra* note 18, at 10.

by emphasizing that Section 230 explicitly uses the term “publisher” when discussing this immunity.<sup>46</sup>

Nonetheless, the court rejected *Zeran*’s argument, explaining that once these online service providers are given “notice of a potentially defamatory posting, [they are] thrust into the role of a traditional publisher . . . [and] must decide whether to publish, edit, or withdraw the posting.”<sup>47</sup> However, the court still recognized the service provider’s right under Section 230 “to make some editorial adjustments to third-party content without being considered the provider of that content.”<sup>48</sup> The court also expressed concern about notice liability not advancing the purpose of Section 230, but rather hindering it by “reinforc[ing] service providers’ incentives to restrict speech and abstain from self-regulation.”<sup>49</sup> The court explained how the typical judgment calls a traditional print publisher can make in assessing whether to publish a defamatory message “would create an impossible burden in the Internet context” due to the substantial amount of posts on these interactive websites.<sup>50</sup> Thus, the court ultimately held that the plain language of Section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user . . . [and] precludes courts from entertaining claims that would place a computer service provider in a publisher’s role.”<sup>51</sup>

Although *Zeran*’s precedent creates a broad immunity against service providers for claims treating them as publishers, the Ninth Circuit circumvented this bar to liability by holding these providers responsible for the promises they

---

46. *Id.* at 10–11; *see* *Cubby, Inc. v. Compuserve, Inc.*, 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991) (holding that a database owner was a distributor, not a publisher, of libel statements yet they could not be held liable because plaintiff failed to show that defendant had knowledge of them).

47. *Zeran*, 129 F.3d at 332.

48. Brannon & Holmes, *supra* note 18, at 15; *see also Zeran*, 129 F.3d at 330.

49. *Zeran*, 129 F.3d at 333. The court made this concern very clear by explaining how if the court was to subject these online providers to distributor liability, then they would be at risk for liability any time they received a warning “of a potentially defamatory statement—from any party, concerning any message . . . [which] would require a careful yet rapid investigation of the circumstances surrounding the posted information, a legal judgment concerning the information’s defamatory character, and an on-the-spot editorial decision whether to risk liability by allowing [its] continued publication . . .” *Id.*; *see also* *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (sharing that publishers’ concerns about unjustified liability create an understandable yet problematic incentive for them to remove messages upon warning regardless of whether the messages were defamatory, which is contradictory to the Constitution’s free speech protections).

50. *Zeran*, 129 F.3d at 333; *see also* *Auvil v. CBS “60 Minutes”*, 800 F. Supp. 928, 931 (E.D. Wash. 1992) (explaining how it is an unfair and unrealistic expectation to require network employees to “continually monitor incoming transmissions and exercise on-the-spot discretionary calls or face \$75 million dollar lawsuits at every turn”).

51. *Zeran*, 129 F.3d at 330. This ruling therefore bars any claim holding these providers responsible for the way that they exercise “traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content . . .” *Id.*; *see* *Fried*, *supra* note 20 (arguing that because the holding in *Zeran* limits the liability for providers when they moderate and fail to moderate content, this “makes moderation less likely, not more, contrary to the goals of Congress”).

make about the content on their site.<sup>52</sup> In *Barnes v. Yahoo! Inc.*, the Ninth Circuit refused to dismiss a contract claim against Yahoo regarding a promise it made to remove the third-party content since the liability arose “not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication.”<sup>53</sup> Other courts have also circumvented the bar to liability involving third-party content by assessing the service provider’s “role in the ‘creation or development’ of the content.”<sup>54</sup> For instance, in *Fair Housing Council v. Roommates.com*, the Ninth Circuit held that Section 230 did not protect the service provider from liability for a questionnaire that “induce[d] third parties to express illegal preferences” in violation of the Fair Housing Act because it was created by Roommates.com, not the users.<sup>55</sup> Furthermore, the appellate court emphasized that websites will not be granted Section 230 immunity if “[they] help[] to develop unlawful content . . . [by] contribut[ing] materially to the alleged illegality of the conduct.”<sup>56</sup>

Not only have judicial interpretations of Section 230 restricted lawsuits for “monetary damages, but [they] also [have barred] suits for injunctive relief that would require sites to take specific actions with respect to third-party content.”<sup>57</sup> In 2018, the Supreme Court of California interpreted Section 230 as barring suits seeking injunctions in *Hassell v. Bird*.<sup>58</sup> In *Hassell*, the plaintiffs attempted to enforce a previous default judgment by asking the court to enter an injunction requiring Yelp to remove certain defamatory statements from its site.<sup>59</sup> In an effort to respect Congress’ policy for Section 230, the court explained how “[a]n injunction like the removal order plaintiffs obtained can impose substantial

---

52. Brannon & Holmes, *supra* note 18, at 11–13.

53. *Barnes v. Yahoo! Inc.*, 570 F.3d 1096, 1107 (9th Cir. 2009).

54. Brannon & Holmes, *supra* note 18, at 15 (quoting *Ben Ezra, Weinstein, & Co. v. Am. Online, Inc.*, 206 F.3d 980, 985 (10th Cir. 2000)).

55. *Roommates.com*, 521 F.3d at 1165.

56. *Id.* at 1168; *cf.* Chi. Lawyers’ Comm., 519 F.3d at 671 (holding that although the content violated the Fair Housing Act, Craigslist was protected from liability by Section 230 for the housing advertisements, because they were entirely written and posted by users). If Airbnb were to have similar postings by its users that violated the Fair Housing Act, they would probably be protected under Section 230 like Craigslist. See Ian C. Ballon, *Zeran v. AOL and Its Inconsistent Legacy*, L. J. NEWSLS.,

<https://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/12/01/zeran-v-aol-and-its-inconsistent-%20legacy/> (last visited Oct. 24, 2021) (“[T]he Ninth Circuit’s decision in *Fair Housing Council v. Roommates.com* [] broadly construed what constitutes *development*, which could strip away [Section 230] protection for an interactive content provider by treating it as an information content provider for user content in narrow circumstances where the site is deemed to have *developed* the user content. While this interpretation is ultimately narrow, clever plaintiffs . . . [will] try to plead around [Section 230] by alleging development in the hope of moving a claim past motion practice to discovery.”).

57. Brannon & Holmes, *supra* note 18, at 12.

58. *Hassell v. Bird*, 420 P.3d 776, 779 (Cal. 2018).

59. *Id.* at 778.

burdens on an Internet intermediary. Even if it would be mechanically simple to implement such an order, compliance still could interfere with and undermine the viability of an online platform.”<sup>60</sup> These Section 230 cases have developed and shaped this “landmark piece of legislation . . . [into] the most important tool ever created for free speech on the internet,” thus leading to STR websites taking advantage of this law and “confidently buttress[ing] their defense [against lawsuits] with [this] 20-year-old federal statute.”<sup>61</sup>

### B. Judicial Decisions Involving STR Websites

In *Airbnb, Inc. v. City & County of San Francisco*, a California district court reviewed Airbnb and HomeAway’s preliminary injunction to bar the enforcement of San Francisco’s ordinance, which “[made] it a misdemeanor to provide booking services for unregistered rental units.”<sup>62</sup> The court discussed how the original San Francisco ordinance regulating STRs had to be scrapped because it would not survive judicial review under Section 230, since the law held Airbnb liable for the content the Airbnb hosts posted on its site.<sup>63</sup> In the amended ordinance, San Francisco officials found a “creative workaround . . . that [made] the Section 230 argument irrelevant,” as the city was not regulating the content or posts but rather the “*business activity*.”<sup>64</sup> Thus, Airbnb can still have illegal listings on its site, but it cannot make a fee off its booking services for these listings.<sup>65</sup>

In this particular case, Airbnb argued that although the new ordinance did not facially treat it as “publishers or speakers of third party content, [Airbnb] insist[ed] that it will have the practical effect of compelling [it] to monitor listings and remove postings for unregistered rentals,” and therefore “is designed to achieve the same impermissible end through indirect means.”<sup>66</sup> In other words, Airbnb attempted to use Section 230 as a sword rather than a shield in this litigation to overturn San Francisco’s ordinance. However, the district court

---

60. *Id.* at 791 (“Section 230 allows these litigation burdens to be imposed upon the *originators* of online speech. But the unique position of Internet intermediaries convinced Congress to spare republishers of online content, in a situation such as the one here, from this sort of ongoing entanglement with the courts.”).

61. Zara, *supra* note 4.

62. *Airbnb, Inc. v. City & Cnty. of S.F.*, 217 F. Supp. 3d 1066, 1069 (N.D. Cal. 2016).

63. *Id.* at 1075.

64. Zara, *supra* note 4 (reflecting on how the city hit Airbnb hard by targeting its whole business method as the company’s massive revenue is dependent on the percentage of booking service fees it gets to collect from its users).

65. *Id.*

66. *Airbnb, Inc.*, 217 F. Supp. 3d at 1074–75. The court lists options that reveal that the conduct compelled by the ordinance does not necessarily require Airbnb to have to screen and edit its users’ content such as, “posting a notice to users that they can provide Booking Services in San Francisco only for units that are lawfully registered and verified as such. . . . Or they may consider charging fees for publishing listings, rather than for facilitating transactions—a measure San Francisco concedes is lawful.” *Id.* at 1075.

rejected Airbnb's argument and stated that the ordinance will not violate Section 230 because there is no support that it "will inevitably or necessarily treat plaintiffs as publishers or speakers of user content, or force them to edit or remove postings."<sup>67</sup> Rather, the ordinance merely "holds Airbnb accountable for *its own conduct*: providing 'booking services' in connection with unregistered units."<sup>68</sup>

Two years later, the Ninth Circuit reviewed a similar question in *HomeAway.com, Inc. v. City of Santa Monica*.<sup>69</sup> In this case, the city's ordinance barred sites like HomeAway and Airbnb from "completing any booking transaction for properties not licensed and listed" in the city's registry of rental properties.<sup>70</sup> The Ninth Circuit ultimately held that "Section 230(c)(1) did not preempt [the] local ordinance regulating short-term property rentals, as applied to websites that hosted listings of such rentals," since the ordinance did not require sites, like HomeAway, to review the content provided by hosts of listings.<sup>71</sup> Both *Airbnb, Inc.* and *HomeAway.com, Inc.* are two important examples of STR websites bringing suit after local lawmakers attempted to set regulations that would hold the companies accountable for illegal listings. Nonetheless, Airbnb has also sued the city of Anaheim and the city and state of New York on similar grounds.<sup>72</sup>

Although these courts are upholding local ordinances in light of Section 230, they struggle to enforce local contracts, as evinced in *La Park La Brea A, LLC v. Airbnb, Inc.*<sup>73</sup> There, the district court interpreted Section 230 to provide immunity to Airbnb and thereby dismissed the plaintiff's claim that attempted to hold Airbnb liable for refusing to take down listings of the plaintiff's properties that violated lease agreements with its tenants.<sup>74</sup> The court explained that even though Airbnb was notified of the listings that violated lease

---

67. *Id.*; cf. Zara, *supra* note 4 (interviewing a Section 230 expert, Eric Goldman, who commented on the business activity rationale that helped the court rule in favor of the city as a "political spin" rather than a "legal analysis"). One could argue that this ruling is a case of judicial activism, as Goldman makes a persuasive argument that "[i]n the end, no matter how it's phrased, San Francisco wants to deputize Airbnb as its assistant tax collector. That fundamental effort of putting Airbnb in the role of policing what its users are doing is the kind of thing that Section 230 was designed to prevent." Zara, *supra* note 4.

68. Zara, *supra* note 4 (emphasis added).

69. *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 679 (9th Cir. 2019).

70. *Id.* at 680. The amended 2017 ordinance's obligations on STR sites are to: "(1) collect and remit Transient Occupancy Taxes; (2) regularly disclose listings and booking information to the City; (3) refrain from booking properties not licensed and listed on the City's registry; and (4) refrain from collecting a fee for ancillary services." Nodiff, *supra* note 3, at 256.

71. Brannon & Holmes, *supra* note 18, at 13; see also *HomeAway.com, Inc.*, 918 F.3d at 682; see also *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 120–24 (D. Mass. 2019) (holding that a similar local law was not barred by Section 230 but declining to hold that Section 230 did not bar requiring improper listings to be removed by a "booking agent[]").

72. Zara, *supra* note 4.

73. *La Park La Brea A, LLC v. Airbnb, Inc.*, 285 F. Supp. 3d 1097, 1105 (C.D. Cal. 2017).

74. *Id.* at 1108.

agreements, “[s]everal courts have held that immunity [under Section 230] is not vitiated because a defendant fails to take action despite notice of the problematic content.”<sup>75</sup>

Yet, a Florida state court refused to apply Section 230 immunity to Airbnb in *Bay Parc Plaza Apts., LP. v. Airbnb, Inc.*<sup>76</sup> There, the court began by addressing Congress’ policy choice, that “plaintiffs ‘may hold liable the person who creates or develops unlawful content, but not the interactive computer service provide[rs] who merely enable that content to be posted online.’”<sup>77</sup> Despite recognizing the protection Congress granted in Section 230, the state court refused to grant the defendant’s motion for judgment on the pleadings, which argued that Airbnb has absolute immunity from suit under Section 230.<sup>78</sup> In denying the motion, the Florida court emphasized that it would “not take [Section 230’s] goal of ‘preserv[ing] the vibrant and competitive free market’ and use that to create ‘limitless immunity for online activity or conduct related to it.’”<sup>79</sup> Despite these cases, many legal scholars reflect that the scope of Section 230 is far from settled, and thus regulators still have leeway to better define the role of Section 230’s immunity in the market of online STRs.<sup>80</sup>

### III. SECTION 230: PROBLEMATIC APPLICATIONS, ENACTED AMENDMENTS, AND PROPOSED CHANGES

#### A. *Issues that Section 230 Drafters Failed to See Coming*

Section 230 came into existence twenty-five years ago, but the Internet it was created to regulate is not the Internet that exists today. Section 230 was written “during a long-gone age of naïve technological optimism and primitive technological capabilities. So much has changed since the turn of the century that those protections are now desperately out of date.”<sup>81</sup> When Section 230 was written, “the notion of four hundred hours of video content per minute per day being uploaded to the [I]nternet as a whole, much less to just one commercial site, was largely beyond the reach of most people’s imagination.”<sup>82</sup> Thus, the

---

75. *Id.* at 1105 n. 6 (quoting *Black v. Google Inc.*, No. 10-02381 CW, 2010 U.S. Dist. LEXIS 82905 (N.D. Cal. Aug. 13, 2010)).

76. *Bay Parc Plaza Apts., LP v. Airbnb, Inc.*, No. 2017-003624-CA-01, 2018 Fla. Cir. LEXIS 348 at \*1, \*8 (D. Fla. July 11, 2018).

77. *Id.* (quoting *Netnet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009)).

78. *Id.* at \*8, \*15.

79. *Id.* at \*15 (quoting *Airbnb, Inc. v. City & Cnty. of S.F.*, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016)).

80. Zara, *supra* note 4 (reflecting on how “attempts by legislators and judges to refine or redefine Section 230’s boundaries are chipping away at the broad immunity websites once took for granted”).

81. Smith & Van Alstyne, *supra* note 22.

82. SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 212 (2019).



drafters of Section 230 understandably never could have predicted the issues that would arise with its application to today's mammoth Internet corporations, especially those that rival the GDP of foreign countries.<sup>83</sup>

Courts, legislators, and big tech companies are now being forced to deal with formerly unimaginable questions regarding accountability under Section 230, particularly given the social devastation these platforms can create.<sup>84</sup> Questions raised include whether Meta Platforms should be accountable for the January 6<sup>th</sup> Capitol riot due to the planning by those involved on its site; whether Twitter should be accountable for the terrorist recruitment enabled on its site; whether Backpage and Pornhub should be accountable for the sexual exploitation of minors facilitated on their sites; whether other social-media platforms should be accountable for the profits they have made off the illegal sales of assault weapons and endangered wildlife;<sup>85</sup> whether TikTok should be accountable for its promotion of videos to minors that glorify drug-use and promote online sales of drug products and whether Snapchat should be accountable for its facilitation of counterfeit pills purchases that caused the death of children;<sup>86</sup> and ultimately, whether Airbnb should be accountable for the housing regulations flouted by unscrupulous landlords who utilize its site.<sup>87</sup> As seen from these questions Section 230's drafters "significantly underestimated the cost and scope of harm" that content on these sites can cause,<sup>88</sup> especially since "online life can and does frequently have real-world offline impacts that are a matter of life and death."<sup>89</sup> Therefore, what started as a law "to promote the growth of an emerging technology is now a legal tool to protect the business interests of the powerful."<sup>90</sup>

---

83. See Zara, *supra* note 4 (interviewing Chris Cox and Ron Wyden, the two congressmen who wrote Section 230 in response to the Prodigy case, who both admit that they could never have imagined the law would end up having the expansive implications it does today); Fernando Belinchón & Qayyah Moynihan, *25 Giant Companies That are Bigger than Entire Countries*, INSIDER (July 25, 2018, 7:40 AM), <https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7> (highlighting how in 2017 Facebook's income exceeded Serbia's GDP, Amazon's revenue was greater than Kuwait's GDP, and the revenues from Google's parent company, Alphabet, surpassed Puerto Rico's GDP).

84. Smith & Van Alstyne, *supra* note 22; see also KOSSEFF, *supra* note 20, at 5 (reflecting on Section 230's significant social costs).

85. Smith & Van Alstyne, *supra* note 22.

86. James Hohmann, *Amend Section 230 to increase social media's liability for drug sales on their platforms*, WASH. POST (Oct. 27, 2021, 6:10 PM), <https://www.washingtonpost.com/opinions/2021/10/27/amend-section-230-increase-social-medias-liability-drug-sales-their-platforms/>.

87. Zara, *supra* note 4.

88. Smith & Van Alstyne, *supra* note 22.

89. ROBERTS, *supra* note 82, at 206.

90. Zara, *supra* note 4; see also Ann Wagner, *FOSTA is model for reforming Section 230*, THE HILL (Aug. 12, 2021, 7:30 PM), <https://thehill.com/blogs/congress-blog/politics/567687-fosta-is-model-for-reforming-section-230?r=1> (reporting on a June 2020 Gallup poll that eight of

When Section 230 was enacted, Congress wanted to encourage these websites to continue to police for harmful third-party content without facing liability for their judgment calls or for inadvertently missing content that should have been taken down.<sup>91</sup> In 1996, this policy was reasonable since, even without liability incentives, websites would police for problematic content “out of economic self-interest, to protect their [brands’ reputations].”<sup>92</sup> However, Section 230’s subsections are in conflict, “[w]hen you grant platforms complete legal immunity for the content that their users post, you also reduce their incentives to proactively remove content causing social harm.”<sup>93</sup> In fact, lawmakers have recently discovered that “providing socially harmful content can be economically valuable to platform owners while posing relatively little economic harm to their public image or brand name.”<sup>94</sup> An integral part of Section 230’s purpose that is often overlooked in current debates is how it “came to be in the first place[, which] was not just so that websites could leave objectionable material up[, but rather] [i]t was so they could take it down.”<sup>95</sup> This enlightening perspective of Section 230’s purpose presents an irony in Airbnb’s Section 230 court battles, as the company “isn’t fighting with San Francisco for its right to take down illegal postings, nor is it fighting to leave them up. It’s fighting to have it both ways,” and so are the many other Internet corporations who take advantage of this flaw in the law.<sup>96</sup>

One of the key issues that the drafters of Section 230 could never have predicted is how intertwined the Internet is with our everyday physical lives.<sup>97</sup> Current applications of Section 230’s protections for tech companies have courts “struggl[ing] to balance the digital with the physical.”<sup>98</sup> Airbnb’s protection under Section 230 introduces the question of “whether the law should inherently treat the [I]nternet differently” and prompts the reflection that:

---

ten Americans say tech companies have too much power and more than fifty percent believe that Section 230 causes more harm than good).

91. Smith & Van Alstyne, *supra* note 22.

92. *Id.*

93. *Id.*

94. *Id.*; see also Bryan Pietsch, et al., *supra* note 23 (describing how a Facebook whistleblower reported on how the company “continuously places profit above the wellbeing and safety of its users”).

95. Zara, *supra* note 4 (explaining how prior to Section 230, these websites left offensive content on their sites to prevent the risk of liability for removing the content).

96. *Id.* Airbnb’s attempt to have the best of both worlds under Section 230 is evident as the company is taking advantage of the blurry line between intermediary and publisher, as “it says it can’t be responsible for policing what its users do. On the other hand, it needs to exert enough control over those users to create and enforce a sophisticated system of rules and policies—one trustworthy enough that millions of people will use it to invite strangers into their homes.” *Id.*

97. See Wagner, *supra* note 90 (discussing how even more intertwined society is with technology due to the effects of the COVID-19 pandemic). Due to the isolation required during the pandemic, many Americans turned “to an [I]nternet ruled by just a handful of corporations for social interaction, political commentary, and vital public health information.” *Id.*

98. Zara, *supra* note 4.

The reason why zoning laws are there to begin with is because calculations were made at a certain point, in certain cities, that they wanted certain rules to be in place because there was a certain quality of life. . . . If the [I]nternet is allowed to basically break all that up, we're giving it a power that I'm not so sure it deserves.<sup>99</sup>

Every business—including hotels, condos, and apartment complexes—has to abide by local regulations.<sup>100</sup> Why then, does Congress allow STR sites—that share the same business assets and qualities as these regulated hotels, condos, and apartment complexes—to skirt local regulations simply because their business location is the web?

### B. Congressional Attempts to Limit Section 230

In 2018, the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (“FOSTA”)<sup>101</sup> became the first amendment to Section 230, and created the fifth exception barring immunity to service providers—this time for knowingly facilitating certain sex trafficking offenses.<sup>102</sup> Since this amendment to Section 230, there has been a growing consensus from lawmakers that Section 230 needs to be updated to better limit its broad and often unhelpful application.<sup>103</sup> However, this is not without loud condemnation by big tech companies.<sup>104</sup> Congress has introduced a number of bills to limit Section 230: “[d]uring the 116th Congress, 26 bills were introduced targeting Section 230. Just one-quarter of the way through the 117th Congress, 10 bills have already been introduced regarding Section 230, ranging from full repeal to instituting narrow exceptions for certain cases.”<sup>105</sup> Representative Ann Wagner, who sponsored the FOSTA bill, expressed disappointment that despite the legal precedent created by FOSTA to amend Section 230, none of the thirty-six attempts made to amend Section 230 in the past three years were enacted.<sup>106</sup> These failed attempts are likely the result of politicians’ inability to agree on what the real issues are and how best to fix them, and thus “many proposals to amend or repeal Section 230 fail to appreciate collateral consequences—and would ultimately end up doing

---

99. *Id.* (quoting Mary Anne Franks, the legislative and tech policy director for the Cyber Civil Rights Initiative).

100. *Illegal Hotels*, *supra* note 9.

101. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254 (2018).

102. Brannon & Holmes, *supra* note 18, at 28; 47 U.S.C. § 230(e)(5).

103. Smith & Van Alstyne, *supra* note 22; Wagner, *supra* note 90.

104. Smith & Van Alstyne, *supra* note 22 (noting although there is some resistance by big tech corporations, Mark Zuckerberg admitted to Congress that “it ‘may make sense for there to be liability for some of the content,’ and that Facebook ‘would benefit from clearer guidance from elected officials’”); Wagner, *supra* note 90; *Communications Decency Act Section 230*, *supra* note 2.

105. Wagner, *supra* note 90.

106. *Id.*

more harm than good.”<sup>107</sup> Representative Wagner argued that “[c]ommonsense reform of Section 230 [at a minimum] will mean these massive tech giants must exercise civic responsibility and be responsive to the rights of victims.”<sup>108</sup>

As discussed previously in this Comment, the liability protection of Section 230 to sites like Airbnb and HomeAway has caused problems for many cities and counties throughout the United States, who struggle to enforce local laws without being able to hold these sites responsible for third-party content that violates local regulations.<sup>109</sup> First introduced in the House of the 116<sup>th</sup> Congress and again in the 117<sup>th</sup> Congress on February 18, 2021, the Bill for Protecting Local Authority and Neighborhoods Act (the “PLAN Act”) would address many of these issues by holding STR sites like Airbnb accountable.<sup>110</sup> The PLAN Act bill addresses protection from liability granted to “interactive computer services (e.g., social media companies) for content posted on their sites by third parties. . . . [And] provides that this protection does not extend to certain claims that a service knowingly facilitated illegal leases or rentals of real property.”<sup>111</sup> This would not be the first amendment to create an exception in the history of the CDA as provision (e)(5) of Section 230 was added in 2018 through FOSTA and denies immunity to online providers that knowingly facilitate sex trafficking, therefore creating legal precedent for this type of exception to providers’ expansive immunity under Section 230.<sup>112</sup> The bill would amend provision (c) of Section 230 by adding that immunity will not apply if:

---

107. Cameron F. Kerry, *Section 230 Reform Deserves Careful and Focused Consideration*, BROOKINGS (May 14, 2021), <https://www.brookings.edu/blog/techtank/2021/05/14/section-230-reform-deserves-careful-and-focused-consideration/>. Collateral consequences include the logistical toll on human content moderators already hired by these major tech companies to review third-party content. See ROBERTS, *supra* note 82, at 207–09.

108. Wagner, *supra* note 90.

109. *Big Tech Rental Platforms Exploit CDA 230 To Shield Illegal Activity*, AIRBNBWATCH, <https://airbnbwatch.org/big-tech-rental-platforms-exploit-cda-230-to-shield-illegal-activity/> (last visited Nov. 24, 2021).

110. H.R. 4232, 116th Cong. (2019); H.R. 1107, 117th Cong. (2021). The PLAN Act has been pending since February 19, 2021, after being referred to the Subcommittee on Communications and Technology. *All Actions Except Amendments H.R.1107—PLAN Act*, CONGRESS, <https://www.congress.gov/bill/117th-congress/house-bill/1107/all-actions-without-amendments> (last visited Feb. 21, 2022).

111. *Summary: H.R. 4232—116th Cong. (2019–2020)*, CONGRESS, <https://www.congress.gov/bill/116th-congress/house-bill/4232> (last visited Sept. 30, 2022).

112. Zara, *supra* note 4 (explaining how Hawaii’s Representative, Ed Case, has brought forward legislation in an attempt to persuade Congress to address and “look more closely at how the liability shield famously enshrined in Section 230 of the Communications Decency Act is being exploited by large home-sharing platforms”); see also Christopher Zara, Airbnb should be legally on the hook for illegal rental listings, Hawaii rep says, FASTCOMPANY (Aug. 21, 2019), <https://www.fastcompany.com/90391757/airbnb-should-be-legally-on-the-hook-for-illegal-rental-listings-hawaii-rep-says> (referencing also Ed Case’s argument that FOSTA provides legal precedent for new amendments to the CDA). Case states that, “[w]e have a valuable template in the FOSTA legislation that passed the House by a vote of 388-25 and was signed into law last year, which could be replicated to cover other illegal online sales.” *Id.*

(A) the claimant alleges such provider facilitated the lease or rental of real property in a circumstance in which a law or contractual agreement restricts such lease or rental; (B) the claimant provides written notice of the alleged violation to such provider; and (C) such provider fails to cure the alleged violation within 30 days after the date on which such provider receives such notice.<sup>113</sup>

Therefore, under this new exception to Section 230's immunity, both landlords and local governments could hold STR websites like Airbnb accountable if the site facilitated a STR in violation of a lease agreement or local law, were given notice, and did not cure the violation within thirty days.

#### IV. CITIES' ATTEMPTS TO REGULATE SHORT-TERM RENTALS

This article will focus on three important cities—New York City, NY, Washington, D.C., and Baltimore, MD<sup>114</sup>—that have passed local legislation in an attempt to define and regulate the effects of STRs in their communities given the prevalence of sites, like Airbnb, which circumvent responsibility when failing to abide by these local laws.<sup>115</sup> Without local regulations in place to apply “public health and safety standards to STRs, guests and the general public are left to rely on the ability of the STR industry to regulate itself,” which is an unreasonable expectation since STRs benefit from not having to comply with hotel regulations.<sup>116</sup> As a result, there has been a rise in regulations passed as counties and cities attempt to define the role of STRs—specifically ones through sites like Airbnb—in their communities amidst the zoning laws already in place in these areas.<sup>117</sup>

Although these STRs were clearly operating for many years, and the majority were illegal under city and county zoning codes for residential areas, if local governments had enforced their illegality these areas would have lost major tax revenue from services like Airbnb; thus, the trend in local legislation has likely

---

113. H.R. 4232, 116th Cong. (2019).

114. The author chose these three areas for the following reasons. First, New York City's Airbnb ordinance has been highly discussed in the news currently especially with this new bill they are attempting to pass to impose higher restrictions on Airbnb within the city. Next, Baltimore and Washington, D.C. are two cities listed on Airbnb's jurisdiction regulations website for hosts to read into, and thus the author wanted to address them after finding their information lacking and outdated.

115. AIRBNBWATCH, *supra* note 109.

116. Nodiff, *supra* note 3, at 238–39 (explaining how sites such as Airbnb do not have to comply with regulations that affect industry counterparts like hotels which must comply with health and safety standards including sanitary accommodations, as well as accessible parking and fire prevention). Issues such as “privacy, criminal activities, dangerous conditions and accuracy in listings” introduces the question of whether “Airbnb's business model of self-regulation provides adequate protection for guests, neighboring property owners and the public at large.” *Id.* at 255.

117. *Id.* at 225–26 (listing considerations of local governments in weighing the risks of STRs in their communities: “impact on housing, neighborhood concerns, public safety, tourism, access, equity, impact on hotels, job creation, and revenue”).

been prevented due to this issue.<sup>118</sup> Airbnb, aware of the implicit fact that “the promise of higher tax revenue will deter local regulations,” has proactively entered into many tax-collection agreements with state and city governments.<sup>119</sup> Local governments are still creating new regulations for STRs however, since they are cognizant that they “are closest to their residents and most familiar with their needs and, thus, are best positioned to determine where STRs are a good fit.”<sup>120</sup> Local areas must consider how “[t]he permanence and stability of people living in single-family residential zoning districts creates a sense of community, cultivates and fosters relationships, and provides an overall quality of a place where people are invested and engaged in their neighborhood and care about each other.”<sup>121</sup> These areas must also weigh this consideration with the fact that “STRs involve purely transient occupancy [like] a traditional hotel . . . [and] STR occupants undermine the purpose of residential districts because they do not exhibit the qualities of permanency and stability associated with long-term residency by families and long-term tenants.”<sup>122</sup>

#### A. New York, NY

New York City is well known for having held out the longest on its ban of STRs, but has recently enacted a new law that would allow these rentals to exist under strict conditions.<sup>123</sup> Despite the city’s ban enacted in 2010, STRs still

---

118. Martin Austerhuhle, *Airbnb and Other Homesharing Services are Now Legal in DC*, NPR (Oct. 28, 2019) <https://www.npr.org/local/305/2019/10/28/774133451/airbnb-and-other-homesharing-services-are-now-legal-in-d-c> (describing how eighty to ninety percent of all the STRs at that time would have been declared illegal thus costing Washington, D.C. \$18 million in tax revenue); Nodiff, *supra* note 3, at 241–42 (commenting on how St. Louis has not enforced the ban of STRs, despite them being in violation of local zoning regulations, likely because as the article earlier noted that Airbnb hosts generated \$9 million in income and the city reclassified STRs as commercial rather than residential for property tax purposes).

119. Nodiff, *supra* note 3, at 241 (noting that further research and analysis of the effectiveness as well as the accountability of these “voluntary collection agreements” is needed as Airbnb might once again place the burden on its hosts of paying these taxes). Heather Somerville, *Airbnb Signs Dozens More Tax Agreements in U.S. and France*, REUTERS (Apr. 12, 2017, 6:02 AM), <https://www.reuters.com/article/cbusiness-us-airbnb-taxes-idCAKBN17E14R-OCABS> (explaining how Airbnb has been attempting to work with local governments to collect and pay their taxes and has entered into twenty of these agreements with states). Despite more areas willing to enter into these agreements with Airbnb to collect taxes, there are strong opponents to Airbnb’s presence, especially in residential areas as the Mayor of Miami Beach explained, “[t]he city allows Airbnb in areas that are zoned for short-term rentals but not in residential neighborhoods. . . . ‘When you bought a house you didn’t bargain on having a nightclub next to you. . . . You relied on having the zoning of the city protect you.’” *Id.*

120. Nodiff, *supra* note 3, at 226–27 (explaining how each area must “tailor an approach based on its unique demographics and needs. . . [and] have autonomy and authority to tailor its own approach”).

121. *Id.* at 245.

122. *Id.* at 250.

123. New York, N.Y., Admin. Code §§ 26-3101–3105 (2022); *see also* Paul Williams, *Airbnb Criticizes NYC Bill to Tighten Short-Term Rental Rules*, LAW360, (June 4, 2021, 6:40 PM),

persist with “more than 37,000 currently listed on Airbnb alone,” and unfortunately, due to “[l]egal and staffing challenges . . . it [is] nearly impossible to enforce the 2010 law, leaving commercial operators of multiple short-term units able to continue skirting it.”<sup>124</sup> The conditions hosts must abide by are: “to register with the city and obtain a registration number before they can rent out their homes, and only short-term rentals that conform to city and state law are eligible[,] the unit must be the host’s primary residence, and the host must be present during the rental.”<sup>125</sup> This STR registration would only be valid for a one-year period and thus must be renewed every year to remain in good standing with the city’s proposed regulation.<sup>126</sup> STR websites like Airbnb and HomeAway “risk fines if they continue to profit from illegal rentals and accept transactions from unregistered hosts.”<sup>127</sup> Notably, although the Santa Monica case—discussed in Part 1 of this Comment—upheld fines imposed on Airbnb for accepting transaction fees for illegal listings that did not comply with the city’s ordinance, this outcome might not be binding authority in New York.

One reason for New York City’s reluctance to permit STRs is an investor rental scheme, spanning from 2015 through 2019, that has driven up the costs and reduced the number of long-term rental units in the city.<sup>128</sup> The second reason is that the city relies on the hotels’ success, as “in 2019, [hotels] accounted for more than \$4 billion in direct state and local tax revenue.”<sup>129</sup> New York City Councilman Ben Kallos expressed his belief that the new bill regulating sites like Airbnb in the city will reduce the amount of illegal STRs, as well as help aid the struggling hotel industry, which has suffered under the strains of the COVID-19 pandemic given the heavy lockdown mandates the city

---

<https://www.law360.com/tax-authority/articles/1391199/airbnb-criticizes-nyc-bill-to-tighten-short-term-rental-rules> (noting how Airbnb has urged New York City to consider other options arguing that “the measure could hamper the city’s recovery from the pandemic [thus] . . . officials should instead focus on requiring booking platforms to collect taxes”).

124. Vivian Abuelo & Tom Cayler, *How to Regulate Airbnb in NYC: With a Registry*, N.Y. DAILY NEWS (Oct. 26, 2021, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-how-to-regulate-airbnb-20211026-3ilftyghwjfbrg43wsf7wbh7ba-story.html>.

125. *Id.* The New York City bill is “modeled after successful legislative efforts in other cities like Boston, Santa Monica and Barcelona, and is targeted at the persistent lawbreakers rather than everyday New Yorkers who might be trying to squeeze a little extra income out of an extra bedroom.” *Id.*

126. New York, N.Y., Admin. Code §§ 26-3101–3105 (2022).

127. Abuelo & Cayler, *supra* note 124.

128. Nodiff, *supra* note 3, at 245, 250 (explaining how the investors posing as hosts created multiple identities to lease apartment units, rented the units out to Airbnb guests, and earned millions in revenue without ever having to comply with safety measures or pay taxes that hotels in the city are subjected to); see also Paris Marineau, *How 9 People Built an Illegal \$5M Airbnb Empire in New York*, WIRE (June 24, 2019), <https://www.wired.com/story/how-9-people-built-illegal-5m-airbnb-empire-new-york/>.

129. Abuelo & Cayler, *supra* note 124.

enacted.<sup>130</sup> The city has estimated that nearly “15,000 apartments have been illegally removed from the long-term rental market” and thus the bill “will force bad actor landlords to return them to their intended use.”<sup>131</sup> Although New York City hotels are not expected to bounce back immediately, “allowing the illegal short-term rental market to flourish while hotels remain closed with their employees out of work will only delay the necessary recovery of the city’s tourism sector.”<sup>132</sup>

### B. Washington, D.C.

Washington, D.C., like New York City, also held out for a while before legalizing STRs through sites like Airbnb and HomeAway, and only got approval from the D.C. Zoning Commission on October 24, 2019, that permitted STRs under certain conditions.<sup>133</sup> Hosts can rent out their property on home-sharing platforms for any time period and as frequently as they like, provided that the owners also reside on the property.<sup>134</sup> There is a 90-day annual cap when owners are not present while the property is rented, although exceptions may be granted for work, travel, or family emergencies.<sup>135</sup> This law also prohibits hosts who own second or third homes from listing them as STRs.<sup>136</sup> The host must also acquire “a valid basic business license with a ‘Short-Term Rental’ endorsement” if it is a STR, while “[a] vacation rental shall require a valid basic business license with a ‘Short-Term Rental: Vacation Rental’ endorsement.”<sup>137</sup> The law mandates that the host must have liability insurance of at least \$500,000, although it allows the host to have this insurance provided by the “booking service.”<sup>138</sup> Lastly, the host must provide every STR guest “a 24-hour accessible telephone number to the host, or to a person who has authority to act on behalf of the host, in the event of an emergency.”<sup>139</sup>

---

130. Katie Honan, *New York City Council Bill Toughens Airbnb Regulations*, WALL ST. J. (May 12, 2021, 7:37 PM), <https://www.wsj.com/articles/new-york-city-council-bill-toughens-airbnb-regulations-11620859968>.

131. Abuelo & Cayler, *supra* note 124.

132. *Id.* (calling on the city’s council to pass the bill and for Mayor de Blasio to sign it before a turnover might occur at the City Hall on January 1, 2022).

133. Austermuhle, *supra* note 118.

134. *Id.*

135. *Id.*

136. *Id.*

137. D.C. CODE § 30–201.02 (2019), <https://code.dccouncil.us/us/dc/council/code/sections/30-201.02.html> (addressing in subsections (e) and (f) occupancy and parking regulations).

138. *Id.*

139. *Id.*



### C. Baltimore, MD

Baltimore amended its Code and added Subtitle 48, Short-term Residential Rentals, via Ordinance 19-217, which became effective on December 31, 2019 shortly after D.C. also amended its Code.<sup>140</sup> In Baltimore, the city defines a STR as “a rental of all or a portion of your home for periods of less than 90 nights.”<sup>141</sup> Ordinance 19-217 established specific requirements for STRs, such as licensing of the rental unit through the Housing Commissioner, establishing the unit is the permanent residence of the host, and ensuring the property does not have any code violations.<sup>142</sup> The host’s STR license, requiring a \$200 fee, is only effective for two-years and prior to its expiration the host must apply to renew the license at least thirty days prior to its expiration date.<sup>143</sup>

## V. LOCAL REGULATIONS LACK FEDERAL BACKING FOR ENFORCEMENT AGAINST STR WEBSITES

STR regulation strategies adopted by cities and counties across the country “span the entire policy spectrum from total bans to registration to nonaction,” and each area must tailor its approach according to the unique needs of its constituents.<sup>144</sup> There is clear evidence that each jurisdiction has communities with different requirements, and thus “[e]ach must have autonomy and authority to tailor its own approach.”<sup>145</sup> This is what the PLAN Act will allow them to do, without needing to worry that sites like Airbnb cannot be held accountable for not respecting these local laws. The regulations discussed in this Comment are all attempting to address a symptom of a larger problem, by focusing primarily on regulating Airbnb hosts and placing the burden on them to apply for these STR licenses and permits. The proposed PLAN Act will deny Airbnb its immunity to liability, forcing it to give up its laid-back approach that enables its users to flaunt local laws and regulations, and resolving the problem at its core by giving teeth to these local regulations.

STR websites must be held accountable for not complying with local regulations that have been put in place to protect cities and neighborhoods. Section 230 was created to regulate the Internet, not to allow the Internet to override local regulations that protect these physical communities. Federal law should not treat the Internet differently at the expense of these communities and thus the PLAN Act must be passed to amend Section 230’s unfair application.

---

140. BALT. CITY, MD., CODE art. 15, § 48 (2022).

141. *Short-Term Rentals*, BALT. CITY DEP’T OF HOUS. & CMTY. DEV., <https://dhcd.baltimorecity.gov/short-term-rentals-0>.

142. *Id.*; see also BALT. CITY, MD., CODE art. 15, § 48-6(a), § 48-7(b)(2), § 48-15(b) (2022).

143. BALT. CITY, MD., CODE art. 15, § 48-8–48-9 (2022).

144. Nodiff, *supra* note 3, at 226.

145. *Id.* at 227.

## VI. CONCLUSION

Ultimately, STR websites—especially Airbnb—must be held accountable for flouting local regulations. The only way to truly hold them accountable is with a federal standard that requires amending Section 230 to create a notice-and-take-down exception where sites like Airbnb, once notified of the illegal listing, must take the listing down within thirty days or risk liability. Each community will clearly have different needs, and some may need to ban these rentals while others may allow them under strict conditions. Congress has an obligation to pass the PLAN Act to help support these local communities with whatever decision they make regarding the legality of STRs, as currently, these regulations can only hold Airbnb *hosts* accountable. The impact of these regulations will be minimal without home-sharing sites' compliance. These massive corporations hold enormous power to make real differences in these communities, by complying with the local laws, and without their cooperation these communities have little hope of seeing these laws properly enforced.