

12-5-2023

Fraud on Airbnb: How to Regulate an Emerging and Problematic Industry

Samuel McNeal

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Housing Law Commons](#)

Recommended Citation

Samuel McNeal, *Fraud on Airbnb: How to Regulate an Emerging and Problematic Industry*, 44 J. Nat'l Ass'n Admin. L. Judiciary 147 (2023)
Available at: <https://digitalcommons.pepperdine.edu/naalj/vol44/iss1/5>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Fraud on Airbnb: How to Regulate an Emerging and Problematic Industry

TABLE OF CONTENTS

I.	BACKGROUND: AIRBNB’S SUCCESSES AND FLAWS.	5
A.	FRAUD IN AIRBNB LISTINGS AND REVIEWS	9
II.	HOW IS AIRBNB CURRENTLY REGULATED?.....	14
A.	AIRBNB REGULATION IN SAN FRANCISCO	15
B.	AIRBNB REGULATION IN BOSTON.....	17
C.	AIRBNB REGULATION IN NEW YORK.....	19
III.	HOW SHOULD AIRBNB BE REGULATED?	21
A.	WHAT IS A SHARING ECONOMY COMPANY?.....	22
B.	PROBLEMS WITH AIRBNB AND THE SHARING ECONOMY	25
C.	THE COMMUNICATIONS DECENCY ACT	26
D.	WHAT DOES SECTION 230 PROTECT?	27
G.	DIFFERENCES FROM ANTI-TRUST LAW.....	30
E.	HOW THE FTC SHOULD REGULATE SHARING ECONOMY COMPANIES	32
F.	LOCAL REGULATIONS DON’T PROTECT USERS FROM FRAUD WELL ENOUGH.....	34
IV.	HOW SHOULD THE FTC REGULATE? LIKE THE SEC WITH SARBANES-OXLEY	35
H.	WHAT WOULD SOX FOR SHARING ECONOMY COMPANIES LOOK LIKE?	38
V.	CONCLUSION	41

Airbnb started with an air mattress in an apartment.¹ In 2007, Brian Chesky and his roommate rented out sleeping space on an air mattress in their apartment over the internet via a simple website they designed and built called “Air Bed and Breakfast.”² That website would become Airbnb.com.³ Since then, Airbnb has grown into a publicly traded company worth over 100 billion dollars and operates all over the world.⁴

Airbnb’s success and influence has changed the stakes for consumer. As hosts began to realize there was a lot of money to be made, the financial incentives for deception rose in parallel.⁵ Airbnb is not a few people renting out their couches on the weekend—it is a consumer-to-consumer platform with 6.6 million listings worldwide as of 2022.⁶ “Hosting” (renting out rooms or entire homes) can be lucrative, and unscrupulous hosts have found ways to defraud guests through fake reviews and fake or inaccurate listings.⁷ Hosts also often run afoul

¹ Tomio Geron, *From Crash Pad to Pizza Profitable, Start-Up Eyes Budget Travel Market*, WALL ST. J. (June 10, 2009, 7:29 PM), <https://www.wsj.com/articles/BL-VCDB-2042>.

² *Id.*

³ *Id.*

⁴ Preetika Rana, Maureen Farrell, & Micah Maidenber, *Airbnb’s Stock Price More Than Doubles in Market Debut*, WALL ST. J. (Updated Dec. 10, 2020, 4:32 PM), <https://www.wsj.com/articles/airbnb-shares-more-than-double-in-market-debut-11607625899>.

⁵ See Maxime Bélanger De Blois, *Deceptive Short-term Rental Operations*, MCGILL SCH. OF URB. PLANNING 1, 3 (2021) (finding deception in listings and reviews on Airbnb); see also John W. O’Neill & Yuxia Ouyang, *From Air Mattresses to Unregulated Business: An Analysis of the Other Side of Airbnb*, PENN STATE UNIV. SCH. OF HOSP. MGMT., AM. HOTEL & LODGING ASS’N, 1, 4 (2016) (finding “2,772 full-time operators (renting 360+ days per year just like a hotel) recorded \$347,479,616 in revenue or a very high average of \$125,353 per host during the time period studied.”)

⁶ *Airbnb Q4 2022 and Full-year Financial Results*, AIRBNB (Feb. 15, 2023), <https://news.airbnb.com/en-uk/airbnb-q4-2022-and-full-year-financial-results/>.

⁷ De Blois, *supra* note 5, at 7.

of local housing regulations, specifically bans on short-term rentals and health and safety code violations.⁸

At first, when local governments tried to hold Airbnb accountable for violating regulations, Airbnb claimed protection under Section 230 of the Communications Decency Act (CDA),⁹ which protects platforms like Facebook, Twitter, and YouTube from being held liable for their users' speech.¹⁰ Courts have allowed local regulators to hold Airbnb accountable in some ways for their hosts' illegal short-term rentals, but it is still difficult to enforce this legislation.¹¹ Additionally, no legislation directly targets inaccurate or fake listings and fake reviews in a way that requires Airbnb to solve these issues.¹² While local legislation has begun to deal with local problems like ensuring hosts' listings follow health and safety codes,¹³ the

⁸ See Nisha Shetty, *Mayor Cracks Whip on Broker's Short-term Rental Scheme*, THE REAL DEAL, (July 12, 2022, 6:14 PM), <https://therealdeal.com/2022/07/12/mayor-cracks-whip-on-brokers-short-term-rental-scheme/>; Nisha Shetty, *How Illegal Airbnbs Slip Through the Cracks*, THE REAL DEAL, (Sept. 17, 2022, 8:00 AM), <https://therealdeal.com/2022/09/27/how-illegal-airbnbs-fall-through-the-cracks/>.

⁹ Katie Benner, *Airbnb Sues Over New Law Regulating New York Rentals*, N. Y. TIMES (Oct. 21, 2016), <https://www.nytimes.com/2016/10/22/technology/new-york-passes-law-airbnb.html>.

¹⁰ *Airbnb, Inc. v. City and Cnty. of San Francisco*, 217 F.Supp.3d 1066, 1074 (N.D. Cal. 2016), injunction granted, 2016 U.S. Dist. LEXIS 160451; *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113, 123 (D. Mass. 2019).

¹¹ See *Airbnb, Inc. v. City and Cnty. of San Francisco*, 217 F.Supp.3d at 1074 and *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113, 123 (showing how Airbnb fought legislation that imposed fines for fee collections on unregistered listings on its website.); See Shetty, *supra* note 7 (showing how difficult it is to enforce health and safety code violations in Airbnb listings).

¹² See *Airbnb, Inc. v. City and Cnty. of San Francisco*, 217 F.Supp.3d at 1074 (holding that Airbnb is a publisher once it collects a fee, but only for unregistered listings that it collects a fee on, which avoided running afoul of Section 230 and indicated that holding Airbnb further liable as a publisher would run afoul of Section 230).

¹³ See *Airbnb, Inc. v. City and Cnty of San Francisco*, 217 F.Supp.3d at 1074; *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d at 123.

Federal Trade Commission (FTC) is well-placed to protect consumers from this kind of fraud.¹⁴ The FTC has made administrative judgments against companies that used deceptive reviews and investigates companies reported to them “to prevent fraudulent, deceptive, and unfair business practices.”¹⁵ The FTC should adopt a system where Airbnb and other consumer-to-consumer business platforms report to the FTC and the public on their current risk and controls systems and their effectiveness. This system would ensure that Airbnb, and consumer-to-consumer platforms like it, would be held responsible for fraud that occurs on their platforms and would make consumers aware of the risk.

In Section I, this article explains the issues within Airbnb and why they need addressing. Section II explains the current state of Airbnb regulation and identifies the loopholes within that regulation that harm consumers. Section III shows why Section 230 of the Communications Decency Act protects Airbnb from some regulations, but why it also allows harm to persist against Airbnb. Section IV will posit that the Federal Trade Commission should oversee a broad, context-based regulation of Airbnb to protect consumers through a risk management reporting mechanism similar to the financial reporting to the Securities and Exchange Commission required under the Sarbanes-Oxley Act. Finally, this article will conclude that this reporting structure will adequately address fraud perpetrated on consumers by Airbnb without infringing on Section 230 speech protections.

¹⁴ *About the FTC*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc> (last visited Mar. 20, 2023, 8:01 PM) (stating the mission of the FTC: “Protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education”).

¹⁵ *Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews*, FED. TRADE COMM’N (Mar. 15, 2011), <https://www.ftc.gov/news-events/news/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online-consumer-independent-reviews>.

I. BACKGROUND: AIRBNB'S SUCCESSES AND FLAWS.

Airbnb is, essentially, a middleman for a host—someone with a room or a home to rent—and a guest—someone looking to rent that room or home.¹⁶ Airbnb's profits come from taking a percentage of what customers pay hosts.¹⁷ Airbnb typically charges both sides; the host is charged 3% of the rental fee, and the guest is charged between 6-12% of the total, with variation within that range based on length of stay and total price.¹⁸

Airbnb's facilitation fee model has made the company successful.¹⁹ To give some sense of their operational scale, as of 2021, "[m]ore than 4 million people offer their private rooms, entire apartments, and villas in more than 220 countries all around the world" and "[h]osts have accommodated more than 825 million guests, cumulatively earning over \$110 billion" over the lifespan of the company.²⁰ The word "Airbnb" has become a verb—to "Airbnb your home" and to "Airbnb for the weekend in Spain"—even if you found it on VRBO or another smaller rental platform.²¹ Airbnb claims to "democratize capitalism" because it "helps combat wage stagnation and worsening economic inequality by empowering people to use their homes to earn extra income, fostering entrepreneurship, and supporting increasing numbers of workers."²² Airbnb

¹⁶ O'Neill et al., *supra* note 5, at 2.

¹⁷ Gabriele Cergol, *The Long Awaited Airbnb IPO: Money Left on the Table in Tech Listings in a Year Marked by a Global Pandemic*, 1 LUISS BUSINESS SCH. DEP'T OF BUS. AND MGMT. CHAIR IN EQUITY MARKETS AND ALT. INVS., 57 (2021).

¹⁸ *Id.*

¹⁹ *Id.* See also Preetika Rana, Maureen Farrell & Micah Maidenberger, *Airbnb's Stock Price More Than Doubles in Market Debut*, WALL ST. J. (updated Dec. 10, 2020, 4:32 PM), <https://www.wsj.com/articles/airbnb-shares-more-than-double-in-market-debut-11607625899>.

²⁰ Cergol, *supra* note 17, at 57.

²¹ Meredith Carey, *Plus Is for People Who Hate Airbnb*, CONDÉ NAST TRAVELER (Feb. 22, 2018), <https://www.cntraveler.com/story/airbnb-plus-is-for-people-who-hate-airbnb>.

²² *Airbnb Policy Tool Chest*, AIRBNB 4 (2017), <https://press.airbnb.com/wp-content/uploads/sites/4/2019/08/Airbnb-Policy-Tool-Chest-2.0.pdf>.

claims it is helping individual homeowners to bring in supplemental income.²³ For travelers and guests, Airbnb provides a way to travel that can be cheaper than a hotel.²⁴

Despite Airbnb's financial success, it has also experienced high-profile scandals.²⁵ In New York, where short-term rentals under 30-days are illegal throughout the state, prosecutors charged Arron Latimer with running a two-million-dollar short-term rental scam.²⁶ Rentals listed on Airbnb that violated local and state laws like, sub-30-day stays or health and safety codes, are easy for tourists to book but incredibly hard for officials to prevent and prosecute.²⁷ New York City's Mayor Eric Adams created an Office of Special Enforcement to stop illegal rentals in 2015, and it targets rentals that are "more illegal than others."²⁸ "More illegal than others" means the Special Enforcement Office goes after hosts who have the most units and violate the most health and safety codes because those have the greatest impact and greatest potential for harm.²⁹ Until 2020, Airbnb made the scams and illegal activity doubly hard to enforce because Airbnb does not require hosts to disclose addresses to guests until after booking as a safety measure, and Airbnb itself refused to disclose that information substantially to the

²³ *Id.*

²⁴ *Id.*

²⁵ See Allie Conti, *I Accidentally Uncovered a Nationwide Scam on Airbnb*, VICE (Oct. 31, 2019, 5:00 AM) <https://www.vice.com/en/article/43k7z3/nationwide-fake-host-scam-on-airbnb> (reporting that an Airbnb host scammed guests in multiple cities through cancellations and fraudulent listings); see James Temperton, *Threats, Fear and Chaos: the Messy Fall of an Airbnb Scam Empire*, WIRED (Apr. 3, 2020, 9:39 AM) <https://www.wired.co.uk/article/airbnb-scam-london-suspended> (reporting that some Airbnb listings were unsafe and the host's agents attempted to remove guests by intimidation).

²⁶ Shetty, *supra* note 8.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

Special Enforcement Office.³⁰ Finally, in 2020, when New York City passed a law “require[ing] online short-term rental platforms to report quarterly data on bookings to the Office of Special Enforcement, including the address of the rental, the URL of the listing, details about the reservation, contact information about the host and bank accounts to which payouts were made,” the Special Enforcement Office was able to identify homes and make sure they weren’t short-term rentals without having to search for the location of the houses by brute force.³¹ The law simply forced Airbnb to report the location of the homes to the city so that the city could enforce the law against short-term rentals.³²

Until 2020, when New York City passed a law that required Airbnb to disclose the location of listings to the city, city investigators had to rely on pictures and descriptions of the neighborhood to identify illegal listings.³³ However, now the law requires that “online, short-term rental platforms had to hand over quarterly data on bookings, including the address of each rental, the URL of the listing, details about the reservation, contact information about the host and bank accounts to which payouts were made.”³⁴ The reporting led the city to uncover Arron Latimer’s scheme in 2022.³⁵ Latimer and others owned and managed six buildings, one of which health inspectors issued “violation after violation” for hazards like inadequate fire alarm and

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

sprinkler systems and lacking in emergency exits.³⁶ Between 2018 and 2022, Airbnb disbursed two million dollars to Latimer for his listings.³⁷ During that time, he “used at least 27 separate host accounts, advertised nearly 80 listings, conducted more than 2,200 transactions, and deceived more than 6,500 guests”³⁸ This kind of fraud—using multiple host accounts, multiple LLCs, duplicate listings—is a common practice among hosts who seek to avoid detection from local regulators, Airbnb’s own internal investigators, and guests.³⁹ The New York City task force argues that this type of fraud, where a host rents out an unsafe listing in violation of short-term rental laws, is exactly what they aim to prevent from occurring in the future with the law that will begin in January 2023.⁴⁰ This law will require all hosts to register with the city and use their registration number to perform rentals on Airbnb.com.⁴¹ Arron Latimer’s scheme shows that Airbnb’s internal compliance measures failed catastrophically—the investigation of Latimer did not result in his removal from the platform until *after* New York City “subpoenaed Airbnb for information on Latimer, or to explain why the operation had continued unchecked for four years.”⁴²

A. FRAUD IN AIRBNB LISTINGS AND REVIEWS

Airbnb does not release its information regarding scams or illegal listings or allow others to look for such instances except where required by law, as shown in the New York City

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See De Blois, *supra* note 5, at 21-31; see also Conti, *supra* note 25; see also Temperton, *supra* note 25.

⁴⁰ See De Blois, *supra* note 5, at 21-31; see also Conti, *supra* note 25; see also Temperton, *supra* note 25.

⁴¹ Shetty, *supra* note 8.

⁴² Shetty, *supra* note 8.

example.⁴³ Without providing information about Airbnb's flagged listings or identification information, scholars and government agencies have had difficulty researching Airbnb to determine the extent of illegal and scam listings.⁴⁴ Nevertheless, some university students have conducted research that shows significant fraud exists in Airbnb listings and reviews.⁴⁵

Maxime Bélanger De Blois, a graduate student at the McGill Graduate School of Urban Planning, studied the level of deception in Airbnb listings and hosts in North America (Canada and the United States) in a supervised research project.⁴⁶ He used image recognition software to identify duplicate photographs used in multiple reviews to identify duplicate listings and listings removed by the hosts and then reuploaded to cleanse negative reviews.⁴⁷ Airbnb allows hosts to delete a listing and recreate it as a new listing, which detaches negative reviews from the listing; however, it does not detach the listings from the host, which is not an issue for a host with many reviews and guests who are only looking at the reviews for the listing they are interested in.⁴⁸ He also used software to identify potentially fake reviews and hosts to determine if a singular person was behind the hosts or a company was posing as a person.⁴⁹ Bélanger De Blois used an extensive data set from AirDNA, "a consulting firm that has conducted high-frequency web scrapes of every listing on Airbnb and VRBO in North America since 2016" that contained data

⁴³ See also Christian Smigiel, *Why Did It Not Work? Reflections on Regulating Airbnb and the Complexity and Agency of Platform Capitalism*, 75 GEOGRAPHICA HELVETICA, 253 (2020); see Shetty, *supra* note 8.

⁴⁴ See Shetty, *supra* note 8.

⁴⁵ Benjamin Anderson, *How Widespread is AirBnB Fraud? Evidence from the Cincinnati Area* (2020) (Thesis report, Farmer School of Business and Department of Economics) (OhioLink) http://rave.ohiolink.edu/etdc/view?acc_num=miami1595804021207175; De Blois, *supra* note 5, at 7.

⁴⁶ De Blois, *supra* note 5, at 7.

⁴⁷ *Id.* at 21-22.

⁴⁸ *Id.* at 21-23.

⁴⁹ *Id.* at 21-23.

from 2016 to just before the COVID-19 pandemic to avoid offsetting conclusions with data from the pandemic.⁵⁰ The data set included reviews, listings, and estimates of listing activity, such as reservations and nightly pricing.⁵¹

He found that 53,724 listings in the dataset or 23.4% used a non-unique photo that had been used in another listing.⁵² He identified a common practice: a “series of seemingly separate listings operated by seemingly separate host accounts, each active for several months and then deactivated shortly before another of these listings became active, which use the exact same photos to advertise.”⁵³ Multiple identical listings allow owners to cleanse negative reviews and also helps them avoid easy detection by government investigators for illegal short-term rentals.⁵⁴ Admittedly, matching photos of a communal apartment complex pool or Disneyland—a nearby tourist attraction—does not mean that the host is deceiving anyone.⁵⁵ However, Bélanger De Blois posited that in markets where most listings do not include a photo of Disneyland or a communal pool and where the photos are of the interior of a listing, the photos should be distinct.⁵⁶ Thus, many hosts are using identical interior photos in multiple listings to deceive

⁵⁰ *Id.* at 16.

⁵¹ *Id.* at 21-26.

⁵² *Id.* at 21.

⁵³ *Id.* at 22.

⁵⁴ *Id.* at 26.

⁵⁵ *Id.* at 26.

⁵⁶ *Id.* at 26.

potential guests.⁵⁷ Bélanger De Blois suggests that using identical photos for multiple listings likely belies two tactics: the bait-and-switch and the cleansing of negative reviews.⁵⁸

Reviews on Airbnb and mainstream media have heavily documented the bait and switch tactic.⁵⁹ The typical situation is where a host has a guest booked into a listing, and right before the guest is supposed to move in, the host sends a message that the listing is unavailable.⁶⁰ The message usually claims there is a plumbing issue or a previous tenant refuses to leave, and the host instead places the guest in another home.⁶¹ The guest often can't rebook due to time constraints and rebooking is particularly difficult during busy seasons or in high-demand markets, where getting a refund and paying for a more expensive stay at another Airbnb or hotel is not feasible.⁶² Airbnb prohibits this conduct, when it is a scam, but protects hosts in a legitimate emergency and allows them to cancel their listing or provide guests with another home.⁶³

Reviews are integral to Airbnb because they allow the host and the guest to vet each other and feel like they can trust the other party, similar to other rating systems on Uber or Lyft.⁶⁴ Bélanger De Blois notes that reviews can boost “a listing’s or a host’s reputation and/or help

⁵⁷ *Id.* at 25.

⁵⁸ *Id.* at 26.

⁵⁹ *See* Conti, *supra* note 22; *see* Temperton, *supra* note 22.

⁶⁰ *See* Conti, *supra* note 22; *see* Temperton, *supra* note 22.

⁶¹ *See* Conti, *supra* note 22; *see* Temperton, *supra* note 22.

⁶² *See* Conti, *supra* note 22; *see* Temperton, *supra* note 22.

⁶³ *Cancelling a Reservation as a Host Without Adverse Consequences*, AIRBNB, <https://www.airbnb.com/help/article/2022> (last visited Mar. 12, 2023).

⁶⁴ Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MIN. J. OF L., SCI. AND TECHNOLOGY 673, 673–76 (2017).

alleviate the cold start effect, i.e. the first months of a listing when no review[s] [have] been left yet and guests are hesitant to book.”⁶⁵ So too, then, can fraudulent reviews. Regarding possible fake reviews, Bélanger De Blois found “12,400 potential fraudulent reviewers, who left 22,437 reviews [on] 15,718 properties owned by 11,884 hosts.”⁶⁶ Although Airbnb hosts prefer guests who provide verified proof of identification on their profile, verification is not required to leave a review. Without requiring verification, Airbnb makes it easier for fake accounts or friends and family of the host to leave reviews.⁶⁷ Additionally, online services claim to provide real-looking positive reviews for a price.⁶⁸ Bélanger De Blois drew conclusions using a Linguistic Inquiry Word Count model.⁶⁹ This type of model tracks several factors: emotional exaggeration, dissimilarity between fake and real reviews, similarity between real reviews, more use of present and future tenses, frequent use of first-person pronouns, and other criteria previously established for identifying fake reviews on other person-to-person sales platforms.⁷⁰ Bélanger De Blois’s conservative estimate flagged 13.8% of all properties in Los Angeles as having reviews from potentially fraudulent reviewers.⁷¹ Ultimately, the data showed that more fake reviews exist in competitive markets “where there are many hosts operating a small number of listings” than in less competitive markets where fewer companies own larger numbers of homes.⁷² These

⁶⁵ De Blois, *supra* note 5 at 32.

⁶⁶ *Id.* at 21.

⁶⁷ *Verifying your identity*, AIRBNB, <https://www.airbnb.com/help/article/1237> (last visited Mar. 12, 2023).

⁶⁸ De Blois, *supra* note 5 at 32-33.

⁶⁹ *Id.* at 18-19.

⁷⁰ *Id.* at 32.

⁷¹ *Id.* at 36.

⁷² *Id.* at 42.

potentially fake reviews undermine guests' ability to trust both the reviews and, by extension, the listings themselves.

Additionally, a graduate student at Miami University, Benjamin Anderson, conducted a study on Airbnb listings in Cincinnati.⁷³ The study aimed to test the prevalence of “bait and switch” listings through a statistical analysis focused on same-day bookings.⁷⁴ Such bookings are usually for homes owned by companies with multiple listings rather than individuals with only one or two listings.⁷⁵ The study found “a statistically significant amount more same day bookings for multi-listers in the Cincinnati area”⁷⁶ The finding is bolstered by Bélanger De Blois’s study, where more than half (53.3%) “of all commercial listings tested positive for at least one form of deception.”⁷⁷ Although more data would provide clearer proof of the scale of various forms of fraud and deception on Airbnb, these two studies offer significant evidence. Combined with large-scale investigative reporting from major media outlets like Vice, the New York Times, and Wired, it is clear that Airbnb faces a pervasive problem.⁷⁸ The issue of deceptive and fraudulent behavior too often causes tangible harm to consumers.⁷⁹

II. HOW IS AIRBNB CURRENTLY REGULATED?

⁷³ Anderson, *supra* note 45 at 1-3.

⁷⁴ *Id.* at 1-3.

⁷⁵ *Id.* at 8

⁷⁶ *Id.* at 8.

⁷⁷ De Blois, *supra* note 5 at 44.

⁷⁸ See Conti, *supra* note 25; see Temperton, *supra* note 25.

⁷⁹ See Luis Ferré-Sadurní, ‘Total Scam’ or ‘Fabulous’? Why Airbnb Deeply Divides Us, N. Y. TIMES (Feb. 29, 2019) <https://www.nytimes.com/2019/02/27/nyregion/airbnb-nyc-law.html>; see Conti, *supra* note 22; see Temperton, *supra* note 22.

The current regulations governing Airbnb vary internationally, as well as domestically.⁸⁰ In the United States, emerging legislation at the state and local levels shows federal legislation, primarily the Communications Decency Act (CDA), is not effectively controlling or regulating internet platforms like Airbnb that facilitate short-term rentals.⁸¹ Although local legislation has successfully withstood challenges from Airbnb under Section 230 of the CDA, particularly those related to illegal short-term rentals, no legislative action has been taken to stop fraudulent listings or reviews.⁸² As a result, consumers remain at serious risk of fraud.⁸³ Three major cities in the U.S. provide a clear picture of current Airbnb legislation and its successes and failures regarding consumer protection: San Francisco, New York, and Boston.

A. AIRBNB REGULATION IN SAN FRANCISCO

In *Airbnb, Inc. v. City and County of San Francisco* in 2016, Airbnb challenged an ordinance requiring every licensure of every Airbnb with the city and later implemented fines for Airbnb hosts for collecting a fee for facilitating the rental of an unregistered home.⁸⁴ San Francisco wanted to reduce illegal short-term rentals and use the registration to ensure that hosts have “proof of liability insurance and compliance with municipal codes, usage reporting, tax payments and other conditions.”⁸⁵ At the time, Airbnb was changing from a peer-to-peer system

⁸⁰ See Fergus O’Sullivan & Jessica Loudis, *Airbnb Hosts Try to Evade City Regulations, From Copenhagen to Catalonia*, BLOOMBERG (Aug. 2, 2023) <https://www.bloomberg.com/news/features/2023-08-02/cities-keep-trying-and-failing-to-regulate-airbnb-nasdaq-abnb>.

⁸¹ Benner, *supra* note 8; *Airbnb, Inc. v. City and Cnty. of San Francisco*, 217 F.Supp.3d 1066 at 1074 (N.D. Cal., 2016); *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113, 123 (D.Mass., 2019).

⁸² *City and Cnty of San Francisco*, 217 F.Supp.3d at 1074; *Airbnb, Inc. v. City of Boston*, 386 F.Supp.3d 113, 123 (D.Mass., 2019). See also Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. OF CHI. L. REV. 103, 103–115 (2016).

⁸³ See *supra* Section II A.

⁸⁴ *City and Cnty. of San Francisco*, 217 F.Supp.3d at 1074.

⁸⁵ *Id.* at 1070.

to a company-to-peer system where the “host” was often a property management company, not an individual homeowner.⁸⁶ In 2016, nearly 40% of Airbnb’s revenue from October 2014 through September 2015 in fourteen of the largest metropolitan areas in the U.S. came from hosts with more than two listed units.⁸⁷ In that same timeframe, 32% of Airbnb’s revenues in San Francisco came from multi-unit hosts, who made up 14.9% of hosts in the city.⁸⁸ The legislation was meant to stop short-term rentals and protect guests from unsafe listings.⁸⁹

The court upheld this requirement, despite a Section 230 challenge,⁹⁰ in which the Northern District of California Circuit Court “[held] that Section 230(c)(1) precludes liability for claims involving ‘(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.’”⁹¹ Said another way, the court found a state law treating a website as a publisher or speaker would not hold a website owner liable for user-posted information under Section 230.⁹² Airbnb conceded the first element that it provides “an interactive computer service” and the third element that its “content” (home listings) come from third parties.⁹³ Instead, Airbnb contended that San Francisco’s ordinance requires the court to

⁸⁶ See O'Neill et al., *supra* note 5 at 4.

⁸⁷ *Id.* at 5.

⁸⁸ *Id.*

⁸⁹ *City and County of San Francisco*, 217 F.Supp.3d at 1074.

⁹⁰ *Id.*

⁹¹ *Id.* at 1072 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016)).

⁹² *Id.*

⁹³ *Id.*

treat them as “a publisher or speaker” of third-party content.⁹⁴ Airbnb viewed the ordinance’s criminal penalty for providing an unregistered rental home on its platform and collecting a fee as a requirement to “actively monitor and police listings by third parties to verify registration.”⁹⁵ Airbnb argued “that [the ordinance’s requirement to actively monitor and police listings] is tantamount to treating them as a publisher because it involves the traditional publication functions of ‘reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content.’”⁹⁶

However, the court ruled that the ordinance does not treat Airbnb as a publisher or speaker because the ordinance “does not regulate what can or cannot be said or posted in the listings” and “creates no obligation on plaintiffs’ part to monitor, edit, withdraw or block the content supplied by hosts.”⁹⁷ Under the court’s view, Airbnb can publish any listing, registered or not, on their platform and without liability under the ordinance until Airbnb collects a fee in service of renting an unregistered unit.⁹⁸ Airbnb is not a publisher or speaker—the ordinance “holds plaintiffs liable only for their own conduct, namely for providing, and collecting a fee for, Booking Services in connection with an unregistered unit.”⁹⁹ This case established that the correct test of legislation regulating online transactions is whether it “inherently requires the court to treat” an “interactive computer service,” like Airbnb, as a “publisher or speaker” of third

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)); *see also* *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc) (any activity “that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under section 230”).

⁹⁷ *City and County of San Francisco*, 217 F.Supp.3d at 1072.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1073.

party-provided content or services.¹⁰⁰ If a regulation requires courts to treat a website owner as a publisher of user-posted information, then it violates Section 230 of the CDA.¹⁰¹

B. AIRBNB REGULATION IN BOSTON

In *Airbnb, Inc. v. City of Boston*, similar to *Airbnb, Inc. v. City and County of San Francisco*, the court upheld an ordinance imposing fines on unlicensed listings on Airbnb.¹⁰² Boston enacted an ordinance imposing regulations on short-term rentals and imposing fines against “booking agents” like Airbnb who accept a fee for an “ineligible unit” rental.¹⁰³ The court, quoting the First Circuit, stated that “Congress sought to encourage websites to make efforts to screen content without fear of liability,” and “to permit the continued development of the internet with minimal regulatory interference.”¹⁰⁴ With that goal of minimizing regulatory interference on web commerce, the court applied a similar test to the San Francisco case above.¹⁰⁵ The court found that the regulation did not force courts to treat Airbnb like a publisher of third-party listings because it did not impose liability on Airbnb for those listings.¹⁰⁶ Instead, it imposed liability on Airbnb as a “booking agent and payment processor.”¹⁰⁷

Airbnb claimed the ordinance would require them to remove noncompliant listings, meaning Airbnb is treated like a publisher of that content.¹⁰⁸ However, this claim did not

¹⁰⁰ *Id.* at 1074.

¹⁰¹ *Id.*

¹⁰² *Airbnb v. City of Boston*, 386 F.Supp.3d 113, 123 (D. Mass. 2019).

¹⁰³ *Id.* at 117.

¹⁰⁴ *Id.* at 119 (quoting *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 19 (1st Cir. 2016)).

¹⁰⁵ *Id.* at 122; *see supra* Section IIA.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

persuade the court.¹⁰⁹ The court found that “[t]he plain language of the provision mandates no such action by Airbnb.”¹¹⁰ The court even went as far as to suggest that this is not Airbnb’s only form of action; Airbnb could choose to notify its users of its already existing indemnification provision in its Terms of Service if the city of Boston did levy a fine against Airbnb for facilitating the rental of an ineligible home.¹¹¹ The court also noted that although this ordinance may practically require Airbnb to change the way that it operates its platform or change its conduct, “allowing internet companies to claim CDA immunity under these circumstances would risk exempting them from most local regulations and would . . . create a lawless no-man’s-land on the Internet.”¹¹² The “independent act of collecting a fee after facilitating an illegal rental transaction” does not fall under the protection of the CDA.¹¹³ Lastly, as a matter of law, the court concluded “that the Penalties provision reaches Airbnb in its capacity as a booking agent and payment processor.”¹¹⁴ Thus, the court imposed no liability nor did it demand any action of Airbnb when the platform publishes third-party content.¹¹⁵ This holding allows the government to regulate internet companies that do not directly provide services to protect consumers, but also

¹⁰⁹ *Id.* at 121–22.

¹¹⁰ *Id.* at 121.

¹¹¹ *Id.* at 121–22.

¹¹² *Id.* at 122. (quoting *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (upholding dismissal of challenge to an ordinance that would stop a booking transaction and collection of a booking fee for renting an unregistered property)).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 122.

allows these internet companies to continue operating without being liable for every claim made by users on a website.¹¹⁶

C. AIRBNB REGULATION IN NEW YORK

In 2010, New York City enacted a law that explicitly banned all rentals under thirty days, effectively banning Airbnb from the city.¹¹⁷ Since then, the City introduced two new laws that allow Airbnb to operate and rent out homes for financial and vacation reasons.¹¹⁸ The first bill would allow residents to rent out their homes while on vacation to provide “tax revenue and tourism dollars to the state and city.”¹¹⁹ The second bill allowed residents to “rent out their primary or secondary residences for periods of up to thirty days to . . . ‘make ends meet and earn extra income.’”¹²⁰ The goal is to “bring exponential economic benefits to both New York City’s residents and its visitors.”¹²¹ Based on the Boston and San Francisco cases, and New York legislation, courts have stopped short of preventing Section 230 from protecting Airbnb from liability.¹²²

The test applied to legislation regulating online transactions is whether it “inherently requires the court to treat” an “interactive computer service,” like Airbnb, as a “publisher or

¹¹⁶ *Id.* (allowing regulations that punish Airbnb for health and safety violations and help keep housing affordable).

¹¹⁷ Kaplan & Nadler, *supra* note 82 at 111.

¹¹⁸ *Id.* at 112.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*; see also City of Boston, 386 F. Supp. 3d at 119; City and County of San Francisco, 217 F. Supp. 3d at 1074.

speaker of information provided by another.”¹²³ While the test allows states to regulate Airbnb because Airbnb profits from the transaction by collecting a percentage fee, it also constrains legislators.¹²⁴ Under this test, Legislators seeking to hold Airbnb liable for fraudulent listings and reviews must treat Airbnb as the speaker of another's words until money is collected for the service.¹²⁵ Ultimately, this test protects what Section 230 is meant to protect: free speech.¹²⁶ If the court had held that this licensing legislation was protected speech, it would have been an overreaching protection that prevented Airbnb from taking legal responsibility for a transaction that clearly benefits them. On the other hand, if the test allowed courts to hold Airbnb liable for any claims made in reviews or listings, it would be cost-prohibitive for Airbnb and other platforms to police the services and products offered on their sites. In the extreme, it may even affect social media companies, with courts holding them responsible for the speech of their users.¹²⁷

III. HOW SHOULD AIRBNB BE REGULATED?

The above examples of local regulation provide a good starting point and local legislation may even address the most severe problems that plague Airbnb, but they do not address fraudulent reviews and listings. However, it is likely that Legislation requiring Airbnb to moderate and remove fraudulent reviews and listings would not survive a Section 230

¹²³ City and County of San Francisco, 217 F. Supp. 3d at 1074.

¹²⁴ City of Boston, 386 F. Supp. at 121.

¹²⁵ *See id.*

¹²⁶ *Id.*

¹²⁷ Gonzalez v. Google LLC, 2 F.4th 871 (2021). (A case before the Supreme Court with a divided panel of the U.S. Court of Appeals for the 9th Circuit that ruled Section 230 protects as speech algorithmic recommendations of videos posted by terrorists).

challenge.¹²⁸ Therefore, the FTC should require transparency and risk control measures to ensure that Airbnb, and companies like it, monitor the risk of fraud on their websites and take reasonable steps to fight it.

Section 230 does not legalize fraud; it protects speech.¹²⁹ Legislation requiring Airbnb to analyze and disclose its fraud management program and how effective it is would not be protected under Section 230; it would not punish Airbnb for rampant fraud or require courts to treat Airbnb as a publisher or speaker.¹³⁰ Implementing transparency and risk control measures would also allow the FTC to investigate and punish bad actors—hosts who are committing fraud—because Airbnb would need to turn over the information of those who it have committed fraud, which would help consumers *and* Airbnb have safer transactions and better consumer experiences.

A. WHAT IS A SHARING ECONOMY COMPANY?

Airbnb CEO Brian Chesky said in an interview: “There were laws created for businesses, and there were laws for people. What the sharing economy did was create a third category: people as businesses They don't know whether to bucket our activity as person or a business.”¹³¹ Chesky acknowledged that Airbnb is a new type of platform and a new type of business that can be described as a “sharing economy company,” which means it is peer-to-

¹²⁸ *Supra* Section IIC.

¹²⁹ *See* 47 U.S.C.A. § 230.

¹³⁰ *See supra* Section IIC.

¹³¹ Andy Kessler, *Brian Chesky: The ‘Sharing Economy’ and Its Enemies*, WALL ST. J. (Jan. 17, 2014) <https://www.wsj.com/articles/SB10001424052702304049704579321001856708992>.

peer.¹³² There is no differentiation between suppliers and customers, and any person can be either.¹³³

Uber, Lyft, TaskRabbit, and Amazon all operate on a nearly identical business model.¹³⁴ Their business is pairing a consumer with a supplier—whether that “supplier” is providing a ride in their car, building your Ikea bed, or shipping you a t-shirt.¹³⁵ The beauty of this business model for a company like Airbnb is that they do not own any product or real estate and take little legal responsibility for the product that the consumers are buying.

Sharing economy companies rely on the tools and assets of their users to provide a service.¹³⁶ Anyone can rent out their room or house on Airbnb; anyone can rent someone else’s room or home on Airbnb.¹³⁷ Hotels are responsible for the state of the rooms that their guests stay in and, if for example a TV in a hotel falls and injures someone, the hotel is sued.¹³⁸ At Airbnb, the host is sued, not Airbnb.¹³⁹

From the regulator’s perspective, the government would like to protect consumers without impeding innovation that creates jobs and financial growth.¹⁴⁰ Chesky, on behalf of

¹³² Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 57–58 (2016).

¹³³ *Id.*

¹³⁴ Stemler, *supra* note 64 at 677.

¹³⁵ *Id.* at 674–77.

¹³⁶ Janice C. Griffith, *Role of State Governments in the Sharing Economy*, in THE CAMBRIDGE HANDBOOK OF THE LAW OF THE SHARING ECONOMY 231, 231–32 (Nestor M. Davidson, Michèle Finck & John J. Infranca eds., Cambridge University Press 2018).

¹³⁷ Stemler, *supra* note 64 at 674–78.

¹³⁸ *Host Liability Insurance Program Summary*, AIRBNB (last updated Jan. 6, 2023) <https://www.airbnb.com/help/article/3145>.

¹³⁹ *Id.*

¹⁴⁰ Griffith, *supra* note 136.

Airbnb, would prefer to have it both ways—he would like his hosts to be treated like individuals, or at most side-hustlers and budding entrepreneurs, who don’t need the heavy hand of government taxing or regulating away their business because they are simply people dealing with people, guests to hosts and hosts to guests.¹⁴¹ But, Airbnb is a big business.¹⁴² In 2014, before Airbnb went public, the company made about 100 million dollars in net revenue per year.¹⁴³ At the end of the third quarter in 2022, Airbnb “had [its] most profitable quarter [yet] with net income of \$1.2 billion, up 46 percent year-over-year, representing a 42 percent net income margin.”¹⁴⁴

Industry journalists and regulators alike consider Airbnb to be a “sharing economy” company, which means that it is a company that uses the internet to arrange consumer-to-consumer transactions.¹⁴⁵ The U.S. Department of Commerce defines a “sharing economy” company as:

1. They use information technology (IT systems), typically available via web-based platforms, such as mobile “apps” on Internet-enabled devices, to facilitate peer-to-peer transactions.
2. They rely on user-based rating systems for quality control, ensuring a level of trust between consumers and service providers who have not previously met.
3. They offer the workers who provide services via digital matching platforms flexibility in deciding their typical working hours.

¹⁴¹ Kessler, *supra* note 138. (“Mr. Chesky says that ‘62% of hosts in New York depend on Airbnb to pay their rent or mortgage.’”) *Id.*

¹⁴² *Id.*

¹⁴³ Kessler, *supra* note 138.

¹⁴⁴ *Airbnb third quarter 2022 financial results*, AIRBNB (Nov. 1, 2022) <https://news.airbnb.com/airbnb-third-quarter-2022-financial-results/>.

¹⁴⁵ Rudy Telles Jr., *Digital Matching Firms: A New Definition in the “Sharing Economy” Space* 1 (June 3, 2016), <https://www.commerce.gov/sites/default/files/migrated/reports/digital-matching-firms-new-definition-sharing-economy-space.pdf>.

4. To the extent that tools and assets are necessary to provide a service, digital matching firms rely on the workers using their own.¹⁴⁶

The sharing economy includes companies, like Airbnb, that connect people and act as intermediaries, thereby decreasing their costs by avoiding both ownership of the good or service and avoiding some or all liability for the services rendered.¹⁴⁷ In her article on the role of government regulation in the sharing economy, Janice Griffith writes that “[t]echnology-based platforms, such as Uber, Lyft, and Airbnb . . . can also create payment and tax collection systems for such transactions, and they can offer marketing advice and other types of expertise.”¹⁴⁸ In short, sharing economy companies are transaction facilitators for services between unaffiliated third-parties, not service providers themselves, and profit by taking a fee from those transactions.¹⁴⁹

B. PROBLEMS WITH AIRBNB AND THE SHARING ECONOMY

Airbnb is not immune to the problem that plagues all internet sales companies: fake reviews and dishonest listings.¹⁵⁰ More than that, because Airbnb hosts and guests rate each other, many feel a personal connection to the other and know that the other will be rating them, so they inflate their rating out of kindness or fear of retaliation.¹⁵¹ Airbnb, like any sharing economy platform, has a financial interest in high (five-star) reviews because they generate more purchases and therefore more booking fees for Airbnb.¹⁵² Airbnb’s content policy gives it “the

¹⁴⁶ *Id.*

¹⁴⁷ Griffith, *supra* note 143 at 232.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See De Blois, *supra* note 5.

¹⁵¹ Stemler, *supra* note 75 at 688–97.

¹⁵² *Id.*

ability to remove a review, ‘in whole or part,’ for any reason at its ‘sole discretion.’”¹⁵³ This policy allows a company with an interest in good reviews, not transparency, to change reviews.

Airbnb functions as a middleman between an actual service provider and the customer. It claims that it cannot be held liable for fraud that occurs on its platform because, under Section 230 of the Communications Decency Act (CDA), Airbnb cannot “be treated as the publisher or speaker of any information provided” by users of their Platforms.¹⁵⁴ Airbnb’s argument that Section 230 should protect them from being treated as a publisher or speaker of third-party has not kept it from being liable for collecting a fee for unauthorized listings.¹⁵⁵ However, Airbnb is protected by Section 230 when it comes to fraudulent reviews and listings because to legislate and punish Airbnb for fraudulent reviews and listings *would* require courts to treat it like a publisher or speaker of that content.¹⁵⁶ Therefore, the FTC should require Airbnb to take responsibility for the fraud on its platform because the company is reaping financial benefits that outstrip competitors like hotels and hostels due, largely, to their ability to avoid legislation that would drive down profits.¹⁵⁷

C. THE COMMUNICATIONS DECENCY ACT

¹⁵³ *Reviews for stays*, AIRBNB (last visited March 12, 2023) <https://www.airbnb.com/help/article/13>.

¹⁵⁴ 47 U.S.C.A. § 230.

¹⁵⁵ *Supra* section IA-C.

¹⁵⁶ See *Airbnb v. City and Cnty. of San Francisco*, 217 F.Supp.3d 1066 at 1074 (2016); see *Airbnb v. City of Bos.*, 386 F.Supp.3d 113, 123 (2019); see also Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N. Y. TIMES (Updated Dec. 15, 2020) (“The law has helped build companies worth hundreds of billions of dollars with a lucrative business model of placing ads next to largely free content from visitors.”) *Id.*

¹⁵⁷ See *Airbnb third quarter 2022 financial results*, AIRBNB (Nov. 1, 2022) <https://news.airbnb.com/airbnb-third-quarter-2022-financial-results/>.

The CDA was meant to hold content providers liable for the content that users accessed.¹⁵⁸ Congress enacted the CDA in 1996 due to a fear of pornography.¹⁵⁹ Senator Exon introduced the Act “out of a concern for the proliferation of pornography and indecency on the Internet and the easy access to that material by the youth of America.”¹⁶⁰ Section 230 functions as a check on the Act’s power to hold content providers liable for the content accessed by their users.¹⁶¹ Under 47 U.S.C.A. § 230, “[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.”¹⁶² Facebook and YouTube, for example, have used Section 230 in the past to avoid liability for the behavior of their users.¹⁶³ Section 230 also protects sites that use customer reviews as a core part of their business, sites like Amazon and Yelp, because it protects them from being held liable for the content of their user’s reviews.¹⁶⁴ In court, “many cases [against tech companies] are quickly dismissed because companies assert they have the right to make decisions on content moderation as they see fit under the law.”¹⁶⁵

D. WHAT DOES SECTION 230 PROTECT?

In *Gonzalez v. Google*, the Supreme Court took on a case regarding the scope of Section 230 of the CDA, which internet platform companies have used to protect themselves from

¹⁵⁸ Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 53 (1996).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 47 U.S.C.A. § 230.

¹⁶² 47 U.S.C.A. § 230(c)(1).

¹⁶³ Wakabayashi, *supra* note 156.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

liability for the content their users publish on their platform.¹⁶⁶ The Gonzalez family sued on behalf of their daughter, who was killed in Paris by a 2015 ISIS terrorist attack.¹⁶⁷ The Gonzalez family used the Anti-Terrorism Act (ATA) to sue Google (which owns YouTube) and argue that Google helped ISIS recruit members through YouTube videos and through YouTube’s recommendation of ISIS videos to YouTube users.¹⁶⁸ The plaintiffs sought damages under the ATA, which allows United States nationals to recover damages for injuries suffered “by reason of an act of international terrorism.”¹⁶⁹ The Anti-Terrorism Act of 1990 provides that if a person or organization causes an injury by “an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization,” liability can be assigned to “any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism.”¹⁷⁰

The family members of Nawras Alassaf, Sierra Clayborn, Tin Nguyen, and Nicholas Thalasinis, who all lost their lives in ISIS-led terrorist attacks, joined the Gonzalez case.¹⁷¹ The plaintiffs alleged that Google, Twitter, and Facebook were liable for the deaths of Nawras Alassaf, Sierra Clayborn, Tin Nguyen, and Nicholas Thalasinis.¹⁷² They “allege[d] that defendants’ social media platforms allowed ISIS to post videos and other content to

¹⁶⁶ *Gonzalez v. Google LLC*, 2 F.4th 871, 880 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 80 (2022), *vacated*, 143 S. Ct. 1191, *rev’d*, *Twitter v. Taamneh*, 143 S. Ct. 1206 (2023).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 18 U.S.C. § 2333(a).

¹⁷⁰ 18 U.S.C. § 2333(d).

¹⁷¹ *Supra* note 166.

¹⁷² *Id.*

communicate the terrorist group's message, to radicalize new recruits, and to generally further its mission,” and specifically allege that “Google placed paid advertisements in proximity to ISIS-created content and shared the resulting ad revenue with ISIS.”¹⁷³ These allegations raised the issue of whether the CDA and Section 230 can be used to shield internet platforms from liability when their algorithms recommend that their users consume or view another user’s harmful content.¹⁷⁴

In *Gonzalez*, the U.S. Court of Appeals for the Ninth Circuit ruled that Section 230 does protect algorithmic recommendations, as long as the internet service provider’s algorithm treated other content similarly on its platform.¹⁷⁵ Section 230 did not protect Twitter, Facebook, and Google from being held liable for aiding and abetting international terrorism if they allowed ISIS to publish content on their websites.¹⁷⁶ The majority acknowledged that Section 230 “shelters more activity than Congress envisioned it would.”¹⁷⁷ However, the majority concluded Congress, not the courts, should clarify how broadly Section 230 applies.¹⁷⁸

The Justices also took a petition for review from Twitter where Twitter have been sued by a Jordanian citizen’s family after he was killed by ISIS in a terrorist attack in Istanbul.¹⁷⁹ This case, in comparison to *Gonzalez*, “hinges on the scope of the Antiterrorism Act and its 2016

¹⁷³ *Id.* at 880.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 913.

¹⁷⁸ *Id.*

¹⁷⁹ Jan Wolfe, *Supreme Court Hears Arguments on Whether Twitter Is Liable in Terror Case*, WALL ST. J. (Updated Feb. 22, 2023) <https://www.wsj.com/articles/supreme-court-to-hear-arguments-on-whether-twitter-is-liable-in-terror-case-603702e9>.

amendments, the Justice Against Sponsors of Terrorism Act” because “[t]hose statutes allow victims of terrorist attacks to seek compensation from sponsors of international terrorism and entities that ‘aid and abet’ terrorism.”¹⁸⁰ The case was dismissed by a lower court in 2018 because the plaintiffs failed to show that the platform knowingly aided and abetted the Istanbul attack by ISIS, but the Ninth Circuit Court of Appeals heard the case again in 2021.¹⁸¹ Defendant’s claim “that they have made extensive efforts to remove Islamic State content and that there is no direct causal link between the websites and the Paris and Istanbul attacks.”¹⁸²

While the Supreme Court heard the *Gonzalez* case in early 2023, Section 230’s protections for tech companies remained.¹⁸³ Legislation that would curtail its protections has stalled in Congress.¹⁸⁴ Courts, like those that heard the City and County of *San Francisco* and *City of Boston* cases, have limited Section 230’s protections, but denied Section 230 protections for user reviews and listings which would strike at exactly what Section 230 protects: user generated content from being treated like content published by the host website.¹⁸⁵

E. DIFFERENCES FROM ANTI-TRUST LAW

Although this article does not raise anti-trust issues regarding Airbnb, sharing economy companies have some similarities with existing business types, like credit cards, because they

¹⁸⁰ Jan Wolfe, *Supreme Court Hears Arguments on Whether Twitter Is Liable in Terror Case*, WALL ST. J. (Updated Feb. 22, 2023) <https://www.wsj.com/articles/supreme-court-to-hear-arguments-on-whether-twitter-is-liable-in-terror-case-603702e9>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ David McCabe, *Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants*, N. Y. TIMES (Feb. 20, 2023) <https://www.nytimes.com/2023/02/20/technology/supreme-court-tech-section230.html>.

¹⁸⁴ *Id.*

¹⁸⁵ *See supra* Section II.

both facilitate transactions.¹⁸⁶ *Ohio v. American Express* is an anti-trust case that is a very clearly two-sided transaction which is the market analogy.¹⁸⁷ American Express differed from the other two dominant credit card companies—Visa and MasterCard—by using a business model that “focuses on cardholder spending rather than cardholder lending.”¹⁸⁸ To provide better rewards to customers, American Express charges higher fees to merchants, which causes some merchants to try to convince consumers not to use their American Express cards by, for example, telling customers that American Express charges higher fees and offering an incentive to no pay with American Express.¹⁸⁹ To combat this practice, American Express put anti-steering provisions into their contracts.¹⁹⁰ The United States and several states sued and argued that this violated the Sherman Antitrust Act.¹⁹¹ The Supreme Court found the transaction was a two-sided market and American Express had not violated anti-trust law because they had not stifled the marketplace with these provisions.¹⁹²

The case is relevant to Airbnb and sharing economy companies because American Express operates “what economists call a ‘two-sided platform,’ providing services to two different groups (cardholders and merchants) who depend on the platform to intermediate between them.”¹⁹³ The court explained that “[t]he key feature of transaction platforms is that

¹⁸⁶ See *supra* Section IA.

¹⁸⁷ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (S. Ct. 2018).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 2281.

they cannot make a sale to one side of the platform without simultaneously making a sale to the other.”¹⁹⁴ American Express must strike “an optimal balance of the prices charged on each side of the platform” to “maximize the value of their services and to compete with their rivals.”¹⁹⁵ American Express extends credit and sets its credit card fee to merchants based on how many credit card holders it has.¹⁹⁶ Like American Express, Airbnb needs both the homeowner and the renter.¹⁹⁷ While this article is not analyzing Airbnb for any anti-trust issues, its transactional marketplace shows how important both hosts and guests are to their business and that without reviews to develop trust, no transactions would occur.¹⁹⁸

a. HOW THE FTC SHOULD REGULATE SHARING ECONOMY COMPANIES

Airbnb v. San Francisco and *Airbnb v. Boston* shows that Section 230 does not protect Airbnb from hosts providing a fraudulent or deceptive product.¹⁹⁹ Based on the above two court cases and legislative action in New York, courts have stopped short of preventing Section 230 from protecting them from liability when the ordinance does not require a court to treat Airbnb like a publisher or a speaker.²⁰⁰

¹⁹⁴ *Id.* at 2282.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *Id.* See also Abbey Stemler, *Feedback Loop Failure: Implications for the Self-Regulation of the Sharing Economy*, 18 MINNESOTA J. OF L., SCI. AND TECH. 673, 700 (2017).

¹⁹⁹ *Airbnb, Inc. v. City of Bos.*, 386 F. Supp. 3d 113, 119 (2019); *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d 1066, 1074 (2016).

²⁰⁰ See also *Airbnb, Inc. v. City of Bos.*, 386 F. Supp. 3d at 119 (2019); *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d at 1074 (2016).

Airbnb claims that its rating system acts as a regulatory check, but this is an inaccurate check.²⁰¹ Even though CEO Brian Chesky stated that “cities can't screen as well as technologies can screen. Companies have these *magical* [emphasis added by article author] things called reputation systems . . . government should exist as the place of last recourse,” the internal “reputations systems” are skewed towards positivity.²⁰² They significantly skew data: “95% of the offerings on Airbnb have guest-generated ratings of 4.5 stars or higher (out of five).”²⁰³

The FTC’s mission is to protect consumers: “[p]rotecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.”²⁰⁴ Some commentators have applauded the FTC for staying out of this fight, but it is for precisely the same reasons that the FTC should enter the arena.²⁰⁵ The “FTC has taken a pro-innovation approach to peer-to-peer ride-sharing companies, while still maintaining the importance of safety and legal compliance.”²⁰⁶ The FTC is the agency best equipped to handle Airbnb because it has begun to regulate other internet service providers and because this issue needs a comprehensive, nationwide approach that holds Airbnb accountable for the service that they are providing—housing.²⁰⁷ The FTC already governs fraudulent

²⁰¹ See De Bois, *supra* note 5 at 32.

²⁰² Stemler, *supra* note 177, at 675.

²⁰³ *Id.*

²⁰⁴ *About the FTC*, FED. TRADE COMM’N (last visited Nov. 20, 2023), <https://www.ftc.gov/about-ftc/mission>.

²⁰⁵ Brittany McNamara, *Airbnb: A Not-So-Safe Resting Place*, 13 COLORADO TECH. L. J. 149, 170 (2015).

²⁰⁶ *Id.*

²⁰⁷ *About the FTC*, *supra* note 204. See also *Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online “Consumer” and “Independent” Reviews*, FTC (Mar. 15, 2011) <https://www.ftc.gov/news-events/news/press-releases/2011/03/firm-pay-ftc-250000-settle-charges-it-used-misleading-online-consumer-independent-reviews>.

reviews; thus, legislation that requires disclosure to the FTC would make their investigations easier.²⁰⁸

b. LOCAL REGULATIONS DON'T PROTECT USERS FROM FRAUD WELL ENOUGH

Paying taxes, as described in the San Francisco and Boston cases, helps to ensure that hosts have licenses and that the listings exist, but it does not fully protect users because they are still left without recourse if and when something goes wrong.²⁰⁹ Governments can force Airbnb to pay fines for taking fees on unregistered listings without running afoul of Section 230, but those laws do not address anything other than registration and health and safety issues.²¹⁰ Section 230's inapplicability leaves room for new regulation even though Airbnb and its supporters argue that its current review system and company policies are sufficient consumer protections.²¹¹

Some argue against regulating Airbnb in this way.²¹² They posit that Airbnb and other sharing economy companies use these review systems as a way to ensure that there is *not* fraud and that regulations would unduly burden innocent companies without good reason.²¹³ However,

²⁰⁸ *Firm to Pay FTC \$250,000 to Settle Charges That It Used Misleading Online "Consumer" and "Independent" Reviews*, *supra* note 207.

²⁰⁹ Kaplan and Nadler, *supra* note 82, at 108.

As is typical, incumbent interests have sought to portray Airbnb and its ilk as “‘evading’ established systems of regulation,” though “this is true only in the sense that the automobile ‘evaded’ the horse tax and saddle regulations . . . These new business models raise complex questions that have not yet been addressed by either legislatures or courts. *Id.*”

²¹⁰ *See* *Airbnb, Inc. v. City of Bos.*, 386 F. Supp. 3d at 119; *Airbnb, Inc. v. City and County of San Francisco*, 217 F.Supp.3d at 1074.

²¹¹ Kaplan and Nadler, *supra* note 82 at 108.

²¹² *Id.*

²¹³ *Id.*

they ignore the fact that the reviews systems have significant amounts of fraud.²¹⁴ They also ignore that the party (Airbnb) who is in charge of removing fake good reviews, deleting or editing honest bad reviews, and the accuracy of listings has a financial interest in high reviews and large amounts of available listings.²¹⁵

IV. HOW SHOULD THE FTC REGULATE? LIKE THE SEC WITH SARBANES-OXLEY

Section 230 does not protect Airbnb from local regulations concerning compliance with short-term rental laws and health and safety codes, but it would likely prevent further regulation of Airbnb's reviews and listings.²¹⁶ Without changing Section 230, which would open up the floodgates to hold social media companies liable for their user's speech, there should be oversight of Airbnb's internal fraud management policies.²¹⁷ Instead, the FTC should regulate Airbnb to prevent fraud and protect consumers under its power to protect consumers. The FTC can look to securities law, and specifically the Sarbanes-Oxley Act, as a model for how a regulatory agency can deal with a problem in the marketplace—in this case, the problem is unregulated short-term rentals sold on a platform that claims no liability for the actions of either party.²¹⁸

When President Bush signed the Sarbanes-Oxley Act of 2002 (SOX), he stated, “Free markets are not a . . . financial free-for-all guided only by greed. For the sake of our free economy, those who break the law—break the rules of fairness, those who are dishonest,

²¹⁴ De Blois, *supra* note 5.

²¹⁵ Kaplan and Nadler, *supra* note 82, at 103–115. See Stemler *supra* note 177 at 700.

²¹⁶ *Supra* Section II.

²¹⁷ *Supra* Section III.

²¹⁸ 18 U.S.C.A. § 1350 (2002).

however wealthy or successful they may be—must pay a price.”²¹⁹ At the time, business scandals leading to the collapse of Enron and WorldCom and a volatile stock market had scared investors and the public enough to force the federal government to act.²²⁰ Legislators and the public believed that a lack of internal controls, specifically regarding accounting practices, caused these corporate scandals, allowing fraud to go on unchecked.²²¹

The goal of SOX Section 404 was to make the controls on accounting practices tighter and strengthen the method of enforcement.²²² This was not meant to change what was or was not fraud—it was meant to make it harder for fraud to happen and easier to catch it when it did occur.²²³ Similarly, Airbnb and other sharing economy companies do not need new definitions and punishments for fraud. They need transparent compliance measures to catch it, and a requirement to report it when they do. Section 230 already requires disclosure of criminal behavior when companies know about such criminal behavior, but without required transparency, this is incredibly hard to prove.²²⁴ Airbnb, additionally, has already proven that it actively avoids collaboration with the government and has not disclosed behavior that violated state laws regarding short-term rentals.²²⁵

²¹⁹ Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*, N. Y. TIMES (July 31, 2002) <https://www.nytimes.com/2002/07/31/business/corporate-conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html>.

²²⁰ *Five years under the thumb*, THE ECONOMIST (July 26, 2007) <https://www.economist.com/briefing/2007/07/26/five-years-under-the-thumb>.

²²¹ Parveen P. Gupta & Tim Leech, *Making Sarbanes-Oxley 404 work: Reducing cost, increasing effectiveness*, 3 INTL. J. OF DISCLOSURE AND GOVERNANCE, 27–48 (2006).

²²² *See id.* at 27-48.

²²³ *See* Bumiller, *supra* note 219.

²²⁴ *See supra* Section II.

²²⁵ *See supra* Section II.

Airbnb has problems controlling deception and fraud on its platform.²²⁶ The SEC dealt with a similar issue not by trying to identify, regulate, and prosecute every instance of misconduct, but by requiring companies to identify and mitigate their accounting risks.²²⁷ 15 U.S.C. section 7262(a) requires the yearly Internal Control Report submitted to the SEC:

(1) state the responsibility of management for establishing and maintaining an adequate internal control structure and procedures for financial reporting; and
(2) contain an assessment, as of the end of the most recent fiscal year of the issuer, of the effectiveness of the internal control structure and procedures of the issuer for financial reporting.²²⁸

Section 7262(a) allows companies to make their own determinations about risk and mitigation strategies, while also providing a check on companies who might prefer to avoid disclosing risks to their investors.²²⁹ It also prevents the SEC from having to investigate all issues, thereby saving the regulatory agency time and money.²³⁰

G. WHAT WOULD SOX FOR SHARING ECONOMY COMPANIES LOOK LIKE?

Sharing economy companies that make their revenue from facilitating consumer-to-consumer interactions for a fee. These platforms include Uber, Lyft, Airbnb, VRBO, TaskRabbit, and, of course, Airbnb.²³¹ Federal legislation need not be overly demanding or narrowly tailored because there will not be fines or punishments levied against Airbnb.²³²

²²⁶ See *supra* Section I.

²²⁷ See 15 U.S.C. § 7262(a).

²²⁸ 15 U.S.C. § 7262(a).

²²⁹ 15 U.S.C. § 7262(a).

²³⁰ 15 U.S.C. § 7262(a).

²³¹ See Rudy Telles Jr., *Digital Matching Firms: A New Definition in the “Sharing Economy” Space*, U.S. DEPT. OF COMMERCE, 1, 1 (June 3, 2016), <https://www.commerce.gov/sites/default/files/migrated/reports/digital-matching-firms-new-definition-sharing-economy-space.pdf>.

²³² *Supra* section IIIA.

Legislation should be broad and should allow sharing economy companies latitude to address and combat the types of fraud that occur on their platform specifically. To ensure that this legislation does not run afoul of Section 230, the legislation cannot require courts to treat Airbnb as a “publisher or speaker.”²³³ Therefore, the legislation should only mandate reporting to the FTC and, similar to the SEC, they may need an oversight committee to review reports and determine that companies are, in fact, sharing economy companies.²³⁴ However, they can use the U. S. Department of Commerce’s definition of a sharing economy company to determine if a company is a sharing economy company.²³⁵ Does it use a web platform to facilitate peer-to-peer transactions?²³⁶ Does it use a review system to develop trust between users?²³⁷ If it does, then it is a sharing economy company.²³⁸ For example, compare Airbnb and Marriott Hotels. Both can be booked online and have reviews, but Airbnb is facilitating a peer-to-peer transaction and Marriott is selling their own rooms—it is a transaction between business and customer.²³⁹

There will be difficulties, though. Amazon may appear to be a sharing economy company because many products are sold there that aren’t Amazon’s but it is still a single-sided platform due to the fact it is not decentralized on both sides.²⁴⁰ Additionally, a large part of Amazon’s

²³³ *Airbnb, Inc. v. City and County of San Francisco*, 217 F. Supp. 3d 1066, 1074 (2016); *Airbnb, Inc. v. City of Boston*, 386 F. Supp. 3d 113, 123 (2019). *See supra* Section II.

²³⁴ 18 U.S.C.A. § 1350.

²³⁵ Telles, *supra* note 145 at 1.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *See id.*

²³⁹ *See* Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URBAN L. J. 31, 57–58 (2016).

²⁴⁰ *See id.*

sales come from products warehoused by Amazon or “provided via authorized, traditional third-party retailers.”²⁴¹ Legislators should restrict this regulatory scheme to sharing-economy companies that facilitate the purchase of services, not products, because they are less tangible and rely heavily on reviews to build trust.²⁴² This stipulation would restrict the regulatory scheme to a smaller number of companies like Airbnb, Uber, Lyft, and Taskrabbit, and would allow the FTC to test the strengths and weaknesses of such a system.

The report these companies submit to the FTC should detail the following:

1. Are customers receiving the service they were promised?
2. Are reviews accurate?
3. Are listings (profiles or service descriptions in companies other than Airbnb) accurate?
4. Are local laws regarding short-term rentals being broken by hosts?

These issues would then be addressed by whatever method of compliance the company deems reasonable, but the outcomes—the degree of success in eliminating violations of local laws, dishonesty, and fraud—would be reported to the FTC and made public. Airbnb already has extensive policies in place,²⁴³ but without a report showing their level of enforcement, those policies are meaningless. The company’s internal assessment of fraud on their platform would constitute the risk assessment portion, would be submitted to the FTC, and would be made available to the public. The FTC would likely need an oversight board like the one used by the FTC, but the public disclosure would help to ensure that the public knows the risks of what they

²⁴¹ Telles, *supra* note 145 at 1.

²⁴² *See supra* Section II.

²⁴³ *Avoiding fraud, scams, and abuse*, AIRBNB, <https://www.airbnb.com/help/article/3059> (last visited Mar. 12, 2023).

are buying. Additionally, this report would function to report fraud to the relevant investigating agency: the FTC.

V. CONCLUSION

Section 230 likely protects Airbnb from being treated as a publisher or speaker of third-party reviews and listings, but it does not protect Airbnb from compliance with regulations that treat it as a booking agent, nor is it likely protected from legislation that would require it to track, fight, and disclose fraud on its platform.²⁴⁴ As long as the FTC's regulatory scheme does not require courts to treat Airbnb as a publisher, then Section 230 is not implicated.²⁴⁵ Additionally, the scheme is a transparency measure that would allow the FTC to prosecute fraudulent reviews and hosts who are breaking already existing laws like health and safety codes, short-term rental statutes, or fake reviews—issues Airbnb claims it wants to stop.²⁴⁶

The FTC's mission is to protect consumers and it should uphold this mission by regulating Airbnb and other sharing economy companies to prevent fraud. The FTC should look to securities law, specifically Sarbanes-Oxley, as a model for how a regulatory agency can deal with a problem in the marketplace—in this case, the problem is unregulated short-term rentals sold on a platform that claims no liability for the actions of either party.²⁴⁷ Airbnb should be judged against its peers, like VRBO, Uber, and Lyft, and submit a fraud-risk assessment to the FTC each year. Airbnb has compliance systems in place to prevent misconduct and fraud, but

²⁴⁴ *See supra* Section III.

²⁴⁵ *See supra* Section III.

²⁴⁶ *See supra* Section III.

²⁴⁷ *See supra* Section II.

the general public does not know how effective these programs are.²⁴⁸ This regulatory scheme is low-impact when compared to the problems it would solve. It is context-specific because each company is allowed to institute its own policies to deal with the fraud that it encounters. Most importantly, it would begin the process of protecting consumers in a new, rapidly expanding marketplace.

²⁴⁸ *See supra* Section II.