

# SHORT-TERM RENTAL REGULATIONS AND RESIDENTIAL HOUSING AFFORDABILITY: BRIDGING THE GAP BETWEEN POLICY AND ENFORCEMENT

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*Housing availability and housing affordability have become critical issues in the United States. Cross disciplinary studies conclude that an increase in short-term rental (STR) units offered on platforms like Airbnb correlates with a decrease in affordable housing, both in terms of rents and home sale prices. To address these concerns, most local governments in high STR density locations passed owner-occupied STR regulations combined with a registration requirement, which is now a minimum STR regulation gold-standard. This Article contends that while STR regulations are necessary to protect affordable housing, until blocking illegal STRs guides legislative efforts, localities will suffer the consequences of unenforceability due to what we term regulatory enforcement oversight. However, the problem is two-fold. We also contend that STR platforms are unconstitutionally using Section 230 to render local government police powers useless to enforce STR regulations. We then offer legal and legislative ways forward.*

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INTRODUCTION

The “sharing economy”<sup>1</sup> was full of promise. You have a car sitting in your garage? Use it to make money and take people to places they want to go. You have an extra room in your house? Rent it out to a traveler for less than a hotel room would cost. This model promised a win-win for providers: extra cash, new connections, and a sense of community aiming to make the world a better place. Airbnb epitomized this ideal. The platform began in 2007 when its founders inflated air mattresses and let visiting strangers stay on their floor for a modest fee.<sup>2</sup> Today, Airbnb boasts over 5 million hosts and over 7.7 million listings across 100,000 cities and towns in over 220 countries.<sup>3</sup> Despite owning no property, it offers more bookings than Marriott or Hilton.<sup>4</sup> As of March 2024, Airbnb’s

<sup>1</sup> The sharing economy is an “IT-facilitated peer-to-peer model for commercial or non-commercial sharing of underutilized goods and service capacity through an intermediary without a transfer of ownership.” Ronit Levine-Schnur & Moran Ofir, *Who Shares the Sharing Economy?*, 32 S. CAL. INTERDISC. L.J. 593, 598 (2023) (citing Daniel Schlagwein et al., *Consolidated, Systemic Conceptualization, and Definition of the “Sharing Economy”*, 71 J. ASS’N INFO. SCI. & TECH. 817, 818 (2020)).

<sup>2</sup> Abbey Stemler, *The Myth of the Sharing Economy and Its Implications for Regulating Innovation*, 67 EMORY L.J. 197, 198 (2017).

<sup>3</sup> *About Us*, AIRBNB NEWSROOM, <https://news.airbnb.com/about-us/> [<https://perma.cc/KM7T-XABT>] (last visited Mar. 6, 2024). It is important to note Airbnb’s massive growth in recent years. In 2017 Airbnb had “over 3 million listings in 190 countries and 65,000 cities,” which is much less than today. Shirley Nieuwland & Rianne van Melik, *Regulating Airbnb: How Cities Deal with Perceived Negative Externalities of Short-Term Rentals*, 23 CURRENT ISSUES TOURISM 811, 811 (2020).

<sup>4</sup> Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 96–97 (2016).

Platform companies adamantly endeavor to be defined first and foremost by what they are not. These companies are not selling the thing itself: the service, the product, the content. Rather, they are selling access to the software, the matching algorithms, and a digital system of reputation and trust between their users.

valuation exceeded \$101 billion, making it the world's 148th most valuable company.<sup>5</sup> However, this rapid growth and profitability have significantly diverged from Airbnb's original home-sharing ethos. Instead, individuals and commercial entities now purchase single-family homes in popular locations exclusively for use as Short-Term Rentals (STRs).<sup>6</sup> Research clearly indicates that a proliferation of Airbnb rentals reduces the number of homes available for purchase or Long-Term Rental (LTR), thereby driving up rents and home prices due to constrained supply.<sup>7</sup>

The rapid growth of Airbnb and other STR platforms caught local governments by surprise. This expansion exemplified the guerilla growth tactics employed by regulatory entrepreneurs, who aim to establish market dominance so widespread and entrenched that, by the time rule-oriented local governments gather the courage to act, banning the platform is nearly impossible due to competing constituent interests.<sup>8</sup> Regulators find some voters furious that popular STR neighborhoods are turning into de facto hotel districts and that housing is becoming too expensive for locals to afford.<sup>9</sup> Other voters view STRs as a vital strategy to cover rising property taxes, home insurance rates, HOA fees, and other living expenses linked to escalating housing costs.<sup>10</sup> In response to this complex regulatory landscape, local governments in the United States sought a balanced approach, resulting in a regulatory gold standard to address both housing affordability and additional income needs: owner-occupied STR regulations combined with a registration requirement.<sup>11</sup> Owner-occupied STRs safeguard local interests by allowing residents who live, work and vote in the locality to operate STRs, thereby ensuring these operators have a stake in the

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*Id.* at 100 (citing Darcy Allen, *What Is a Taxi? Regulation and the Sharing Economy*, OECD INSIGHTS (Dec. 22, 2014), <http://www.oecdinsights.org/2014/12/22/what-is-a-taxi-regulation-and-the-sharing-economy> [<https://perma.cc/5F5Y-4B3T>]).

<sup>5</sup> *Airbnb*, COMPANIESMARKETCAP, <https://companiesmarketcap.com/airbnb/marketcap/> [<https://perma.cc/DH8N-DTCE>]

<sup>6</sup> See Stemler, *supra* note 2, at 198. STR has been defined as "an activity in which one party, the 'host,' agrees to rent out all or part of a home to another party, the 'guest,' on a temporary, time-limited basis." TINA LEE ET AL., NAT'L LEAGUE OF CITIES, *SHORT-TERM RENTAL REGULATIONS: A GUIDE FOR LOCAL GOVERNMENTS* 8 (2022), <https://www.nlc.org/wp-content/uploads/2022/05/Short-Term-Rental-Regulations.pdf> [<https://perma.cc/Z43T-2QMQ>]. There is however a great deal of variability of the definition within local ordinances, with many defining the STR rental as one that lasts less than thirty days. See *id.*

<sup>7</sup> Yang Yang & Zhenxing (Eddie) Mao, *Welcome to My Home! An Empirical Analysis of Airbnb Supply in US Cities*, 58 J. TRAVEL RSCH. 1274, 1274 (2019).

<sup>8</sup> See Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 390 (2017).

<sup>9</sup> See *Crack Down*, L.A. BUS. J., May 18, 2015, at 16, <https://link.gale.com/apps/doc/A417022214/GBIB?u=orla57816&sid=bookmark-GBIB&xid=0e497443> [<https://perma.cc/HVL7-S2KV>].

<sup>10</sup> See, e.g., AIRBNB, AIRBNB ECONOMIC IMPACT & HOUSING REPORT LOS ANGELES METRO 3 (2023), <https://news.airbnb.com/wp-content/uploads/sites/4/2024/05/airbnb-los-angeles-economic-impact-report-2023.pdf> [<https://perma.cc/T5ZG-5EY5>].

<sup>11</sup> See discussion *infra* Section I.B.1.

community. Requiring the owner to occupy the home while STR guests are there also puts the onus on the homeowner to manage unruly guests instead of putting the onus on neighbors and the local government. The registration requirement, when drafted properly, creates a means to distinguish legal STRs from illegal STRs, with the associated fees theoretically enabling localities to hire staff to enforce these regulations effectively.

Post-regulation research indicated that these STR regulations were effective. Localities that had, at minimum, these rules experienced less unchecked STR growth, fewer whole-home STRs, fewer hosts hosting multiple STRs, fewer commercial STRs, and greater housing availability than prior to the regulation's passage.<sup>12</sup> However, it soon became apparent that these regulations were either not being enforced or were being inadequately enforced.<sup>13</sup> This lack of enforcement, combined with a post-pandemic travel environment, led to a surge in illegal and commercial STRs, further overwhelming local government enforcement efforts.<sup>14</sup> Despite the significant legal and affordable housing implications of unenforced STR regulations, this issue has not received adequate scholarly attention. This Article addresses this gap in the literature.

This Article proceeds as follows. Part I explains the evolution of owner-occupied STR regulations combined with a registration requirement as the gold standard for local governments aiming to regulate STRs and protect both affordable housing and income-generation needs. In Part II we contend that while STR regulations are necessary, until blocking illegal STRs guides legislative efforts, localities will suffer the consequences of unenforceability due to what we term regulatory enforcement oversight. These oversights open the door for commercial and illegal STR operators to engage in regulatory arbitrage, the exploitation of loopholes in regulations and government enforcement processes to avoid legal repercussions and getting caught.<sup>15</sup> However, the problem is two-fold. We also contend that STR platforms are unconstitutionally using Section 230 (Section 230) of the Communications Decency Act (CDA), to render local government police powers useless to enforcement of STR regulations. In Part III we provide legal and legislative paths forward.<sup>16</sup>

## I. THE EVOLUTION OF AN STR REGULATORY GOLD STANDARD

In this Part, we draw on cross-disciplinary literature to explain how owner-occupied STR regulations combined with a registration requirement became the minimum gold standard for local government STR regulations aiming

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<sup>12</sup> See Gianluca Bei & Filippo Celata, *Challenges and Effects of Short-Term Rentals Regulation: A Counterfactual Assessment of European Cities*, ANNALS TOURISM RSCH., July 5, 2023, at 1, 11.

<sup>13</sup> See Nieuwland & Melik, *supra* note 3, at 818.

<sup>14</sup> Emeka Ndaguba et al., *Policy and Regulatory Initiatives for the Short-Term Rental Sector: A focus on Airbnb*, 26 ACAD. MKTG. STUDIES J. 1, 1 (2022).

<sup>15</sup> See discussion *infra* Section II.B.

<sup>16</sup> See discussion *infra* Section III.B.

to protect affordable housing. Unfortunately, by the time local governments realize that they need to act, it is already too late, as widespread community adoption of STR platform technologies has already occurred. This gives STR platforms the upper hand in the political process, forcing local governments to pass compromised regulations, rather than desired regulations.

### A. *To Ban or Not to Ban—Is That Even a Question?*

Here we explain how regulatory control of STRs slipped through the fingers of local governments, diminishing their influence, and harming affordable housing efforts. While much has been written about the disrupting effect of STRs on the lodging industry,<sup>17</sup> the ease to entrepreneurship in a sharing economy,<sup>18</sup> the discriminatory nature of STR platforms and hosts,<sup>19</sup> and the nuisance effects of STRs on local neighborhoods,<sup>20</sup> this Article focuses on the effects of STRs on affordable housing. The primary driver for local governments to adopt regulations curbing STRs is the concern that STRs “reduce long-term rental supply, threaten housing affordability, and raise local renters’ and resident owners’ cost of living while benefiting a handful of nonresident owners and visitors.”<sup>21</sup> This Article argues that while STR regulations are necessary to protect affordable housing, without strong tailored enforcement, such regulations are inadequate and even harmful as they deteriorate government trust.

#### 1. Banning STRs Would Increase Affordable Housing

Local governments hoping to ban STRs in the name of affordable housing have a compelling data-driven argument. The surge in STRs, facilitated by platforms like Airbnb, VRBO, and HomeAway has transformed the

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<sup>17</sup> See, e.g., Simone Bianco et al., *Disruptor Recognition and Market Value of Incumbent Firms: Airbnb and the Lodging Industry*, 48 J. HOSP. & TOURISM RSCH. 84, 84 (2022); Georgios Zervas et al., *The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry*, 54 J. MKTG. RSCH. 687, 687–705 (2017).

<sup>18</sup> See, e.g., Laura Crommelin et al., *Is Airbnb a Sharing Economy Superstar? Evidence from Five Global Cities*, 36 URB. POL’Y & RSCH. 429, 432 (2018).

<sup>19</sup> See, e.g., Levine-Schnur & Ofir, *supra* note 1, at 609–12; Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, AM. ECON. J., Apr. 2017, at 1; Juliet B. Schor, *Does the Sharing Economy Increase Inequality Within the Eighty Percent?: Findings from a Qualitative Study of Platform Providers*, 10 CAMBRIDGE J. REGIONS, ECON. & SOC’Y 263, 268 (2017).

<sup>20</sup> See, e.g., Nieuwland & Melik, *supra* note 3, at 813 (citing LEIGH GALLAGHER, *THE AIRBNB STORY: HOW THREE ORDINARY GUYS DISRUPTED AN INDUSTRY, MADE BILLIONS . . . AND CREATED PLENTY OF CONTROVERSY* (1st ed. 2017); Nicole Gurrán & Peter Phibbs, *When Tourists Move In: How Should Urban Planners Respond to Airbnb?*, 83 J. AM. PLAN. ASS’N 80, 85–86 (2017)) (“Nuisance complaints range from noise caused by visitors (e.g. loud parties and drunken behaviour), to issues with traffic, parking and waste management, and safety concerns when strangers enter the neighbourhood and buildings.”).

<sup>21</sup> Mao, *supra* note 7, at 1274 (citing Dayne Lee, *How Airbnb Short-Term Rentals Exacerbate Los Angeles’ Affordable Housing Crisis: Analysis and Policy Recommendations*, 10 HARV. L. & POL’Y REV. 229, 239–40 (2016)); see also LEE ET AL., *supra* note 6, at 11.

landscape of urban tourism globally and sparked international conversations about the impact on residential neighborhoods.<sup>22</sup> While the term STR applies to all short-term rental housing facilitated by technology platforms like Airbnb, VRBO, and HomeAway, most of the research has been conducted on Airbnb.<sup>23</sup> There are two primary reasons for this. The first is its expansive market reach as the world's largest home sharing platform.<sup>24</sup> The second is access to reliable Airbnb data sources, such as *AirDNA* and *Inside Airbnb*, which can be analyzed alongside the American Housing Survey.<sup>25</sup> Thanks to this data, multiple studies have concluded that an increase in Airbnb supply does lead to a reduction in affordable housing units.<sup>26</sup>

Most of the research on STR disruptions to residential affordability has been measured within specific localities, such as New York City,<sup>27</sup> Los Angeles,<sup>28</sup> Boston,<sup>29</sup> Denver,<sup>30</sup> and Santa Monica.<sup>31</sup> However, this issue has not been confined to the United States. Airbnb's detrimental effects on affordable housing have been studied and documented worldwide,

<sup>22</sup> Claire Colomb & Tatiana Moreira de Souza, *The Airbnb Effect—Part 2: How Do Short Term Vacation Rentals Impact Housing Markets?*, ROYAL INST. CHARTERED SURVEYORS (Sept. 2, 2021), <https://www.rics.org/news-insights/wbef/the-airbnb-effect—part-2-how-do-short-term-vacation-rentals-impact-housing-markets> [<https://perma.cc/7E2J-JYLM>].

<sup>23</sup> Mohamed Ahmed Qotb Sakr et al., *15 Years of Airbnb's Authenticity That Influenced Activity Participation: A Systematic Literature Review*, 6 J. HUMANS. & APPLIED SOC. SCI. 55, 59 (2023).

<sup>24</sup> Nachatter Singh Garha & Alda Botelho Azevedo, *Airbnb and the Housing Market in the COVID-19 Pandemic: A Comparative Study of Barcelona and Lisbon*, 57 ANÁLISE SOC. 4, 6 (2022) (“Airbnb remains the largest service provider in the short-term rental business, with almost twice as many listings as its closest competitors (e.g., Homeaway, Holidu, and Housetrip).”).

<sup>25</sup> See Hui Li et al., *Market Shifts in the Sharing Economy: The Impact of Airbnb on Housing Rentals*, 68 MGMT. SCI. 8015, 8016, 8018–19 (2022).

<sup>26</sup> *Id.* at 8016; Barron et al., *The Effect of Home-Sharing on House Prices and Rents: Evidence from Airbnb*, 40 MKTG. SCI. 1, 34 (2020); Wei Chen et al., *The Battle for Homes: How Does Home Sharing Disrupt Local Residential Markets?*, 68 MGMT. SCI. 8589, 8600 (2022).

<sup>27</sup> For example, “[r]esearch in New York . . . has shown that a doubling of Airbnb locations has led to a rise in property values of 6–11%.” Nieuwland & Melik, *supra* note 3, at 813 (citing S. Sheppard & A. Udell, *Do Airbnb Properties Affect House Prices* (Williams Coll. Dep't. of Econ., Working Paper, 2016), <http://web.williams.edu/Economics/wp/SheppardUdellAirbnbAffectHousePrices.pdf> [<https://perma.cc/TQ9L-33XM>]); *see also* James Allen, *Disrupting Affordable Housing: Regulating Airbnb and Other Short-Term Rental Hosting in New York City*, 26 J. AFFORDABLE HOUS. & CMTY. DEV. L. 151, 165 (2017).

<sup>28</sup> Consider that rents in the seven most STR-saturated Los Angeles neighborhoods were “20% higher, and increased 33% faster” than other Los Angeles neighborhoods in 2014. Lee, *supra* note 21, at 235.

<sup>29</sup> For example, “a one-standard deviation increase in Airbnb listings is associated with an increase in asking rents of 0.4% in Boston.” Li, *supra* note 25, at 8018 (citing Keren Horn & Mark Merante, *Is Home Sharing Driving Up Rents? Evidence from Airbnb in Boston*, 38 J. HOUS. ECON. 14 (2017)).

<sup>30</sup> *See* Nieuwland & Melik, *supra* note 3, at 819 (finding that STRs, particularly by commercial rentals, was contributing to an affordable housing shortage in Denver).

<sup>31</sup> *See* Cayrua Chaves Fonseca, *The Effects of Short-Term Rental Regulations: Evidence from the City of Santa Monica 2–3* (2018) (unpublished manuscript), <https://cayruachaves.github.io/files/working-paper-1.pdf> [<https://perma.cc/F27J-73WV>].

including in Berlin, Germany;<sup>32</sup> Lisbon and Porto, Portugal;<sup>33</sup> Barcelona<sup>34</sup> and Mallorca,<sup>35</sup> Spain; Sydney, Australia;<sup>36</sup> London, England;<sup>37</sup> and several cities within France,<sup>38</sup> and Austria.<sup>39</sup> A recent comprehensive data-driven study found a correlation between increases in Airbnb units and decreases in the supply of affordable residential LTR units.<sup>40</sup>

Interestingly, the research indicated that affordable residential housing is affected by both new entrants into the STR market (those purchasing affordable housing to convert to STRs) and “switchers” (owners of affordable rental units who convert their property from LTRs to STRs).<sup>41</sup> Notably, more of the affordable housing supply is taken up by new entrants into the Airbnb market than by switchers.<sup>42</sup> This suggests that a rapid increase in Airbnb units may create greater housing challenges for purchasing affordable single-family homes than for renting affordable residential properties. Indeed, data from another study supports this argument, as marketing researchers found that “a 1% increase in Airbnb listings leads to a 0.018% increase in rents and a 0.026% increase in house prices.”<sup>43</sup>

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<sup>32</sup> See Adam Crowe, *Short-Term Rentals and the Residential Housing System: Lessons from Berlin*, 8 CRITICAL HOUSING ANALYSIS 129, 135 (2021) (finding that in 2018 Berlin had a housing shortfall of over 200,000 units, about 9,000 units of which were unavailable due to STRs).

<sup>33</sup> Consider, on average, a 1% increase in Airbnbs within a Portuguese municipality resulted in a 3.7% increase in housing prices. See Sofia F. Franco & Carlos Daniel Santos, *The Impact of Airbnb on Residential Property Values and Rents: Evidence from Portugal*, 88 REG’L SCI. & URB. ECON. 1, 1 (2021).

<sup>34</sup> Consider, from 2007 to 2017, rents in Barcelona increased from 1.9% to 7%, depending on neighborhood Airbnb saturation. See Miguel-Angel Garcia-Lopez et al., *Do Short-Term Rental Platforms Affect Housing Markets? Evidence from Airbnb in Barcelona*, 119 J. URB. ECON. 3, 11 (2020).

<sup>35</sup> Ismael Yrigoy, *Rent Gap Reloaded: Airbnb and the Shift from Residential to Touristic Rental Housing in the Palma Old Quarter in Mallorca, Spain*, 59 URB. STUD. 2709, 2710, 2721 (2019) (finding a significant 2010 to 2016 increase of rental housing being listed for tourist use, and a simultaneous decrease of housing listed for LTR).

<sup>36</sup> Gurran & Phibbs, *supra* note 20, at 88 (finding that about half of Sydney’s LTRs are now STRs and that this sizable impact on availability puts upward pressure on rents).

<sup>37</sup> “[A] 10-percent increase in the number of Airbnb properties in a [London] ward increases real rents by 0.1 percent. The effect of Airbnb is highest in one-bedroom properties because these smaller properties are substitutes for hotel rooms, inducing landlords to shift supply from long-let rental market to Airbnb.” Amit Chaudhary, *Effects of Airbnb on the Housing Market: Evidence from London* (Oct. 19, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3945571](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3945571) [<https://perma.cc/C29L-TUGV>].

<sup>38</sup> See Kassoum Ayoubia et al., *Does Airbnb Disrupt the Private Rental Market? An Empirical Analysis for French Cities*, 43 INT’L REG’L SCI. REV. 76, 76 (2020) (“We show that the density of Airbnb rentals puts upward pressure on rents in Lyon, Montpellier, and Paris, whereas it has no significant effect in other cities.”).

<sup>39</sup> See Justin Kadi et al., *Short-Term Rentals, Housing Markets and Covid-19: Theoretical Considerations and Empirical Evidence from Four Austrian Cities*, 7 CRITICAL HOUS. ANALYSIS 47 (2020).

<sup>40</sup> Li et al., *supra* note 25, at 8016.

<sup>41</sup> *Id.* at 8018.

<sup>42</sup> *Id.*

<sup>43</sup> Barron et al., *supra* note 26, at 25.

As compelling as these studies are, and despite their recent publication dates, most of the data gathered for these studies were from a pre-pandemic environment.<sup>44</sup> The COVID-19 pandemic dramatically changed the STR landscape by allowing remote workers to operate from anywhere in the world, which rapidly increased STR usage, the length of stays, and the number of STRs available.<sup>45</sup> STR listings skyrocketed from over six million listing in March 2019 (before the pandemic hit) to over seven million listings in 2025.<sup>46</sup> Consequently, the effects of STRs on affordable housing have become even more dire since most of the studies in this literature review were published. There is a pressing need for more recent peer-reviewed research to fully understand and address the current impacts.

By measuring the impact of Airbnb on affordable housing in Barcelona, Spain and Lisbon, Portugal before and during the COVID-19 pandemic, one study examined a crucial period when Airbnb listings initially decreased due to the pandemic before skyrocketing shortly thereafter.<sup>47</sup> This snapshot is invaluable as it captured data on a trend that has since continued: casual homeowners renting single rooms in their residential homes rapidly left the market due to quarantine requirements and safety concerns, while whole-home Airbnbs remained popular, allowing homeowners and guests to reside separately from one another.<sup>48</sup> The data also showed a significant increase in commercial listings (i.e., multiple Airbnb listings owned by large real estate firms or large investors) and multi-host listings (i.e., a person or company hosting more than three Airbnb properties) during this time.<sup>49</sup>

Commercial investors, who can afford to purchase entire properties *en masse* and convert them into Airbnbs exacerbated the issue.<sup>50</sup> Thus, the pandemic not only increased the number of Airbnbs on the market and decreased affordable housing, but it may have fundamentally altered the sharing economy aspect of the STR accommodation marketplace and turned it into a capitalistic frenzy whereby the wealthy buy properties to convert into STRs. This observation is consistent with Airbnb's reported

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<sup>44</sup> See e.g., Myrto Dagkouli-Kyriakoglou et al., *Digital Mediated Short-Term Rentals in the (Post-)Pandemic City*, 3 DIGIT. GEOGR. & SOC'Y (2022).

<sup>45</sup> *Id.* at 2.

<sup>46</sup> See Matthew Woodward, *Airbnb Statistics [2025]: User & Market Growth Data*, SEARCH LOGISTICS (Jan. 27, 2025), <https://www.searchlogistics.com/learn/statistics/airbnb-statistics/> [<https://perma.cc/Y9ZB-BUXT>]; see also Li, *supra* note 25, at 8015.

<sup>47</sup> Garha & Azevedo, *supra* note 24, at 21–22.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 15 (“In 2019, the total number of multi-hosts in Barcelona was 775 (6.3% of all hosts). However, they owned and managed 28.1% of the total number of listings in Barcelona. . . . The total number of multi-hosts in Lisbon (1,035, 10.9%) was even higher than in Barcelona. In 2019, they owned and managed 41.5% of the total number of listings in Lisbon.”).

<sup>50</sup> See *id.*



85% increase in average host earnings in 2021.<sup>51</sup> In some instances, “entire apartment blocks or even neighborhoods turn[ed] into vacation rentals.”<sup>52</sup> For example, near Walt Disney World in Orlando Florida, there are entire STR neighborhoods, often dominated by a small handful of hosts, that offer homes with *ten to twelve* Disney-themed bedrooms along with *six to eight* bathrooms—these are homes that an individual with a median Orlando service industry salary of \$66,292<sup>53</sup> could never afford to purchase.<sup>54</sup> This type of STR commercialization also leads to “overtourism,” which drains local “public finance, safety, and shared public service” resources.<sup>55</sup> Commercial STRs also accelerate gentrification in local housing markets, whereby lower-income homeowners are crowded-out due to rising costs and replaced with “newcomers with higher socio-economic status,” often disproportionately affecting racial minorities.<sup>56</sup> Despite being marketed as community-oriented networks intended to reduce costs and enhance convenience for the bottom 80% of earners, these platforms often benefit highly educated professionals seeking to boost their income.<sup>57</sup> This shift to crowd out lower-income, marginalized, and less-educated individuals further exacerbates affordability housing issues.

## 2. Why Arguments to Ban STRs Are Irrelevant

Despite compelling arguments for banning STRs, regulatory efforts have been undermined by “regulatory entrepreneurship” from the beginning.<sup>58</sup> For instance, San Francisco, the 2008 birthplace of Airbnb, already had a ban on private home rentals lasting less than thirty days.<sup>59</sup>

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<sup>51</sup> Jordon Pandey et al., *Anyone Hoping to Make an Easy Buck off Vacation Properties Must Contend with an ‘Airbnbust’ and a Growing Number of Places Looking to Regulate Short-Term Rentals*, BUS. INSIDER (2023), <https://www.businessinsider.com/cities-fighting-airbnbs-with-regulations-for-short-term-rentals-2022-5> [<https://perma.cc/SN62-QM2H>].

<sup>52</sup> Nieuwland & Melik, *supra* note 3, at 822.

<sup>53</sup> U.S. CENSUS BUREAU, *Quick Facts: Orlando City, Florida*, <https://www.census.gov/quickfacts/fact/table/orlandocityflorida/PST040222> [<https://perma.cc/8URP-2XX6>].

<sup>54</sup> See, e.g., AIRBNB, <https://www.airbnb.com> (search “Disney World, Orlando, FL” and “12 guests”) (last visited Nov. 6, 2024).

<sup>55</sup> Lindsay M. Tedds et al., *Why Existing Regulatory Frameworks Fail in the Short-Term Rental Market: Exploring the Role of Regulatory Fractures*, 17 (Univ. Calgary Sch. of Public Policy Pub. Vol. 14:26 Oct. 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4048253](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4048253) [<https://perma.cc/3L5K-CF7D>].

<sup>56</sup> Levine-Schnur & Ofir, *supra* note 1, at 618.

<sup>57</sup> Schor, *supra* note 19, at 263, 264–65, 276; see also Li, *supra* note 25, at 8039.

<sup>58</sup> Regulatory entrepreneurship is “pursuing a line of business in which changing the law is a significant part of the business plan.” Pollman & Barry, *supra* note 8, at Abstract, 392–98.

<sup>59</sup> See, e.g., Emily Badger, *How Airbnb Just Changed the Housing Laws in San Francisco*, WASH. POST: WONKBLOG (Oct. 8, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/10/08/how-airbnb-just-changed-the-housing-laws-in-san-francisco/> [<https://perma.cc/3JG2-PFZK>].

Yet, as soon as Airbnb emerged, so did enforcement issues. “It is difficult to know who is listing properties (address[es] are not included on websites such as Airbnb) and for what period of time, as well as what actually transpires in terms of stay length etc.”<sup>60</sup> San Francisco’s attempt to further regulate Airbnb faced significant resistance. The city sought to pass stricter rules but agreed to compromise after Airbnb invested \$8.4 million to mobilize hosts and guests to knock on over 285,000 doors and get politically involved to defeat the local proposition.<sup>61</sup> The 2015 compromise still exists in San Francisco, with the primary requirements being that (1) STRs are only allowed to operate in the primary residence of a permanent resident, (2) non-owner-occupied rentals are limited to ninety cumulative nights per year, and (3) STRs fulfill the registration requirement.<sup>62</sup> Contemporaneous with the passage of this regulation, Airbnb’s Global Policy Chief “announced plans to create and support ‘home-sharing clubs’ in 100 U.S. cities” to counter local regulations,<sup>63</sup> adding “we’ll spend what it takes to succeed.”<sup>64</sup> This strategic move highlights the challenges local governments face in enforcing STR regulations amidst significant pushback and substantial financial resources from industry giants.

Regulatory entrepreneurs see “changing the law” as a core component of their business strategy.<sup>65</sup> As noted by scholars Elizabeth Pollman and Jordan Barry, these entrepreneurs navigate “legal gray areas” until they become “too big to ban,” and then successfully rally users for the political support to mold laws in their favor.<sup>66</sup> The STR model is perfectly positioned to do this. Local governments regulate residential housing through land use policies, such as zoning laws.<sup>67</sup> While land use regulations seem rigid to property owners, they appear ambiguous to technology platforms.<sup>68</sup> STR operators exploit this ambiguity by arguing that their business models were unforeseeable when current land use policies were drafted, and thus those laws do not apply to them.<sup>69</sup> Consequently, STRs have bypassed single-family

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<sup>60</sup> Rebecca Leshinsky & Laura Schatz, “*I Don’t Think My Landlord Will Find Out: Airbnb and the Challenges of Enforcement*,” 36 URB. POL’Y & RSCH. 417, 423 (2018).

<sup>61</sup> Pollman & Barry, *supra* note 8, at 405 (citing Heather Somerville, *Airbnb to Create 100 Clubs to Advocate for Home-Sharing*, REUTERS (Nov. 4, 2015), <https://www.reuters.com/article/technology/airbnb-to-create-100-clubs-to-advocate-for-home-sharing-idUSKCN0ST2RL/> [<https://perma.cc/839M-W2XL>]).

<sup>62</sup> S.F. ADMIN. CODE tit. 41A, § 5 (2023); *FAQs on Short-Term Rentals*, S.F. PLANNING, <https://sfplanning.org/str/faqs-short-term-rentals> [<https://perma.cc/9BXG-MJWM>].

<sup>63</sup> Pollman & Barry, *supra* note 8, at 405 (citing Somerville, *supra* note 61).

<sup>64</sup> Somerville, *supra* note 61.

<sup>65</sup> Pollman & Barry, *supra* note 8, at 393; *see also* Lobel, *supra* note 4, at 105.

<sup>66</sup> Pollman & Barry, *supra* note 8, at 390.

<sup>67</sup> Levine-Schnur & Ofir, *supra* note 1, at 612.

<sup>68</sup> *See* Pollman & Barry, *supra* note 8, at 398.

<sup>69</sup> *See id.* (citing Jordan M. Barry & Paul L. Caron, *Tax Regulation, Transportation Innovation, and the Sharing Economy*, 82 U. CHI. L. REV. ONLINE 69, 73–74 (2017)). “The many public reports of startup companies ignoring notifications of their illegal activity suggest that this is part of a larger strategy combining business and politics.” Pollman & Barry, *supra* note 8,

zoning and land use restrictions, transforming residential properties into venues for both personal and commercial use.<sup>70</sup> This strategic exploitation of local zoning laws is not accidental but a deliberate maneuver to expand operational scope and circumvent traditional regulatory constraints.<sup>71</sup>

Technology platforms are also ideal for rapid, exponential growth, termed “guerrilla growth.”<sup>72</sup> The platforms profit from leveraging technology to seamlessly connect buyers and sellers through proprietary online systems.<sup>73</sup> Anyone who wants to operate an STR can list their property on these platforms within minutes.<sup>74</sup> The regulatory process cannot keep up with the speed of the internet, and by the time government attempts to intervene, the entrenched consumer popularity of STRs and the financial influence of STR platforms via grassroots politics, traditional lobbying, and aggressive litigation, make the prospect of an outright ban nearly impossible.<sup>75</sup> Scholars have pointed out that “there are almost no cases in which Airbnb activity has been banned.”<sup>76</sup>

Additionally, local governments find themselves opposing a highly persuasive narrative. The appeal of STRs lies in their promise of economic empowerment: ordinary people can earn money simply by welcoming strangers into their home.<sup>77</sup> This narrative resonates deeply with values of personal freedom, equality, and property rights. This makes it a powerful argument to overcome, particularly as local governments have failed to serve as reliable defenders of affordable housing. Their restrictive zoning policies and other regulatory measures have even been shown to drive up housing prices.<sup>78</sup> While STRs may contribute to increased housing costs, they also provide a temporary solution for homeowners facing high property taxes, insurance costs

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at 398 n.63 (citing Serena Saitto, *Inside Big Taxi’s Dirty War with Uber*, BLOOMBERG BUS. (Mar. 11, 2015), <https://www.bloomberg.com/news/articles/2015-03-11/inside-big-taxi-s-dirty-war-with-uber> [<https://perma.cc/4TR4-63HU>]) (“Uber’s strategy has been to launch services regardless of the rules and then leverage its popularity to force regulators to adapt. So far, that approach has succeeded in about 30 markets in North America . . .”).

<sup>70</sup> See Pollman & Barry, *supra* note 8, at 441–42.

<sup>71</sup> *Id.* at 442.

<sup>72</sup> See *id.* at 390.

<sup>73</sup> *Id.* at 416.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 401, 405–06 (“This includes tactics such as putting political operatives on the board of directors or hiring them as key advisors and using professional lobbyists.”).

<sup>76</sup> Levine-Schnur & Ofir, *supra* note 1, at 637 (citing Nieuwland & Melik, *supra* note 3, at 822; Hans R. A. Koster et al., *Short-Term Rentals and the Housing Market: Quasi-Experimental Evidence from Airbnb in Los Angeles*, 124 J. URBAN ECON. 1 (2021)).

<sup>77</sup> See Levine-Schnur & Ofir, *supra* note 1, at 612 (citing Zervas et al., *supra* note 15, at 708; Giovanni Quattrone et al., *Who Benefits from the “Sharing” Economy of Airbnb?* 1385 (WWW ‘16: Proceedings of the 25th Int’l Conf. on World Wide Web, 2016)).

<sup>78</sup> Pollman & Barry, *supra* note 8, at 441 (citing Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329, 329 (2005)); Levine-Schnur & Ofir, *supra* note 1, at 612 (citing Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL’Y DEBATE 25, 27 (2019)).

and other financial pressures to stay in their desired homes by earning extra income through renting out their space.<sup>79</sup> However, this solution perpetuates the vicious cycle of driving residents out of familiar neighborhoods they can no longer afford and preventing new long-term renters and homeowners from entering the neighborhood.<sup>80</sup> It also complicates the regulatory process, with many homeowners wanting bans and/or restrictions on Airbnb, and other homeowners spouting the necessity of STRs to pay for mortgages and increased property taxes.<sup>81</sup> Cities are then forced to balance supporting the economic benefits and mitigating the negative externalities of STRs.

## B. A Gold Standard Emerges

Localities do not always have the funds, staffing or expertise to take on highly contentious regulatory efforts. Even when they do, they must balance the importance of passing one law with other uses of taxpayer dollars. A good solution is to adapt existing ordinances to local use and to learn from the experiences of larger localities leading national battles with STR platforms.

### 1. Local Government Authority to Regulate STRs

Local governments possess broad authority under their police powers to regulate or even ban STRs through zoning ordinances, provided they articulate a rational basis for doing so, such as concerns about affordable housing and preserving neighborhood character.<sup>82</sup> For instance, in

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<sup>79</sup> See Nieuwland & Melik, *supra* note 3, at 811–82 (citing Andrej Holm, *Wie verändert Airbnb den Wohnungsmarkt? Eine Politische Ökonomie der Ferienwohnungen*, GENTRIFICATION BLOG (2016), <https://gentrificationblog.wordpress.com/2016/07/05/berlin-wie-veraendert-airbnb-den-wohnungsmarkt-eine-politische-oekonomie-der-ferienwohnungen/> [<https://perma.cc/perma.cc/5KZS-YZXD>]; Javier Gutiérrez et al., *The Eruption of Airbnb in Tourist Cities: Comparing Spatial Patterns of Hotels and Peer-to-Peer Accommodation in Barcelona*, 62 TOURISM MGMT., 278 (2017).

<sup>80</sup> See Nieuwland & Melik, *supra* note 3, at 813 (citing Agustín Cocola-Gant, *Holiday Rentals: The New Gentrification Battlefront*, 21 SOCIO. RSCH. ONLINE 1 (2016).

<sup>81</sup> See generally Elena Kovrigin, *Is This the End of Airbnbs in Asheville NC?*, YOUTUBE (Feb. 11, 2024), [https://www.youtube.com/watch?v=A112R5Z\\_RY4&t=928s&ab\\_channel=LivinginAsheville](https://www.youtube.com/watch?v=A112R5Z_RY4&t=928s&ab_channel=LivinginAsheville) (last visited February 12, 2024). This video describes local conversations and conflicting goals regarding Airbnb. See *id.*

<sup>82</sup> Ronald Garfield & Hunter S. Ross, *Airbnb, VRBO, Short-Term Rentals: Recent Developments, Enforcement Hurdles, and Mitigating Risks*, 37 PROB. & PROP. 52, 54 (2023) (citing *Ewing v. City of Carmel-by-the-Sea*, 234 Cal. App. 3d 1579, 1587 (Cal. Ct. App. 1991); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (“The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”); *Draper v. City of Arlington*, 629 S.W.3d 777, 792 (Tex. App. 2021) (recognizing consensus among courts that STR landlords are not “similarly situated” with LTR landlords). *But see* *Village of Tiki Island v. Ronquille*, 463 S.W.3d 562, 569 (Tex. App. 2015) (holding that a homeowner-plaintiff prevailed under a specific eminent domain power found in the Texas State Constitution after alleging that they bought the property specifically to operate as an STR and then a ban was subsequently enacted amounting to an unconstitutional taking under state law, which did not block the ban but merely prohibited enforcement against the plaintiff).

*Ewing v. City of Carmel-by-the-Sea*, the court upheld a complete ban on STRs, reasoning that “[s]hort-term tenants have little interest in public agencies or in the welfare of the citizenry.”<sup>83</sup> They do not participate in local government, coach little league, or join the hospital guild. They do not lead a scout troop, volunteer at the library, or keep an eye on an elderly neighbor. Literally, they are here today and gone tomorrow without engaging in the sort of activities that weld and strengthen a community.”<sup>84</sup>

Moreover, local governments have the flexibility to adapt their policies as needed. They can even change their mind. For example, both Jersey City, New Jersey and Cannon Beach, Oregon, initially adopted a *laissez-faire* approach to STR regulation.<sup>85</sup> This minimal regulatory stance often involves using negotiated agreements with STR platforms to get concessions, such as allowing the city to collect taxes on rental transactions, without significant regulatory restrictions.<sup>86</sup> While *laissez-faire* policies can attract tourism, they can also backfire. In response to unforeseen consequences or community backlash, localities may shift abruptly from lenient to stringent regulations, including outright bans on STRs.

Initially, Jersey City’s mayor sought to boost investment by legalizing STRs with an ordinance passed in 2015.<sup>87</sup> This ordinance permitted STRs in residential areas without requiring hosts to maintain a license.<sup>88</sup> The ordinance primarily restricted STRs by prohibiting STRs from “materially disrupt[ing] the residential character of the neighborhood” and limiting each user to five rental properties.<sup>89</sup> However, as STRs proliferated, dissatisfaction grew due to hotel industry lobbying, concerns about neighborhood changes, and reduced income for unionized hotel workers.<sup>90</sup> In response, Jersey City enacted a new ordinance in 2019 that imposed stricter regulations.<sup>91</sup> While not an outright ban, it restricted non-owner-occupied STRs to sixty nights per year and prohibited short-term leasing.<sup>92</sup> Investors who purchased STR properties between 2015 and 2019 for the sole purpose of renting them out as STRs sued the city, claiming the new regulation amounted to an unconstitutional taking under the Fifth Amendment’s Takings Clause and a violation of the Contract Clause in Article I.<sup>93</sup> The Third Circuit Court of

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<sup>83</sup> *Ewing*, Cal. App. 3d at 1579.

<sup>84</sup> Garfield & Ross, *supra* note 82, at 54 (quoting *Ewing*, Cal. App. 3d at 1584).

<sup>85</sup> See *Nekrilov v. City of Jersey City*, 45 F.4th 662 (3d Cir. 2022); *Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1083 (1993).

<sup>86</sup> See *Nieuwland & Van Melik*, *supra* note 3, at 814 (citing Gregory E. Lines, *Hej, Not Hej Dâ: Regulating Airbnb in the New Age of Arizona Vacation Rentals*, 57 ARIZ. L. REV. 1163, 1171 (2015)).

<sup>87</sup> *Nekrilov*, 45 F.4th 662, 666 (3d Cir. 2022)

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 666–67 (quoting JERSEY CITY, N.J., ORDINANCE NO. 15.137 (Oct. 28, 2015)).

<sup>90</sup> *Id.* at 667.

<sup>91</sup> *Id.* at 667–68.

<sup>92</sup> *Id.* at 667.

<sup>93</sup> *Id.* at 668.

Appeals dismissed these claims, ruling that the regulation did not eliminate all profitable uses of the property, as it could still be used as an LTR or sold, and thus did not constitute a taking nor any other constitutional violation.<sup>94</sup> The court remained unsympathetic to the argument that LTRs were less profitable than STRs in light of the city’s articulation of a public purpose for passing the ordinance.<sup>95</sup>

A similar legal outcome occurred in Cannon Beach, Oregon. The coastal town initially encouraged STRs but later enacted an ordinance that completely banned them.<sup>96</sup> Property owners sued, arguing an unconstitutional taking under the Fifth and Fourteenth Amendments.<sup>97</sup> As in *Nekrilov*, the Oregon Supreme Court ruled that the ordinance advanced the legitimate government interest of preserving affordable housing and neighborhood character, and that it did not eliminate all economically viable uses of the properties.<sup>98</sup> Again, the court upheld local authority.

## 2. The Path of Least Resistance

There exists little data-driven research advising regulators on which policies most and least effectively address STR effects on affordable housing. One helpful study demonstrated that capping the number of Airbnbs a single host could manage to one reduced both rents and home values by 3% in New York City, San Francisco, and Portland.<sup>99</sup> Airbnb referred to this as a “One Host, One Home” policy.<sup>100</sup> Failure to adhere to this policy resulted in the suspension or deactivation of the host’s Airbnb account.<sup>101</sup> The success of this initiative can largely be attributed to it being voluntarily rolled out by Airbnb, thus enforcing it as a partnership, and not left solely to localities.<sup>102</sup> Today, local governments cannot expect voluntary enforcement assistance from STR platforms.<sup>103</sup> This type of policy also has workarounds that benefit commercial STR operators and the wealthy, as they have the means to hire different hosts to run each property or to financially entice friends, family, or contracted parties to provide their name, driver’s license number, phone number, email, etc. to be listed as a host (and bear legal responsibility).<sup>104</sup>

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<sup>94</sup> *Id.* at 670–71.

<sup>95</sup> *Id.* at 671, 679–80.

<sup>96</sup> *Cope v. City of Cannon Beach*, 317 Or. 339, 855 P.2d 1083, 1084 (1993). Hosts had five years to cease STR operation. *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1086–87.

<sup>99</sup> Chen et al., *supra* note 26, at 8590.

<sup>100</sup> *Id.* Hosts could still list properties on other platforms, such as VRBO or HomeAway. *Id.* at 8601.

<sup>101</sup> *Id.* at 8593.

<sup>102</sup> *Id.*

<sup>103</sup> Chen et al., *supra* note 26, at 8609.

<sup>104</sup> *Id.* at 8601.

While using data to make informed regulatory policy decisions should be the ideal, politicians making political decisions often do not have data on their minds.<sup>105</sup> Data-driven peer-reviewed research is slow; as mentioned, most of the studies referenced collected data pre-COVID-19 and are just now being published.<sup>106</sup> Politicians are elected officials who answer to the people in real time to secure election or re-election wins. Thus, it would not be unusual for politicians to pass regulations to appease public perceptions without collecting or analyzing data on the actual effects of STRs within their locality.<sup>107</sup> Some have even posited that politicians pass most STR regulations to address affordable housing concerns but do so without any empirical evidence.<sup>108</sup> This makes it difficult for local governments to subsequently determine whether regulations are making a difference.

In order to create a meaningful study design, academic researchers generally must limit the scope of their studies to one or two policy interventions.<sup>109</sup> This is not helpful for local government policy makers who prefer to use a combination of quantitative, locational, density, and qualitative restrictions.<sup>110</sup> Quantitative restrictions may include caps on the number of STR accommodations allowed per owner/host, occupants, rental days, or rental occurrences per year.<sup>111</sup> Location restrictions confine STRs to specific zones (e.g., zip codes, neighborhoods, commercial districts), while density restrictions limit the number of STRs allowed within such zones.<sup>112</sup> Qualitative restrictions define the type of accommodation (e.g., primary residence, owner-occupied); registration, licensing, fee, fine, and tax requirements; as well as noise, health and safety requirements (e.g., requiring an installed smoke detector).<sup>113</sup>

The most efficient way for politicians to draft effective regulations with minimal pushback from regulatory entrepreneurs is to adopt and adapt regulations passed in other, often larger, localities. 2015 and 2016 were significant years for STR regulations. As discussed, in February 2015, San Francisco transitioned from an STR ban to imposing an owner-occupied requirement (for 275 days per year), along with residency and registration requirements.<sup>114</sup> Similarly, in December 2016, New Orleans moved from an STR ban to implementing an owner-occupied requirement

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<sup>105</sup> Li, *supra* note 25, at 8017.

<sup>106</sup> See discussion *supra* Section I.B.1.

<sup>107</sup> Li, *supra* note 25, at 8017.

<sup>108</sup> *Id.*

<sup>109</sup> See, e.g., Li, *supra* note 21, at 8016; Chen et al., *supra* note 26, at 8590.

<sup>110</sup> Nieuwland & van Melik, *supra* note 3, at 812; Daniel Guttentag, *Airbnb: Disruptive Innovation and the Rise of an Informal Tourism Accommodation Sector*, 18 CURRENT ISSUES IN TOURISM, 1192 (2015); Gurrán & Phibbs, *supra* note 20; C. Gottlieb, *Residential Short-Term Rentals: Should Local Governments Regulate the 'Industry'?*, 65 PLANNING & ENV'T L. 4 (2013).

<sup>111</sup> Nieuwland & van Melik, *supra* note 3, at 814.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 814; see also LEE ET AL., *supra* note 6, at 9.

<sup>114</sup> See Badger, *supra* note 59.

(for 275 days per year), a ban in the French Quarter, and a registration requirement.<sup>115</sup> New Orleans further amended their regulation in 2019 to include a primary residence restriction, whereby an STR must be the primary residence of the property owner.<sup>116</sup> However, in 2022, the Fifth Circuit found this provision *per se* invalid under the Dormant Commerce Clause as it discriminated against interstate commerce in favor of local interests.<sup>117</sup> Notably, owner-occupied regulations have not experienced the same legal shortcomings and are sometimes referred to as home-sharing regulations.<sup>118</sup> This Article uses the term “owner-occupied regulations” to avoid confusion as all STR stays are technically home-sharing stays.

Contrary to the trend of leniency, in May 2015, Santa Monica adopted one of the strictest STR regulations in the country. The Santa Monica City Council aimed to protect the city’s housing stock, preserve the residential character of neighborhoods, and prevent home-shares from turning into de facto hotels, while still allowing owners and long-term residents to host guests.<sup>119</sup> Santa Monica’s 365-day owner-occupied regulation prohibited STR rentals while the owner was away or on vacation and banned renting entire duplexes, triplexes, or apartment units while living in one of the units.<sup>120</sup> They also enforced registration requirements with occupancy limits (i.e., “1 person per 200 square feet of the home, or 2 adults per bedroom”) and heavy penalties (starting at “\$1,000 per day per violation.”)<sup>121</sup>

Santa Monica’s regulations proved effective. A 2018 study showed that the ordinance led to a 61% decrease in entire home STRs, reducing the number of STRs by 861 units.<sup>122</sup> However, there was no reported change in rent prices at the time of the study, as former STR units had not been listed for LTR use by the time the study was conducted. Subsequent reports in 2019 indicated an 80% reduction in STR listings in Santa Monica since the ordinance’s introduction, with only 351 properties listed on Airbnb.<sup>123</sup>

Given the success of such a strict ordinance, other localities grew confident that they could benefit by adopting similar, though less stringent, regulations. Regulations featuring both owner-occupied restrictions and a registration requirement have become the *minimal* gold standard across the nation, with local needs dictating whether additional quantitative, locational, density, or qualitative restrictions are necessary.<sup>124</sup> However, as quickly as

<sup>115</sup> Eric Craig, *Short-Term Rentals Approved in New Orleans after Council Vote*, CURBED NEW ORLEANS (Dec. 1, 2016, 4:43 PM), <https://nola.curbed.com/2016/12/1/13812616/short-term-rentals-new-orleans-final> [<https://perma.cc/T4J2-2N67>].

<sup>116</sup> Garfield & Ross, *supra* note 82, at 55.

<sup>117</sup> *Id.*; see Hignell-Stark v. City of New Orleans, 46 F.4th 317, 325 (5th Cir. 2022).

<sup>118</sup> See Bei & Celata, *supra* note 12, at 6.

<sup>119</sup> See Crack Down, *supra* note 9, at 16.

<sup>120</sup> SANTA MONICA, CAL., MUN. CODE § 6.20 *et seq.*, § 6.20.010(e) (2019).

<sup>121</sup> SANTA MONICA, CAL., MUN. CODE § 6.20.020(a)(7) (2024).

<sup>122</sup> Fonseca, *supra* note 31, at 1.

<sup>123</sup> Crowe, *supra* note 32, at 131.

<sup>124</sup> See LEE ET AL., *supra* note 6, at 9.



these ordinances were passed, claims of lax enforcement began to arise, and this too led to regulatory changes. While limiting the owner-occupied requirement to a certain number of days per year (e.g., 275) was initially popular, local governments soon learned that it was not enforceable—there lacked a mechanism to determine stay lengths or frequency without platform assistance—and the language appears less frequently in later-adopted regulations.<sup>125</sup> Tiered regulations that have different permit systems for different classifications of STR operators (residential, investor, and commercial) have also grown less popular as community confusion and verification limitations complicate enforcement; additionally, tiered systems do less to protect residential housing affordability.<sup>126</sup> Without adequate enforcement mechanisms, the positive effects of STR regulations are temporary.<sup>127</sup>

## II. THE ACHILLES' HEEL OF ENFORCEMENT EFFORTS IS ILLEGAL STRS

*Passing* regulations and *enforcing* regulations are two separate challenges. Localities often assume that passing an ordinance means STR hosts will obey the ordinance, but this has not proven to be the case.<sup>128</sup> Once word gets out that STR regulations are not being enforced or are underenforced, a surge of illegal operators quickly emerge.<sup>129</sup> Illegal STR operators pose the most significant enforcement challenge. Common types of illegal operators are those who (1) operate without a valid registration number, (2) list with expired or fake registration numbers, (3) disguise STRs as LTRs, (4) falsely claim the unit is the host's primary residence or is owner-occupied at the time of rental, and (5) misrepresent the unit's location to be in a neighboring location with more favorable STR rules.<sup>130</sup> In this Section, we present novel data on the prevalence of illegal STR operators in small and mid-sized cities, propose a new hypothesis on the pervasiveness of illegal operators, and then examine Los Angeles and New York City as case studies to compare lenient versus strict enforcement responses.

### A. *Illegal STRs Are Omnipresent*

Illegal STR operators pose a nationwide problem, wreaking havoc in cities like Boston, Denver, Los Angeles, New York City, and San Francisco.<sup>131</sup>

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<sup>125</sup> See Leshinsky & Schatz, *supra* note 60, at 423.

<sup>126</sup> See Nieuwland & van Melik, *supra* note 3, at 814.

<sup>127</sup> See Bei & Celata, *supra* note 12, at 10.

<sup>128</sup> See BETTER NEIGHBORS LOS ANGELES, THE LOS ANGELES HOME-SHARING ORDINANCE ENFORCEMENT REPORT AND RECOMMENDATIONS 19–24 (2022) [hereinafter BNLA REPORT]. [https://static1.squarespace.com/static/5fc9845732f65217775cb3a5/t/63f8e87357c81b184848b95b/1677256830192/BNLA\\_Annual+Report\\_2022-web.pdf](https://static1.squarespace.com/static/5fc9845732f65217775cb3a5/t/63f8e87357c81b184848b95b/1677256830192/BNLA_Annual+Report_2022-web.pdf) [https://perma.cc/G26L-L9CR]; LEE ET AL., *supra* note 6, at 13.

<sup>129</sup> BNLA REPORT, *supra* note 128, at 19–24.

<sup>130</sup> *Id.*

<sup>131</sup> See *supra* Section I.B.2; *infra* Sections II.B.1, II.B.2; see generally *supra* notes 52–53; LEE ET AL., *supra* note 6, at 13.

While most STR research focuses on large tourist cities, we aimed to determine if a similar surge in illegal operators was occurring in small to mid-sized tourist cities (populations between 90,000 and 150,000) across the continental United States. Our study included Asheville, North Carolina; Boulder, Colorado; Cambridge, Massachusetts; Charleston, South Carolina; and Santa Monica, California. In addition to being tourist cities, these cities have an owner-occupied STR ordinance that includes a registration requirement.<sup>132</sup>

Asheville and Boulder attract tourists due to their proximity to the mountains. Charleston is located along the Atlantic Ocean and holds historical significance. Cambridge, home to Harvard University and near Boston, also carries historical importance. Santa Monica was chosen for its Pacific Ocean beach location, proximity to Los Angeles, and to assess how its pioneering regulatory efforts have fared since COVID-19. As Table 1 demonstrates, illegal STRs are abundant in these locations.

Table 1. Compliance Rates in Small to Midsize Cities with “Gold Standard” STR Regulations

City	Asheville, NC <sup>133</sup>	Boulder, CO <sup>134</sup>	Cambridge, MA <sup>135</sup>	Charleston, SC <sup>136</sup>	Santa Monica, CA <sup>137</sup>
City Population <sup>138</sup>	94,589	108,250	118,403	150,227	93,076
Total Airbnb Listings	3,329 <sup>139</sup>	686 <sup>140</sup>	1,130 <sup>141</sup>	2,046 <sup>142</sup>	1,190 <sup>143</sup>

<sup>132</sup> See generally LEE ET AL., *supra* note 6, at 13.

<sup>133</sup> ASHVILLE, N.C., CODE OF ORDINANCES § 7-16-1(9).

<sup>134</sup> BOULDER, COLO., CODE OF ORDINANCES § 10-3-19. Boulder requires licensing of STRs, limits who may get a license for an STR, and limits ability to rent accessory buildings as STRs. *Id.* Boulder County, Colorado (where the City of Boulder is located) enacted a land use ordinance that requires hosts to be present during an STR stay. BOULDER CTY., COLO., CODE OF ORDINANCES § 4-516.

<sup>135</sup> CAMBRIDGE, MASS., MUNICIPAL CODE § 4.60 *et seq.*

<sup>136</sup> CHARLESTON, S.C., CODE OF ORDINANCES § 54-227.

<sup>137</sup> SANTA MONICA, CAL., CODE OF ORDINANCES § 6.20.010 *et seq.*

<sup>138</sup> U.S. CENSUS BUREAU, *Quick Facts Database*, <https://www.census.gov/quickfacts/> (last visited Mar. 19, 2024) (using population data from 2020).

<sup>139</sup> INSIDE AIRBNB, <http://insideairbnb.com/asheville> (last visited Mar. 20, 2024).

<sup>140</sup> AIRBNB.COM, <https://www.airbnb.com/boulder-co/stays> (last visited Apr. 23, 2024).

<sup>141</sup> INSIDE AIRBNB, <http://insideairbnb.com/cambridge> (last visited Mar. 20, 2024).

<sup>142</sup> AIRBTICS.COM, <https://app.airbtics.com/airbnb-data/united-states/sc/charleston> (last visited Mar. 19, 2024).

<sup>143</sup> AIRBTICS.COM, <https://app.airbtics.com/airbnb-data/united-states/ca/santa%20monica> (last visited Mar. 19, 2024).

% non-complaint with owner-occupied requirement	87.8%	79% <sup>144</sup>	57.3%	86%	86%
% non-complaint with registration requirement	32% <sup>145</sup>	25% <sup>146</sup>	63% <sup>147</sup>	75% <sup>148</sup>	Not determinable <sup>149</sup>

This data was compiled from various sources in March and April 2024. Datasets like *AirDNA*, *Inside Airbnb*, and *Airbtics* provided some of the data, but due to limited information on smaller cities, some of the data was obtained by scraping information from *Airbnb* directly. As owner-occupied restrictions prevent whole-home STRs, the number of whole-home STR listings versus room listings determined compliance rates. These numbers are somewhat inflated as permissible guest houses and ancillary dwellings sometimes look like whole-home rentals on STR listings. Asheville and Santa Monica allow ancillary dwellings; Boulder, Cambridge, and Charleston allow them with additional restrictions.<sup>150</sup> Additionally, some whole-home STR listings are still legal because localities offered legacy exemptions to STRs that operated before the owner-occupied restrictions were passed. This occurred in Asheville (2018) and Boulder (2019).<sup>151</sup>

<sup>144</sup> It appears that some of the whole-house rentals may be ancillary buildings and/or exempt if established as a STR prior to 2019. *Consider supra* note 134.

<sup>145</sup> Compliance data regarding permitting/licensing was difficult to acquire. However, neighboring Woodfin, with similar licensing requirements had only 32% STRs as noncompliant. Barbara Durr, *Woodfin Begins Enforcement of Ordinance to Regulate Short-term Rentals*, ASHVILLE WATCHDOG (Sept. 13, 2023), <https://www.asheville.com/news/2023/09/woodfin-begins-enforcement-of-ordinance-to-regulate-short-term-rentals/> [https://perma.cc/GHK3-QTAH]. In addition, some of these units may have received a legacy exemption prior to the 2018 ban. See Kimberly King, *City Leader Calls for Investigation into Short-Term Rentals Amid Housing Shortage*, ABC13NEWS WLOS (Nov. 13, 2023), <https://wlos.com/news/local/asheville-short-term-rentals-investigation-ban-whole-house-rental-less-30-days-council-member-sage-turner-wants-investigated> [https://perma.cc/RS5W-BZDT].

<sup>146</sup> Airbnb.com does not make it easy for cities and researchers to verify that registration and licensing requirements are properly disclosed in listings. The authors reviewed thirty-six Airbnb.com listings for the City of Boulder. Out of the thirty-six listings reviewed, nine did not have a registration number listed. *See supra* note 140.

<sup>147</sup> The City of Cambridge's data shows only 424 licensed STRs. CITY OF CAMBRIDGE, *Open Data Portal*, [https://data.cambridgema.gov/Inspectional-Services/Short-Term-Rentals/wxgv-w968/about\\_data](https://data.cambridgema.gov/Inspectional-Services/Short-Term-Rentals/wxgv-w968/about_data) (last visited Mar. 20, 2024).

<sup>148</sup> Skyler Baldwin, *Charleston's Short-term Rental Restrictions Become New Standard*, CHARLESTON CITY PAPER (June 16, 2023), <https://charlestoncitypaper.com/2023/06/16/charlestons-short-term-rental-restrictions-become-new-standard/> [https://perma.cc/65EX-UR7U].

<sup>149</sup> This ordinance does not require owners or hosts to disclose a registration number on the STR listings. SANTA MONICA, CAL., MUN. CODE § 6.20 *et seq.* (2024).

<sup>150</sup> *See supra* notes 133–37.

<sup>151</sup> *See supra* notes 133, 134.

Legacy exemptions are detrimental when regulating late, after STRs have already proliferated. Despite these inflations, we observe that most STRs opened post-COVID-19 (after the legacy exempting dates); thus, the non-compliance rates from 57.3% to 87.8% demonstrate a systemic problem.

Of the five cities surveyed, only Cambridge shows greater than 40% compliance with its whole-home ban. This higher rate of compliance may be attributed to housing advocates who have educated the public about STR regulation for years.<sup>152</sup> Besides education, Cambridge is also proactive in enforcing its STR regulations.<sup>153</sup> It maintains a publicly accessible list of registered STRs on its city website and encourages citizens to file complaints against non-compliant STRs through an online complaint mechanism.<sup>154</sup> Even though Cambridge has the highest rate of compliance, that rate is not ideal.

Registration compliance is determined by searching for a registration number on STR listings. With notable variations between cities, 25% to 75% of listed STRs were non-compliant. Santa Monica's compliance rate was undeterminable. Although it has a registration requirement, it does not require that the registration number be posted on listings, making it impossible to collect web scraping data. Unlike the owner-occupied data, the registration non-compliance rates are likely deflated. Illegal operators are not afraid to post fraudulent or expired registration numbers.<sup>155</sup> Advanced web scraping is needed to cross-reference registration numbers with valid, non-expired numbers on file with the city.

The data quality issues we experienced are also encountered by localities. Without cooperation from STR platforms, the "only option is to rely on web scraping, which is riddled with technical difficulties and does not return any official, validated statistics."<sup>156</sup> Localities can hire private firms or collaborate with stakeholders to conduct web scraping, or they can model Charleston, South Carolina and create their own web scraping software to detect violations with their ordinance.<sup>157</sup> Still, it has been argued that "without direct access to detailed data about transactions conducted online,

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<sup>152</sup> ACTION ALERT: Tell City Council to Preserve Permanent Housing with Short Term Rental Regulations, A BETTER CAMBRIDGE BLOG (Mar. 31, 2017), [https://www.abettercambridge.org/actionalert\\_str\\_ordcmte](https://www.abettercambridge.org/actionalert_str_ordcmte) [http://perma.cc/LTF2-ZDXW].

<sup>153</sup> Alyssa Chen, *Cambridge Returns to Short-Term Rental Law, Looking at Loopholes Allowing Bad Airbnb'ers*, CAMBRIDGE DAY (Oct. 27, 2024), <https://www.cambridgeday.com/2024/10/27/cambridge-returns-to-short-term-rental-law-looking-at-loopholes-allowing-bad-airbnbers/> [https://perma.cc/3WV4-3REJ].

<sup>154</sup> CITY OF CAMBRIDGE, *Open Data Portal*, [https://data.cambridgema.gov/Inspectional-Services/Short-Term-Rentals/wxgv-w968/about\\_data](https://data.cambridgema.gov/Inspectional-Services/Short-Term-Rentals/wxgv-w968/about_data) (last visited Apr. 26, 2024); CITY OF CAMBRIDGE, *Register a Short-Term Rental*, <https://www.cambridgema.gov/iwantto/registerashorttermrental> (last visited Apr. 26, 2024).

<sup>155</sup> BNLA REPORT, *supra* note 128, at 20.

<sup>156</sup> Bei & Celata, *supra* note 12, at 11.

<sup>157</sup> Minkyung Park, *The Sharing Economy, Regulations, and the Role of Local Government*, 6 INT'L J. TOURISM CITIES 158, 167 (2020).

or the possibility of removing or blocking irregular listings, enforcement is either incredibly difficult or extremely costly.<sup>158</sup> In other words, most STR regulations, as written *and* regulated, are unenforceable.

### B. *Regulatory Arbitrage v. Regulatory Enforcement Oversight*

This Article argues that passing unenforceable regulations is a significant regulatory oversight. Once regulations are enacted, stakeholders exploit drafting and enforcement weaknesses to their advantage, resulting in market failures such as decreases in affordable housing and inability to enforce against illegal STR listings. This phenomenon is known as regulatory arbitrage.<sup>159</sup> Regardless of whether it harms or helps government, business, or society, regulatory arbitrage is predictable. Local governments have failed to adapt by adopting enforcement-focused regulatory efforts. Thus, we find the term “regulatory enforcement oversight” appropriately shifts responsibility back to regulators, encouraging them to relinquish outdated regulatory frameworks that have proved ineffective for enforcement in a technology-driven world. Aspiring to draft “Goldilocks” legislation causes regulatory enforcement oversight.

Without a strong enforcement identity, local governments sway between the arguments for and against STRs during the regulatory process, weakening their resolve in the face of stakeholder pressures. This has been termed the “Goldilocks Regulatory Challenge,” where the aspiration to create laws that are “just right”—neither too broad (overinclusive) nor too narrow (underinclusive)—results in underinclusive laws filled with loopholes ripe for regulatory arbitrage.<sup>160</sup> Local governments passed STR regulations to protect constituents unhappy with the “hotelization” of their neighborhoods, support constituents needing extra income, avoid lengthy and expensive STR platform battles and to benefit economically from increased tourism.<sup>161</sup>

However, the resulting gold standard regulations came with the same exploitable loopholes present in most technology platform regulations: the inability of a slow contentious regulatory process to keep pace with changes in a technology-driven regulatory environment. As a result, local governments are unable to effectively catch illegal operators. When Denver attempted to shut down illegal operators, they encountered privacy

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<sup>158</sup> Bei & Celata, *supra* note 12, at 3.

<sup>159</sup> Levine-Schnur & Ofir, *supra* note 1, at 594 (citing Nizan Geslevich Packin, *Show Me the (Data About the) Money!*, 2020 UTAH L. REV. 1277, 1296 (2020); Elizabeth Pollman, *Tech, Regulatory Arbitrage, and Limits*, 20 EUR. BUS. ORG. L. REV. 567–90 (2019); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227 (2010)).

<sup>160</sup> Lobel, *supra* note 4, at 156.

<sup>161</sup> See generally Levine-Schnur & Ofir, *supra* note 1, at 638 (providing that “prevention of ‘hotelization’ of residential neighborhoods” is an important policy principle that should guide regulatory reform).

constraints that prohibited house visits, difficulties with operators not listing house addresses on STR platforms, hosts displaying pictures of the interior (but not exterior) of homes, and even hosts removing postings during the work hours when regulators are active.<sup>162</sup> Cities face challenges identifying, tracing, contacting, and delisting illegal STR operators, raising questions about the feasibility of enforcement.

Regulatory enforcement oversights can occur at every phase of the legislative process, including the goal-setting stage. Local governments cannot draft effective, enforceable, and funded STR regulations until they establish strict enforcement goals, commit to them, and pass legislation accordingly. Local governments must also assess the cost to achieve enforcement goals and build these costs into STR regulations through registration fees, fines, and tax structures.<sup>163</sup> “Dedicated resources, time, staff and money are necessary for successful enforcement,” particularly in a changing regulatory environment.<sup>164</sup>

Professor Lindsay Tedds refers to the mistake of enforcing against new, adaptable technology with outdated methods as a “regulatory fracture.”<sup>165</sup> For instance, a permit or licensing process may work well for regulating restaurants, which can be inspected without notice and shut down for non-compliance, leading to significant financial consequences for violators.<sup>166</sup> However, in a technology-driven world, registration systems can enable regulatory arbitrage.<sup>167</sup> Due to residential privacy rights, local regulators cannot conduct surprise home inspections without a code violation or voluntary cooperation from STR owners and operators.<sup>168</sup> Hosts can also easily list and de-list homes on STR platforms, creating a constantly changing regulatory environment that traditional enforcement methods cannot match.<sup>169</sup> Local governments must adapt early and regularly to these changes. If cities lack the resources to do this themselves, they can use STR-generated funds to hire private companies such as *BNB Shield*, *Host Compliance*, and *Granicus* to police illegal listings.<sup>170</sup>

Regulatory enforcement oversight also stems from failing to use data for enforcement decision making and not engaging stakeholders.<sup>171</sup>

<sup>162</sup> Nieuwland & van Melik, *supra* note 3, at 818, 821.

<sup>163</sup> See LEE ET AL., *supra* note 6, at 24, 25, 27, 30.

<sup>164</sup> *Id.* at 30.

<sup>165</sup> Tedds et al., *supra* note 55, at 1; DAVID A. GREEN ET AL., COVERING ALL THE BASICS: REFORMS FOR A MORE JUST SOCIETY (2021), <https://ssrn.com/abstract=3781825> [<https://perma.cc/4RLX-UCWJ>].

<sup>166</sup> See Andrew Samuel et al., *Optimal Regulation Under Imperfect Enforcement: Permits, Tickets, or Both?*, 67 SCOT. J. POL. ECON. 420, 420–21 (2020).

<sup>167</sup> LEE ET AL., *supra* note 6, at 23; Nieuwland & van Melik, *supra* note 3, at 821.

<sup>168</sup> LEE ET AL., *supra* note 6, at 23.

<sup>169</sup> Nieuwland & van Melik, *supra* note 3, at 821.

<sup>170</sup> Leshinsky & Schatz, *supra* note 60, at 424.

<sup>171</sup> BNLA REPORT, *supra* note 128, at 13.

Most cities do not collect data before and after implementing ordinances, so they cannot measure the effectiveness of regulations.<sup>172</sup> Small to mid-sized cities also do not attract the external research attention that larger cities do, increasing the need to use web scraping to self-study. However, data can be collected by diverse stakeholders, such as online providers like *AirDNA* or *Inside Airbnb*, the hotel industry, tourism agencies, and community organizations.<sup>173</sup> For example, Fayetteville, Arkansas achieved its data goals by working with students at a local university.<sup>174</sup> To be meaningful, data should look beyond the total number of STRs and answer key policy questions, such as how many currently operating STRs are renting entire homes or operating without a valid registration number.<sup>175</sup> As seen in our analysis of small to mid-sized cities, two common regulatory enforcement oversights are (1) legacy exemptions for STRs that operated prior to the regulations and (2) not requiring registration numbers on STR listings. These policy decisions significantly undermine the usefulness of available compliance data by hiding the true number of illegal operators.

Commercial STRs have engaged in regulatory arbitrage to enter the STR market. This Article defines commercial STRs as both commercial listings (i.e., Airbnb listings owned by real estate firms or investors) and multi-host listings (i.e., a person or company hosting more than one Airbnb property), though only the latter can be identified through web scraping.<sup>176</sup> Because most STR regulations were designed with an eye toward residents operating STRs, they are often silent about commercial operators.<sup>177</sup> These regulations typically assume STR hosts are homeowners or “unsophisticated home-sharers,” whereas many are actually “professional and profit-motivated business operations.”<sup>178</sup> Ordinances often presume an STR’s host owns the home, but a host is simply the person on an STR platform interacting with guests and potential guests. Commercial STR owners often hire or form property management companies that, in turn, hire employees or contract with independent contractors to manage *multiple* properties.<sup>179</sup> Thus, these hosts have no ownership interest in the properties. To the detriment of local communities and legally operating STRs, this loophole has allowed commercial STR operators to infiltrate the STR marketplace, leverage their financial and political might, deter strict

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<sup>172</sup> See Jenny Schuetz, *Are New Housing Reforms Working? We Need Better Research to Find Out*, BROOKINGS (Nov. 21, 2022), <https://www.brookings.edu/articles/are-new-housing-policy-reforms-working-we-need-better-research-to-find-out/> [https://perma.cc/ZU2N-SK2F].

<sup>173</sup> LEE ET AL., *supra* note 6, at 13–14.

<sup>174</sup> *Id.* at 16.

<sup>175</sup> *Id.* at 14.

<sup>176</sup> See Garha & Azevedo, *supra* note 24, at 15.

<sup>177</sup> See LEE ET AL., *supra* note 6, at 19, 23.

<sup>178</sup> Tedds et al., *supra* note 55, at 3.

<sup>179</sup> *Id.* at 12.

STR ordinances, and manipulate new regulations to their advantage.<sup>180</sup> When regulatory battles are lost, there is often enough enforcement oversight that commercial operators can continue to rent illegally with insignificant consequences.<sup>181</sup> This oversight allows commercial operators to ignore the law and incorporate these costs into their business model.

The following case studies from Los Angeles and New York City show a stark contrast in the consequences for maintaining an illegal STR. In Los Angeles, initial action involved sending a warning letter, and if the illegal listing persisted, assessing a \$500 fine.<sup>182</sup> But this fine did not need to be paid if an appeal was filed, and the appeal process could be prolonged.<sup>183</sup> Best practice suggests that a fine should be issued on a first offense in lieu of a warning letter, as warning letters are insufficient deterrents.<sup>184</sup> Fines should continue to accrue during the appeals process to prevent operators from exploiting the system to continue operating illegally.<sup>185</sup> Fines against illegal operators across the country range from \$200 to \$2,000 per violation or per day.<sup>186</sup> New York City presently assesses a fine of “not more than the lesser of \$5,000 or three times the revenue generated by the short-term rental” and an additional \$1,000 penalty for lying on a registration or renewal application.<sup>187</sup> However, unreasonably high deterrents have faltered in court, mostly under state laws.<sup>188</sup> The National League of Cities (NLC), an organization that researches municipal needs, analyzed sixty STR ordinances in 2022 and recommended that “[f]ines should be proportionate to *or more than* the economic gains that violators can realize from breaking the rules, and should escalate for repeat violators, including the threat of revocation of a permit or license.”<sup>189</sup> The community group, Better Neighbors Los Angeles (BNLA), recommends *minimum daily* fines of \$572 or twice the listing’s daily rate, to deter illegal activity.<sup>190</sup>

When local governments commit regulatory enforcement oversights that result in unenforceable laws, trust in government deteriorates. Passing meaningless laws causes communities to essentially cry “foul play” and “ulterior motives.”<sup>191</sup> These claims are not without merit. Local

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<sup>180</sup> See Bei & Celata, *supra* note 12, at 4.

<sup>181</sup> See BNLA REPORT, *supra* note 128, at 19, 29.

<sup>182</sup> *Id.* at 29–33.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 33.

<sup>185</sup> *Id.*

<sup>186</sup> LEE ET AL., *supra* note 6, at 25.

<sup>187</sup> N.Y.C. ADMIN. CODE § 26-3104 (a)–(c).

<sup>188</sup> *City of Miami Beach v. Nichols*, 314 So.3d 313, 315–16 (Fla. Dist. Ct. App. 2020) (holding that Miami Beach broke state law when it levied fines of \$20,000 for a first offense, \$40,000 for a second and so forth until all subsequent offenses were \$100,000).

<sup>189</sup> LEE ET AL., *supra* note 6, at 3–4, 25 (emphasis added).

<sup>190</sup> BNLA REPORT, *supra* note 128, at 3, 33.

<sup>191</sup> See, e.g., David Forbes, *Kill Airbnb Before It Kills Asheville*, ASHVILLE BLADE (Oct. 18, 2022), <https://ashevilleblade.com/?p=4467> [<https://perma.cc/2DV9-AS2F>].



governments are biased stakeholders too, and a proliferation of STRs comes with numerous benefits. STRs bring jobs, as they must be cleaned, maintained, and inspected—these duties are rarely completed by hosts.<sup>192</sup> Local governments also derive economic benefits from tourism, tax revenues, and the proliferation of small local businesses.<sup>193</sup> Even the downside of unaffordable housing comes with the benefit of increased property tax dollars to improve schools and infrastructure.<sup>194</sup> STRs give localities the ability to host large temporary tourist events, such as the Olympics or national political conventions, despite the inadequacy of hotel occupancies to accommodate the influx of guests.<sup>195</sup> Demonstrating a more altruistic bias, local governments have collaborated with STR hosts to house individuals fleeing domestic violence or experiencing homelessness.<sup>196</sup> Without a strict enforcement identity, it is easy for the public to believe that local governments want to keep the good times rolling.<sup>197</sup> This has fueled society to put false faith in technology platforms as the cure to society's woes.

### 1. Los Angeles: A Case Study in Regulatory Enforcement Oversight

Los Angeles is a prime example of good intentions going awry when enforcement is not at the forefront of regulatory efforts. In 2018, Los Angeles sought a “Goldilocks” regulation that would “balance the loss of affordable housing and increase of nuisance activity with the purported economic opportunity made available to individuals by the STR industry.”<sup>198</sup> This regulation included: (1) a primary residence requirement, (2) a “One Host, One Home” requirement, (3) a registration requirement, and (4) a prohibition against platforms processing transactions for

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<sup>192</sup> Tedds et al., *supra* note 55, at 20; see also Miriam A. Cherry, *Age Discrimination in the On-Demand Economy and Crowdwork*, 40 BERKELEY J. EMP. & LAB. L. 29, 48 (2019); Tarik Dogru et al., *The Airbnb Paradox: Positive Employment Effects in the Hospitality Industry*, TOURISM MGMT., Apr. 2020, at 1, 3.

<sup>193</sup> Levine-Schnur & Ofir, *supra* note 1, at 614 (citing Dimitri Ioannides et al., *Airbnb as an Instigator of ‘Tourism Bubble’ Expansion in Utrecht’s Lombok Neighbourhood*, 21 TOURISM GEOGR. 822, 828 (2019); Nieuwland & van Melik, *supra* note 3, at 812 (citing Jefferson-Jones, *supra* note 94; Bei & Celata, *supra* note 12).

<sup>194</sup> Tedds et al., *supra* note 55, at 18.

<sup>195</sup> *Id.* at 1–2; Nieuwland & van Melik, *supra* note 3, at 818–19.

<sup>196</sup> Tedds, *supra* note 55, at 21; Green et al., *supra* note 165.

<sup>197</sup> See generally Shelley Kreiczer-Levy, *Destabilized Property: Property Law in the Sharing Economy*, 172 (CAMBRIDGE UNIV. PRESS 2019) (citing Sofia Ranchordás & Abram Klop, *Data-Driven Regulation and Governance in Smart Cities*, RSCH. HANDBOOK ON DATA SCI. & L. 245 (A Berlee et al. eds., 2018)) (“There is a growing concern that the city will not protect its residents, will exclude members who do not fit its vision, monetize common resources, or ignore local customs and needs.”).

<sup>198</sup> BNLA REPORT, *supra* note 128, at 1.

non-compliant STRs.<sup>199</sup> However, it did not have an owner-occupied requirement, meaning operators did not have to be present when guests were there.<sup>200</sup> The regulation limited renting STRs to 120 days per year or less unless operators purchased a more expensive permit (\$982 annually instead of \$183).<sup>201</sup>

After Los Angeles passed these regulations, the city observed a 50% decline in Airbnb listings and a 2% reduction in house prices and rents.<sup>202</sup> Another study similarly found a 3% reduction in house prices and rents.<sup>203</sup> However, Los Angeles failed to adequately enforce these regulations, leading to a proliferation of illegal STRs.<sup>204</sup> This situation prompted formation of the community group BNLA, “a coalition of Southern California hosts, tenants, housing activists, hotel workers, and community members,” dedicated to reducing illegal STRs in Los Angeles by supporting the enforcement of the city’s STR ordinance.<sup>205</sup>

BNLA found that between November 2020 and October 2022, amid the post-COVID-19 travel and home buying boom, Los Angeles experienced a 3% increase in STR listings, a notable 28.5% increase in STR nights occupied, and a staggering 54.5% increase in Airbnb revenue.<sup>206</sup> During this same period, identifiable illegal listings surged by 14%, likely an underestimated figure, with approximately 34% of all hosts found to be non-complaint.<sup>207</sup> Despite the increase in STR permits and illegal listings, Los Angeles issued 54% fewer warning letters to illegal hosts, had an 85% decrease in illegal host fines, routinely failed to fine STR platforms, and potentially lost \$3,482,370.74 in fine revenue for the city.<sup>208</sup>

The report identified several regulatory enforcement oversight failures, including (1) not taking steps to enforce the ordinance against either STR operators or STR platforms; (2) failing to gather the data necessary to enforce and not using compliance data and illegal STR URL lists generated by the city’s contractor to enforce; (3) the inability to enforce the 120 day rental cap; (4) only responding to complaints at registered STRs while ignoring complaints of illegal STRs and not conducting house visits at illegal STRs; and (5) rarely issuing or collecting fines from STR operators, underutilizing daily fines, and not fining STR platforms at all.<sup>209</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 2 (citing Koster et al., *supra* note 75, at 18).

<sup>203</sup> Li, *supra* note 21, at 8018 (citing Koster et al., *supra* note 76, at 18).

<sup>204</sup> BNLA REPORT, *supra* note 128, at 19.

<sup>205</sup> *Id.* at 3.

<sup>206</sup> *Id.* at 15.

<sup>207</sup> *Id.* at 16.

<sup>208</sup> *Id.* at 19, 27.

<sup>209</sup> *Id.* at 25–30.

Los Angeles blamed STR platforms. It said the platforms could not be trusted, and enforcement was impossible without their cooperation. The city claimed that absent an STR platform contractually agreeing to it, they could not enforce the requirement for platforms to share registration numbers, names, addresses, and booking dates, also making it impossible to enforce the 120 day rental cap.<sup>210</sup> STR platforms refused to remove illegal posts flagged by the city.<sup>211</sup> Despite having the authority to do more, 96% of the city's STR operator enforcement actions were warning letters, with only 4% being fines.<sup>212</sup> As staffing was an issue, fines could have generated needed funds. There is no explanation for why platforms were not fined, though it appears platforms prefer to fight fines rather than pay them, as only one platform agreed to pay a fine for repeated violations.<sup>213</sup>

From the outside, it looks like Los Angeles got overwhelmed and gave up. Thus, the BNLA was born, and it shared several recommendations: (1) hold STR platforms accountable; (2) collect and use data to quickly issue maximum and meaningful fines and remove illegal STRs; (3) list every permissible STR on a public website and investigate reports by the public about illegal STRs; (4) increase staffing for enforcement; (5) compel compliance through increased litigation against platforms and operators; (6) and that Los Angeles conduct a performance audit on its enforcement efforts.<sup>214</sup> Utilizing a different approach than Los Angeles, New York City provides a great study on strict enforcement and increased litigation against platforms.

## 2. New York City: A Case Study in Regulatory Offense

New York City has pursued strict STR enforcement from the beginning and is arguably the most aggressive STR enforcer in the country. Understanding the evolution of their legislative history is crucial for applying lessons learned to other localities. In 2010, New York City amended the New York State Multiple Dwelling Law (MDL), making it illegal to rent out most New York City apartments in buildings with three or more units for fewer than thirty days unless the permanent tenant was also present during the rental period.<sup>215</sup> This regulation aimed to preserve residential housing and prevent illegal hotels, but it was passed prior to STR platforms becoming a policy concern.<sup>216</sup>

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<sup>210</sup> *Id.* at 25.

<sup>211</sup> *Id.* at 25–26.

<sup>212</sup> *Id.* at 29.

<sup>213</sup> *Id.* at 25.

<sup>214</sup> *Id.* at 32–35.

<sup>215</sup> Roberta A. Kaplan & Michael L. Nadler, *Airbnb: A Case Study in Occupancy Regulation and Taxation*, 82 U. CHI. L. REV. ONLINE 111 (2017) (citing N.Y. MULT. DWELL. L. § 4(8)(a)).

<sup>216</sup> *Id.* at 111.

Despite the law's language resembling current owner-occupied STR regulations, Airbnb argued it did not apply to them, stymying enforcement efforts.<sup>217</sup> Airbnb used the law's legislative history and an exception in the law allowing "house guests, or lawful boarders, roomers or lodgers," to stay for less than thirty days to support its case.<sup>218</sup> The New York City Environmental Control Board sided with Airbnb, as this exception did not require guests to be a personal acquaintance of the homeowner.<sup>219</sup> In a similar case, a court upheld Airbnb rentals by interpreting the law as only banning the primary use of a dwelling as STRs, not its secondary use, and banning STRs as a majority building use.<sup>220</sup> A perfect example of regulatory entrepreneurship, Airbnb stifled New York City's enforcement efforts and used the legal system to change the law in its favor, citing its lack of market presence when applicable laws were passed.<sup>221</sup>

In 2016, New York City strengthened its ability to police the 2010 MDL language by making it illegal to *advertise or sublease anything other than the permanent residential use* of a dwelling, enabling enforcement *before* an STR is even rented.<sup>222</sup> The City also imposed fines on hosts advertising illegal STRs, with penalties set at \$1,000 for a first-time offense, \$5,000 for a second, and \$7,500 for a third.<sup>223</sup> The City intended to use these funds to proactively regulate and prosecute hosts for illegal listings.<sup>224</sup> Airbnb challenged this law but dropped the suit when the City promised that it would only prosecute hosts, not platforms, and confirmed that the rules only applied within New York City, not statewide.<sup>225</sup> Despite the law's strictness, "the revenue to Airbnb from rentals in New York City increased from \$610 million dollars in 2016 to \$805 million dollars in 2018."<sup>226</sup>

<sup>217</sup> *Id.* at 109–10.

<sup>218</sup> *Id.* at 111 (citing N.Y. MULT. DWELL. L. § 4(8)(a)(1)(A)) ("The law was passed in 2010, only one year after Airbnb first entered the New York market, and was responsive to an issue that predated Airbnb's existence. The issue involved "illegal hotels": certain landlords sought to evict tenants from their apartments to remove that housing stock from the rental market and operate it as full-time transient housing. Indeed, the legislation's primary sponsor, New York State Senator Liz Krueger, has repeatedly explained that it was not intended to target Airbnb or its users.").

<sup>219</sup> *Id.* at 111 (citing *City of New York v. Abe Carrey*, Appeal Nos 1300602 and 1300736, 5–6 (N.Y. Envir. Control Bd. Sept. 26, 2013)).

<sup>220</sup> Moshe Goldblatt, *NYC v. Airbnb: New York City's Attempt to Regulate Home-Sharing Platforms and Airbnb's Attempt to Fight Back*, 3 CARDOZO INT'L & COMP. L. REV. 1305, 1308 (2020) (citing *City of New York v. 330 Continental LLC*, 873 N.Y.S.2d 9 (App. Div. 2009)).

<sup>221</sup> *Id.* at 1306.

<sup>222</sup> *Id.* at 1312 (citing 45–47 S. 2016, 8704-C (N.Y. 2016)).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 1312–13 (citing Greg Bensinger, *Airbnb Settles New York State Suit, Focusing on City*, WALL ST. J. (Nov. 22, 2016), [http://www.wsj.com/articles/airbnb-drops-new-york-state-suit-focusing-on-city-1479849933?reflink=desktopwebshare\\_permalink](http://www.wsj.com/articles/airbnb-drops-new-york-state-suit-focusing-on-city-1479849933?reflink=desktopwebshare_permalink)).

<sup>226</sup> Goldblatt, *supra* note 220, at 1313 (citing *Revenue of Airbnb in New York City, Market Overview*, New York, AIRDNA, <https://www.airdna.co/vacation-rental-data/app/us/new-york/new-york/overview> [<https://perma.cc/9UTC-3CX4>]).

In 2018, New York City passed Local Law 146, also known as the “Homesharing Surveillance Ordinance,” in another attempt to crack down on illegal listings. This law required STR platforms, as “booking services,” to share monthly data with the Mayor’s Office of Special Enforcement (OSE), including host names, addresses, how many days the home was rented and compensation received.<sup>227</sup> Airbnb and HomeAway both filed actions in what became a consolidated lawsuit against the ordinance.<sup>228</sup> The case settled when the City agreed to limit the scope of the data collection to protect host privacy and delayed the implementation, and thus platform reporting duty, until January 2021.<sup>229</sup> This settlement lacked teeth as it let “booking services” (i.e., platforms) periodically self-report illegal listings and assessed a fine of up to \$1,500 or total fees collected on a transaction.<sup>230</sup>

In January 2022, New York City enacted Local Law 18, known as the STR Registration Law, which mandated that all STR hosts register with the OSE to obtain a registration number and to agree to turn over their STR transaction data to OSE upon request.<sup>231</sup> The registration number must be included in STR listings, facilitating enforcement through web scraping and new platform requirements.<sup>232</sup> Fines for illegal operators also increased to up to \$5,000 per violation.<sup>233</sup> Moreover, the STR Registration Law made it illegal for “booking services” to “charge, collect or receive a fee from a person in connection with a short-term rental” without first verifying with the OSE that the STR has a valid registration.<sup>234</sup> This part of the law targeted platforms directly, and meaningfully, resulting in push back from these platforms.

Local Law 18, New York City’s strictest ordinance, took effect in September 2023.<sup>235</sup> Due to Airbnb’s marketing and misleading news, many believe all legislation from 2016 to 2023 was passed in 2023.<sup>236</sup> However,

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<sup>227</sup> Council of City of N.Y. Intro. No. 0981-A, amending N.Y. ADMIN. CODE § 26-2101-04 (Aug. 6, 2018), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3522047&GUID=BD0FAC13-E6DD-4C55-8376-CD82F1093402> [<https://perma.cc/D8UN-AKUJ>].

<sup>228</sup> Goldblatt, *supra* note 220, at 1317–18 (citing *Airbnb, Inc. v. City of New York*, 373 F.Supp. 3d 467 (S.D.N.Y. Jan. 3, 2019)).

<sup>229</sup> Settlement & Release Agreement, *City of New York*, 373 F.Supp. 3d 467 (No. 157-1) (June 12, 2020), <https://www.citylandnyc.org/wp-content/uploads/sites/14/2020/06/airbnbny-settlement-and-release-agreement.pdf> [<https://perma.cc/X553-255X>].

<sup>230</sup> *Id.*

<sup>231</sup> N.Y.C. ADMIN. CODE §§ 26-3101–3201 (2024).

<sup>232</sup> *Id.* at § 26-3102.

<sup>233</sup> *Id.* at § 26-3203.

<sup>234</sup> *Id.* at § 26-3202.

<sup>235</sup> *Short-Term Rental Registration and Verification by Booking Services*, New York Office of Special Enforcement, <https://www.nyc.gov/site/specialenforcement/registration-law/registration.page> (last visited Nov. 4, 2024).

<sup>236</sup> For an example of one such misleading news report, see Andrea Sachs, *What New York City’s New Airbnb Rules Mean for Travelers*, WASH. POST (Sept. 6, 2023), <https://www.washingtonpost.com/travel/2023/09/01/nyc-airbnb-rules-local-law-18/> [<https://perma.cc/U9Q3-BBJJ>].

Local Law 18 mainly added registration requirements, higher fines, and blocking payments to platforms if they listed an unregistered STR.<sup>237</sup> As the law impacted platforms significantly,<sup>238</sup> Airbnb called it a de facto ban and labeled it “extreme and oppressive” to influence public opinion.<sup>239</sup> Like the other owner-occupied regulations discussed thus far, New York City’s law is not a ban—it is a partial ban, and the City’s owner-occupied regulation technically dates back to 2010, with its legal recognition as an STR restriction starting in 2016.<sup>240</sup> The only meaningful difference between the 2016 law and the current law is that now STR platforms cannot make money facilitating illegal STR transactions. This would certainly put platforms in a panic, as “more than half of Airbnb’s \$85 million net revenue in 2022 from [STRs] in New York City came from activity that is illegal.”<sup>241</sup> Airbnb filed suit to stop the ordinance, but the judge found that Airbnb lacked standing to sue as the regulations were “entirely rational” and avoided the strictest alternative of an outright ban.<sup>242</sup>

It is too soon to measure the real impact of Local Law 18. However, three months after it went into effect rental costs in Manhattan and Brooklyn decreased.<sup>243</sup> Listings on Airbnb decreased as well—in May 2022 there were over 10,000 Airbnb listings for New York City and by February 2024, there were around 1,000.<sup>244</sup> Most renters appear to be converting their STRs to LTRs, as hoped, as rental stays for longer than twenty-eight days are up 37%.<sup>245</sup> STR rentals in nearby Jersey City are also up.<sup>246</sup> While the prevalence appears limited, some illegal operators have switched their listings to social media (e.g., Craigslist, Facebook) or other websites that do not serve as booking agents.<sup>247</sup>

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<sup>237</sup> *See id.*

<sup>238</sup> *See id.*

<sup>239</sup> *See id.*

<sup>240</sup> Holden Walter-Warner, *City Fines Short-Term Landlords \$16M After Crackdown*, REAL DEAL (July 17, 2024), <https://therealdeal.com/new-york/2024/05/15/city-issues-16m-in-fines-in-post-airbnb-crackdown/> [<https://perma.cc/PQ24-VLGV>].

<sup>241</sup> *See* Mihir Zaveri, *New York City’s Crackdown on Airbnb is Starting. Here’s What to Expect*, N.Y. TIMES (Sept. 5, 2023), <https://www.nytimes.com/2023/09/05/nyregion/airbnb-regulations-nyc-housing.html> [<https://perma.cc/9UMY-LLBK>].

<sup>242</sup> *Airbnb, Inc. v. New York City Mayor’s Off. of Special Enforcement*, 2023 N.Y. Misc. LEXIS 4044, 2023 NY Slip Op 32740(U) (N.Y. Sup. Ct. Aug. 8, 2023).

<sup>243</sup> Ginia Bellafante, *Can a New Law Force Airbnb Hosts to Become Landlords?*, N.Y. TIMES (Feb. 8, 2024), <https://www.nytimes.com/2024/02/09/nyregion/nyc-airbnb-rentals.html> [<https://perma.cc/WBG2-K6HV>].

<sup>244</sup> *Id.*

<sup>245</sup> *Should I Allow for Long-Term Rental Airbnb Guests?*, HOSTAWAY, <https://www.hostaway.com/blog/long-term-rental-airbnb-guests/> [<https://perma.cc/WDL5-CM5V>].

<sup>246</sup> Dennis Schaal, *Airbnb Defacto Ban in NYC Spurs ‘Staggering’ Gains in New Jersey*, SKIFT (Jan. 26, 2024), <https://skift.com/2024/01/26/airbnb-defacto-ban-in-nyc-spurs-staggering-gains-in-new-jersey/> [<https://perma.cc/SJ7J-DBDC>].

<sup>247</sup> Kim Velsey, *The ‘Airbnb Alternative’ Black Market*, CURBED (Nov. 28, 2023), <https://www.curbed.com/2023/11/airbnb-alternative-black-market-craigslist-nyc-crackdown.html> [<https://perma.cc/WAD7-ETKP>].

We identify the following key lessons from these case studies. When localities like Los Angeles engage in regulatory enforcement oversight, illegal operators and STR platforms exploit the resulting loopholes, overwhelming local governments to the point where enforcing seems futile. New York City on the other hand did not engage in regulatory enforcement oversight. It recognized before 2016 that *the only way to regulate illegal STRs is to prevent them from being listed in the first place*. Every aggressive legislative and litigious effort undertaken from that point on appears *targeted to address one clear enforcement goal*.<sup>248</sup> While not a panacea, especially as New York City is learning as it goes, current regulations have thus far reduced illegal listings and aligned resources around a single enforcement target. New York City was also understaffed and unable to go after all culprits, so it targeted commercial illegal STR operators to deter new commercial market entrants and to generate higher fine revenue to fund additional enforcement efforts.<sup>249</sup> Since 2012, the City has collected over \$16.3 million in fines for legal violations.<sup>250</sup>

We also note a concerning problem in both cases. STR platforms are not just using regulatory arbitrage to exploit legislative loopholes, they are actively using it to undermine local government police power authority while hiding behind a Section 230 shield. This poses a constitutional problem. Legislative and litigious solutions to these problems are addressed next.

### III. PLAY OFFENSE, NOT DEFENSE, TO ENFORCE

Local governments cannot draft effective, enforceable STR regulations until the phrase “We’ve never done it that way before” leaves the bureaucratic vernacular and is replaced with an adaptable and continuous improvement mindset. This is easier to do with a clear goal, which we now have. The best way to reduce regulatory enforcement oversight and achieve affordable housing gains is to prevent illegal STRs from listing their properties. When illegal STRs do list their properties, authorities must catch and heavily fine them. This approach protects affordable housing, neighborhood character, and social or need-driven *legal* STR operators.<sup>251</sup> As demonstrated, regulatory entrepreneurs will do everything in their power to undermine local government police power authority to

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<sup>248</sup> Goldblatt, *supra* note 220, at 1312–13.

<sup>249</sup> *Id.* at 1316.

<sup>250</sup> Walter-Warner, *supra* note 240.

<sup>251</sup> Interestingly, “one-third of sharing economy participants are socially motivated,” as opposed to profit motivated, as they enjoy company, meeting new people, and educating others on where they live. Tedds et al., *supra* note 55, at 9 (citing Eliane Bucher et al., *What’s Mine is Yours (for a Nominal Fee)—Exploring the Spectrum of Utilitarian to Altruistic Motives for Internet-Mediated Sharing*, 62 COMPUTS. HUM. BEHAV. 316, 322 (2016)).

block illegal listings.<sup>252</sup> In this Section, we examine case law that supports legislative mandates requiring STR platforms to crack down on illegal listings, we update the gold standard with a focus on strategies to combat illegal STRs, and we explore both litigious and legislative approaches to Section 230 platform immunity as applied to STR regulations.

### A. *Section 230 Is a Punctured Shield*

Lessons from New York City make clear that the most effective way to enforce against illegal listings is to prevent them from being listed in the first place. Securing assistance from STR platforms on data sharing *and* removing illegal postings is *vital* to prevent such listings.<sup>253</sup> However, STR platforms have no incentive to help local governments enforce regulations. STR digital platforms increase their value by *both* increasing the number of hosts listed on their platform *and* by increasing the number of guests staying at STRs, as they profit from each.<sup>254</sup> For example, Airbnb collects “a flat fee of three percent of the total booking price, and guests pay Airbnb service fees of around 14 percent of the total booking price.”<sup>255</sup> This makes diverse local regulations a nuisance that complicates their business model and increases operational costs. Platforms have operated outside the law for too long, and it is time to rain them in.

New York City’s decision to make it illegal for platforms to profit from an illegal STR was in response to developing case law.<sup>256</sup> Platforms use Section 230 of the Communications Decency Act to shield themselves from liability, claiming speech protections.<sup>257</sup> Since STR platforms do not own property, they argue that they are speech providers that offer STR listing content on their websites, giving them the ability to “enable, verify, and validate transactions between guests and hosts.”<sup>258</sup> They also use Section 230 as a sword, shifting enforcement responsibility to STR hosts while refusing to “place warnings on individual listings where STRs are banned by local regulations or violate lease agreements . . . resulting in renters unfairly discovering ‘their weekend home is illegal when they get

<sup>252</sup> See *supra* Section I.B.2.

<sup>253</sup> Bei & Celata, *supra* note 12, at 10.

<sup>254</sup> *Id.* at 7–8. Millennials book 60% of all Airbnb listings. *Id.* at 13.

<sup>255</sup> Garfield & Ross, *supra* note 82, at 53 (2023) (quoting Airbnb Resource Center, *How Much Does Airbnb Charge Hosts*, AIRBNB (Nov. 16, 2020), <https://www.airbnb.com/resources/hosting-homes/a/how-much-does-airbnb-charge-hosts-288> [<https://perma.cc/LWL7-VWM5>]).

<sup>256</sup> See *supra* Section II.B.2.

<sup>257</sup> Samuel McNeal, *Fraud on Airbnb: How to Regulate an Emerging and Problematic Industry*, 44 J. NAT’L ASS’N ADMIN. L. JUDICIARY 146, 149 (2023) (citing *Airbnb, Inc. v. City and County 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)).

<sup>258</sup> Tedds et al., *supra* note 55, at 7; see also *HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683, 686 (9th Cir. 2019).



a knock on the door.”<sup>259</sup> While there is hope the U.S. Supreme Court will address the misinterpretation of Section 230 that creates market inequities, so far, it has not.<sup>260</sup> Case law from San Francisco, Santa Monica, and Boston, where platforms sued for a preliminary injunction to bar ordinance enforcement and lost, is advancing the regulatory cause for STRs.

San Francisco sought to mandate STR platform compliance by making it a misdemeanor to “provide booking services for unregistered rental units.”<sup>261</sup> The court held that this provision did not violate Section 230 or the First Amendment but did require the City to develop a “functional verification system” whereby it could provide Airbnb a list of valid registered rentals.<sup>262</sup> The parties then settled, with Airbnb agreeing to comply with language that made it illegal for STR platforms to *derive profit from any booking of an illegal listing*.<sup>263</sup> In *HomeAway.com, Inc. v. City of Santa Monica*, the court upheld a similar ordinance, which stopped the collection of booking fees for unregistered properties.<sup>264</sup> The court found this regulation legal as these transactions are nonspeech, non-expressive conduct that do not implicate the First Amendment or Section 230.<sup>265</sup> That same year, in *Airbnb, Inc. v. City of Boston*,<sup>266</sup> a court upheld a comparable east coast ordinance, ruling that liability for illegal posting was based on Airbnb being merely a “booking agent and payment processor.”<sup>267</sup>

STR regulations across the country should adopt this language. STR platforms, as regulatory entrepreneurs, will push back. Local governments must maintain strict enforcement and resist the pressure to sign a Memorandum of Understanding (MOU) or settle lawsuits with platforms—tools platforms use to manipulate local governments. For example, the platform asked the city of Denver to sign MOU confidentiality language that required Denver to resolve all disputes with the platform through

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<sup>259</sup> Nicole Schaeffer, *Federal Protection of Illegal Short-Term Rentals: How the Protecting Local Authority and Neighborhoods Act Will Hold Airbnb Liable, Enforcing Local Regulation*, 72 CATH. U. L. REV. 127, 128–29 (2023) (citing Marvin J. Nodiff, *Short-Term Rentals: Can Cities Get in Bed with Airbnb?*, 51 URB. LAW. 225, 254–55 (2021)); see also Anna Tims, *During a Stay with Airbnb, We Were Told the Let Was ‘Illegal’*, GUARDIAN (July 14, 2022), <https://www.theguardian.com/money/2022/jul/14/during-a-stay-with-airbnb-we-were-told-the-let-was> [<https://perma.cc/3R2B-FBQL>].

<sup>260</sup> See *Gonzalez v. Google LLC*, 143 S. Ct. 1191, 1192 (2023) (avoiding ruling on the merits in).

<sup>261</sup> *City & County of San Francisco*, 217 F.Supp. 3d at 1069.

<sup>262</sup> *Id.* at 1080.

<sup>263</sup> *City of Santa Monica*, 918 F.3d at 680.

<sup>264</sup> *Id.* at 676–77.

<sup>265</sup> *Id.*

<sup>266</sup> *Airbnb, Inc. v. City of Boston*, 386 F.Supp. 3d 113, 113–14 (D. Mass. 2019).

<sup>267</sup> *Id.* at 122; see also Kristine Morr, *Challenges to New York City’s Short-Term Rental Regulations*, COLUMBIA BUS. L. REV. (Nov. 16, 2023), <https://journals.library.columbia.edu/index.php/CBLR/announcement/view/669> [<https://perma.cc/77D2-VKTA>].

arbitration in exchange for the platform “disclosing data, posting property registration numbers and removing illegal listings.”<sup>268</sup> Denver declined. When cities do sign MOUs whereby platforms agree to take down illegal listings, the platforms avoid policing the listings, and instead make cities send them a list of suspicious properties.<sup>269</sup> When a list is sent, platforms do not consistently remove illegal listings.<sup>270</sup> This results in a double loss: valuable rights are given up and costly enforcement is not alleviated. This manipulation by platforms demonstrates that they are not acting as mere service providers—they *actively* work to stop local governments from blocking illegal listings.

### B. Update the Gold Standard

To be clear, the following legislative language is not put forth as a solution to illegal STR woes. It merely uses research and current legislation to update the *minimum* gold standard in a world where web scraping and platform illegal “booking” profit restrictions are the primary enforcement tools. It is hoped that stronger tools will emerge in the future. We also do not explore the wealth of ancillary restrictions adopted across the country (e.g., occupancy limits, restricting STRs to certain zip codes or boroughs, caps on the total number of STRs), leaving their adoption to address unique local needs. Ancillary restrictions that make STR regulations confusing, unenforceable, or contrary to policy intent, are not recommended. For instance, we do not recommend tiered regulations that assign different permits and different rules based on ownership classifications.<sup>271</sup>

In summary, the updated *minimum* gold standard to combat illegal STRs is as follows:

- A 365-day owner-occupied requirement which also prohibits rentals while the owner is away or on vacation. Do not offer legacy exemptions for existing

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<sup>268</sup> LEE ET AL., *supra* note 6, at 29 (citing Conrad Swanson, *Frustrated Denver Officials Reject Deal with Airbnb*, DENVER POST (Feb. 14, 2020), <https://www.denverpost.com/2020/02/14/denver-airbnb-agreement> [<https://perma.cc/6KR5-DGMA>]).

<sup>269</sup> *Id.* Platforms have even violated MOUs that require them to remit taxes automatically when a booking is made. Multiple cities, including Charleston, are suing STR platforms for unremitted taxes. It has even been said that STR platforms have been known to put in the taxing agreements that they are not accountable for remitting *accurate* tax payments. *Id.* at 27 (citing Andrew Brown, *SC Cities Sue Airbnb and Other Short-Term Rental Companies for Not Paying Local Taxes*, POST & COURIER (May 19, 2022), [https://www.postandcourier.com/business/real-estate/sc-cities-sue-airbnb-and-other-short-term-rental-companies-fornot-paying-local-taxes/article\\_f44f0f60-9bb9-11eb-a4b5-636eb8976c0f.html](https://www.postandcourier.com/business/real-estate/sc-cities-sue-airbnb-and-other-short-term-rental-companies-fornot-paying-local-taxes/article_f44f0f60-9bb9-11eb-a4b5-636eb8976c0f.html) [<https://perma.cc/89F8-VT4N>]).

<sup>270</sup> Donna Bryson, *Denver Cracks Down on Unlicensed Short-Term Rental Hosts—Through the Platforms*, DENVERITE (Nov. 23, 2020, 7:03 pm), <https://denverite.com/2020/11/23/denver-cracks-down-on-unlicensed-short-term-rental-hosts-through-the-platforms/> [<https://perma.cc/45H5-LRUG>].

<sup>271</sup> See Nieuwland & Melik, *supra* note 3, at 820.

whole-home STRs, as this practice essentially permits illegal STRs to operate and makes web-scraping data unreliable.<sup>272</sup>

- A “One Host, One Home” restriction, which prohibits each host from renting more than one STR.<sup>273</sup> This language should also prohibit renting a whole duplex, triplex, or apartment while living in one of its units.<sup>274</sup>
- A requirement to register all STRs with the city, and update annually, with documentation requirements necessary to validate the legality of the STR. A residency requirement can also be added if legal in the jurisdiction.
- Require a current valid registration number on all STR listings *and advertisements*,<sup>275</sup> regardless of how or where the listing is posted.<sup>276</sup>
- Registrants should attest during the registration process that all the information they provide is true and accurate, that they consent to sharing STR rental information and periodic STR inspections, and that they agree to abide by all local, state, and federal rules, including non-discrimination rules.<sup>277</sup>
- Pierce Section 230 and make it illegal for platforms or any other entity or service provider that helps enable, verify, or validate transactions between guests and hosts to derive a profit from the booking of any unregistered, whole-home, or otherwise verifiable illegal listing.<sup>278</sup> This requirement should be combined with a monthly electronic reporting requirement disclosing names and addresses of illegal operators.
- Ban commercial entities by requiring STR operators to carry \$1,000,000 of personal injury and property liability insurance and requiring that “only natural persons aged eighteen or older may own a property used as a

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<sup>272</sup> See *supra* Section II.A and related discussion.

<sup>273</sup> See *supra* Section I.B.2.

<sup>274</sup> *Id.* From an enforcement perspective, it is easier to scrub data to search for a host being registered multiple times than it is for a city to identify whether a host really owns or is residing at the STR property.

<sup>275</sup> We added the advertisement language to also address STRs listed on social media like Craigslist and Facebook Marketplace. It is advisable to make regulatory definitions against platforms as broad as possible.

<sup>276</sup> *Id.*

<sup>277</sup> See *infra* notes 284–90 and related text.

<sup>278</sup> See *supra* Section III.B and related discussion.

non-commercial STR. Ownership, in whole or in part, by a business entity, trust, or any other juridical person is prohibited.”<sup>279</sup>

- Ban STRs in rent-controlled buildings.<sup>280</sup>
- Fines should be of a deterrable amount, such as \$1,000 for a first offense, \$5,000 for a second, and \$7,500 for a third.<sup>281</sup> After the third offense, the license should be suspended or revoked.
- Authorities should issue fines for a first offense, not warning letters. The fines should continue to accrue during any appeals process.<sup>282</sup>
- Authorities should assess significant fines, such as \$300 per violation per day, against STRs platforms for deriving a fee from illegal listings and against commercial STRs for continuing to operate an STRs.<sup>283</sup>
- Enact criminal penalties against hosts and platforms for illegal and fraudulent listings. These penalties can initially be criminal misdemeanors, punishable by an additional fine, and escalate to a felony if the illegal usage continues or a larger fraudulent scheme emerges.<sup>284</sup>
- Maintain needed existing provisions, such as the ability to levy taxes and impose safety requirements.<sup>285</sup>

When understaffed, enforcement should prioritize removal of illegal listings by platforms, commercial entities, and fraudulent operators. Funding for resource constraints must come through STR regulation fee structures, fine structures, and tax structures. These funds should be used to advance litigation efforts, hire enforcement staff, purchase enforcement

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<sup>279</sup> NEW ORLEANS, LA., CODE OF ORDINANCES § 26-617(a). Banning commercial operators presents significant challenges. Defining “commercial” within an ordinance and enforcing such a ban is complex, especially when STR platforms often disclose host names but not owners. Even when the owner is disclosed, one business entity can own multiple entities. For example, in Florida it costs less than \$150 per year to open and operate a limited liability company (LLC). While it may be a hassle, it is not cost prohibitive for a corporation to open a different LLC to “own” each property. If the city pursued an LLC with heavy fines or penalties for illegally operating an STR, the LLC could hide behind its corporate veil or just declare bankruptcy and walk away relatively unscathed.

<sup>280</sup> Rent-controlled buildings will switch from LTR to STR usage when able because it is more profitable. *See* Li et al., *supra* note 25, at 8017, 8038.

<sup>281</sup> *See supra* note 193 and accompanying text.

<sup>282</sup> *See supra* Section II.B.

<sup>283</sup> *See, e.g.,* Airbnb, Inc. v. City of Boston, 386 F.Supp. 3d 113, 123 (D. Mass. 2019).

<sup>284</sup> Models include New York City’s flat \$1,000 per violation penalty for making false statements or concealing material facts on an STR application or renewal and San Francisco making it “a misdemeanor to provide booking services for unregistered rental units.” *See supra* notes 159, 219.

<sup>285</sup> Nieuwland & van Melik, *supra* note 3, at 816.

technology, create an online management system that lists legal STRs and has an illegal STR reporting system, and engage in regular STR enforcement communications.<sup>286</sup> Additionally, whether enforcement measures will be done in-house or contracted out to private or non-profit entities must be discussed. Local governments must also effectively market rules to guests, hosts, residents, tourism campaigns, realtors, and local landlord associations.<sup>287</sup> These groups may not comply with regulations they are not aware of or do not understand.<sup>288</sup> Moreover, STR regulations are not static. Localities should use feedback, audits, and mistakes as learning lessons to revisit ordinances and adapt.<sup>289</sup> Cities like Santa Monica, New Orleans, and New York City have revised their ordinances multiple times.<sup>290</sup> Cities should mandate check-in times with stakeholders to see if goals are being achieved to facilitate this process.<sup>291</sup> For example, Fayetteville, Arkansas increased its “occupancy tax rate to better fund the cost of enforcement, adjust[ed] the cap on the number of short-term rentals allowed in the community and require[ed] a unit inspection.”<sup>292</sup>

When local governments form coalitions to study local needs, we recommend that the purpose should not be to make balanced legislative recommendations, but to make recommendations that block the potential exploitation of legislative language by STR platforms, commercial entities, and illegal STRs. Choosing coalition stakeholders that possess enforcement, technological, and communication capabilities that complement local government authority will enhance these efforts.

Local governments must embrace technology, which extends beyond data collection to developing technology-focused regulatory frameworks.<sup>293</sup> Necessary information and tools should not be controlled solely by technology platforms. Platforms exploit regulatory gaps and ambiguities and quickly adjust their business models in response to changing regulations, which can render even updated regulations outdated. This lag between technological advancement and regulatory development is compounded by a lack of digital literacy and technical expertise among local officials, significantly undermining effective enforcement.<sup>294</sup>

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<sup>286</sup> See *supra* notes 136–40 and accompanying text.

<sup>287</sup> LEE ET AL., *supra* note 6, at 44 (citing City of Henderson, *Short-Term Vacation Rentals*, <https://www.cityofhenderson.com/government/departments/community-development-and-services/short-term-vacation-rentals> [<https://perma.cc/Q8JU-7W5B>]).

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 13.

<sup>290</sup> Vicky Liu, *Behind NYC’s Tightening Restrictions on Airbnb and Short-Term Rentals*, CHI. POL’Y REV. (Jan. 31, 2024), <https://chicagopolicyreview.org/2024/01/31/behind-nycs-tightening-restrictions-on-airbnb-and-short-term-rentals/> [<https://perma.cc/74CE-S3FS>].

<sup>291</sup> LEE ET AL., *supra* note 6, at 35.

<sup>292</sup> *Id.*

<sup>293</sup> See generally *id.* at 1.

<sup>294</sup> Kreiczer-Levy, *supra* note 197, at 172 (citing Abhi Nemani, *Data and Dashboards: The Linchpin of the Smart City*, 85 UMKC L. REV. 973 (2017)).

By striving for stability, local governments have, instead, achieved stagnation.<sup>295</sup> Local governments need to adopt adaptive regulatory frameworks that evolve with technological advancements. This includes utilizing big data<sup>296</sup> and artificial intelligence to monitor and predict platform and illegal user behavior, enabling more proactive enforcement.<sup>297</sup> This approach is not unfamiliar, as “smart cities” use technology to gather information on traffic conditions, employ police cameras with monitoring capabilities, and use data to improve the local infrastructure.”<sup>298</sup>

Technology can also be gained through complimentary partnerships. Stakeholders often possess enforcement and communication capabilities that enhance local government efforts. For example, some neighborhoods combat peer-to-peer networks with peer-to-peer enforcement by using apps like *Host Compliance* and *Sublet Spy* to identify and report illegal STR activity.<sup>299</sup> When local governments have a website of all legal STRs and an online illegal STR reporting process, illegal STRs can be identified and inspected more efficiently.<sup>300</sup>

### C. *Be Aggressive, B-E Aggressive!*

Local governments have played the technology platform pawn long enough. Platforms realize that “local political fights generally attract smaller amounts of resources than national fights do.”<sup>301</sup> This allows them to use their financial and political might to their advantage. As algorithm and data masters, they strategically pick their regulatory battles, prioritizing locations that have large, motivated user bases that platforms can directly contact and mobilize into action.<sup>302</sup> This mass grassroots appeal puts significant pressure on executive and legislative bodies and over time can

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<sup>295</sup> Cf. HANOCH DAGAN, *A Liberal Theory of Property*, 151 (CAMBRIDGE UNIV. PRESS 2021) (Stability “demands resistance to *constant* change but not to *any* change.” (quoting *id.* at 212)).

<sup>296</sup> “Big data is a term that refers to the process of predicting individuals’ future behaviors by identifying patterns based on a computer analysis of enormous quantities of complex information.” KREICZER-LEVY, *supra* note 197, at 165 (citing Lior Jacob Strahilevitz, *Towards a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2021 (2013)).

<sup>297</sup> KREICZER-LEVY, *supra* note 197, at 165–66.

<sup>298</sup> *Id.* at 172 (citing Ranchordás & Klop, *supra* note 188).

<sup>299</sup> Anna Joo Kim et al., *Planning and the So-Called ‘Sharing’ Economy/ Can Shared Mobility Deliver Equity?/ The Sharing Economy and the Ongoing Dilemma about How to Plan for Informality/ Regulating Platform Economies in Cities—Disrupting the Disruption?/ Regulatory Combat? How the ‘Sharing Economy’ is Disrupting Planning Practice/ Corporatised Enforcement: Challenges of Regulating AirBnB and Other Platform Economies/ Nurturing a Generative Sharing Economy for Local Public Goods and Service Provision*, 20 PLAN THEORY & PRAC. 261, 262 (2019).

<sup>300</sup> See *supra* notes 130–31.

<sup>301</sup> Pollman & Barry, *supra* note 8, at 418.

<sup>302</sup> *Id.* at 411–12, 419–20 (citing Daniel Roberts, *FanDuel, DraftKings File Lawsuits Against NY Attorney General*, FORTUNE (Nov. 13, 2015, 4:20 PM), <https://fortune.com/2015/11/13/fanduel-draftkings-lawsuits-schneiderman/> [<https://perma.cc/HNJ9-C7F8>]).

even impact the judiciary, as state and local judges are often elected.<sup>303</sup> They also think outside the box—literally—by surrounding resistant cities like Portland with supportive regulations in the adjacent cities, until the pressure to cave becomes insurmountable.<sup>304</sup> The time has come for local governments to play offense, not defense, against STR platforms by using litigation and legislation.

Section 230 has overstepped its bounds. When courts interpreted Section 230's language as meaning STR platforms do not have to police illegal content, they likewise ruled that platforms can unconstitutionally prevent state and local governments from policing illegal content. Local governments must explore all possible legal avenues to address this issue. Although we are not constitutional scholars, we suggest that local governments and the National League of Cities collaborate to file suit and seek declaratory relief, or alternative judgments, that Section 230 is unconstitutional to the extent it impedes enforcement. This argument hinges on the notion that Section 230 exceeds Congress's enumerated powers and violates the Tenth Amendment.<sup>305</sup>

The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>306</sup> Powers explicitly granted to the states, and through them to local governments, are not within the purview of Congress.<sup>307</sup> The Supreme Court has consistently held that police powers, defined as the states' right to protect the health, morals, and safety of their people, are reserved to the states.<sup>308</sup> Police powers trump federal law when Congress *impairs their enforcement*, particularly when the state or local statute aims to protect its citizens rather than stemming

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<sup>303</sup> *Id.* at 421 (citing Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives on Judicial Independence*, 64 OHIO ST. L.J. 3, 9 (2003); Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 666–71 (1999); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 265 (2008)).

<sup>304</sup> *Id.* at 420–21 (citing *Hey Portland, We Are Just Across the River . . . #WeWantUberPDX*, UBER NEWSROOM, <https://newsroom.uber.com/pdx/hey-portland-we-are-just-across-the-river-wewantuberpdx/> (last updated Dec. 7, 2015)). Surrounding municipalities are often a forgotten stakeholder. Once regulations are passed, STRs proliferate in surrounding areas.

<sup>305</sup> See *New York v. United States*, 505 U.S. 144, 156 (1992).

<sup>306</sup> U.S. CONST. amend. X.

<sup>307</sup> *New York*, 505 U.S. at 156 (citing *United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941)).

<sup>308</sup> *McDonald v. City of Chicago*, 561 U.S. 742, 901 (2010) (citing *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (“[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons” (internal quotation marks omitted)); *United States v. Morrison*, 529 U.S. 598, 618 (2000); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976) (“The promotion of safety of persons and property is unquestionably at the core of the State’s police power); *United Auto., Aircraft, and Agric. Implement Workers of Am. v. Wis. Emp. Rels. Bd.*, 351 U.S. 266, 274 (1956)).

from protectionism.<sup>309</sup> Local governments have articulated a clear rational basis to protect affordable housing and neighborhood character for their citizens.<sup>310</sup> While Congress’s authority under the Commerce Clause and Supremacy Clause are formidable, a well-tailored local government challenge could withstand judicial scrutiny and protect citizens from the unintended consequences of Section 230.<sup>311</sup>

Regarding the Commerce Clause claim, local governments can plead in the alternative: first, that the Commerce Clause does not apply to the specific judgement sought, and second, that even if it does, they still prevail. Section 230 was enacted in 1996, prior to the contemplation of STR platforms, to protect internet speech out of fear that failing to do so would have “chilling implications” on the burgeoning internet.<sup>312</sup> “The statute generally precludes providers and users from being held liable for information provided by another person, *but it does not exempt them from liability for information that they have developed or for activities unrelated to third-party content.*”<sup>313</sup> Given that the italicized language falls outside of Congress’s intent to regulate interstate commerce, local governments can combine their evidence of thwarted police power enforcement *by platforms* to include in court pleadings. While not a federal or local government issue, a Florida state court found that Airbnb *developed* information to aid illegal STRs by (1) keeping apartment locations “confidential until a booking is confirmed,” with Airbnb, not the host, then disclosing the address; (2) never asking tenants if they have the legal right to host an STR; (3) never warning tourists when their stays are illegal; (4) actively concealing the identity of illegal users; (5) and refusing to stop brokering illegal rentals even after receiving notice they are in violation of the law.<sup>314</sup> The court determined that fostering internet growth should not equate to “limitless immunity for online activity or conduct.”<sup>315</sup>

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<sup>309</sup> *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 588 U.S. 504, 521–22, 538 (2019) (citing *Mugler v. Kansas*, 123 U.S. 623, 659, 661 (1887); *R.R. Co. v. Husen*, 95 U.S. 465, 472, (1878); *Welton v. Missouri*, 91 U.S. 275, 278 (1876)).

<sup>310</sup> *See supra* Section I.B.1.

<sup>311</sup> U.S. CONST. art. I, § 8, cl. 1, 3; art. VI, cl. 2.

<sup>312</sup> Schaeffer, *supra* note 259, at 132 (citing 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/> [<https://perma.cc/V8GS-ZGNZ>]; 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> [<https://perma.cc/7KFQ-826P>] (explaining that Congress passed Section 230 to encourage review of Internet content without the risk of liability for missing and not removing all potentially harmful content)).

<sup>313</sup> CONGRESSIONAL RESEARCH SERVICE, SECTION 230: AN OVERVIEW 2 (Jan. 4, 2024) [hereinafter CRS REPORT], <https://crsreports.congress.gov/product/pdf/R/R46751> [<https://perma.cc/BR6T-ANTT>].

<sup>314</sup> *Bay Parc Plaza Apts., LP v. Airbnb, Inc.*, No. 2017-003624-CA-01, 2018 Fla. Cir. LEXIS 348 at \*1, \*4 (D. Fla. July 11, 2018) (citing Third Amended Complaint).

<sup>315</sup> *Id.* at \*6; *see also* Schaeffer, *supra* note 259, at 140, 142.



While challenging, local governments can potentially prevail on the merits of a direct commerce clause challenge. State activities are immune from federal regulation under the Commerce Clause if (1) the federal statute regulates states as states, (2) the statute addresses matters of state sovereignty, (3) compliance with the statute impairs state ability to exercise traditional government functions, and (4) the federal interest does not justify state submission.<sup>316</sup> Section 230 regulates states as states in both its purpose and its language.<sup>317</sup> Section 230's purpose was to overrule a New York State Supreme Court decision that held an internet provider liable for a defamatory post by an anonymous user.<sup>318</sup> Congress believed that protecting the growth of the internet required allowing "users and providers of 'interactive computer services' to make their own content moderation decisions, while still permitting liability in certain limited contexts."<sup>319</sup> However, one of the areas of permissible liability is a red herring, and instead regulates states as states. Section 230(e)(3) of the CDA says "[n]othing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."<sup>320</sup> Here Congress disguises an immunity as an usurpation of power. Even the Congressional Research Service (CRS) recognizes that courts have read this provision as "preempt[ing] contrary state law."<sup>321</sup>

The statute also addresses matters of state sovereignty, as compliance with the statute impairs the state's ability to exercise traditional government functions. Courts have interpreted Section 230's "publisher"

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<sup>316</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985) (quoting *Nat'l League of Cities v. Usery*, 426 U.S. 833, at 845, 852, 854 (1976)).

<sup>317</sup> *Bay Parc Plaza Apts.*, 2018 Fla. Cir. LEXIS 348, at \*3.

<sup>318</sup> Schaeffer, *supra* note 259, at 132 (citing Neil Fried, *Fix Section 230 To Hold Online Platforms Accountable*, LAW 360 (June 21, 2021, 4:50 PM), <https://www.law360.com/articles/1393878/fix-section-230-to-hold-online-platforms-accountable> [<https://perma.cc/ZPH8-VUAN>]); *see also* CRS REPORT, *supra* note 313, at 6 (citing *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No.31063/94, 1995 WL 323710 (N.Y. Sup. Ct. 1995)).

<sup>319</sup> CRS REPORT, *supra* note 313, at 8.

<sup>320</sup> 47 U.S.C. § 230(e)(3).

<sup>321</sup> *See* CRS REPORT, *supra* note 313, at 4 (citing *Doe v. GTE Corp.*, 347 F.3d 655, 658 (7th Cir. 2003)).

(*Compare, e.g., HomeAway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 683 (9th Cir. 2019) (holding that an ordinance regulating home rentals "is not 'inconsistent' with the CDA" because it would not impose a duty on websites to monitor third-party content), *with, e.g., Backpage.com, LLC v. McKenna*, 881 F.Supp. 2d 1262, 1273 (W.D. Wash. 2012) (holding that a state criminal law "is likely inconsistent with and therefore expressly preempted by Section 230" because it would impose liability on websites for third-party content). *Cf. Dangaard v. Instagram, LLC*, No. C 22-01101 WHA, 2022 WL 17342198, at 5 (N.D. Cal. Nov. 30, 2022) (citing Section 230(e)(3) and the "policy" provisions in Section 230(b) as additional support for a ruling that Section 230(c)(1) did not bar certain claims)).

immunity as protecting platforms when they decide “whether to publish, withdraw, postpone or alter content.”<sup>322</sup> This judicial interpretation is legally inaccurate and exceeds Congress’s intended scope.<sup>323</sup> Court interpretation that platforms do not have to police illegal listings has estopped local governments from exercising their police powers over illegal listing, perpetuating platform manipulation over sovereign rights. Furthermore, federal interest does not justify state submission. “Every business including hotels, condos, and apartment complexes [must] abide by local regulations. 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?”<sup>324</sup> If STR platforms can succeed in court by arguing that existing laws should not apply to them because STRs were not prevalent when the law was passed, then local governments should likewise be able to argue that Section 230 cannot block their STR enforcement police powers as Section 230 was passed “[t]welve years prior to the creation of Airbnb.”<sup>325</sup> These arguments would also fail under the Supremacy Clause, which only makes congressional laws the “supreme law of the land” provided they do not violate the Constitution or the laws of any state.<sup>326</sup>

Local government should also support legislative changes to Section 230 that restore police power enforcement authority. Section 230, after all, is legislation and unpopular legislation to many, such as hotel lobbies. Samuel McNeal reminds scholars that Section 230 does not legalize fraud, stating that legislation “requiring Airbnb to analyze and disclose its fraud management program and how effective it is” to the Federal Trade Commission (FTC) for public posting on its website would encourage STR platforms to take “reasonable steps” to combat

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<sup>322</sup> CRS REPORT, *supra* note 313, at Overview (citing *Zeran v. Am. Online, Inc.* 129 F.3d 327, 330–31 (4th Cir. 1997)); *see also City of Santa Monica*, 918 F.3d at 681 (citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1102 (9th Cir. 2009)).

<sup>323</sup> *See* CRS REPORT, *supra* note 313, at 1.  
*Force v. Facebook, Inc.*, 934 F.3d 53, 84 (2d Cir. 2019) (Katzmann, J., concurring in part) (“opining that Section 230 as applied creates ‘extensive immunity . . . for activities that were undreamt of in 1996’” and it “[i]t therefore may be time for Congress to reconsider the scope of § 230”); *Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC*, 141 S. Ct. 13, 14–15 (2020) (Thomas, J., statement respecting the denial of certiorari) (“positing that the ‘modest understanding’ of what Section 230 is meant to do based on its text ‘is a far cry from what has prevailed in court’”); 1 R. SMOLLA, *LAW OF DEFAMATION* § 4.86 (2d ed. 2019) (“[C]ourts have extended the immunity in § 230 far beyond anything that plausibly could have been intended by Congress.”).  
*Id.*

<sup>324</sup> Schaeffer, *supra* note 259, at 143.

<sup>325</sup> *Id.* at 132.

<sup>326</sup> U.S. CONST., art. VI, cl. 2.

fraud.<sup>327</sup> More directly, a 2021 Bill titled the Protecting Local Authority and Neighborhoods Act (the “PLAN Act”) was introduced into Congress with the aim of amending Section 230 to make it illegal for platforms to “knowingly facilitate[] illegal leases or rentals of real property.”<sup>328</sup> Removing this immunity from STR platforms would return the onus of enforcement control back to local governments or compel platforms to stand in the shoes of the executive branch and enforce themselves.<sup>329</sup> Although this Bill did not pass Congress, similar legislative efforts could succeed with coordinated support. Passing such a bill will require governments, non-profits, and private entities to work together. Partnering with fair housing, anti-discrimination, and wealth inequality legal and advocacy groups who also seek to amend Section 230 can help to create a more compelling public narrative to pass legislation than “protect police powers.” This broader coalition can emphasize the diverse and significant impacts of STR platforms on communities, thereby generating stronger public and legislative support to amend Section 230.

STR platforms and hosts engage in discriminatory practices.<sup>330</sup> “Fair housing laws prohibit discrimination in the sale or rental of housing for reasons of race, color, religion, sex, familial status, or national origin, with only a few well-defined exemptions.”<sup>331</sup> Title II of the Civil Rights Act of 1964 likewise prohibits public accommodation discrimination, including by hotels.<sup>332</sup> However, STRs, which often operate in private homes, are not subject to the same regulations, allowing owners to choose with whom to share their property.<sup>333</sup> This has freed hosts and platforms from the constraints of non-discrimination, permitting implicit and explicit biases to create a discriminatory market that lacks relational justice.<sup>334</sup> As stated by Nancy Leong and Aaron Belzer:

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<sup>327</sup> Samuel McNeal, *Fraud on Airbnb: How to Regulate an Emerging and Problematic Industry*, 44 J. NAT’L ASS’N ADMIN. L. JUDICIARY, 166–67 (2023).

<sup>328</sup> Schaeffer, *supra* note 259 at 144 (citing *Summary: H.R. 4232 116th Cong. (2019–2020)*).

<sup>329</sup> *Id.* at 149.

<sup>330</sup> See Levine-Schnur & Ofir, *supra* note 1, at 620. “A study found discrimination occurs among landlords of all sizes, including small landlords sharing the property and larger landlords with multiple properties. Applications from guests with distinctively African American names are 16% less likely to be accepted relative to identical guests with distinctively White names.” Levine-Schnur & Ofir, *supra* note 1, at 620 (citing Edelman, *supra* note 17).

<sup>331</sup> Krecizer-Levy, *supra* note 197, at 114 (citing Tim Iglesias, *Does Fair Housing Law Apply to “Shared Living Situations”?* *Or the Troubles with Roommates*, 22 J. AFFORD. HOUSING & COMMUN. DEV. L. 111 (2014)); 42 U.S.C. §§ 3601–91.

<sup>332</sup> Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271, 1274 (2017) (citing 42 U.S.C. § 2000a(b) (2012)).

<sup>333</sup> Krecizer-Levy, *supra* note 197, at 114. *But see* Leong & Belzer, *supra* note 332, at 1304 arguing under the rational in *Singleton v. Gendason*, that once a home owner seeks the help of others to rent, this exemption is forfeited. 545 F.2d 1224, 1227 (9th Cir. 1976).

<sup>334</sup> Dagan, *supra* note 295, at 196–97.

[Platforms] often make race visible to both providers and users by requiring that they create profiles that include names, photographs, and other information. Such profiles may trigger conscious and unconscious bias and result in discrimination even if the parties never meet in person. Moreover, platform economy businesses encourage or even require providers to rate users. Rating systems aggregate biases, and users who are members of disfavored racial categories may begin to receive worse service or, eventually, to be denied service altogether.<sup>335</sup>

For example, STR guests with African American names receive 16% fewer acceptances than those with White names, regardless of the commercial status of the property owner.<sup>336</sup>

STR investing is exacerbating wealth inequality through rising home and rental prices, gentrification, and the commercialization of the American housing market. “According to one study, 78% of Airbnb landlords are individual and corporate investors.”<sup>337</sup> The larger existential issue for society is that homeownership is increasingly leaving the hands of citizens and entering the hands of investors at an alarming rate. Across the country, corporations have been purchasing “modestly priced houses, frequently in neighborhoods with large Black and Latino populations, and converted the properties to rentals.”<sup>338</sup> While large institutional investors own 3% of the housing supply nationally, this figure is significantly higher in certain regions, such as Charlotte, where they owned 20% of the market in 2022.<sup>339</sup> The problem is compounded when smaller investors are accounted for. Senator Jeff Merkley of Oregon noted, “You have created a situation where ordinary Americans aren’t bidding against other families, they’re bidding against the billionaires of America for these houses and it’s driving up rents and it’s driving up the home prices.”<sup>340</sup>

This trend negatively impacts wealth generation and the ability to fund retirement as younger generations are increasingly crowded out of homeownership. Privileged classes crowding out less privileged classes

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<sup>335</sup> Leong & Belzer, *supra* note 332, Abstract, 1274, 1294–95; *see also* Lee Anne Fennell, *Searching for Fair Housing*, 97 B.U. L. REV. 349, 357, 369 (2017) (identifying widespread discriminatory patterns by home seekers).

<sup>336</sup> Levine-Schnur & Ofir, *supra* note 1, at 620.

<sup>337</sup> *Id.* at 619–20 (citing Giovanni et al., *supra* note 77; Tarik Dogru et al., *Airbnb 2.0: Is it a Sharing Economy Platform or a Lodging Corporation?*, 78 TOURISM MGMT. 1, 8 (2020) (arguing that this trend was also observed across all fifty U.S. states: 63.5% of Airbnb hosts had two or more listings, generating as much as 69% of Airbnb’s revenues)).

<sup>338</sup> Ronda Kaysen, *New Legislation Proposes to Take Wall Street Out of the Housing Market*, N.Y. TIMES (Dec. 6, 2023) (“In one neighborhood in east Charlotte, Wall Street-backed investors bought half of the homes that sold in 2021 and 2022.”).

<sup>339</sup> *Id.*

<sup>340</sup> Kaysen, *supra* note 338.

and future generations from homeownership and affordable rents is a form of “wrongful destruction,” or a wrong in rem, where unregulated conduct results in a horizontal wrong against indefinite others.<sup>341</sup> Homeownership ties people to communities, leading to community stability, investment, and social connectedness, including “close, intimate, long-term relationships with cohabitants, family members, neighbors, and friends.”<sup>342</sup> The secondary market for housing, viewed as an investment rather than a primary residence, cannibalizes an already scarce need-based housing supply, driving rental and home prices, and attracting more investors.<sup>343</sup> While not illegal, the social-obligation theory of property asserts that property law is not just about freedom and economics: “It is also about human flourishing and supporting the communities that enable us to live well-lived lives.”<sup>344</sup> Homeownership and home rental should advance societal welfare by providing a personal sanctuary and personal dignity, akin to personhood itself.<sup>345</sup> Private law should prevent privileged classes from depriving others of such personhood simply for investment purposes.<sup>346</sup> To advance these causes, Congress put forth the End Hedge Fund Control of Homes Act of 2023, which would ban new home purchases by hedge funds and require them to divest currently held property over the next ten years.<sup>347</sup> Although it did not pass, local governments should do what is within their means to support similar legislation by providing education information to entities advocating for such bills, particularly when they bolster the enforceability of local STR ordinances.

STR platforms and collaborative consumption generally are here to stay.<sup>348</sup> Their ability to circumvent outdated practices while fostering human connection remains attractive to society.<sup>349</sup> While innovation must persist, it cannot be absolute. Platforms overstep when they manipulate local regulatory authority, engage in uncontrolled discriminatory practices, and economically harm the markets in which they dominate. Indeed, “regulatory entrepreneurs are not saints or altruists; they are profit-seeking actors, and they will generally use their political power to further their profit-seeking goals.”<sup>350</sup> Simply put, regulatory entrepreneurs do not want to

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<sup>341</sup> J.E. Penner, *Property Rights: A Re-examination*, 197 (OXFORD ACAD. 2020).

<sup>342</sup> Kreiczer-Levy, *supra* note 197, at 110.

<sup>343</sup> See generally Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273, 302–03 (2004).

<sup>344</sup> Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 818 (2009).

<sup>345</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 995–96 (1982).

<sup>346</sup> *Id.*

<sup>347</sup> Kaysen, *supra* note 338.

<sup>348</sup> Rachel Botsman & Roo Rogers, *What’s Mine Is Yours: The Rise of Collaborative Consumption*, xvi (HARPER COLLINS, 2010).

<sup>349</sup> *Id.*

<sup>350</sup> Pollman & Barry, *supra* note 8, at 443.

get the socially optimal result, they want the result that is best for them.”<sup>351</sup> This unchecked behavior cannot continue in perpetuity.

### CONCLUSION

This Article examines local STR regulations aimed at addressing affordable housing. The current regulatory gold standard has two minimum requirements. First is an owner-occupied restriction, which is a home-sharing restriction that takes the form of a partial ban in that it limits STRs to specific parts of an owner’s primary residence, such as a room, ancillary dwelling, or guest house. These restrictions may be applied selectively to residential areas within a city and may also mandate that the property owner be present during the rental period, prohibiting rentals while the owner is away. Second is a registration requirement, which is a permitting or licensure system that necessitates hosts to obtain a registration number and pay a fee. The registration number then must be displayed on STR listings to demonstrate compliance. Research shows these regulations are effective, but only when enforced. The mere passage of STR regulations is insufficient to protect affordable housing.

Enforcing illegal STRs is a daunting, if not impossible, challenge across the nation in small, mid-sized and large cities. Key lessons from Los Angeles and New York City case studies teach us several lessons. Governments that implement a balanced-interest legislative approach are engaging in regulatory enforcement oversight by passing regulatory language that cannot be enforced with web scraping and other currently available means. Governments that put blocking illegal STRs before they post at the forefront of all legislative efforts have fared better, but STR platforms are still obstructing their police power authority at every opportunity.

Local governments must make blocking illegal STRs their primary enforcement goal to protect affordable housing and maintain control over their police powers. This will enable them to align resources, legislative changes, and litigation efforts towards a common goal. As the industry continues to evolve, local governments must remain vigilant, adapting regulations to address emerging challenges. They also must litigate aggressively to protect the constitutional rights bestowed upon them.

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<sup>351</sup> *Id.*