FROM THE DIGITAL TO THE PHYSICAL: FEDERAL LIMITATIONS ON REGULATING ONLINE MARKETPLACES

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ABSTRACT

Online marketplaces have transformed how we shop, travel, and interact with the world. Yet, their unique innovations also present a panoply of challenges for communities and states. Surprisingly, federal laws are chief among those challenges despite the fact that online marketplaces facilitate transactions traditionally regulated at the local level. In this Article, we survey the federal laws that frame the situation, especially §230 of the Communications Decency Act (CDA), a 1996 law largely meant to protect online platforms from defamation lawsuits. The CDA has been stretched beyond recognition to prevent all manner of prudent regulation. We offer specific suggestions to correct this misinterpretation to assure that state and local governments can appropriately respond to the digital activities which impact physical realities.

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INTRODUCTION

Imagine you serve on the city council of a mid-size college town. Your constituents are outraged because local landlords are buying small houses near the downtown strip just to list them on a short-term rental site to let to alumni and parents. This behavior is raising housing prices and disrupting the peace and character of neighborhoods, while lining the pockets of landlords. As you try to deal with the angry phone calls, tweets, and emails, you are surprised to learn that federal law restricts what actions you can take to address this intimate local issue. What's the problem? Perhaps the most revered twenty-six words in the United States Code: Section 230 of the Communications Decency Act (CDA).

Section 230 is a 1996 law that was originally designed to protect online websites (think message boards and AOL chatrooms) from defamation lawsuits for user-generated speech. It has been credited as the law that gave us the Internet and launched the digital revolution.[1] Interestingly, over the past twenty-plus years, §230 has been applied to situations far outside the purpose and text of the law—protecting online marketplaces from everything from product liability[2] to obligations under a myriad of state and local rules.[3] As a result, §230 is now the first line of defense for online marketplaces wanting to avoid onerous regulations.

This article challenges existing interpretations of §230 and highlights how it and similar federal laws interfere with state and local government efforts to regulate online marketplaces—particularly those that dramatically shape our physical realities, such as Uber and Airbnb. This article also provides a framework for assessing when a marketplace should be held to account for the activities it facilitates. In line with this theory, we offer specific suggestions to assure that state and local governments can appropriately respond to the challenges presented by online marketplaces.

Section 230 is sacred to many technology companies and tech law scholars, and it is not our intent to discount the contributions the law has made to the modern Internet. However, as Congress revisits the language of the CDA, it is more important than ever before to critically examine its purpose, its benefits, and its harms. Changes are needed to at least §230's interpretation, if not its actual text, to assure that online marketplace are accountable for the negative consequences of their actions—and to assure that state and local governments have the tools needed to appropriately govern.

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1 Derek Khanna, *The Law that Gave Us the Modern Internet—and the Campaign to Kill It*, THE ATLANTIC (Sept. 12, 2013), https://www.theatlantic.com/business/archive/2013/09/the-law-that-gave-us-the-modern-internet-and-the-campaign-to-kill-it/279588/.

2 Inman v. Technicolor USA, Inc., No. 11-666, 2011 WL 5829024 (W.D. Pa. Nov. 18, 2011) (using §230 to protect eBay from liability for defective products sold through its site).

3 *See e.g.* Hill v. StubHub, Inc., 727 S.E.2d 550 (N.C. Ct. App. 2012) (relying on §230 to avoid a anti-scalping regulations), review denied, 736 S.E.2d 757 (N.C. 2013); Complaint at 1, Airbnb, Inc. v. City of Santa Monica, No. 2:16-cv-6645 (C.D. Cal. Sept. 2, 2016); Complaint, Airbnb, Inc. v. Schneiderman, No. 1:16-cv-08239, at *2 (S.D.N.Y. Oct. 21, 2016).

I. THE MARKETPLACES AT ISSUE

Historically, most businesses followed a linear business model,[4] focused primarily on creating goods and services to sell to distributors or customers.[5] Consider the largest companies in the world in 2007: Citigroup, ExxonMobil, General Electric, and Shell Oil.[6] However, in the past decade, sophisticated electronic communications platforms have brought a massive shift. Today, many of the world's largest companies incorporate or are built on platforms,[7] which act as intermediaries between producers and customers or otherwise standardize and shape customer activity.[8]

A *marketplace* is a type of platform that facilitates a commercial transaction—be it the exchange of cash for a ride to the airport, or a night on someone's couch.[9] Marketplaces create the digital space for commerce—reducing transaction costs and allowing people to easily interact and transact.[10] Unlike traditional firms, marketplaces do not create or even acquire the products or services to be sold. Rather, they serve to connect buyers and sellers.[11]

In the following subsections, we briefly describe four online marketplaces raising notable regulatory questions—examples that tend to reoccur in regulatory debates and in the balance of this Article.

A. Craigslist and general-purpose listings

Online communications can facilitate all manner of transactions. Among the earliest, most longstanding, and most flexible is Craigslist, arguably the predecessor and inspiration for the specialized marketplaces that followed.

Craigslist was founded in San Francisco in 1995 by contrarian and philanthropist Craig Newmark, when he first shared upcoming city events with a dozen friends by email.[12] The company eventually evolved into an online classified ad service and enjoyed exceptional

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4 Alex Moazed & Nicholas L. Johnson, Modern Monopolies: What it Takes to Dominate the 21st-Century Economy 22 (2016).

5 MOAZED & JOHNSON, *supra* note 4, at 22.

6 *Global 500 June 2007 Ranks (2007),* FINANCIAL TIMES, http://im.ft-static.com/content/images/6aec81f8-2bd9-11dc-b498-000b5df10621.pdf.

7 By market capitalization, Google (now organized under the umbrella company Alphabet), Amazon, and Facebook are among the world's largest companies. Will Oremus, *Tech Companies Are Dominating the Stock Market as Never Before*, SLATE (July 29, 2016), http://www.slate.com/blogs/moneybox/2016/07/29/the_world_s_5_most_valuable_companies_apple_google_microsoft_amazon_facebook.html. These companies are also among the top ten most powerful brands, save Amazon, which is number twelve. *The List,* FORBES, https://www.forbes.com/powerful-brands/list (last visited January 7, 2018).

8 *See* Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 376–77 (2016).

9 MOAZED & JOHNSON, *supra* note 4, at 29.

10 Transaction costs include search costs, standardizing terms of trade, and distilling vast amounts of information.

11 MOAZED & JOHNSON, *supra* note 4, at 6.

12 Jon Fine, *How Craigslist's Founder Realized He Sucked as a Manager*, INC. (Sept. 2016), https://www.inc.com/magazine/201609/jon-fine/inc-interview-craigslist.html; Ryan Mac, *Craig Newmark Founded Craigslist To Give Back, Now He's a Billionaire*, FORBES (May 3, 2017, 1:16 PM), https://www.forbes.com/sites/ryanmac/2017/05/03/how-does-craigslist-make-money/.

success. By 2017 it offered comprehensive online listing services in 727 cities in 78 countries.[13] Craigslist's categories span the gamut from household goods to jobs to housing to friends and personal listings.

Despite its wide scope in both subject matter and geography, Craigslist retains its bare-bones design, just simple single-colored text on a white background, without graphics or even a logo. The site's architecture remains similarly simplistic—blank screens where users can describe the products they were selling, apartments they were renting, or workers they wish to hire, with Craigslist serving primarily to store and distribute the information. To find the listings they want, most users rely on Craigslist's search feature, which searches the full text of posts. Craigslist also collects limited metadata, self-reported by the users providing listings, such as the condition of an item and the geographic location where it was available. Users can search on these criteria if desired.

Most Craigslist users do business in person, providing an opportunity for in-person inspection of goods, which reduces many kinds of disputes. With in-person transactions, Craigslist saw no need for tracking or reporting reputations of buyers or sellers, for offering any kind of insurance or guarantee, or for providing a payment platform.[14]

Consistent with Craigslist's limited features, the site collects unusually low fees from users. Before 2004, Craigslist was entirely free in all cities except San Francisco.[15] In 2004, Craigslist began charging for certain listings in Los Angeles and New York, ultimately expanding to fees for certain job listings and sales by dealers, as well as for brokered apartment rentals in New York City.[16] All other categories are provided without charge to buyer, seller, or anyone else.[17] Nor does Craigslist seek additional revenue by showing advertising. Rather, Craigslist keeps its costs low (including employing less than fifty people as of 2017,[18] few new features, and a simple site with modest demands on servers and infrastructure), yielding, by all indications, ample profits[19] despite providing most of its services without charge.

Craigslist makes do with a skeleton staff in part because most customer functions are automated. Users can add or delete listings, or reset their passwords, without assistance. Craigslist staff notably does not handle day-to-day disputes about improper listings. Instead, links at the top of each listing let other users "flag" posts that are prohibited for

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13 *Sites*, CRAIGSLIST, https://www.craigslist.org/about/sites (last visited Dec. 22, 2017).

14 *See* Peter High, *The Craig Behind Craigslist and Craigconnects on His Influences and His Passions*, FORBES (Sept. 6, 2016), https://www.forbes.com/sites/peterhigh/2016/09/06/the-craig-behind-craigslist-and-craigconnects-on-his-influences-and-his-passions/ (noting that the founder of Craigslist wanted the site to be simple and effective without any of the "fancy stuff").

15 Elizabeth Mott, *Does Craigslist Charge to Post Jobs*, CHRON, http://smallbusiness.chron.com/craigslist-charge-post-jobs-75712.html (last visited Dec. 22, 2017).

16 *Posting Fees*, CRAIGSLIST, https://www.craigslist.org/about/help/posting_fees (last visited Dec. 22, 2017).

17 Elizabeth Mott, *supra* note 15; *Posting Fees*, *supra* note 16.

18 *Factsheet*, CRAIGSLIST, https://www.craigslist.org/about/factsheet (last visited Dec. 22, 2017) ("40-some craigslist staff work at offices located in San Francisco, CA").

19 *Craigslist Revenue Soars Again*, AIM GRP. (Nov. 29, 2016), https://aimgroup.com/2016/11/29/craigslist-revenue-soars-again/.

violating the Craigslist Terms of Use.[20] When a post receives several such reports, Craigslist software removes it automatically. Craigslist internal software also identifies some posts for automatic removal, and Craigslist staff have the ultimate authority to remove posts as they see fit.[21]

Despite its flagging system, Craigslist faced a variety of complaints about certain categories of listings. Most controversial were the "Adult" listings where critics saw the company facilitating prostitution, sex trafficking, and abuse. Under pressure, including a congressional inquiry, criticism from attorneys general, and campaigns from advocacy groups, Craigslist in 2010 shut this category.[22] Craigslist also faced periodic complaints about the content of listings, for example from housing listings expressing a preference for tenants of a particular race, the subject of 2006 litigation that we discuss in Section IV.B.

B. Uber and ride-hailing

While Craigslist can be used to buy or sell almost anything, Uber and other ride-hailing services[23] specialize in a single type of transaction: transportation. Uber historically presented itself to users with the motto "everyone's private driver,"[24] and most passengers think of the company as a substitute for a taxi.[25] But in legal documents and proceedings, Uber structures its role and responsibility more narrowly, arguing that it is a technology company (Transportation Network Company or "TNC") that creates a marketplace connecting passengers and drivers.[26] With its role framed in that way, Uber claims it is not responsible for the acts or omissions of drivers. Passengers might have all manner of

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[20] *Flags and Community Moderation*, CRAIGSLIST, https://www.craigslist.org/about/help/flags_and_community_moderation (last visited Nov. 5, 2017).

[21] *Flags and Community Moderation*, *supra* note 20.

[22] Claire Cain Miller, *Craigslist Says It Has Shut Its Section for Sex Ads*, N.Y. TIMES, (Sept. 15, 2010), http://www.nytimes.com/2010/09/16/business/16craigslist.html.

[23] Similar services include Lyft and Fasten in the US, Grab in Southeast Asia, and Didi Chuxing in China.

[24] Stuart Thomas, *Uber Gets Massive $258m Cash Injection From Google Ventures*, VENTUREBURN, (Aug. 22, 2013), http://ventureburn.com/2013/08/uber-gets-massive-258m-cash-injection-from-google-ventures/ (showing screenshot of Uber's historic motto and marketing materials).

[25] *See Taxis v. Uber: Substitutes or Complements?*, THE ECONOMIST (Aug. 10, 2015), https://www.economist.com/blogs/graphicdetail/2015/08/taxis-v-uber ("[T]he majority of Uber's growth has come from substituting for taxis rather than from complementing them.").

[26] *U.S. Terms of Use*, UBER, https://www.uber.com/legal/terms/us/: "The Services comprise mobile applications and related services (each, an 'Application'), which enable users to arrange and schedule transportation, logistics and/or delivery services and/or to purchase certain goods, including with third party providers of such services and goods under agreement with Uber or certain of Uber's affiliates ('Third Party Providers'). … YOU ACKNOWLEDGE THAT YOUR ABILITY TO OBTAIN TRANSPORTATION, LOGISTICS AND/OR DELIVERY SERVICES THROUGH THE USE OF THE SERVICES DOES NOT ESTABLISH UBER AS A PROVIDER OF TRANSPORTATION, LOGISTICS OR DELIVERY SERVICES OR AS A TRANSPORTATION CARRIER." (capitalization in original)

complaints against drivers, from poor choice of route[27] to vehicle condition[28] to assault.[29] But Uber says that passengers must bring such claims against drivers and not Uber.[30]

At the same time, Uber recognizes that passengers expect assurances about driver safety and reliability. Uber therefore advertises that it offers "a ride you can trust,"[31] including motor vehicle record and driver background checks,[32] driver ratings,[33] insurance,[34] and around-the-clock support.[35]

Compared to other online marketplaces, Uber exercises importantly more control over transactions. For one, many marketplaces let sellers post asking prices, allowing independent sellers to set differing prices in light of their costs, impatience, and other factors. For example, each seller on Craigslist independently sets an asking price, as do sellers with fixed prices or buy-it-now prices on eBay.[36] In contrast, Uber both specifies the base price (per minute and per mile rate) in each city,[37] and sets minute-by-minute "surge" increases (based on local supply and demand).[38] Furthermore, many marketplaces let the parties to a transaction choose or approve each other. For example, a buyer on Craigslist or eBay can decide which seller to buy from. Moreover, a Craigslist seller can decline to do business with an unwanted buyer, and eBay sellers can decline to do business with buyers with low reputation.[39] In contrast, Uber assigns drivers to passengers and vice versa.[40] In theory, a driver dissatisfied with a proposed passenger can decline the ride request or cancel, and a passenger dissatisfied with a driver can do the same, but Uber

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27 *Trip Issues and Refunds: My Driver Took a Poor Route*, UBER, https://help.uber.com/h/0487f360-dc56-4904-b5c9-9d3f04810fa9 (last visited Nov. 5, 2017) (providing a potential fare adjustment for users whose driver took a poor route).

28 *Trip Issues and Refunds: My Driver's Vehicle was in Poor Condition*, UBER, https://help.uber.com/h/ce11768c-c469-4a75-bb02-abc55ad15fa2 (last visited Nov. 5, 2017) (providing a potential fare adjustment for users whose driver's vehicle was in poor condition).

29 *Trip Issues and Refunds: My Driver was Unprofessional,* UBER, https://help.uber.com/h/595d429d-21e4-4c75-b422-72affa33c5c8 (last visited Nov. 5, 2017) (providing resources for various issues with an unprofessional driver, including if the driver's behavior made the rider feel unsafe).

30 U.S. Terms of Use, *supra* note 26.

31 *Ride*, UBER, https://www.uber.com/ride/ (last visited Dec. 22, 2017).

32 *Community Guidelines*, UBER, https://www.uber.com/legal/community-guidelines/us-en/ (last visited Dec. 22, 2017) (under the heading "Background Checks").

33 *A Guide to Uber: Rating a Driver*, UBER, https://help.uber.com/h/7b64dda6-78f5-4575-b7da-3c9e40d2c816 (last visited Nov. 5, 2017).

34 *Insurance,* UBER, https://www.uber.com/drive/insurance/ (last visited Dec. 22, 2017).

35 *Trip Safety*, UBER, https://www.uber.com/ride/safety/ (last visited Dec. 22, 2017).

36 *Selling Using a Fixed Price*, EBAY, https://pages.ebay.com/help/sell/fixed-price.html (last visited Dec. 22, 2017).

37 *Get a Fare Estimate in Your City*, UBER, https://www.uber.com/fare-estimate/ (last visited Dec. 22, 2017).

38 *What Is Surge?*, UBER, https://help.uber.com/h/e9375d5e-917b-4bc5-8142-23b89a440eec (last visited Dec. 22, 2017).

39 *Selecting Buyer Requirements*, EBAY, http://pages.ebay.com/help/sell/buyer-requirements.html (last visited Dec. 22, 2017).

40 Before accepting a ride, a driver has limited information about a passenger and may be unable to identify an unwanted passenger. *See Trip Safety*, *supra* note 35 (stating that "all ride requests are blindly matched").

tracks cancellations by both drivers and passengers, and views cancellations unfavorably.[41] Taken collectively, these factors put Uber in a distinctive position of control over transactions between passengers and drivers, notably more so than other marketplaces.

C. Airbnb and short-term rentals

Similar to Uber's narrow scope, short-term rental platforms focus on accommodation by allowing guests stay in strangers' rooms or homes. The platform provides an online environment where hosts and guests can find each other, communicate, and transact.

Short-term rental platforms have proven popular. Best known and largest by market share[42] is Airbnb. As of June 2017, Airbnb offered over 3 million listings in 191 countries, ranging from a room shared with others, to entire apartments, to homes, mansions, and palaces.[43] Competitors include Flipkey, HomeAway, and VRBO. Airbnb has grown sharply; in summer 2010, roughly 47,000 guests stayed with Airbnb hosts, but by 2015 the number had grown more than 300-fold to 17 million.[44]

Consistent with demands from both guests and hosts, and in an effort to streamline the process and avoid or resolve all manner of disputes, short-term rental platforms typically offer a wide range of features. They provide systems for payment, including calculating the amount payable, holding deposits, and sometimes collecting and remitting applicable taxes. They provide mechanisms to receive, process, and report reviews and reputations, including adjudicating which reviews are trustworthy and removing those that fail standards. They assist with communication between guests and hosts, culminating in dispute resolution when requested by either side. They provide structured communication systems to help hosts describe and market their properties and help guests search, sometimes even sending professional photographers to present a property at its best.[45] And they provide certain insurance and guarantees, protecting guests against certain malfeasance by hosts and vice versa.[46]

Despite the popularity of short-term rentals, most such rentals appear to violate a variety of state and local laws. Critics flag a series of concerns. For one, hosts often offer short-term rentals in properties zoned only for ordinary residential use. In many

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41 *A Guide to Uber: Cancelling an Uber Ride*, UBER, https://help.uber.com/h/56270015-1d1d-4c08-a460-3b94a090de23 (last visited Nov 5, 2017). A driver who cancels too frequently may be penalized or even removed from Uber's service. *See Community Guidelines*, UBER, *supra* note 32 (at heading "Cancellation Rate"). Users similarly face restrictions on cancellations: Uber charges a cancellation fee if a user cancels more than two minutes after requesting a ride. *See Problem with Cancellation Fee*, UBER, https://help.uber.com/h/6bec690f-ee35-40ba-96ee-c38a8ae796e0 (last visited Dec. 22, 2017).

42 CJ Arlotta, *Airbnb continues to dominate short-term rental market*, HOTEL BUS. (Feb. 3, 2017), http://m.hotelbusiness.com/Other/Airbnb-Continues-to-Dominate-Short-Term-Rental-Market/56245.

43 *About Us*, AIRBNB, https://www.airbnb.com/about/about-us (last visited June 1, 2017).

44 *Airbnb Summer Travel Report: 2015*, AIRBNB, at 3 (September 9, 2015), http://blog.atairbnb.com/wp-content/uploads/2015/09/Airbnb-Summer-Travel-Report-1.pdf.

45 *See Does Airbnb Provide Professional Photography Services?*, AIRBNB, https://www.airbnb.com/professional_photography (last visited Nov. 8, 2017).

46 For example, Airbnb's Host Guarantee will reimburse eligible hosts for up to $1,000,000 in damages. *The $1,000,000 Host Guarantee*, AIRBNB, https://www.airbnb.com/guarantee (last visited Nov. 8, 2017).

jurisdictions, zoning offers no exception even for de minimis commercial use.[47] In any event, many Airbnb hosts offer properties continuously, exceeding any notion of a de minimis exception.[48] Second, many jurisdictions impose substantial taxes on short-term rentals[49] as voters rationally elect to tax outsiders, both because outsiders lack the political mechanisms to oppose such taxes, and because they perceive that visitors will not respond to such taxes by traveling elsewhere.[50] Yet short-term rentals largely have not paid these taxes.[51] Third, most jurisdictions have higher safety requirements for commercial properties. For example, hotels are often required to install automatic fire suppression systems such as sprinklers[52] as well as provide nonflammable bedding.[53] These protections respond to a series of incidents in which hotels hosted disasters of exceptional severity,[54] but these protections also increase the costs for new entrants seeking to provide accommodations. As applied to hosts offering accommodations in their own homes or in residential units they coordinate, short-term rental marketplaces often argue that these laws are outdated or inapplicable.[55]

D. Ticket resale marketplaces

A variety of ticket resale sites connect buyers and sellers of tickets for athletic, cultural, and entertainment events. Best known is StubHub, founded in 2000 and acquired by eBay in 2007.[56] Competitors include Razorgator, SeatGeek, Ticket Network, Ticket Liquidator,

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47 *See, e.g.,* FAIRFAX COUNTY DEPARTMENT OF CODE COMPLIANCE, SHORT TERM RESIDENTIAL RENTAL (2016), https://www.fairfaxcounty.gov/code/sites/code/files/assets/documents/short-term-rentals.pdf ("nothing in the Zoning Ordinance permits renting dwellings or rooms in dwellings for short periods of time without approval of a special exception by the Board of Supervisors to make a home a bed and breakfast").

48 David Streitfeld, *Airbnb Listings Mostly Illegal, New York State Contends*, N.Y. TIMES, Oct. 15, 2014, https://www.nytimes.com/2014/10/16/business/airbnb-listings-mostly-illegal-state-contends.html.

49 Ann Carrns, *Lodging Taxes and Airbnb Hosts: Who Pays, and How*, N.Y. TIMES, June 16, 2015, https://www.nytimes.com/2015/06/17/your-money/lodging-taxes-and-airbnb-hosts-who-pays-and-how.html; *Chicago's New Airbnb Ordinance Greets Visitors to the City with a 21 Percent Tax Bill*, ILL. POL'Y (June 23, 2016), https://www.illinoispolicy.org/chicago-city-council-enacts-airbnb-regulations/.

50 *See, e.g.,* Daniel Beekman, *Seattle Imposes New Limits on Airbnb, Other Short-Term Rentals with 7-0 Council Vote*, SEATTLE TIMES, Dec. 12 2017, https://www.seattletimes.com/seattle-news/politics/seattle-imposes-new-limits-on-airbnb-other-short-term-rentals-with-7-0-council-vote/.

51 Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (June 15, 2013), http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/.

52 *See, e.g.*, CAL. CODE REGS. tit. 19, § 902 (2016).

53 *See, e.g.*, CAL. CODE REGS. tit. 19, § 1292.1 (2016).

54 FEMA, *Hotel and Motel Fires,* 10 TOPICAL FIRE REP. SERIES, no. 1 (2010), https://www.usfa.fema.gov/downloads/pdf/statistics/v10i4.pdf (tracing increased hotel fire precautions to a 1946 incident with substantial casualties; and enumerating the safety precautions implemented in response).

55 Andy Kessler, *The Weekend Interview with Brian Chesky: The 'Sharing Economy' and Its Enemies*, WALL ST. J. (Jan. 17, 2014), https://www.wsj.com/articles/brian-chesky-the-8216sharing-economy8217-and-its-enemies-1390003096 (quoting Airbnb founder and CEO, Brian Chesky, "We're not against regulation, we want fair regulation"); Elliot Njus, *Airbnb: Bedroom Inspections for Short-Term Rental Hosts 'Unnecessary and Unfair*,' THE OREGONIAN (Apr. 25, 2014), http://www.oregonlive.com/business/index.ssf/2014/04/airbnb_inspections_for_short-t.html.

56 Lloyd Vries, *eBay Buys StubHub Ticket Broker for $310M*, CBS MONEYWATCH (Jan. 11, 2007), https://www.cbsnews.com/news/ebay-buys-stubhub-ticket-broker-for-310m/.

and Vivid Seats.[57] Each marketplace shows a range of tickets from third-party sellers, lets a buyer choose the desired seats, and charges a commission on each purchase. Marketplaces typically add payment processing, customer service, and insurance to streamline service to buyers and increase buyer confidence.

Marketplaces face tensions when sellers seek to sell tickets above face value ("scalping"). In many states, such resales are broadly unlawful.[58] Further disputes arise when ticket brokers use "bots" to buy tickets en masse, then resell them at a markup through online ticket marketplaces—violating state laws in several states as well as the terms and conditions of the original ticket sale contract.[59]

Critics suggest that ticket marketplaces normalize this unlawful activity and distinctively profit from it (since marketplace fees are largely proportional to purchase price).[60] In contrast, marketplaces style themselves as neutral, allowing sellers to list tickets at, above, or below face value as they see fit. Marketplaces typically require ticket sellers to assure that sales and selling prices are legal. For example, Stubhub's User Agreement instructs: "When setting the sale price of your tickets, it is your responsibility to comply with all applicable laws, statutes, and regulations."[61] Nonetheless, disputes arise, particularly when consumers feel they paid too much.

II. ENFORCEMENT EFFORTS

Online marketplaces increasingly facilitate and coordinate activities that impact the physical world—particularly in the spheres traditionally regulated by state and local governments such as transportation, housing, and tourism. Yet, online marketplaces are often able to bypass existing regulations. For one, the application of existing regulations may be unclear under law. For example, regulations may anticipate only direct relationships and not those intermediated by online marketplaces. Regulations may anticipate services provided by large companies rather than individuals. Thus, enforcement may be impractical, particularly where enforcement agencies lack the information, resources, or experience necessary to pursue a large number of small suppliers. Lastly, as this Article explains, federal law may limit, or may be perceived to limit, responses by state and local governments.

The absence of enforcement can introduce a series of market failures. For example,

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[57] Lawrence Pines, *StubHub's Top 4 Competitors*, INVESTOPEDIA (Sept. 8, 2016), https://www.investopedia.com/articles/company-insights/090816/stubhubs-top-4-competitors.asp (citing Ticket Liquidated, Razorgator, Vivid Seats, and SeatGeek as StubHub's four biggest competitors).

[58] Eric Schroeder et al., *A Brief Overview on Ticket Scalping Laws, Secondary Ticket Markets, and the StubHub Effect*, 30 ENT. & SPORTS LAW. 1, 26–30 (2012), https://www.bryancave.com/images/content/6/9/v2/69355/ESL-v030n02-Sum12-Scalping.pdf (surveying state antiscalping laws).

[59] *See, e.g.,* OR. REV. STAT. § 646A.115 (2010); 4 PA. STAT. AND CONST. STAT. ANN. §§ 201-15 (West 2010); TENN. CODE ANN. § 39-17-1104 (2014).

[60] *See* Jim Zarroli, *Can't Buy a Ticket to that Concert You Want to See? Blame Bots,* NPR (Jan. 28, 2016), https://www.npr.org/sections/thetwo-way/2016/01/28/464708137/cant-buy-a-ticket-to-that-concert-you-want-to-see-blame-bots (noting that in 2013 an unlicensed ticket vendor sold almost $31 million worth of tickets on StubHub).

[61] *StubHub Marketplace Global User Agreement*, STUBHUB (Sept. 21, 2017), https://www.stubhub.com/content/legal.

casual service providers may avoid paying a variety of taxes and fees including income tax and payroll tax.[62] Indeed, some of the cost advantages of ride-hailing services comes from avoiding fees and taxes that taxis pay for wear on roads and for use of other public spaces. Furthermore, lower prices for ride-hailing service can induce passengers to forego public transportation,[63] with resulting externalities including pollution and congestion.[64] Meanwhile, casual service providers may find it tempting to discriminate against customers of disfavored race,[65] gender,[66] sexual orientation,[67] or other classification.

Furthermore, regulators and enforcement agencies may reasonably be concerned about the apparent asymmetry in regulation of incumbent firms versus online marketplaces and the casual providers they coordinate.[68] Even if existing regulations are an imperfect fit for new marketplaces, a complete absence of regulation could cause even larger distortions—pushing activity to new unregulated platforms and away from existing firms, which are conditioned to better internalize the costs associated with consumer protection.

Notably, these market failures typically do not directly affect marketplace users, who often enjoy and benefit from marketplace transactions. Rather, the aggrieved parties tend to be outsiders and not party to the transactions at issue. Thus, the main factor pushing marketplaces to follow applicable law is for the prospect of enforcement action[69]—raising the question of how, exactly, state and local governments can regulate online marketplaces. The following subsections survey approaches taken and challenges faced by select state and local governments.

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62 *See* Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH U.L. REV. 989 (2016) (identifying tax enforcement and compliance challenges).

63 Emily Badger, *Is Uber Helping or Hurting Mass Transit?*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/upshot/is-uber-helping-or-hurting-mass-transit.html (citing a U.C. Davis Institute of Transportation Studies survey found that ride-hailing services draw people away from public transit).

64 *See generally* Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1 (2017) (arguing that regulators have not been responsive to taxi apps and new regulations need to encompass both traditional taxis and app-dispatched taxis).

65 Benjamin Edelman, Michael Luca & Dan Svirsky, *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 AM. ECON. J.: APPLIED ECON. 1, 3 (2017).

66 Id.

67 Rishi Ahuja & Ronan Lyons, *The Silent Treatment: LGBT Discrimination in the Sharing Economy* at 2–3 (Trinity Econ. Papers, Working Paper No. 1917, 2017), https://www.tcd.ie/Economics/TEP/2017/tep1917.pdf.

68 Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remarks at the 42nd Annual Conference on Int'l Antitrust Law & Policy (Oct. 2, 2015), https://www.ftc.gov/system/files/documents/public_statements/810851/151002fordhamremarks.pdf (instructing that prudent policy should "avoid creating two distinct regulatory tracks—with one set of rules for the older, incumbents businesses and a different set of rules for the new entrants they now increasingly compete against").

69 California instituted fines of $5,000 for each active driver who fails a background check. Cal. Pub. Util. Code § 5445.2 (West 2017) (effective Jan. 1, 2018); see Fed. Trade Comm'n, THE "SHARING" ECONOMY: ISSUES FACING PLATFORMS, PARTICIPANTS & REGULATORS 81 (2016), https://www.ftc.gov/system/files/documents/reports/sharing-economy-issues-facing-platforms-participants-regulators-federal-trade-commission-staff/p151200_ftc_staff_report_on_the_sharing_economy.pdf.

A. Verification

Regulators frequently seek to require marketplaces to verify that users comply with various regulatory requirements. For example, in several states ride-sharing services must ensure that their drivers pass background checks.[70] However, compliance is not guaranteed, in part, because of the shield federal law provides.[71] For example, during nine months of 2015, the City of San Francisco required hosts to register with a new office for that purpose, pay fees, and comply with additional requirements. But only 1,082 of 5,378 Airbnb properties registered as required.[72] With short-term rental marketplaces concealing information about hosts (such as names, contact information, and street addresses), it was particularly difficult for regulators to find the responsible hosts or enforce applicable requirements. As describe more fully in the next section, Airbnb argued that §230 applied to its activities and therefore it could not be responsible for illegal listings. However, after both litigation and informal discussions, platforms and regulators eventually agreed that marketplaces would verify user compliance either by submitting lists of participating hosts or by providing a means for compliant hosts to post their registration numbers (making noncompliant hosts apparent to enforcement staff).[73] Whatever the merits and demerits of this approach, early evidence suggests it is strikingly more effective at compelling hosts to comply with the law.[74]

B. Design

Online marketplaces are built environments, arguably with no "natural" or "necessary" design. Therefore, regulators find it particularly natural to seek specific changes to a marketplace's design.

The simplest addition to a marketplace is to require the inclusion of certain disclosures information. In principle, the addition could be as simple as a static disclosure included on one page or on a set of similar pages. For example, the State of New York requires each TNC, such as Uber and Lyft, to display complaint procedures and the timeframe for the resolution of complaints on the main page of the TNC's site.[75]

In other circumstances, a regulator or enforcement agency might ask a marketplace to

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[70] *See Uber and Lyft Will Soon Face Strict New Background Check Rules in This State*, FORTUNE (Nov. 29, 2016), available at http://fortune.com/2016/11/29/uber-lyft-driver-background-checks-massachusetts/ (reporting that Massachusetts now requires ride service companies to perform strict background checks on all their drivers).

[71] Andrew J. Hawkins, *Uber Hit with $8.9 Million Fine in Colorado for Letting Unqualified Drivers on Its Platform*, THE VERGE (Nov. 21, 2017), https://www.theverge.com/2017/11/21/16685908/uber-colorado-fine-unqualified-drivers-convict (fining Uber $8.9 million for failed background checks).

[72] BUDGET & LEGISLATIVE ANALYST'S OFFICE, CITY & CTY. OF S.F. BD. OF SUPERVISORS, POLICY ANALYSIS REPORT 2 (2016), http://sfbos.org/sites/default/files/FileCenter/Documents/55575-BLA.ShortTermRentals%20040716.pdf.

[73] Carolyn Said, *Airbnb, HomeAway Settle SF Suit, Agree to Register All Local Hosts*, SFGATE (May 1, 2017), http://www.sfgate.com/business/article/Airbnb-settles-SF-suit-agrees-to-register-all-11112109.php.

[74] Elizabeth Weise, *Airbnb Rentals in San Francisco May Dive with New Host Rules*, USA TODAY (May 1, 2017), https://www.usatoday.com/story/tech/news/2017/05/01/airbnb-san-francisco-settlement-regulations-illegal-homeaway/101168688/ .

[75] N.Y. VEH. & TRAF. LAW §§ 1691–1700 (McKinney 2017).

add more complex information. Massachusetts, for instance, requires TNCs to display fare estimates to riders.[76] In California, TNCs must allow disabled passengers to indicate whether they need an accessible vehicle, which requires TNCs to add buttons or similar mechanisms to receive such requests.[77]

Marketplaces vary in their responses to regulators' requests for additions. The examples in the preceding paragraphs were largely straightforward, seeking (at most) increased prominence of features that the marketplaces presumably already provided. But marketplaces oppose requirements they consider too intrusive or otherwise burdensome, and they typically fight them through lobbying and litigation.[78] For example, Portland, Oregon in 2014 began to require short-term rental hosts to obtain permits, and in turn required that hosting marketplaces display hosts' permit numbers.[79] Homeaway refused to display the numbers and Portland sued. Once again §230 was central, leading the city to abandon the effort.[80]

Other regulations might reasonably ask marketplaces to withhold certain information. This approach is most plausible in the context of discrimination. Employers have long been limited in their ability to ask certain questions of job applicants, as the discriminatory impact of such questions is understood to outweigh any proper purpose.[81] Marketplaces similarly collect and distribute a wide range of information that could facilitate discrimination, including users' names and photos. Finding discrimination by Airbnb guests against hosts[82] and by Airbnb hosts against guests,[83] recent academic articles suggested that Airbnb withhold the names and photos of guests during pre-booking correspondence, so that booking decisions would be race-blind. Airbnb notably declined,[84]

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76 MASS. GEN. LAWS ANN. ch. 159A ½, § 2(d) (2016).

77 CA PUB. UTILS. COMM'N, 12-12-011, REGULATIONS RELATING TO PASSENGER CARRIERS, RIDESHARING, AND NEW ONLINE-ENABLED TRANSPORTATION SERVICES (2012).

78 See e.g. Andrew Hawkins, *Airbnb threatens to sue New York if governor signs new law curtailing its service*, THE VERGE (September 7, 2016), https://www.theverge.com/2016/9/7/12834606/airbnb-threatens-lawsuit-new-york-governor-cuomo-law (threatening to sue the state of New York); Kevin Henegan, Short-term Rental Ordinance, Email to Zach Cowan (February 14, 2017), http://berkeleytenants.org/wp-content/uploads/2017/04/2017-04-04-Item-11-Amending-BMC-Section-23C-22-050-Short-Term-Rental-1.pdf (at page 5) (threatening to sue Berkeley, California).

79 Jessica Plautz, *Portland Could Soon Be the Most Airbnb-Friendly City in the U.S.* (July 23, 2014), http://mashable.com/2014/07/23/portland-airbnb/#nyIJBDsa2GqN.

80 City of Portland v. HomeAway, Inc., 240 F. Supp. 3d 1099 (D. Or. 2015) (stating that the City admitted in supplemental pleadings in the case that §230 prevents it from holding Homeaway liable for its failure to provide hosts' registration numbers). Airbnb also lobbied against this requirement before it was enacted; then, after it was enacted, Airbnb sought its retraction. Steve Law, *Airbnb Lobbying Portland to End City Inspection of Short-Term Rentals*, PORTLAND TRIBUNE (August 10, 2017), http://portlandtribune.com/pt/9-news/368939-251546-airbnb-lobbying-portland-to-end-city-inspections-of-short-term-rentals.

81 *See* Adam Samaha & Lior Jacob Strahilevitz, *Don't Ask, Must Tell—And Other Combinations*, 103 CAL.L.REV. 919, 946 (2015); Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW.L.REV. 1667, 1711–12 (2008).

82 Benjamin Edelman & Michael Luca, *Digital Discrimination: The Case of Airbnb.com* (Harv. Bus. Sch., Working Paper, No. 14-054, 2014).

83 Edelman, et al., supra note 65.

84 Laura Murphy, *Airbnb's Work to Fight Discrimination and Build Inclusion* 11 (2016), https://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf.

instead offering a variety of other changes such as requiring users to promise not to discriminate.[85]

C. Tax

Cities and states have several reasons to seek to tax marketplace transactions. For one, every increase in the tax base allows correspondingly lower taxes across the board; conversely, failing to tax reduces the tax base, requiring correspondingly larger taxes on other goods and services. Furthermore, taxing marketplace transactions is necessary for equity with taxed competitors. Consider a customer's choice between a hotel room versus a short-term rental. Suppose the customer views a $100 hotel room as comparable in quality to a $110 Airbnb, but the hotel room is subject to a 20% tax. Comparing the $120 gross price for the hotel to the $110 Airbnb, the customer will choose the latter—but had the purchases been taxed similarly, the hotel would have prevailed.

A concerned state or municipality could attempt to collect taxes directly from marketplace sellers, such as Airbnb hosts. But this approach has obvious challenges. For one, there are a large number of such entities, requiring correspondingly large enforcement efforts. Furthermore, as discussed in Section II.A, marketplaces widely conceal the names and contact information of their sellers, impeding enforcement efforts premised on communication with those who purportedly owe tax. San Francisco's 2015 experience attempting to collect tax from Airbnb hosts, without cooperation from Airbnb, illustrates the difficulty and predictably low compliance.[86]

Despite these challenges, states and municipalities have nonetheless had some success seeking assistance from marketplaces. Notably, Airbnb now concedes that taxes are due, and assists in collecting them on jurisdictions' behalf.[87] That said, Airbnb only offers this benefit if a jurisdiction otherwise accedes to Airbnb's favored regulatory scheme, such as Airbnb's approach to short-term rentals generally, zoning, enforcement, and more.[88] So while a jurisdiction may be able to tax short-term rentals, it then foregoes other policies contrary to the marketplace's preferences.

Broadly similar tax disputes arise in the context of ride hailing. In the period in which Uber and kin operated without regulatory authorization, the company widely failed to collect or remit the various taxes and fees that apply by law, such as airport fees and commercial tolls.[89] In due course, TNCs typically agreed to pay certain airport fees—but

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85 *Id.*

86 *Policy Analysis Report*, *supra* note 72.

87 Airbnb Policy Tool Chest 2-4, AIRBNB (2016), https://www.airbnbcitizen.com/wp-content/uploads/2016/12/National_PublicPolicyTool-ChestReport-v3.pdf. *But see* Brad Tuttle, *The Other Complication for Airbnb and the Sharing Economy: Taxes*, TIME (June 15, 2013), http://business.time.com/2013/06/15/the-other-complication-for-airbnb-and-the-sharing-economy-taxes/ (arguing that "very few people" in the sharing economy pay taxes).

88 *Id.* at 4.

89 *See, e.g.,* Cullinane v. Uber Techs., Inc., No. 1:14-cv-14750-DPW, 2016 WL 3751652 (D. Mass. July 11, 2016) (alleging that Uber charged a nonexistent "Logan Massport Surcharge & Toll" but remitted none of this fee to Logan Airport or any other government authority). *See also* People v. Uber Techs., Inc., No. CGC-14-543120, 2016 WL 1532347 (Cal. Super. Mar. 2, 2016) (alleging that Uber charged passengers a "Airport Fee Toll" for rides to San Francisco International Airport but did not pay any portion of this fee to the airport).

only as jurisdictions approved of their overall approach.[90]

Amazon Marketplace shows the challenges that result from ignoring tax on marketplace transactions. As of 2017, approximately half of Amazon's sales[91] come from what Amazon calls "Marketplace" sellers. These sellers list their products on Amazon's site, and many store their goods in Amazon's warehouses and pay Amazon to pack and send their products. Nonetheless, Amazon presents Marketplace sellers as independent entrepreneurs who are individually tested for presence under *Quill v. North Dakota*.[92] While Amazon in 2017 promised to collect and remit state sales tax in all states that impose such tax,[93] Marketplace sellers are beyond the scope of that promise—prompting renewed battles between Amazon and tax authorities. As of 2017, five states have made rulings or passed laws finding physical presence when a marketplace seller stores inventory in a warehouse.[94] Even so, enforcement raises practical challenges; Amazon has approximately two million Marketplace sellers, and when Amazon handles fulfillment for a Marketplace seller, the seller may not even know which warehouses hold its inventory.[95] In an effort to avoid the mammoth task of contacting and pursuing Marketplace sellers, South Carolina argued that Amazon itself is responsible for collecting taxes on behalf of businesses that used Amazon Marketplace to sell products to South Carolina residents.[96] Among other factors, South Carolina noted that Amazon itself controls to whom and where items are sent; Amazon sends the items itself; Amazon receives and holds payment; Amazon controls the transaction, such as customer service and returns. Amazon responded with a protest letter,[97] and litigation is ongoing.[98]

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90 Massachusetts is illustrative: As part of Massachusetts broadly accepting Uber, the company gained permission to operate at Logan International Airport, and began paying fees for each such pickup. Adam Vaccaro, *Uber Gets Permission to Operate at Logan*, BOSTON GLOBE (Jan. 31, 2017), https://www.bostonglobe.com/business/2017/01/31/uber-gets-permission-operate-logan/LGLwinZSrFBD2zWpQLexFJ/story.html.

91 Statista, *Percentage of Paid Units Sold by Third-Party Sellers on Amazon Platform as of 3rd Quarter 2017*, https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/ (last visited Jan.15, 2018)..

92 504 U.S. 298, 309 (1992).

93 Chris Isidore, *Amazon to Start Collecting State Sales Tax Everywhere*, CNN TECH (Mar. 29 2017), http://money.cnn.com/2017/03/29/technology/amazon-sales-tax/index.html.

94 Ned Lenhart, *Does Owning Inventory in a State Create Sales Tax Nexus?*, AMPERSAND ACCOUNTING, LLC NEWS (Mar. 27, 2017), http://ampersandaccounting.com/news/does-owning-inventory-in-a-state-create-sales-tax-nexus/ (noting that California, Florida, Illinois, Pennsylvania, and Texas all consider owning inventory in a warehouse to be a sufficient nexus).

95 Matt Day, *States Go After Third-Party Sellers on Amazon*, DETROIT NEWS (Nov. 6, 2017), http://www.detroitnews.com/story/business/2017/11/06/states-want-taxes-amazon-marketplace-sellers/107413816/.

96 Department Determination, *Amazon Services, LLC v. South Carolina Dep't of Revenue*, Docket No. 17-ALJ-17-0238-CC (SC Admin. Law Court, June 21, 2017), https://www.brannlaw.com/wp-content/uploads/2017/09/AIS-170238.pdf.

97 *Andrew Ballard, Amazon Sees 'No Basis' for South Carolina's Tax Collection Request,* BLOOMBERG LAW (Nov. 29, 2017), https://www.bna.com/amazon-sees-no-n73014472549/.

98 *Id*.

D. Disclosure of user information

Regulators sometimes seek to observe user activity in order to monitor behavior on marketplaces and pursue alleged improprieties. Sometimes, regulators may be content to collect data from a marketplace using "scraper" software that examines listings. But these methods sometimes prove ineffective.

A first challenge is the scale of operation. For example, the eBay auction marketplace hosts approximately 1.1 billion listings at any moment, with tens of millions more added each week.[99] While standard site search tools can focus attention on particular terms, an enforcement agency searching for recalled items, counterfeits, or the like would struggle to find all listings of concern.

A second challenge is the reactive posture of regulators and enforcement agencies using standard search tools to see information available to the public. In this reactive context, enforcement necessarily lags behind marketplace activity. For example, a prohibited new listing would be present for at least hours, if not days or weeks, before a periodic enforcement search found it, not to mention documenting its violations and demanding that the marketplace remove it. When misconduct creates particularly severe harms, such as risks to health and safety, this delay may be seen as unacceptable. In response, Massachusetts in November 2016 began to require that TNCs pre-submit their proposed new drivers for advance review by regulators including cross-checking with regulators' analyses of criminal records.[100]

A third challenge is that marketplaces sometimes conceal the information of greatest importance to regulators. For example, a host on Airbnb can post a verbose description of the property and unlimited photographs—but cannot provide a full legal name, email address, mailing address, or property address. Many hosts would not want to post such information, but Airbnb has clear business reasons to prohibit such postings: If guests could contact hosts directly, they would circumvent Airbnb's booking service and the associated fees, requiring Airbnb to find a new business model.[101] But once Airbnb conceals this information, both removing it from the standard listing template and also prohibiting hosts from sharing it in any other way, enforcement agencies cannot use the standard Airbnb searching and browsing functions to find potentially-unlawful listings within their jurisdictions. With no other option available, it is that much more natural for regulators to seek at least information, if not assistance, from Airbnb in their enforcement efforts.

In response, regulators sometimes seek superior access to marketplace data. For example, in 2013, New York Attorney General, Eric Schneiderman sought data on 15,000 hosts who appeared to be violating applicable zoning and tax requirements.[102] Airbnb

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99 *FAST FACTS Q2 (2017)*, EBAY, https://static.ebayinc.com/assets/Uploads/PressRoom/eBay-FastFacts-Q22017-IR.pdf.

100 H.R. 4570, 189th Leg., Reg. Sess. (Ma. 2016), https://malegislature.gov/Bills/189/House/H4570.

101 *Cf. What Should I Do If Someone Asks Me to Pay Outside of the Airbnb Website,* AIRBNB, https://www.airbnb.com/help/article/199/what-should-i-do-if-someone-asks-me-to-pay-outside-of-the-airbnb-website (last visited Dec. 28, 2017).

102 Eric Schneiderman, Opinion, *Taming The Digital Wild West*, N.Y TIMES (Apr. 22, 2014), https://ag.ny.gov/press-release/op-ed-taming-digital-wild-west.

resisted, moving to quash the subpoena as an overbroad "fishing expedition." Airbnb further argued that the applicable laws were unconstitutionally vague, that the requested production was burdensome, and that hosts' information was private and should not be subject to subpoena.[103] The court rejected each of these contentions save for concern at overbreadth, finding that the subpoena must confine itself to listings for jurisdictions and lengths that violate applicable zoning laws.[104] In response, Airbnb and Schneiderman reached an agreement, and Airbnb shared some of the requested user information.[105]

For a marketplace facing a regulator's demand for user information, a key challenge is that such data could extinguish business models grounded in noncompliance with applicable laws. So long as regulators cannot easily find the names and addresses of hosts violating New York housing and tax law, some hosts will likely be willing to break those laws in exchange for a reasonable profit from doing so. But with their names and details available to the New York Attorney General, hosts have every reason to pause. Indeed, subsequent to the NYAG's successful demand for host information, Airbnb dropped hundreds of hosts in Manhattan,[106] suggesting that compelled disclosure sharply affected the marketplace's prospects there.

III. THE CASE AGAINST STATE AND LOCAL REGULATION

Whatever the benefits of state and local regulation of online marketplaces, marketplaces argue that regulators simply cannot do so. Arguments against state and local regulation often build on the federal immunity provided by Section 230(c)(1) of the Communications Decency Act of 1996, which states in relevant part: "No provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by an information content provider."[107]

§230 was originally enacted, in part, to encourage providers of interactive computer services to moderate user-provided content without fear of publisher liability,[108] but on the whole, courts have offered a notably broader interpretation of this provision. For one, Courts have held that §230 immunizes not just efforts to moderate user content, but also

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103 Complaint, *Airbnb, Inc. v. Schneiderman*, No. 1:16-cv-08239 (S.D.NY. Oct. 21, 2016).

104 *Airbnb, Inc. v. Schneiderman*, No. 5393-13, slip op. at 2 (N.Y. Sup. Ct. May 13, 2014), https://www.nycourts.gov/press/PDFs/AirbnbDecision.pdf.

105 Letter Confirming Agreement Regarding Compliance with Subpoena from Clark Russell, Deputy Bureau Chief of the Internet Bureau, Office of the Attorney Gen. of the State of N.Y., to Belinda Johnson, Gen. Counsel, Airbnb, Inc. (May 20, 2014) (on file with the State of New York Office of the Attorney General, https://ag.ny.gov/pdfs/OAG_Airbnb_Letter_of_Agreement.pdf).

106 *See, e.g.,* Murray Cox & Tom Slee, INSIDE AIRBNB, HOW AIRBNB'S DATA HID THE FACTS IN NEW YORK CITY (2016), http://insideairbnb.com/reports/how-airbnbs-data-hid-the-facts-in-new-york-city.pdf. *See also* Alison Griswold, *More than 600 New York City Hosts Got Kicked Off Airbnb Last Fall for Not Meeting Standards*, QUARTZ (February 24, 2016), https://qz.com/624145/more-than-600-new-york-city-hosts-got-kicked-off-airbnb-last-fall-for-not-meeting-standards/.

107 47 U.S.C. § 230(c)(1) (1998).

108 Anthony Ciolli, Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas, 63 U. MIAMI L. REV. 137 (2008).

decisions not to moderate.[109] "While Congress could have made a different policy choice, it opted not to hold [providers of] interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium."[110]

Moreover, courts have found that the "robust"[111] immunity of §230 applies even if providers knew of allegedly-unlawful material,[112] encouraged it,[113] altered the design of their services to facilitate it,[114] and charged for the assistance they provided.[115] Proponents of these broad interpretations say this is no mistake. Courts said an alternative approach "would have an obvious chilling effect,"[116] emphasizing the benefit §230 brought in "encourage[ing] Internet services that increase the flow of information by protecting them from liability when independent persons … supply harmful content."[117] §230 advocate Eric Goldman called the statute a "masterpiece" and "a remarkable success,"[118] while David Post said "No other sentence in the U.S. Code … has been responsible for the creation of more value,"[119] and numerous other scholars agreed.[120] Tech companies were similarly effusive. For example, the Internet Association (representing forty technology companies such as Amazon, Facebook, Google, and Microsoft) said §230 was crucial to keeping the Internet "free, innovative, and collaborative."[121] The Electronic Frontier

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109 Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016); Doe v. MySpace, Inc., 428 F.3d 413 (5th Cir. 2008) (finding a social networking site immune from negligence liability for failing to implement safety measures to protect children from exploitation).

110 Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998).

111 Carafano v. Metrosplash, 339 F.3d 1119 (9th Cir. 2003).

112 Global Royalties, Ltd. v. Xcentric Ventures, LLC, 544 F.Supp.2d 929 (D. Ariz. 2008) (finding website operator immune under §230 even though it had notification of defamatory content); Shiamili v. Real Estate Grp. of N.Y., Inc., 952 N.E.2d 1011 (N.Y. 2011).

113 Jones v. Dirty World Entm't Holding, 755 F.3d 398 (6th Cir. 2014) (finding immunity when defendant solicited gossip); Goddard v. Google, 640 F. Supp. 2d 1193 (N.D. Cal. 2009) (finding immunity when defendant's software suggested that advertisers use unlawful keywords to falsely describe their products).

114 Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 (finding immunity when defendant designed its service to facilitate sex trafficking, including declining to verify phone numbers, declining to verify email addresses, and removing all metadata from photographs used in advertisements in order to impede investigations).

115 Goddard v. Google, No. C 08-2738, 2008 WL 5245490, (N.D. Cal. Dec. 17, 2008) (finding immunity despite defendant charging advertisers to promote unlawful services).

116 Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997).

117 Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187, 1199 (10th Cir. 2009).

118 Eric Goldman, *Congress Is About To Eviscerate Its Greatest Online Free Speech Achievement*, ACS BLOG (Sept. 11, 2017), http://blog.ericgoldman.org/archives/2017/09/congress-is-about-to-ruin-its-online-free-speech-masterpiece-cross-post.htm.

119 David Post, A Bit Of Internet History, Or How Two Members Of Congress Helped Create A Trillion Or So Dollars Of Value, WASH. POST (Aug. 27, 2015). See also Jeff Kosseff, The Gradual Erosion of the Law That Shaped the Internet: § 230's Evolution Over Two Decades, 18 COLUM. SCI. & TECH. L. 1, 1–3 (2016).

120 *See e.g.* Jeff Kosseff, The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades, 18 COLUM. SCI. & TECH. L. REV. 1 (2016); Cecilia Ziniti, Note, The Optimal Liability System for Online Service Providers: How Zeran v. America Got It Right and Web 2.0 Proves It, 23 BERKELEY TECH. L.J. 583 (2008); Matthew Scruers, Note, The History and Economics of ISP Liability for Third Party Content, 88 VA. L. REV. 205 (2002).

121 Press Release, Internet Association, Internet Association Files Brief in Support of Home Sharing, Section 230 (Sept. 9, 2016) (on file with author, https://internetassociation.org/090916homesharing/).

Foundation called §230 "[t]he most important law protecting Internet speech,"[122] and Wired said §230 was "the most important law in tech."[123]

Online marketplaces have embraced §230 in seeking to block or invalidate legislation and regulation they dislike.[124] Best known is Airbnb's June 2016 litigation against the City of San Francisco, arguing that the city's amended short-term rental ordinance violates CDA because it "treats online platforms such as Airbnb as the publisher or speaker of third-party content" and thus, Airbnb argued, is completely preempted by §230.[125] In seeking a preliminary injunction enjoining enforcement of the ordinance, Airbnb emphasized that the ordinance "punish[es] platforms for failing to verify and screen third-party listings" which, Airbnb said, "directly conflicts with the CDA and is barred under settled law."[126] Distinguished amici (including the Internet Association, described above; and the Electronic Frontier Foundation, arguably the best-known digital rights group) sought to file briefs with the court in support of Airbnb's position.[127]

A. The prima facie case under §230

In seeking to invalidate a state or local law at issue under §230, a marketplace must establish three elements. First, that the marketplace in fact operates an interactive computer service within the meaning of §230. Second, that third parties provided the information at issue. Third, that the challenged state or local law conflicts with §230 by treating the interactive computer service as publisher or speaker of that information. All

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122 *CDA 230: The Most Important Law Protecting Internet Speech*, ELECTRIC FRONTIER FOUND. http://www.eff.org/issues/cda230/legal (last visited Dec. 28, 2017).

123 Christopher Zara, *The Most Important Law In Tech Has A Problem*, WIRED.COM (Jan. 3, 2017), https://www.wired.com/2017/01/the-most-important-law-in-tech-has-a-problem/.

124 *See* City of Portland v. HomeAway, Inc., 240 F. Supp. 3d 1099 (D. Or. 2015); Complaint at 1, Airbnb, Inc. v. City of Santa Monica, No. 2:16-cv-6645 (C.D. Cal. Sept. 2, 2016); Complaint, Airbnb, Inc. v. Schneiderman, No. 1:16-cv-08239, at *2 (S.D.N.Y. Oct. 21, 2016); Lily Leung, *Anaheim Won't Fine Websites Like Airbnb for Illegal Short-Term Rental Listings*, ORANGE CTY. REGISTER (Aug. 23, 2016), http://www.ocregister.com/articles/city-726671-term-short.html (quoting Anaheim City's spokesperson, Mike Lyster, "After considering federal communications law, we won't be enforcing parts of Anaheim's short-term rental rules covering online hosting sites . . . ."); City of Chicago v. StubHub!, Inc., 624 F.3d 363 (7th Cir. 2010) (ticket resale marketplace relying on §230 to attempt to avoid Chicago tax on ticket resale); Memorandum on Appeal of Uber Technologies, Inc., In the Matter of an Investigation to Consider the Nature and Extent of Regulation Over the Operations of Uber Technologies, LLC and Other Similar Companies, Maryland Public Service Commission Case No. 9325 (June 6, 2014), http://webapp.psc.state.md.us/newIntranet/casenum/submit_new.cfm?DirPath=C:\Casenum\9300-9399\9325\Item_99\&CaseN=9325\Item_99.

125 Complaint, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD).

126 Motion for Preliminary Injunction, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD).

127 [Proposed] Brief for Electronic Frontier Foundation et. al as Amici Curiae Supporting Plaintiff's Motion for Preliminary Injunction, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD), https://cdt.org/files/2016/09/Amicus-Brief-Airbnb-vs-SF.pdf; [Proposed] Brief for Internet Association and CALinnovated as Amici Curiae Supporting Plaintiff's Motion for Preliminary Injunction, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD), http://lawprofessors.typepad.com/files/airbnb-v-san-francisco---internet-association-amicus.pdf.

three elements are potentially disputed, as discussed in Section IV, below. Nonetheless, the prima facie case is usually straightforward.

First, marketplaces call for a broad interpretation of "interactive computer service."[128] Describing eBay, Airbnb, or Uber, a lay person might call them modern replacements for malls, hotels, or taxis. But their operations are grounded in provision of interactive computer services whereby they learn the availability of service providers, receive requests from customers, and in various ways connect customers to service providers. Certainly, the services are "interactive" in the sense that they provide users with the ability to submit, filter, and process information, among numerous other interactive features. And these services are accessed by a "computer" broadly understood (notably including smartphones). Where courts have considered the definition of "interactive computer service," they have been correspondingly inclusive in their interpretations.[129]

Second, marketplaces fairly allege that the disputed behavior at issue comes from third parties. Consider, e.g., a seller's listing within the eBay marketplace for a product that is itself unlawful (perhaps a counterfeit, a recalled item, or an item not licensed for sale within the United States). In general, listings appear using the title, description, photos, and other information that sellers submit. The simplest summary of these submissions is that third parties—the sellers—provided the information at issue.

Third, marketplaces allege that when regulations hold them liable for certain illegal transactions, the regulations improperly treat the marketplaces as publishers or speakers of content provided by users.[130] Consider a state law disallowing the sale of recalled items or banning ticket sales above face value, thereby prohibiting eBay and StubHub from including such listings in their respective marketplaces. Such liability and such prohibitions, they say, are exactly what §230 does not allow.[131]

Despite the apparent simplicity of the prima facie §230 allegations, there remain all manner of potential disputes, broadly arising out of the additional actions that marketplaces take to cause, assist, and facilitate the disputed information and activities. We turn to those disputes in Section V, below.

B. Fellow travellers

While §230 is the best known and most used basis of marketplaces challenging state and local regulation, additional federal laws convey similar principles.

1. 1996 Federal Telecommunications Act

Some marketplaces seek shelter in the 1996 Federal Telecommunications Act[132] (FTA), the parent Act of §230. In an attempt to fight off regulation of its activities in both

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128 *See, e.g.,* Complaint at 13, Airbnb, Inc. v. City of Anaheim, No. 8:16-cv-1398 (C.D. Cal. July 28, 2016); Memorandum of Defendant Stubhub, Inc. in Support of Its Motion to Dismiss at 13–17, City of Chicago v. StubHub!, Inc., 624 F.3d 363 (7th Cir. 2010).

129 Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003); Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. App. 2001).

130 Complaint at 13-14, Airbnb, Inc. v. City of Anaheim, No. 8:16-cv-1398 (C.D. Cal. July 28, 2016).

131 Id.

132 P.L. No. 104-104, 110 Stat. 56 (1996). The FTA overhauled and modernized the Communications Act of 1934. *See* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 29 CONN. L.R. 123, 125 (1996).

Maryland and California,[133] Uber, for example, argued that the purposes and objectives of the FTA create a conflict preemption.[134] Specifically, Uber claimed that in order to establish a "pro-competitive, deregulatory national policy framework,"[135] the FTA distinguished between "telecommunications services,"[136] which are subject to regulation by the FCC as common carriers, and "information services," which are not.[137] This distinction arguably showed Congress's intent to "occupy the field of regulation of information services," and thus "regulations that have the effect of regulating information services are in conflict with federal law and must be preempted."[138]

With this line of reasoning, Uber and other online marketplaces must demonstrate that they are "information service" providers in order to fall under the FTA's preemption umbrella. To be classified as an "information service," the FTA identifies two requirements: 1) the provider must offer "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," and 2) the provider must not use "any such capability for the management, control, or operation of telecommunications system or the management of a telecommunications service."[139] The second requirement ensures the mutual exclusivity of telecommunication and information services.

Relying on its familiar claim that "Uber Technologies, Inc. is a technology company," Uber asserted that it satisfied the first requirement because the core of its business makes information available about third party providers of transportation services.[140] Similarly, it claimed to satisfy the second requirement because it uses various telecommunications services (wireline and wireless Internet providers) to transmit information and does not offer or manage a telecommunications service itself.[141]

2. Stored Communications Act

Marketplaces also invoke the Stored Communications Act (SCA) to avoid state and

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133 Public Utilities Commission of the State of California, Comment of Uber Technologies, Inc. on Order Instituting Rulemaking (Dec. 20, 2012), http://docs.cpuc.ca.gov/publisheddocs/efile/g000/m042/k157/42157058.pdf; Memorandum on Appeal of Uber Technologies, Inc., *supra* note 125.

134 Conflict preemption exists whenever the "challenged state statute 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Perez v. Campbell, 402 U.S. 637, 649 (1971), quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

135 H.R. Rep. No. 104-458, at 1 (1996) (Conf. Report on S.652).

136 "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(50) (2010). "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of Users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. §153(53) (2010).

137 Memorandum on Appeal of Uber Technologies, Inc., *supra* note 125, at 42.

138 *Id*. at 45 (quoting Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F. Supp. 2d 993, 1002 (D. Minn. 2003)) (finding that federal law preempted Minnesota's imposition of fees on Vonage's Voice over Internet Protocol).

139 47 U.S.C. § 153(24) (2010).

140 Memorandum on Appeal of Uber Technologies, Inc., *supra* note 125, at 46.

141 Id.

local regulations that require marketplaces to share user data with regulators.[142] The SCA limits when and how governments may access information that is stored by Internet service providers including online marketplaces. The requirements vary based on the type of service and the type of information sought.[143] For the information deemed most sensitive, the SCA requires a warrant, subpoena with notice to the customer, or a court order based on "specific and articulable facts" with notice to the customer.[144] State and local regulations often contemplate marketplaces sharing user information without such protections,[145] leading marketplaces to invoke SCA in challenging those regulations.

SCA defenses have proven effective for some marketplaces. Airbnb's dispute with San Francisco is illustrative. The August 2016 San Francisco ordinance required Airbnb to periodically disclose to the City the names and addresses of certain hosts, without any requirement that the City obtain a court order.[146] In challenging the ordinance, Airbnb invoked the SCA; rather than litigate this aspect of Airbnb's defense, the City agreed to demand user data only with a subpoena.[147]

3. Avoiding tax obligations

Marketplaces have attempted enjoin state and local governments from imposing tax obligations on them under a variety of federal principles and laws[148] including the Due Process Clause,[149] Dormant Commerce Clause,[150] and the Internet Tax Freedom Act

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142 HomeAway.com, Inc. v. City of Portland, No. 3:17-cv-00091-MO, 2017 WL 2213154 (D. Or. May 11, 2017); Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016); Airbnb, Inc. v. City of Santa Monica, No. 2:16-cv-06645 (C.D. Cal. filed Sept. 2, 2016).

143 18 U.S.C.A. § 2703 (2012). If a marketplace is considered a provider of an electronic communications service (ECS), meaning it provides users with the ability to send or receive wire or electronic communications, then it must have a search warrant to obtain "content information" stored on its servers for 180 days or less. 18 U.S.C.A. § 2510 (2012). If the government wants content information stored for more than 180 days by an ECS or information retained by a remote computing service (RCS) regardless of the length of storage, the government can obtain that information based on a warrant, subpoena with notice to the customer, or a court order based on "specific and articulable facts" with notice customer. 18 U.S.C.A. § 2703(b)(1)(B) (2012). If a marketplace is classified as either an RCS or ECS, the government only needs to obtain a court order based on "specific and articulable facts" (without customer notice) to access basic customer information such as names, addresses, and types of services.

144 18 U.S.C.A. § 2703(b)(1)(B) (2012).

145 *See, e.g.,* S.F. Cal., Ordinance No. 104-16, *supra* note **Error! Bookmark not defined.**, amending San Francisco Administrative Code 41A.5(g)(4)(C)(ii), contemplating that a short-term rental marketplace would send certain host information to the San Francisco regulator without any of the procedural protections specified in SCA.

146 *Id.*

147 Settlement Agreement at 1, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. 2016) (No. 3:16-cv-03615-JD).

148 *See, e.g.,* Summons, Amazon.com, LLC v. N. Y. State Dep't of Taxation & Fin., 877 N.Y.S.2d 842 (N.Y. App. Div. 2009) (No. 13-259), https://www.wired.com/images_blogs/business/files/amazoncomplaint.pdf; HomeAway Inc. v. City & Cty. of San Francisco, No. 14-CV-04859-JCS, 2015 WL 367121 (N.D. Cal. Jan 27,2015).

149 Amazon.com, LLC v. N. Y. State Dep't of Taxation & Fin., 877 N.Y.S.2d 842 (N.Y. App. Div. 2010).

150 Complaint at 12, Amazon.com, LLC v. N. Y. State Dep't of Taxation & Fin., 877 N.Y.S.2d 842 (N.Y. App. Div. 2009) (No. 13-259), https://www.wired.com/images_blogs/business/files/amazoncomplaint.pdf.

(ITFA).[151] Due Process clause arguments are typically unsuccessful. By contrast, the Dormant Commerce Clause establishes a nexus requirement that states sometimes struggle to satisfy. As mentioned in Section II.C, *Quill* allows a jurisdiction to impose tax obligations on a company only if the company has a physical presence in that jurisdiction. The structure of online marketplaces makes it particularly easy for them to argue that they are not physically present in a jurisdiction. Consider a host providing short-term rentals through Airbnb. Airbnb needs no physical presence in a state to offer this service; Airbnb predictably argues that the host acts on its own, certainly not as Airbnb's agent nor otherwise on Airbnb's behalf, in its in-state activities.

Marketplaces have also attempted to use the Internet Tax Freedom Act (ITFA) which forbids "[m]ultiple or discriminatory taxes on electronic commerce"[152] (though, contrary to the suggestion in its title, the ITFA did not make transactions on the Internet tax free).[153] "Multiple" taxes refer to transactions that are taxed by two states without an appropriate tax credit.[154] "Discriminatory" taxes treat Internet commerce differently than other types of commerce.[155] Marketplaces have tried to invoke these protections. For example, StubHub! argued that a Chicago tax on its ticket sales violated the ITFA because the tax was discriminatory, posing a distinctive burden on online marketplaces compared to offline resellers.[156] However, the Court found that the ordinance did not turn on "the role of a computer server or the provision of electronic servicers" because a reseller of tickets is a reseller of tickets regardless of the form of their services. Thus, the tax was not discriminatory.[157] Nonetheless, the IFTA may still help protect other marketplaces from specially tailored taxes, as suggested by the pending litigation related to Chicago's tax of on online streaming services.[158]

Despite the appeal of these alternative theories, §230 remains by far the leading authority for marketplaces seeking to avoid state and local regulation. In the next section, we turn to the core arguments about applying that statute to online marketplaces.

IV. ESCAPING THE CDA

Does §230 compel a court to disallow state and local regulation of online marketplaces? We see five broad mechanisms whereby a court might conclude not.

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151 47 U.S.C.A. § 151 (2012).

152 Internet Tax Freedom Act, Pub. L. No. 114–125, § 1101(a) (2016) (codified at 47 U.S.C. § 151 note (2012)).

153 *See* Jeffrey M. Stupak, CONGRESSIONAL RESEARCH SERVICE, THE INTERNET TAX FREEDOM ACT: IN BRIEF (2016), https://fas.org/sgp/crs/misc/R43772.pdf (noting that IFTA is unrelated to issues of taxation of electric commerce across state borders).

154 Internet Tax Freedom Act, Pub. L. No. 114–125, § 1105(6) (2016) (codified at 47 U.S.C. § 151 note (2012)).

155 Internet Tax Freedom Act, Pub. L. No. 114–125, § 1105(a)(2) (2016) (codified at 47 U.S.C. § 151 note (2012)).

156 City of Chicago v. StubHub! Inc., 624 F.3d 363 (7th Cir. 2010).

157 *Id.* at 367.

158 Complaint, Labell v. City of Chicago, No. 2015-CH-13399, 2015 WL 5316414 (Ill. Cir. Ct. Sept. 9 2015), https://3epjwm3sm3iv250i67219jho-wpengine.netdna-ssl.com/wp-content/uploads/2016/11/ComBlog-Labell-v-City-of-Chicago.pdf.

A. Marketplace as something more than a provider of an interactive computer service

In extending far beyond computer service, to real-world transactions with real-world implications, marketplaces may exceed the boundaries of the §230 safe harbor because they are not purely providers of interactive computer services. This is especially true when the majority of a marketplace's activities are outside the scope of immunity intended by Congress.

By its terms, §230 limits its benefits to "provider[s] of an interactive computer service." The statute defines an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server."[159] The definition of an interactive computer service has been interpreted broadly and includes not only Internet service providers and bulletin boards, but mobile applications and various websites.[160] As a result, courts rarely pause to fully consider the definition's outer limits.[161]

There should be no serious dispute that online marketplaces *provide* interactive computer service. But when interactive computer service is incidental to a substantially different function ineligible for protection under §230, a marketplace may struggle to claim to in fact *be a provider* of an "interactive computer service" protected by §230.[162] The same would be true for a company that mostly operates offline and uses the Internet only to enhance its service. For example, consider a fitness studio that allows users to log on to its website to swap available spots with other participants in its group fitness classes.

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159 47 U.S.C. § 230(f)(2) (2012).

160 Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution Over Two Decades*, 18 COLUM. SCI. TECH. REV. 1 (2016); *see also* Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169, 1175 (9th Cir. 2009) (finding a provider of anti-malware software an ICS); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir. 2003) (dating website); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 812 (2002) (an auction website); Milgram v. Orbitz Worldwide, Inc., 16 A.3d 1113 (N.J. Super. Ct. Law Div. 2010) (a travel website).

161 Milgram v. Orbitz Worldwide, Inc., 16 A.3d 1113, 1121 (N.J. Super 2010) ("There is no issue that defendants qualify as an "interactive computer service" as defined by the CDA."); Gibson v. Craigslist, Inc., No. 08 Civ. 7735(RMB), 2009 WL 1704355, at *3 (S.D.N.Y. June 15, 2009) ("Plaintiff does not appear to dispute that Craigslist is a provider of an interactive computer service."). However, *Federal Trade Commission v. LeadClick* is a notable exception. 838 F.3d 158 (2d Cir. 2016). LeadClick managed a group of advertisers through tracking software, which recorded customer clicks and purchases. These advertisers engaged in deceptive trade practices, and the FTC attempted to hold LeadClick responsible. LeadClick argued that §230 immunized it from liability, but the Second Circuit Court of Appeals found that §230 did not apply because, among other reasons, LeadClick's tracking software "was wholly unrelated to its potential liability under" §230. *Id.* at 175.

162 Zango, Inc. v. Kaspersky Lab, Inc. presents the rare situation in which an anti-malware company was considered a provider of an interactive computer service simply because it tangentially used the Internet to update its software. 568 F.3d 1169 (9th Cir. 2009). The main purpose of the company's software was to remove malware, and when the company's program blocked the appellant's website, the company used the CDA to protect itself from liability. The Ninth Circuit Court of Appeals was dismissive of the appellant's argument that the word "interactive" requires that the platform provide people with access to the Internet. Instead, the court asserted that a provider of an ICS only needs to provide access to a computer server and not the Internet itself. However, regardless of the court's interpretation of "provide[] or enable[] access by multiple users to a computer server," the plain meaning of the term "provider" could still be interpreted to require a platform to primarily provide access to computer servers.

Despite the role of online scheduling, no one suggests that that the studio is a provider of interactive computer service or would be able to use the CDA to avoid local health and safety regulations.[163]

Marketplaces' own statements may undermine their claim to be providers of an interactive computer service, to the exclusion of broader functions. Consider Uber's claims about its scope and role: Uber historically presented itself to users with the motto "everyone's private driver,"[164] and then-CEO Travis Kalanick wrote on Uber's official blog: "[W]e're rolling out a *transportation system* in a city near you" (emphasis added).[165] Elsewhere, Uber claimed that the company "provides the best *transportation service* in San Francisco" (emphasis added).[166] Having held itself out as a "transportation system" and "transportation service," Uber struggles to establish that it is only, primarily, or importantly a provider of a computer service.

When courts have considered marketplaces' combination of computer service and other roles outside the context of §230, they have been correspondingly skeptical that computer service predominates. For example, in denying an Uber motion for summary judgment in a case about the classification of drivers, one court remarked that "Uber does not simply sell software; it sells rides."[167] The court continued:

> Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs, John Deere is a 'technology company' because it uses computers and robots to manufacture lawn mowers, Domino Sugar is a 'technology company' because it uses modern irrigation techniques to grow its sugar cane. … If … the focus is on the substance of what the firm actually does…, it is clear that Uber is most certainly a transportation company.[168]

Regulatory proceedings have taken a similarly dim view of claims to provide only computer service. For example, the California Public Utilities Commission (CPUC) criticized Uber's claim to be exempt from CPUC's jurisdiction because it was an information service. CPUC explained: "We reject Uber's application that TNCs are nothing more than an application on smart phones, rather than part of the transportation industry."[169]

Indeed, a marketplace's efforts may extend beyond the provision of interactive computer services in a variety of directions. A marketplace may seek to guarantee quality, for example through insurance, investigations, make-goods, and credits, bring the

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163 For companies that offer services primarily online, courts may take a different approach.

164 Thomas, *supra* note 24 (screenshot of Uber's historic motto and marketing materials).

165 Travis Kalanick, *Take Uber's New Logo for a Spin,* UBER NEWSROOM (Dec. 6, 2011), https://www.uber.com/newsroom/take-ubers-new-logo-for-a-spin/.

166 Declaration of Shannon Liss-Riordan in Support of Opposition/Response to Motion, Exhibit 29 at 2, O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014) (No. 223-29).

167 Order Denying Defendant Uber Technologies, Inc.'s Motion for Summary Judgment at 10, O'Connor v. Uber Technologies, Inc., No. C-13-3826 EMC, 2014 WL 1760314 (N.D. Cal. May 2, 2014) (No. 211), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1935&context=historical.

168 *Id.*

169 CA PUB. UTILS. COMM'N, 13-09045, DECISION ADOPTING RULES AND REGULATIONS TO PROTECT PUBLCI SAFETY WHILE ALLOWING NW ENTRANTS TO THE TRANSPORTATION INDUSTRY 12 (2013), http://docs.cpuc.ca.gov/publisheddocs/published/g000/m077/k192/77192335.pdf.

marketplace that much closer to the substance of the transaction. When a marketplace pays incentives to bring in service providers, including converting service providers from other activities to participation in the marketplace, the marketplace's role becomes that much larger and its intertwining in the transaction that much deeper. When a marketplace sets detailed rules—what type of car an Uber driver may drive; what safety features an Airbnb host must provide—the marketplace similarly tests the boundaries of "computer service." And when these factors combine, a marketplace may end up looking like the organizing force behind a series of transactions—a far cry from simply providing an interactive computer service.

While courts have never seriously considered limiting the application of §230 based on the statute's "provider" language, congressional intent suggests that they should. The findings and policy in §230(a)-(b)—written into the law itself—indicate congress's intent to promote the development of the Internet[170] and to encourage the exchange of information and ideas.[171] Therefore, when a marketplace extends into wholly offline behavior (such as staying in a short-term rental), the stated purposes of §230 call into question whether that statute should be read to immunize the offline behavior.

B. Marketplace as an information content provider

If a person or company is "responsible, in whole or in part" for "the development or creation" of a given piece of information, the plain language of §230 instructs that the person or company is an "information content provider"[172] ("ICP") rather than a provider of an "interactive computer service," and hence not protected by the §230 immunity. In their many efforts to facilitate and streamline transactions, marketplaces may cross this line and thereby lose the protections of §230.

ICP status is the most litigated prong of §230, and courts have revised the tests they apply to this question.[173] The initial test asked whether an intermediary develops or creates content in a way that exceeds "traditional editorial functions"[174] such as withdrawing, postponing, altering, or organizing.[175] If the intermediary's role extends beyond editorial functions and includes making "material substantive contribution[s] to the information that is ultimately published," this test finds the intermediary an ICP outside the scope of §230 protection.[176]

The activities of some online marketplaces arguably extend well beyond editorial functions. Consider marketplaces that provide guarantees, insurance, credits, and

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170 47 U.S.C. § 230(b)(1) (2012).

171 47 U.S.C. § 230(a)(3), (b)(3) (2012).

172 47 U.S.C.A. § 230(f)(3) (2012).

173 David S. Ardia, Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act, 43 LOY. L.A. L. REV. 373 (2010).

174 Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997). *See* also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (finding that even though a matchmaking website classifies user characteristics and collects responses to specific questions it is not a "developer"); Blumenthal v. Drudge, 992 F.Supp. 44, 50 (D.D.C. 1998) (acknowledging that AOL would be considered an information content provider if it "had any role in creating or developing any of the information").

175 Langdon v. Google, Inc., 474 F. Supp. 2d 622 (D. Del. 2007); Donato v. Moldow, 865 A.2d 711, 720 (N.J. Super. 2005).

176 Donato, 865 A.2d at 727.

incentives for users, and marketplaces that design systems to control user interactions, investigate and adjudicate disputes, and even set prices.[177]

Beginning in 2008, some courts shifted to a new test for ICP status. Looking beyond editorial functions, *Roommates.com* instructed that "[A] website helps to develop unlawful content, and thus falls within the exception of §230, if it contributes *materially* to the alleged *illegality* of the conduct" (emphasis added).[178] Under this test, Roommates.com was found to materially contribute to illegal conduct because its tools (such as dropdown menus) forced individuals to specify preferences based on unlawful criteria (such as race and gender).

Subsequent cases interpreted the *Roommates.com* test.[179] Some courts offered a narrow interpretation known as the "solicitation standard," which finds an intermediary to be an ICP, outside the protections of §230, only if it specifically solicited illegal behavior.[180] The leading case for the solicitation standard is *Federal Trade Commission v. Accusearch, Inc.*, in which a defendant ran a website that collected consumer requests for phone records, then obtained those phone records from third-party providers in violation of the Telecommunications Act.[181] The court held that "a service provider is 'responsible' for the development of offensive content only if it in some way *specifically* encourages development of what is offensive about the content" (emphasis added). Because *Accusearch* specifically encouraged third-party providers to commit illegal acts, it was deemed an ICP without §230 protection.[182]

Under *Accusearch*'s solicitation standard, critics can point to marketplace actions that arguably cross the line into the specific encouragement that *Accusearch* disallows. For example, Uber employees coached drivers on avoiding detection by airport police who sought to ticket unauthorized commercial pickups.[183] A closer question arises when most or substantially all user activity is unlawful, for example when a jurisdiction disallows short-term rentals.[184] On one hand, an intermediary might reasonably argue that continuing to operate its standard service does not "encourage" the misbehavior and certainly does not "specifically encourage" it. Yet some intermediary actions are reasonably understood as targeting specific hosts and transactions, arguably "specifically encoura[ing]" the corresponding transactions. Consider signup bonuses to guests and/or hosts, as well as free photography for hosts—in each case, encouraging a specific transaction or set of

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177 See especially Section IV.A.

178 *Roommates.com*, 521 F.3d at 1168.

179 Fair Hous. Council of San Fernando Valley v. Roomattes.com, LLC, 521 F.3d 1157, 1168 (9th Cir. 2008).

180 Jeffrey R. Doty, Inducement or Solicitation? Competing Interpretations of the "Underlying Illegality" Test in the Wake of Roommates.com, note, 6 WASH J.L. TECH & ARTS 125, 132 (2010).

181 Fed. Trade Comm'n v. Accusearch Inc., 570 F.3d 1187, 1191–92 (10th Cir. 2009).

182 *Id.* at 1199; *see also* MCW, Inc. v. Badbusinessbureau.com, No. Civ.A.3:02-CV-2727-G, 2004 WL 833595 (N.D. Tex. April 19, 2004) (finding defendants ineligible for §230 protection because "they actively encourage[ed] and instruct[ed] a consumer to gather specific detailed information," which "is an activity that goes substantially beyond the traditional publisher's editorial role").

183 Tonytee, Comment to *FLL Warning to Drivers*, UBERPEOPLE.NET (Nov. 4, 2014), https://uberpeople.net/threads/fll-warning-to-drivers.4509/page-2#post-74768.

184 *See, e.g.*, S. Res. S6340A, 2015-2016 Legis. Sess. (N.Y. 2016), https://www.nysenate.gov/legislation/bills/2015/s6340/amendment/a.

transactions. And when substantially all of a marketplace's transactions in a given jurisdiction are unlawful—for example, when a jurisdiction simply does not allow short-term rentals in residential units—one might be similarly skeptical of the marketplace's provision of service in that jurisdiction.[185]

Notably, new marketplaces often create the architecture that systematizes the illegality. The details depend on what the statute or regulation requires, especially how it apportions responsibility between marketplace and service provider. But consider a statute that requires every short-term listing to publish its exact street address on every advertisement, versus a marketplace that bans such publication, designs software to block such information, and employs staff to further check for and remove such information. On those facts, surely the marketplace would be "responsible in whole or in part" for the omission and indeed would have "specifically encouraged" the omission that is offensive—having required the omission by both marketplace policy and technical and manual enforcement.

Where a marketplace all but creates a market, there may also be a fair argument that the marketplace is "responsible in whole or in part" for what follows. Of course travelers stayed in strangers' homes before Airbnb – the original bed-and-breakfasts among others. And passengers rode in private cars, not just licensed taxis but pirate taxis and friends and family, often paying to do so. Yet Airbnb and Uber dramatically expanded the size of these markets—in part through advertising to increase awareness of the possibility, but also through pricing incentives to encourage it, as well as vetting, insurance, customer service, and dispute resolution to increase the number of customers and service providers inclined to participate, not to mention lobbying and litigating to advance and defend the practices they favored. Where a marketplace takes such far-reaching actions to make a market, it arguably crosses the line, and the case for its responsibility is correspondingly stronger.

C. *Not treating marketplace as publisher or speaker*

§230 only protects ICS providers from "inconsistent" state and local laws that impose liability based on "status or conduct as a publisher or speaker."[186] §230 was Congress's response to defamation claims against Prodigy,[187] an online bulletin board system comprised of user-submitted messages. Indeed, §230 incorporates the words "publisher" and "speaker," both terms of art in defamation claims. These facts suggest that §230 should be limited to defamation or at least to claims resulting from an intermediary's publication. If a marketplace's illegality comes from some action not fairly traced to

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185 In contrast to *Accusearch*, a Massachusetts trial court offered a broader interpretation of *Roommates*, the inducement standard, which captures general encouragement. In *NPS v. StubHub* the trial court held that StubHub was an ICP because it used "improper means," such as providing training materials and incentives, to intentionally induce or encourage ticket sellers to violate anti-scalping laws. NPS LLC v. Stubhub, Inc., No. 06-4874-BLS1, 2009 WL 995483 (Mass. Super. Jan 26, 2009). However, courts have declined to incorporate the Stubhub test. *See* Hill v. Stubhub, Inc., 727 S.E.2d 550, 563 (2012) (refusing to follow *NPS* because the court did not find the reasoning persuasive); Milgram v. Orbitz Worldwide, Inc., 16 A.3d 1113, 1127 (2010) (asserting that *NPS* contradicts the spirit of *Donato*).

186 Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1102 (9th Cir. 2009).

187 Stratton Oakmont v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

conduct as publisher or speaker, §230 is reasonably understood to offer no protection. Moreover, even granting that many marketplaces could be said to "publish" listings, they often do substantially more, as discussed in Section IV.A.

Sometimes a provider's actions are plainly removed from its actions as publisher or speaker of third-party content. The leading case establishing this principle is *Barnes v. Yahoo!*. In *Barnes*, a Yahoo! employee promised the plaintiff that Yahoo! would remove sexually explicit posts made by her ex-boyfriend. When Yahoo! eventually refused to take down the post, the plaintiff sued for a variety of claims including promissory estoppel. Since promissory estoppel claims seek to hold individuals liable under contract law, the court reasoned that the cause of action did "not seek to hold Yahoo[!] liable as a publisher or speaker of third-party content, but rather as the counterparty to a contract."[188] More generally, when an ICS's *own* conduct is at issue and that conduct "does not turn on holding an Internet service liable for posting or failing to remove content by a third party," §230 will not provide protection.[189]

But in other disputes, it can be awkward, if not maddening, to assess whether a law "inherently requires the court to treat" an ICS as "a publisher or speaker" because §230 was originally designed to respond to defamation or defamation-related torts.[190] In those situations, the fundamental illegality is clear—the underlying defamation—and it is apparent that the communication service's role is primarily, if not solely, to redistribute and "publish" the content. In contrast, for claims such as negligence,[191] support for terrorism,[192] and discrimination,[193] the roles of the independent user and communication service do not neatly track what §230 anticipates.[194]

The Ninth Circuit attempted to reaffirm the distinction between imputing liability for third-party activity on ICSs and holding them directly liable for their own bad acts in

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188 *Id*. at 1107.

189 Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066, 1074 (N.D. Cal. 2016). *See also* Lansing v. Sw. Airlines Co., 980 N.E.2d 630, 638 (Ill. App. 2012) (holding that "section230(c) 'as a whole cannot be understood' as granting blanket immunity to an ICS user or provider from any civil cause of action that involves content posted on or transmitted over the Internet by a third party"); *see also* McDonald v. LG Elecs. USA, Inc., 219 F. Supp. 3d 533, 538 (D. Md. 2016) (declining to give Amazon §230 immunity for "its own tortious conduct").

190 Airbnb, Inc., 217 F. Supp. 3d at 1100-1102; Fair Hous. Council of San Fernando Valley v. Roomates.com, LLC, 521 F.3d 1157, 1163 (9th Cir. 2008).

191 Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016).

192 Fields v. Twitter, 217 F. Supp. 3d 1116 (N.D. Cal. 2016).

193 Sikhs for Justice "SFJ", Inc. v. Facebook, Inc., 144 F. Supp. 3d 108 (N.D. Cal. 2015).

194 The awkwardness is apparent in the controversial California Court of Appeal decision in *Hassell v. Bird*, 247 Cal. App. 4th 1336 (2016). There, a business had received a negative reviewed on the Yelp site, and it complained of defamation by the anonymous reviewer. After a default judgment, the Court ordered Yelp to remove the disputed review. Yelp objected, citing §230 for the proposition that it was not responsible for the underlying defamation and thus could not be required to remove the post. But the Court of Appeal found that Yelp was not treated as a publisher when a trial court ordered it to remove the post. In particular, the Court found that since Yelp was not a party to the original case, the removal order did not impose any liability on Yelp for its role as a publisher. Yelp complained of possible contempt liability for violating the Court's order, but the Court said Yelp offered no authority that §230 guaranteed Yelp safety from contempt proceedings, and the Court said any contempt sanction would be for Yelp's own actions, not for its role as publisher or distributor of third party content.

Airbnb, Inc. v. City and County of San Francisco.[195] There, the court found that §230 did not prevent San Francisco from imposing civil and criminal liability on Airbnb for its own actions in providing a booking service. In particular, the court found that the ordinance at issue regulates the plaintiffs' "own conduct as Booking Service providers and cares not a whit about what is or is not featured on their websites."[196] Similarly, the Ninth Circuit distinguished a website's own acts from users' acts in its 2016 *Internet Brands* decision finding that §230 did not prevent claims that a website negligently failed-to-warn a plaintiff of a known scheme to lure women into situations where they could be assaulted.[197] The failure, the court argued, was a wrong independent of third-party user behavior and was unrelated to any obligation to moderate or remove dangerous postings.[198]

Relatedly, some might question whether CDA truly protects marketplaces whose actions include charging a fee. A marketplace's efforts to seek and accept payment are arguably separate and apart from "treat[ing it] as the publisher or speaker." When illegality targets payment, rather than publishing, the applicability of §230 is less clear. This approach has the additional virtues of tracking common law instincts about benefit as an indicator of liability, and of exempting noncommercial and zero-fee services (most of Craigslist notably included) while placing liability on the large commercial marketplaces that seem particularly well-positioned to take action.

Proponents of broad §230 protections question the wisdom of these decisions.[199] But where a marketplace's efforts extend importantly beyond publishing, such as processing payments or otherwise intertwining themselves with transactions, the marketplace may face liability on theories predicated on its own acts, not on its role as publisher or speaker of the material that comes from others.

D. Federalism avoidance canon and localism

The scope of §230 preemption of state law is arguably ambiguous under the plain language of the statute. But the correct interpretation of ambiguous law is informed by canons of statutory interpretation under which the courts interpret ambiguous federal statutes to minimally preempt state law and to minimally encroach on traditional areas of state regulation. Both factors call for a narrow interpretation of §230 where a broad interpretation would conflict with state law, at least in certain fields, and thereby suggest that §230's protection to marketplaces may be correspondingly narrower.

1. The statutory language

§230(e)(3) provides a preemption clause which declares, "Nothing 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

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195 Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (2016).

196 *Id.* at 1074.

197 Doe v. Internet Brands, Inc., 824 F.3d 846 (9th Cir. 2016).

198 *Id*. at 851.

199 *See, e.g.*, Eric Goldman, *Section 230 Ruling against Airbnb Puts All Online Marketplaces at Risk*–Airbnb v. San Francisco, TECH. & MKTG. L. BLOG (Nov. 14, 2016), http://blog.ericgoldman.org/archives/2016/11/section-230-ruling-against-airbnb-puts-all-online-marketplaces-at-risk-airbnb-v-san-francisco.htm .

State or local law that is inconsistent with this section."[200]

This preemption clause at first glance may seem to be unnecessary. The Constitution's Supremacy Clause instructs that Federal law preempts inconsistent state law and does not preempt consistent state law.[201] There is no need for a federal statute to reiterate the point.

It is "a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute."[202] This principle disfavors an interpretation that renders §230's preemption clause meaningless. We must search, then, for an interpretation that gives genuine meaning to the preemption clause. The most natural interpretation, we suggest, is that Congress sought to emphasize that there are indeed consistent state laws which will and should remain in effect despite §230. Such emphasis is most consistent with a narrower reading of §230 and not consistent with the expansive safe harbor that some have favored.

2. Avoidance canons

Rules of statutory interpretation provide an additional basis to question the scope of §230's immunity against state law. "The Court has adopted a cluster of clear statement rules that protect a broad value of federalism by presuming that absent a plain statement of legislative intent, Acts of Congress cannot intrude upon the usual balance of state and federal power."[203]

Two overlapping rules help interpret any ambiguity in §230. The first is the "presumption against preemption of state law by a federal statute."[204] If there is doubt about the scope of preemption, this presumption would let state law stand. The second is the presumption against constructions of federal statutes that produce "federal encroachment upon a traditional state power."[205] (Inasmuch as federal law generally treats local power as delegated state power,[206] we elide here for simplicity the distinction between state and local law.) On subjects traditionally left to the states, this presumption would be particularly deferential to state law.

Broad readings of §230 run afoul of both presumptions when applied to certain

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200 47 U.S.C.A. § 230(e)(3) (2012).

201 U.S. CONST. art. VI, cl. 2.

202 Williams v. Taylor, 529 U.S. 362, 404 (2000).

203 John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 HARV. L. REV. 2003, 2025 (2009).

204 *See* Manning, *supra* note 203, at 2026 n.93, and sources cited.

205 *See, e.g.*, Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers (SWANCC), 531 U.S. 159, 172–73 (2001) (noting, in the agency statutory interpretation context, that the Court's "prudential desire not to needlessly reach constitutional issues . . . is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a *traditional state power*" (emphasis added) (citing United States v. Bass, 404 U.S. 336, 349 (1971)); BFP v. Resolution Trust Corp., 511 U.S. 531, 544 (1994) ("To displace traditional state regulation . . . the federal statutory purpose must be 'clear and manifest . . . .'"); *cf.* United States v. Bass, 404 U.S. 336, 349 (1971) (invoking a clear statement rule where "the broad construction urged by the Government [would] render[] *traditionally local criminal conduct a matter for federal enforcement*" (emphasis added)).

206 *See* David S. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 487 (1999) ("[B]lack-letter constitutional law formally deems [local governments] to be the mere administrative appendages of the states that 'create' them."). *But see id.* at 493 (listing cases in which "the Supreme Court . . . str[uck] down state attempts to control the political discretion of towns and cities").

marketplaces. The presumption against preemption suggests that the ambiguities in §230 discussed above[207] and elsewhere in the literature[208] should be construed not to limit marketplaces' liability under state law. The presumption against encroachment lends particular force to the presumption against preemption in the context of marketplaces that facilitate transactions that are traditionally regulated under the state police power (whether wielded by state or local governments). Areas traditionally regulated by the states and cities include, for example, land use[209] (including zoning, real estate, and other aspects of short-term rentals) as well as car services and taxicabs[210] (thereby reaching ride-hailing services). Federalism principles therefore suggest that §230 should not block state and local regulation of the local activities of these firms.

E. Turning away from the CDA caselaw

A final line of reasoning turns away from §230 caselaw along one of several dimensions. Indeed, many scholars suggest that §230 is misguided or overbroad.[211] Some courts have been equally skeptical, favoring common law notions of liability and questioning why Congress (supposedly) instructed a different result online.[212] To date, the Supreme Court has not had occasion to interpret §230. It is not implausible that an appellate court would chart a new course, particularly as online information systems come to intermediate ever more transactions,[213] as the divergence between §230 versus common

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207 *See infra* part IV.A-C.

208 See Danielle Keats Citron & Benjamin Wittes, The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity, FORDHAM L. REV. (forthcoming) (at III.A), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007720; Gregory M. Dickinson, Note, *An Interpretive Framework for Narrower Immunity Under Section 230 of the Communications Decency Act*, 33 HARV. J.L. & PUB. POL. 863, 869–70 (2010).

209 *See* SWANCC, 531 U.S. at 174 (recognizing states' "traditional and primary power over land and water use"); FERC v. Mississippi, 456 U.S. 742, 767 n.30 (1982) ("[R]egulation of land use is perhaps the quintessential state activity.").

210 Nestor M. Davidson & John J. Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 YALE L. & POL'Y REV. 215, 216 (2016); Paul Stephen Dempsey, *Taxi Industry Regulation, Deregulation & Reregulation: The Paradox of Market Failure*, 24 TRANSP. L.J. 73, 76–77 (1996) (discussing the history of taxicab regulation in the United States, and stating); *id.* at 78 ("Typically, taxis are regulated at the local level . . . .").

211 Brief for Legal Momentum et al. as Amici Curiae Supporting a Petition for a Writ of Certiorari, Jane Doe No. 1 v. Backpage.com, LLC, 137 S.Ct. 622 (2017) (No. 16-276) (petition for writ of certiorari denied), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2319&context=historical.

212 *See e.g.* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12 ("If the evils that the appellants have identified are deemed to outweigh the First Amendment values that drive the CDA, the remedy is through legislation, not through litigation"); Fair Hous. Council of San Fernando Valley v. Roomattes.com, LLC, 521 F.3d 1157, 1189, n.15 (9th Cir. 2008) ("The Internet is no longer a fragile new means of communication that could easily be smothered in the cradle by overzealous enforcement of laws and regulations applicable to brick-and-mortar businesses. Rather, it has become a dominant—perhaps the preeminent—means through which commerce is conducted. And its vast reach into the lives of millions is exactly why we must be careful not to exceed the scope of the immunity provided by Congress and thus give online businesses an unfair advantage over their real-world counterparts, which must comply with laws of general applicability.")

213 Catherine A. Tremble, Wild Westworld: The Application of Section 230 of the Communications Decency Act to Social Networks' Use of Machine-Learning Algorithms, 86 FORDHAM L. REV. 824 (2017).

law standards becomes increasingly stark,[214] as public sentiment shifts against tech platforms,[215] and as scholars mount an increasingly vigorous assault against §230 overbreadth.[216]

A first line of attack would narrow the §230 safe harbor by taking seriously the words "good samaritan" and "decency" (§230(c)'s section heading and the statute title, respectively). Citron and Wittes offer specifics.[217] Broadly, a marketplace is a plausible "good samaritan" advancing "decency" to the extent that it acts (or attempts to act) to block objectionable material. But those terms are correspondingly inapt where the marketplace seeks to retain, or indeed promote, misconduct. Where a marketplace rejects an easy solution that would increase compliance with applicable law, its status as "good samaritan" seems particularly far-fetched.

Second, since the passage of the CDA, courts have used it to protect intermediaries from liability for unlawful user content even if they had knowledge of its unlawfulness.[218] However, the stated purposes of §230[219] offer zero suggestion that the law was designed to protect intermediaries who knowingly and willfully violate state or local law. One might protest that §230 intentionally grants protection even when an intermediary knows about a problem, in order to encourage and support intermediaries. Yet some intermediaries are on specific notice of violations—for example, a marketplace knowing that every transaction in a given jurisdiction is unlawful. It is particularly difficult to see a proper purpose resulting from allowing those intermediaries to continue with impunity.

In the next section, we broaden the preceding analyses by considering the fundamental principles that arguably should shape whether, when, and why marketplaces are (or should be) liable for the transactions they facilitate.

V. A FRAMEWORK FOR ASSESSING MARKETPLACE LIABILITY

Two normative systems predominate in the §230 literature and caselaw: efficiency and fault. Generally, discussions of efficiency ask how assignments of liability maximize goods and minimize harms, and discussions of fault tend to ask whether an intermediary is

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214 *See e.g.* Leanne Ta and Aaron Rubin, *The Decline and Fall of Section 230?*, THE LAW AND BUSINESS OF SOCIAL MEDIA (December 15, 2016), https://www.sociallyawareblog.com/2016/12/15/the-decline-and-fall-of-section-230/.

215 *See e.g. Internet firms' legal immunity is under threat*, THE ECONOMIST (February 11, 2017), https://www.economist.com/news/business/21716661-platforms-have-benefited-greatly-special-legal-and-regulatory-treatment-internet-firms; Alan Rozenshtein, It's the Beginning of the End of the Internet's Legal Immunity, FOREIGN POLICY (November 13, 2017), http://foreignpolicy.com/2017/11/13/its-the-beginning-of-the-end-of-the-internets-legal-immunity/.

216 *See e.g.* Citron and Wittes, *supra* note 208; Doug Lichtman and Eric Posner, *Holding Internet Service Providers Accountable*, 14 SUP. CT. ECON. REV. 221, 260 (2006); Brief for Legal Momentum et al. as Amici Curiae Supporting a Petition for a Writ of Certiorari, Jane Doe No. 1 v. Backpage.com, *supra* note 211.

217 Citron and Wittes, *supra* note 208.

218 *See, e.g.,* Zeran v. America Online, 129 F.3d 327 (4th Cir. 1997).

219 47 U.S.C.A. § 230(b) (2012).

culpable.[220] In other words, efficiency asks whether imposing liability is *reasonable*, and fault asks whether it is *appropriate*.

In many cases, the two normative systems are in accord. Often it would also be inefficient for the intermediary to prevent the problem, and the intermediary is also essentially blameless. In other cases, the intermediary is relatively well-positioned to make the problem stop, and simultaneously bears a significant share of the blame.[221]

Below, we consider efficiency and fault rationales that inform when it is reasonable and appropriate for liability to attach to online marketplaces.[222] We are mindful of the limitations of our effort: For one, assigning liability requires fact-finding beyond the scope of our Article. Furthermore, we claim neither that our listing of factors is exhaustive, nor that these factors are always most important. Rather, we offer these factors in hopes that they offer a useful and intuitive framework for assessing marketplace liability.

A. Efficiency

Typically, efficiency analyses ask how to maximize goods and minimize harms.[223] The details are often problematic: looking at the same limited information, different people can reach divergent conclusions about the goods and harms in play, particularly when the goods or harms are debatable or difficult to measure.

So too in the §230 efficiency literature. Looking at §230, some see the protector of a thriving Internet economy and ecosystem, emphasizing the benefits §230 brings to innovators and platforms in their vast operations.[224] In contrast, those who are more concerned about harms often ask which party to an intermediated transaction is in the best position to avert those harms.[225] Many of the latter focus on particular harms that intermediaries could work harder to combat, and attempt to design regimes that would help

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220 For a discussion of similar rationales in tort law, see Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29–33 (1972) (discussing moral and efficient theories of negligence rules). These normative frameworks parallel discussions of deterrence (or utilitarian) versus retributivist values in criminal law regimes. *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801, 1811–13 (1997).

221 The two systems are most obviously aligned when the market itself is considered problematic, and when the website on which transactions are taking place is designed to facilitate precisely those transactions. Websites specifically designed to cultivate criminal markets are the most obvious example. *See, e.g.*, *See, e.g.*, Nick Bilton, *Silicon Valley Murder Mystery: How Drugs and Paranoia Doomed Silk Road*, VANITY FAIR (May 2017), https://www.vanityfair.com/news/2017/04/silk-road-ross-ulbricht-drugs-murder. The fear that the hosts of such markets would evade liability by citing §230 is presumably why §230(e)(1) carves out violations of federal criminal law from §230's protections, §230(e)(1) (West 1998).

222 Our approaches borrow heavily from the language of tort law. This is more than coincidental: Tort law addresses liability to non-contracting third parties, and disputes about the obligations of marketplaces often similarly arise from harms to users other than the marketplaces' customers.

223 *See, e.g.*, Jeremy Bentham, A FRAGMENT ON GOVERNMENT (1776) ("[I]t is the greatest happiness of the greatest number that is the measure of right and wrong . . . ."); Posner, *supra* note 220, at 33 (defining "efficient" as "cost-justified").

224 See notes 118 to 120*, supra*.

225 *See generally, e.g.*, Mann & Belzley, The Promise of Internet Intermediary Liability, 47 WM. & MARY L. REV. 239 (2005); Citron and Wittes, *supra* note 208; TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2010).

limit those harms without unduly burdening intermediaries.[226]

In an efficiency analysis, the bottom-line question is: *Does imposing liability produce a net good*? To be tractable, this question must be broken down into smaller pieces. One might begin with importance: How much does it matter whether the objectionable transactions are controlled? Next, cost, effectiveness, and feasibility: What tools does the marketplace have to control these transactions? What do they cost? How well do they work? If the marketplace controls these transactions, what cost would that impose on unobjectionable transactions and on its own operations generally? Finally, consider secondary effects: what other options do participants in the problematic market have? When these transactions flow through the marketplace, does that make law enforcement's job easier or harder?[227] When one player in the market is held liable, will other participants in the same marketplace self-regulate out of fear of liability, or will they take advantage of the vacuum left behind in the market?

These questions often pose serious difficulties. Importance, costs, and feasibility can be hotly contested; and effects and responses are challenging to predict. Furthermore, situations differ not just from market to market, but by time and place. Additional challenges arise when harms are difficult to measure, as is often the case for defamation,[228] psychological distress, [229] and invasions of privacy.[230] The harms resulting from traffic in unlawful weapons are, at least in part, more readily measured. In contrast, it is more difficult to quantify the subtler psychological harms of traversing bilious comments on YouTube.[231]

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[226] *See, e.g.*, Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 Yale L.J.F. 41 (2007), https://www.yalelawjournal.org/forum/regulating-cyberbullies-through-notice-based-liability; Vanessa Brown-Barbour, *Losing Their License to Libel: Revisiting Sec. 230 Immunity*, 30 BERKELEY TECH. L.J. 1505, 1547-60 (2015); Scruers, *supra* note 224, at 260–64.

[227] Similar questions were debated when intense public pressure led Craigslist to shut down its "erotic services" section, which facilitated prostitution. *See, e.g.*, Claire Cain Miller, *Craigslist Says It Has Shut Down Its Section For Sex Ads*, N.Y. TIMES (Sept. 16, 2010), http://www.nytimes.com/2010/09/16/business/16craigslist.html; William Saletan, *Pimp Mobile: Craigslist Shuts Its "Adult" Section. Where Will Sex Ads Go Now?*, SLATE: FRAME GAME (Sept. 7, 2010), http://www.slate.com/articles/news_and_politics/frame_game/2010/09/pimp_mobile.html. A working paper found that Craigslist's erotic services section increased the size of the prostitution market, but also made it safer. Scott Cunningham, Gregory DeAngelo, & John Tripp, *The Effect of Online Erotic Services Advertising on Prostitution Markets, Pricing, and Murder,* (Ctr. for the Econ. Analysis of Risk, Working Paper Series 2018), http://cear.gsu.edu/files/gravity_forms/45-9a8e751f713c799256f347c4aad2a49d/2017/04/Online-Erotic-Services-Advertising-and-Murder.pdf.

[228] *See, e.g.*, James H. Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U. L. REV. 375, 380 (1980) ("Reputational injury . . . is particularly difficult to establish.").

[229] *Cf.* Eugene Kontorovich, Note, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493 (2001) (noting the evidentiary problems associated with the "inchoate, subjective nature of [emotional distress] claims").

[230] *Cf.* Dorsey D. Ellis, Jr., *Damages and the Privacy Tort: Sketching a "Legal Profile*," 64 IOWA L. REV. 1111, 1152–53 (1979) (noting the conceptual confusion introduced in privacy torts "result[ing] from the failure to articulate a functional means of evaluating the interests protected by privacy" and logically subsequent ambiguity with respect to appropriate damages).

[231] *Cf.* Amelia Tait, *Why Are Youtube Comments the Worst on the Internet?*, NEW STATESMAN (Oct. 26, 2016), https://www.newstatesman.com/science-tech/internet/2016/10/why-are-youtube-comments-worst-internet ("For years, YouTube has notoriously been the home of the worst comment section on the internet,

In the context of marketplaces, at least one efficiency problem is generally simplified. Marketplaces tend to have superior capabilities to monitor and detect user misbehavior, as they have the best information about activities on their systems. Marketplaces can receive such information from their software, such as apps and phones recording and reporting who went where when, as well as from users' own submissions, customer feedback, and complaints. For example, California requires ride-hailing service, like Uber, to follow a "zero tolerance" policy for drunk driving.[232] Upon receiving a drunk driving complaint, a service must suspend the driver until further investigation.[233] Indeed, California imposes fines if a service does not do so, reflecting the judgment that ride-hailing services have the best information about this problem and thus should be required to act.[234]

On the flip side, several scholars writing about intermediary liability online have argued that service providers will tend to overregulate activities on their platforms when they (a) are subject to liability and (b) have incentives that differ from their users'.[235] For example, if a blog hosting platform were liable for libelous posts, it might block remove all manner of entries—some that are truly libelous, but also many that are at most borderline—in an effort to reduce its liability, with little regard for interests of authors and readers. Based on this concern, those scholars question liability rules that would exacerbate the divergent incentives of providers and users. In this regard, online marketplaces present less of a problem because their incentives tend to align broadly with their sellers': both marketplaces and sellers want to increase the number of transactions.

Certain extreme enforcement efforts have clear efficiency consequences. One might imagine regulations that are so costly, or prevent such marginal harms, as to be unreasonable. For example, it would be enormously costly for eBay to proactively prevent

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and if you Google 'Why are YouTube comments…', the search engine will helpfully complete your sentence with the options 'so bad', 'so racist', and 'so toxic'.").

232 CA PUB. UTILS. COMM'N, 13-09045, DECISION ADOPTING RULES AND REGULATIONS TO PROTECT PUBLIC SAFETY WHILE ALLOWING NEW ENTRANTS TO THE TRANSPORTATION INDUSTRY (2013), http://docs.cpuc.ca.gov/publisheddocs/published/g000/m077/k192/77192335.pdf.

233 *Id.* *See also* Florida's zero tolerance policy. H.R.J. Res. 221, 2017 Leg. (Fla. 2017), https://www.flsenate.gov/Session/Bill/2017/221/BillText/er/PDF.

234 In April 2017, the California Public Utilities Commission recommended assessing Uber over $1.3 million for 150-plus violations of the zero-tolerance rules. SAN FRANCISCO PUB. UTILS. COMM'N, I.17-04-009, ORDER INSTITUTING INVESTIGATION AND ORDER TO SHOW CAUSE WHY THE COMMISSION SHOULD NOT IMPOSE APPROPRIATE FINES AND SANCTIONS ON RAISER-CA LLC (2017), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M182/K872/182872304.PDF.

235 *See, e.g.*, Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1007–08 (2001) ("Because an ISP derives little utility from providing access to a risky subscriber, a legal regime that places liability on an ISP for the acts of its subscribers will quickly lead the ISP to purge risky ones from its system."); Asaaf Hamdani, *Who's Liable for Cyberwrongs,* 87 CORNELL L. REV. 901, 918 (2002) (fearing that ISPs will be overcautious because "ISPs do not capture the full value of the conduct they are entrusted with policing"); Neil Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 13 n.30 (2003) ("ISPs and their subscribers have asymmetric incentives. ISPs do not fully share the benefits its subscribers derive from placing material, whether infringing or non-infringing, on the network. As a result, imposing liability on ISPs for subscribers' infringing material induces ISPs to overdeter, purging any material that a copyright holder claims is infringing"); Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 296-297 (2011) at 296–97.

the sale of counterfeit goods, since products ordinarily do not come into eBay's hands.[236] Requiring eBay to take physical custody of all goods, and inspect them in detail, would surely create costs disproportionate to the problem. Yet that does not mean all anti-counterfeiting efforts are fatally flawed on efficiency grounds. Smaller interventions at eBay, perhaps focused on frequently counterfeited products or high-risk sellers, might pass efficiency scrutiny.[237] Meanwhile, the architecture of Amazon Marketplace, with many goods sent from Amazon's own warehouses, might make policing comparatively easily.

B. Fault

In contrast to efficiency's consequentialist analysis, fault generally refers to blameworthiness. Analyzing intermediary liability from the perspective of fault entails asking whether an intermediary *deserves* to have liability imposed on it, usually based on some disputed aspect of its design or conduct.[238]

In the context of marketplaces, fault analysis typically looks for indicia of specific blameworthy conduct. One can ask: Did the marketplace do something to cultivate problematic activities?[239] Or: Did the marketplace fail to intervene where it could have?[240] Or: Did the marketplace intervene clumsily, making matters worse?[241]

Here too, the questions often pose serious difficulties. For example, a question about who "did" a given deed is not straightforward when multiple users collaborated—such as when an intermediary provides a tool that one user employs to harm another. Critics will often see the intermediary as liable on a root cause theory, while defenders will see an intervening cause in the independent user's bad act. Meanwhile, causation is similarly muddied when a given type of harm has long occurred, with or without intermediaries, or via prior intermediaries. Critics often focus on a new intermediary's special role, perhaps distinctly assisting or facilitating the problem, while defenders point to a preexisting problem as indication that the intermediary did not create the situation.

Nonetheless, fault analysis is usually more tractable than efficiency analysis because it typically requires understanding only one company's behavior,[242] where thorough efficiency analysis often requires assessing responses by buyers, sellers, competitors, and

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[236] For a general discussion of eBay's secondary liability for the sale of counterfeit goods, see Kurt M. Saunders & Gerlinde Berger-Walliser, *The Liability of Online Markets for Counterfeit Goods: A Comparative Analysis of Secondary Trademark Infringement in the United States and Europe*, 32 NW. J. INT'L L. & BUS. 37, 44–51 (2011).

[237] eBay has, in fact, implemented some such measures. *See Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 98–99 (2d Cir. 2010).

[238] *See, e.g.*, F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1198 (10th Cir. 2009) ("That is, was it *responsible* for the development of the specific content that was the source of the alleged liability?" (emphasis added)).

[239] *See, e.g.*, *id.* at 1198–1200.

[240] *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997) ("[U]nder [Stratton Oakmont's] holding, computer service providers who regulated the dissemination of offensive material on their services risked subjecting themselves to liability, because such regulation cast the service provider in the role of the publisher . . . .").

[241] *See, e.g.*, Dov Waisman, *Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for the Good Samaritan Immunity?*, 29 GA. ST. U. L. REV. 609, 618–19 (2013) (discussing the legal requirement of reasonable care in altruistic undertakings).

[242] *See, e.g.*, *Accusearch*, 570 F.3d at 1198–1200.

beyond. Consider a regulation targeting a general-purpose tool that facilitates misdeeds that have long occurred, for example targeting Craigslist in its provision of a listing service whereby sellers can list almost anything, whereupon some sellers express racial preferences for real estate tenants. Because the listing tool is general in its purpose, allowing listing or sale of almost anything and with little or no tailoring to a particular use case, it appears unlikely that Craigslist "did" much to support the listings. Blame is arguably further reduced by the ineffectiveness of plausible interventions. For example, landlords could probably evade most keyword filters via synonyms, euphemisms, misspellings, or the like. And landlords could move to an alternative platform if Craigslist proved too strict. On a blame theory, then, many analysts may be prepared to forgive Craigslist's inclusion of some listings expressing a racial preference for tenants.

C. Factors for assessing marketplace liability

Applying the principles of efficiency and fault, we see five factors that can guide assessments of marketplace liability.

1. Specificity vs. generality

Some marketplaces facilitate transactions in exceptionally specific markets. For example, Uber's local transportation business operates in certain places, in defined classes of vehicles, at specific prices and on specific terms. In contrast, other marketplaces can be used for almost anything; consider the exceptional range of both goods and services on Craigslist.[243]

We call such constraint along a given dimension of marketplace design *specificity*, and its reverse *generality*. A high degree of specificity tends to suggest that a given marketplace should be held liable under both efficiency and fault doctrines.

Fundamentally, a marketplace's generality on a given dimension suggests that the marketplace engages in less oversight of the activities of market participants along that dimension. In that case, it may be distinctively burdensome to impose new oversight obligations, raising efficiency concerns. Generality also tends to reduce apparent culpability: all else being equal, a marketplace that has not chosen to facilitate specific potentially problematic activities bears less blame than one that has. On the other hand, if a marketplace chooses to target a specific category of goods or services, it can more reasonably be expected to anticipate and police abuses related to that particular market.[244]

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[243] *See, e.g.*, Aaron Mak, *Craigslist Posters Are Already Trying To Sell Their Used Eclipse Glasses As Collectors' Items*, SLATE (Aug. 21, 2017), http://www.slate.com/blogs/moneybox/2017/08/21/craigslist_posters_are_already_trying_to_sell_their_used_eclipse_glasses.html; Tamar Lapin, *Woman Tries To Sell Baby Arctic Fox On Craigslist*, N.Y. POST (Aug. 17, 2017), http://nypost.com/2017/08/17/woman-tries-to-sell-baby-arctic-fox-on-craigslist/; Warren Wolfe, *64 Pounds Of Mercury Turns Up On Craigslist*, STAR TRIBUNE (May 17, 2012), http://www.startribune.com/64-pounds-of-mercury-turns-up-on-craigslist/151977355/.

[244] We return to a variation on this point in Localism, *infra*. *See also* F.T.C. v. Accusearch, Inc., 570 F.3d 1187, 1200 (10th Cir. 2009) (imposing liability in part because "[b]y paying its researchers to acquire telephone records, knowing that the confidentiality of the records was protected by law, [Accusearch] contributed mightily to the unlawful conduct of its researchers. . . . [T]he offensive postings were Accusearch's *raison d'etre* and it affirmatively solicited them.").

A potential twist in this analysis arises from abuses associated with a specific marketplace that are rooted in its specificity, but unanticipated or otherwise not blameworthy. For example, consider the use of Airbnb for prostitution.[245] If short-term rentals are generally attractive to prostitutes,[246] Airbnb's specificity as to the short-term rental market may mean the platform is particularly attractive for facilitating prostitution. But unless evidence is adduced that Airbnb attempts to foster this use of its service, or perhaps that Airbnb negligently or recklessly ignored some evidence of the problem, there would be little logic in imposing liability on Airbnb for any facilitation of prostitution that might take place.

A second limitation of this approach is the prospect of inviting marketplaces to turn a blind eye to the way their services are systematically used. Potential generality is probably not enough; when a marketplace is general in theory but specific in practice, an informed analysis should look at the actual situation at hand, and assign liability accordingly. If it turned out that Craigslist was used overwhelmingly for sale of counterfeit goods, recalled goods, illegal services, or other misdeeds, Craigslist's generality alone should not impede accountability.[247]

Finally, a particularly specific marketplace might not truly be a marketplace at all, but rather a seller of goods or services, in which case secondary liability doctrines fall away, and primary liability doctrines take center stage.[248] Consider first the ordinary case: If a single independent operator offered on Craigslist to drive passengers around town for a fee, we would not think that Craigslist was functionally equivalent to a car service. Rather, we would take that as an inevitable consequence of Craiglist's generality. Uber's specificity, in contrast, gives rise to a different inference. Ordinarily, we would use a term like car service or taxi dispatch to describe an intermediary that dispatches vehicles to transport customers from point to point within a city, taking a portion of each driver's earnings, and providing incidental assistance such as customer service, billing, record-keeping, and perhaps insurance. We would not think that such a company was anything but a business selling transportation services directly to customers. Uber's functional similarity to a longstanding business model suggests that it is, in fact, a business selling services rather than a marketplace connecting drivers and riders.[249]

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245 *See* Daniel Rubio & Luke Jones, *Owners Shocked To Learn Cooper-Young Airbnb Rental Used As Brothel*, WREG, (July 18, 2017), http://wreg.com/2017/07/18/owners-shocked-to-learn-cooper-young-airbnb-rental-used-as-brothel/; *"My Airbnb Flat Was Turned into a Pop-Up Brothel,"* BBC MAG. (Apr. 8, 2017), http://www.bbc.com/news/magazine-39528479; Amanda Woods, *Prostitutes are Using Airbnb for 'Pop-up Brothles,'* N.Y. POST (July 3, 2017), http://nypost.com/2017/07/03/prostitutes-are-using-airbnb-for-pop-up-brothels/.

246 We express no opinion on this factual question.

247 Indeed, a similar allegation arose in litigation about file-sharing tools—software that could in principle copy any file, from government records to public domain materials, but were distinctively and indeed overwhelmingly used to copy copyrighted music and movies. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

248 We discuss a variation on this point in more depth in Control of the Transaction, *infra*.

249 *Cf.* Charlie Warzel, *Let's All Join The AP Stylebook In Killing The Term "Ride-Sharing,"* BUZZFEED (Jan. 8, 2015), https://www.buzzfeed.com/charliewarzel/lets-all-join-the-ap-stylebook-in-killing-the-term-ride-shar ("[T]he vast majority of services that Uber and Lyft and others provide mimics a traditional taxi or driver service.").

2. Scale

When objections to a marketplace are best addressed through a solution with large up-front costs but low marginal costs, it may be efficient to impose liability only on especially large marketplaces.

Consider ContentID, the YouTube feature that scans video and audio content to check for reproduction of copyrighted material, automatically paying a rights-holder for use (or, if the rights-holder so instructs, removing an infringing video altogether).[250] Building ContentID required not just the technical capability to match similar audio, but also an inventory of copyrighted works and information about the corresponding rights-holders. Despite the apparent challenge in setting up such a system, once running it enjoys economies of scale: Running ContentID on one hundred thousand YouTube videos is not all that much cheaper than rolling it out over one billion YouTube videos. For YouTube, then, the up-front costs are spread across an exceptional inventory of content, benefiting from the exceptional scale of YouTube's business. A YouTube without ContentID might rightly be accused of cutting an important corner. Yet the same accusation would ring hollow if directed towards a tiny startup.

Similar concepts apply to other marketplaces. Consider a short-term rental marketplace considering developing and maintaining a directory of municipal laws that apply to short-term rentals. A large marketplace could spread these costs across its thousands of properties and, in all likelihood, millions of transactions—probably a reasonable undertaking. In contrast, a small marketplace would probably struggle to do the same work.

3. Unlawful design

A platform may be designed in a way that simplifies, assists, or encourages unlawful behavior. Roommates.com, discussed earlier, is the prototypical example. The company structured its matching service to make it dramatically easier for users to unlawfully discriminate in their housing choices. In so doing, it enabled and arguably encouraged unlawful discrimination.[251] Compare the facilitation of racial discrimination on Roommates.com with racial discrimination on Airbnb, which seems to result from guests' and hosts' own preferences, unprompted by Airbnb.[252] While Airbnb could make design choices that discourage or prevent discrimination,[253] its design choices do not appear to be designed to facilitate or encourage unlawful discrimination the way critiqued in *Roommates.com*.

4. Control, enhancement, representation, and market development

Below, we consider four sub-factors for assessing how a service's sales-enhancing activities might support imposing liability. Stated at the highest level of generality, the

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250 *How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?hl=en (last visited Jan. 1, 2018).

251 *See infra* Section IV.B.

252 For evidence on racial discrimination among guests directed at hosts, see generally Edelman and Luca, *supra* note 82. For evidence on hosts' discrimination, see generally Benjamin Edelman, et al., *supra* note 65.

253 *See* Edelman and Luca, *supra* note 82 at 12-13; Benjamin Edelman, et al., *supra* note 65 at 17–18.

idea is that marketplaces may be liable for activities they undertake to raise the quality and volume of the goods and services consumers purchase through them. The sub-factors are conceptually distinct and draw on different legal concepts, but may overlap in any combination.

a. Control of the transaction

Intermediaries often seek to standardize market participants' experiences. Take Uber, which gives drivers "tips for 5-star trips" including how to drive, how to communicate with passengers, and even how to dress.[254] Even more importantly, Uber sets prices,[255] much like a taxi company or regulator would, eliminating the possibility of one-on-one negotiation; requires drivers to carry insurance;[256] and sets rules relating to car types.[257] Rather than merely facilitating a transaction between rider and driver, Uber organizes and structures the most important elements of the transaction. Other marketplaces similarly provide precise instructions to sellers to standardize buyers' experience.[258]

Standardization and control may suggest that the putative online marketplace is not an intermediary between sellers and buyers at all, but the true seller.[259] For example, in setting prices and other key terms, Uber makes itself look more like the true service provider and less like an independent marketplace. As putative intermediaries exercise greater control over the transactions that they facilitate, they step towards being simple sellers, and start being subject to primary, rather than secondary, liability. This logic is rooted in fault: a seller is more blameworthy for problems that arise from its own service than an intermediary is blameworthy for transactions it merely facilitates.

b. Enhancement

Online marketplaces often do more than facilitate transactions: they may undertake to *enhance* the offerings on their platform. For example, from 2011 through June 2017, Airbnb offered hosts free professional photography services to better present their

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254 *Tips for 5-Star Trips*, UBER, https://www.uber.com/drive/resources/5-star-tips/ (last visited Jan. 1, 2018).

255 *See supra* notes 37-38. Contrast Airbnb, which also provides pricing advice to its users "based on the listing's 'features, location, amenities, booking history, availability, and seasonal supply and demand.'" Johanna Interian, Note, *Up in the Air: Harmonizing the Sharing Economy Through Airbnb Regulations*, 39 B.C. INT'L & COMP. L. REV. 129, 156 (2016). Since the suggestion is optional, we would tend to classify this as Airbnb helping the seller, who may not a refined sense of the market, rather than as Airbnb controlling the transaction.

256 *Insurance Requirements*, UBER, https://help.uber.com/h/6e7ac56f-a12b-440a-9e6e-83acea284b55 (last visited Jan. 1, 2018).

257 Lucy Bayly, *Some Drivers See Red Over Uber Black's Strict Rules on Car Upgrades,* NBC NEWS (Mar. 25, 2016), https://www.nbcnews.com/business/business-news/some-drivers-see-red-over-uber-black-s-strict-rules-n545621.

258 *See, e.g., Selling at Amazon.com: Shipping and Packaging,* AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=hp_left_ac?ie=UTF8&nodeId=200420570 (last visited Jan. 1, 2018).

259 Similar arguments underlie suits arguing that Uber drivers are employees rather than independent contractors. *See* O'Connor v. Uber Tech., Inc., 82 F. Supp. 3d 1133, 1148–49 (N.D. Cal. 2015) ("[T]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (internal quotation marks omitted)).

properties.[260] Improved photographs helped properties attract more guests and command higher rates, to the mutual benefit of the host and Airbnb. Similarly, Uber and Lyft offer drivers a variety of tools to improve ride quality. Lyft, for example, has offered its drivers various hardware to help riders identify their drivers,[261] making it more convenient to hail a ride. These measures encourage larger tips and future trips.

These efforts are sensible business decisions, but they also suggest that Airbnb, Uber, and Lyft are more than mere marketplaces. In particular, these efforts undermine any claim that the resulting service is solely the work of third party sellers and the marketplace merely a neutral pass-through. Instead, in these cases, the marketplace is more properly understood as collaborating with sellers. In the language of §230, the intermediary is involved, "in whole or in part, [in] the creation or development of [product] information,"[262] and the listings are therefore not "provided by *another* information content provider" so as to immunize the marketplace.[263] (This is exactly the logic of *F.T.C. v. Accusearch, Inc.*[264]) Nonetheless, such efforts to enhance consumer experience—voluntary on the marketplace's part, and optional on the seller's—are different from the standardization and control discussed earlier.

If marketplaces are to be found liable on the basis of their efforts to enhance offerings on their services, the analysis would rest mainly on the logic of fault. Essentially, the marketplace's involvement in the offering may also create complicity, making liability appropriate. However, efficiency ideas also support imposing liability in these circumstances. For one, marketplaces that become entangled with their offerings may have greater ability to monitor and control those offerings. For example, it is tenuous for Airbnb to argue that it has sufficient resources to identify and train photographers in each of dozens of cities, but insufficient resources to learn the zoning and tax requirements in those same cities. The more the marketplace intertwines itself with individual offerings, the better positioned the marketplace for monitoring and oversight.

c. Representations

Online marketplaces sometimes make independent representations about the quality of a specific listing or about their general efforts across all listings.[265] Such representations

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260 Nidhi Subbaraman, *Airbnb's Small Army Of Photographers Are Making You (And Them) Look Good*, FAST CO. (Oct. 17, 2011), https://www.fastcompany.com/1786980/airbnbs-small-army-photographers-are-making-you-and-them-look-good. Zee and Lyna, *No More Free Professional Photography By Airbnb*, AIRBNB COMMUNITY (June 26, 2017), https://community.withairbnb.com/t5/Hosting/No-more-free-Professional-Photography-by-Airbnb/td-p/434295. Airbnb continues to provide hosts with professional photographers, but the service is no longer free. *Does Airbnb Provide Professional Photography Services*, AIRBNB, https://www.airbnb.com/help/article/297/does-airbnb-provide-professional-photography-services (last visited Jan. 1, 2018).

261 Andrew J. Hawkins, *Lyft Is Replacing The Pink Mustache With a Psychedelic Dash Display That Knows Your Name*, THE VERGE (Nov. 15, 2016), https://www.theverge.com/2016/11/15/13624152/lyft-amp-led-display-replace-pink-mustache-logo.

262 47 U.S.C.A. §230(f)(3) (West 1998).

263 §230(c)(1) (emphasis added).

264 570 F.3d 1187 (10th Cir. 2009); *see also infra* section IV.B.

265 *See, e.g.,* Complaint, People v. Uber Techs., Inc., No. CGC-14-543120, 2016 WL 1532347 (Cal. Super. Aug. 18, 2015) (discussing Uber's "Safest Rides on the Road" Claim, which describes specific methods of

tend to induce interest from marginal customers, to the advantage of both sellers and the marketplace. When customers buy in reliance on such representations, imposing liability may be appropriate.

Insofar as the marketplace enhances the attractiveness of offerings in a way that can be disentangled from the offering itself, it is the publisher and speaker only of information it has itself provided.[266] The enhancement is, of course, a consequence of the marketplace's publication of certain third-party content. But liability premised on the enhancement need not require treating the marketplace "as the publisher or speaker of any information provided by another information content provider."[267] Assignment of liability can stem from either an efficiency or a fault rationale, since it results from the marketplace's relationship to its own content, rather than its relationship to a third party's content.

d. Market development

Beyond merely presenting listings or making connections between buyers and sellers, marketplaces can develop the markets themselves. Consider the many steps Airbnb took to encourage short-term rentals in private residences. Airbnb litigated and lobbied to build its, its hosts, and its peers' right to operate in certain markets. It led public relations campaigns to normalize and defend its business model, and to make the short-term rental market more attractive for both hosts and guests.[268] It offered signup bonuses to hosts[269] and guests.[270] How many transactions would have taken place in the short-term rentals Airbnb envisioned, had it not been for these efforts? Having all but created the market, the company's efforts prompt a natural instinct that it should bear greater responsibility for resulting problems.

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background checks, screening, and associated processes). *See also Keeping You Safe on eBay*, EBAY, http://pages.ebay.com/help/account/safety.html (last visited Jan. 1, 2018) (describing specific methods to protect users and create a safe marketplace),

266 For more discussion of intermediaries entangling themselves with material from independent users, see Note, *Badging: Section 230 Immunity in a Web 2.0 World*, 123 HARV. L. REV. 981, 992–95 (2010). For discussion of the legal status of rating systems as representations, see *id.* at 995–97.

267 42 U.S.C. § 230(c)(1) (2012). *Cf.* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1107 (9th Cir. 2009) ("Contract liability here would come not from Yahoo's publishing conduct, but from Yahoo's manifest intention to be legally obligated to do something, which happens to be removal of material from publication.") The alternative would have at least one unusual consequence: the FTC's Endorsement Guides would be hamstrung in certain contexts. The Guides call for "disclosure of connection[s] between an endorser and the marketer that consumers would not expect and [tha]t would affect how consumers evaluate the endorsement . . . ." FTC, THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (2017), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking. For example, the FTC expects reviewers who receive free products with the "expectation that [they]'ll promote or discuss" the product in their blog to disclose the gift. *See id.* Imagine that the Amazon gifts a reviewer an Amazon-published ebook and that the reviewer does not disclose the gift in her review. The ebook is "information provided by another information content provider." If the fact that the reviewer was responding to information provided by another information content provider immunized the reviewer under § 230 the FTC guidelines would be a dead letter.

268 Robert Safian, *What Airbnb Has Discovered About Building a Lasting Brand*, FAST COMPANY (Apr. 18, 2017), https://www.fastcompany.com/40407506/what-Airbnb-has-discovered-about-building-a-lasting-brand.

269 *Earn a $200 Cash Bonus by Hosting on Airbnb,* AIRBNB, https://blog.atairbnb.com/withkendra/ (last visited Jan. 1, 2018).

270 *Airbnb Increased $40 Sign-UP Bonus!*, THRIFTY TRAVELER (Nov. 2, 2017), https://thriftytraveler.com/Airbnb/.

On this line of reasoning, a marketplace is more liable for a market that it created—a market that plausibly wouldn't have existed but for its distinctive efforts—than for transactions that would surely have occurred with or without the support of a given marketplace operator. In contrast to Airbnb's efforts to bring about short-term rentals in private residences, compare Craigslist's provision of a new way for vacation listings to find customers. Certainly vacation home owners had found tenants before Craigslist, and would do so without Craigslist. Whatever goes wrong in that market, it's much less clear that Craigslist caused the problem or materially increased it.

One might object that liability rooted in market development presents an undue impediment to first movers: If market developers face additional liability, then later market entrants could free-ride on leaders' efforts. That said, theory and experience reveal the advantages of being a successful first-mover in businesses with network effects. So there is little suggestion that such free-riding would discourage meritorious market development activities. Moreover, if a first entrant faced substantial liability for its misdeeds, on a market development theory, we suspect the applicable regulators, enforcement agencies, and other legal institutions would ultimately become better-positioned to pursue subsequent similar offenders, blunting any supposed advantage from having done less to develop the market.

5. Localism

Political processes and scholars alike often debate which level of government—federal, state, or local—is appropriate to manage a particular area of policy. These discussions often explore efficiency concerns.[271] For example, consistency across jurisdictional lines can facilitate centralized compliance by companies. Meanwhile, websites by default enjoy international reach, so a local regulation could catch sites unawares and stymie online activity, good and bad. These principles support broad regulatory scope, for example at the national level but not at the local level.[272] On this view, §230 enacts a policy judgment that efficiency interests are poorly served by websites having to police where they are being accessed.

But many communities prefer to set local rules to meet idiosyncratic local preferences and circumstances. Similar concerns about local versus national regulations arise in

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[271] See generally, e.g., Zachary D. Liscow, The Efficiency of Equity in Local Government Finance, 92 N.Y.U. L. REV. 1828 (2017); Camilla A. Hrdy, State Patents as a Solution to Underinvestment in Innovation, 6222 KAN. L. REV. 487 (2013); Ashira Pelman Ostrow, Land Law Federalism, 61 EMORY L.J. 1397 (2012); Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 HARV. L. REV. 553 (2001); Paul Heald, Federal Intellectual Property Law and the Economics of Preemption, 76 IOWA L. REV. 959 (1991); Herbert Hovenkamp, Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem, 97 YALE L.J. 1017 (1987); Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J. L. & ECON. 23 (1983). The argument for localism can be rooted in various other rationales. See, e.g., David J. Barron, A Localist Critique of the New Federalism, 51 DUKE L.J. 377–78 (2001).

[272] *Compare, e.g.*, Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 823 (Cal. 2005) (finding local regulation of financial services preempted in part because "[c]ommercial reality today would confound any effective regulation of mortgage lending based on potentially hundreds of competing and inconsistent measures at the local level") *with id.* (George, C.J., dissenting) (discussing predatory lending as a "*community development*" issue). *See also* John T. Scholz & Feng Heng Wei, *Regulatory Enforcement in a Federalist System*, AM. POL. SCI. REV. 1249 (1986).

discussions of the proper regulator for communications technologies including the Internet itself

Moreover, many online marketplaces are not mere websites. Their services reach into diverse communities in tangible ways. eBay sellers ship goods; Airbnb hosts put people up in their residences; Craigslist users transact locally in myriad forms.[273] This physicality gives online marketplaces a certain concreteness compared to websites which only distribute information.

It therefore may be particularly reasonable that state or local regulation target marketplaces when they distinctively facilitate transactions that are traditional targets of state and local, rather than national, regulation. Transactions related to land use,[274] taxis,[275] guns,[276] alcohol,[277] and cannabis[278] are all regulated in dramatically different ways across jurisdictions.[279] Businesses that facilitate any of the above should not be surprised when they have to navigate more of a jurisdictional thicket than, say, telecommunications companies. There is no particular reason that an online business in these or similar markets should not have to engage with different rules in different jurisdictions, just as physical businesses in these markets have always had to do.

To some extent, this is a special case of the generality and specificity discussed in Section V.C.1. It seems both intuitive and fair to require attention to state and local rules when an online marketplace targets specific markets that have long been managed at the state or local level.

Notably, online marketplaces may end up facing somewhat different obligations than brick-and-mortar stores. For one thing, the marketplaces facilitate transactions, while the stores are sellers in their own right. Furthermore, brick-and-mortar establishments choose where to operate, getting advance opportunity to review local laws. In contrast, online marketplaces often by default operate everywhere, and it is more plausible that an online

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273 For a more expansive discussion of this point, and of regulation of the sharing economy as a local problem, see generally Davidson & Infranca, *supra* note 210,

274 *See, e.g.*, Rapanos v. United States, 547 U.S. 715, 738 (2006) ("Regulation of land use . . . is a quintessential state and local power."), and cases cited; Ostrow, *supra* note 271, at 1404 ("[T]he dominant descriptive and normative account of land-use law is premised upon local control")

275 *See* Davidson & Infranca, *supra* note 210 at 217 (including "taxi medallion requirements" in a list of "distinctly local legal issues").

276 *See, e.g.,* Guardian US Interactive Team, *Gun Laws In The US, State By State—Interactive*, THE GUARDIAN (Jan. 16, 2013), https://www.theguardian.com/world/interactive/2013/jan/15/gun-laws-united-states; Dustin Weeden, *Guns on Campus: Overview*, NAT'L CONF. OF STATE LEGISLATURES (May 5, 2017), http://www.ncsl.org/research/education/guns-on-campus-overview.aspx (reviewing laws on access to guns on campus by state).

277 *See generally* NAT'L ALCOHOLIC BEVERAGE CONTROL ASS'N, WET AND DRY COUNTIES: CONTROL AND LICENSE STATES (2014), http://www.nabca.org/assets/Docs/Research/December%202014%20WetDry%20Counties.pdf.

278 See, e.g., Bob Salsberg, 100 Massachusetts Towns Have Voted for Weed Bans, Moratoriums, or Zoning Restrictions, ASSOCIATED PRESS (Sept. 19, 2017).

279 Note that all of the above may be regulated at either the state level, the local level, or both. *Cf.* Town of Telluride v. Lot 34 Venture Co., 3. P.3d 30, 32 (Colo. 2000) (en banc) (noting, in case discussing whether state housing law preempted local rent control law, that "[t]he issue of rent control implicates both state and local interests"). Our point is not specific to regulations enacted by state or local government, and we express no preference between the two.

marketplace could truly be unfamiliar with an idiosyncratic local law. The more unusual the law and the further from the marketplace's core operations, the stronger the argument for leeway for the online marketplace, including generous opportunity to cure violations as well as light sanctions.

VI. A WAY FORWARD

In this final section, we turn to recommendations for courts, Congress, and cities and states as they approach liability of online marketplaces.

A. What courts should do

Our starting point is that courts should be skeptical of §230 as a complete immunity. For one, they should take seriously every word of §230, including every requirement, restriction, and contingency. In particular, they should admit that prior courts have sometimes overlooked such gaps, and be prepared to impose the requirements fairly written in the statute. Notwithstanding *stare decisis*, courts should decline to follow cases that were manifestly ungrounded in the statute.[280] Our analysis in Part III offers a roadmap of how courts can find their way to answers closer to both the text of the statute and sound policy as we see it.

B. What Congress should do

Congress should begin by recognizing that §230 has been misinterpreted—far beyond Congress's actual intent as of 1996, beyond the plain language of the statute, and most of all beyond wise public policy. With this recognition, the natural response is to narrow §230 through appropriate statutory revisions.

Congress could deny §230 protections when an intermediary is on actual notice of a specific problem or pattern of problems, particularly when such notice come from a qualified public official (such as an appropriate regulator) or from litigation.

Congress could withhold §230 protections when an intermediary directly profits from an offending listing, for example by charging a transaction fee for such a listing.

Congress could require intermediaries to provide some level of diligence in screening material. A natural objection is that the proper level of diligence varies. Yet a flexible standard could nonetheless prove useful. For example, a "reasonable care" requirement would ask intermediaries to calibrate their effort to their own resources, the nature of the material, and the popularity of a given submission.

Congress could limit §230 protections to intermediaries that are truly and substantially facilitating free expansion. Where an intermediary is solely facilitating commerce, such as proposing commercial transactions between buyers and sellers, the broad §230 immunities could be replaced with additional obligations of the sort described above. Similarly, Congress should clarify that §230 does not reach transactions of the sort that have traditionally been regulated locally.

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[280] Doe v. Friendfinder Network, Inc., 540 F. Supp. 2d 288, 292 (D.N.H 2008) (providing a website with §230 immunity for using a plaintiff's image and information on an ad teaser despite the website's assurances to the plaintiff that it would be removed); Zango, Inc. v. Kaspersky Lab, Inc., 568 F.3d 1169 (9th Cir. 2009) (finding that a provider of an ICS only needs to provide access to a computer server and not the Internet itself).

These narrowings, individually or in some combination, would rein in judicial broadenings contrary to Congressional intent.

Any efforts to narrow §230 will of course prompt opposition from the firms that benefit from the current broad immunity. In this respect, much can be learned from Congress's 2017 efforts to prevent online sex trafficking. Seeing intermediaries invoking §230 to defend their listings of prostitutes who are victims of sex trafficking, Congress in August 2017 introduced legislation which sought to allow claims under state and federal criminal and civil laws, relating to certain sex trafficking, and notably removing §230 protections from certain intermediaries that knowingly facilitate such trafficking.[281] As would be expected given §230's popularity among intermediaries and their defenders,[282] even this small narrowing of §230 attracted widespread criticism. CDA proponent Eric Goldman said this legislation would "ruin" §230,[283] and tech giants Google and Facebook lobbied against it, as did the Internet Association representing them along with Amazon, Microsoft, Twitter, and others.[284] This legislation notably altered only the far edges of §230, as to a business the tech giants do not participate in. Any effort closer to home—altering regulation of mainstream commercial marketplaces—would surely prompt even stronger objection from the companies directly affected.

C. What cities and states should do

State and local regulators cannot directly change §230 (though state Attorneys General have notably sought to reduce §230's immunity[285]), yet they nonetheless can adjust their approach to policy goals in light of §230

A sensible first step is to be mindful of §230 limitations from the outset of a regulatory effort. When seeking to regulate an online market facilitated by an online marketplace, a prudent regulatory scheme should anticipate §230 defenses and try to proceed accordingly. In this regard, the 2016 San Francisco short-term rental ordinance broke new ground, carefully distinguishing between obligations of a marketplace versus its users (hosts).[286]

A nuanced regulatory scheme imposes distinct duties on each party, carefully calibrated to avoid violating §230's prescriptions. Regulatory schemes that bear in mind §230 are also more likely to be appropriately calibrated to the actual capabilities and needs of marketplaces and users, and therefore simply better regulatory schemes. Yet even there, San Francisco in some respects fell short. Faced with litigation, San Francisco reworked the challenged ordinance to eliminate requirements or restrictions on the publication of a rental listing, instead only imposing restrictions on collecting fees for providing booking

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281 Stop Enabling Sex Traffickers Act of 2017 (SESTA), S.1693, 115th Cong; Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA), H.R. 1865, 115th Cong.

282 See e.g. notes 118-127*, supra*.

283 Goldman, *supra* note 118.

284 Iain Thomson, *Silicon Valley Giants Tap Escape On Fight Against Web Sex Trafficking Law*, THE REGISTER (Nov. 6, 2017), https://www.theregister.co.uk/2017/11/06/silicon_valley_sesta_latest/.

285 Elizabeth Heichler, *U.S. states' attorneys general to take aim at Internet 'safe harbor' law*, IDG News Service (June 18, 2013), https://www.pcworld.com/article/2042351/us-states-attorneys-general-to-take-aim-at-internet-safe-harbor-law.html .

286 See note **Error! Bookmark not defined.***, supra*.

services without registration.[287] Moreover, in litigation, San Francisco abandoned the ordinance's vision that rental marketplaces provide information without a subpoena.[288] With the benefit of San Francisco's experience, other state and local regulators should design their requirements similarly, thereby narrowing the grounds for possible §230 opposition.

A second approach attempts to overcome structural weakness of state and local regulators in disputes with large marketplaces. As a threshold matter, marketplaces tend to be both well-funded and profitable, yielding ample resources that often exceed those available to a state or local government. But more than that, questions of intermediary liability and regulatory scope tend to be fundamental to online marketplaces, which are therefore well-positioned to litigate these issues, whereas generalist state and local government attorneys have little reason to be §230 experts. Finally, marketplaces tend to confront the same issues in myriad jurisdictions, giving their attorneys the advantage of experience on the substantive questions at hand, which is correspondingly lacking for state and local government attorneys. In response, state and local governments could wisely collaborate—as district attorneys in Los Angeles and San Francisco did in 2014 litigation against Uber.[289] Yet we see little sign of similar joint litigation, or even common drafting or information-sharing, in other cases state and local proceedings against Uber. The many state and local governments concerned about Airbnb would similarly do well to collaborate.

Third, state and local governments may need to be realistic about institutional capabilities. Here again, San Francisco's experience overseeing short-term rentals is instructive. While San Francisco's ordinance called for a verification system to validate a host's authorization to provide short-term rentals, Airbnb complained that the system was not functional, yet they could face criminal penalties for failing to use it. Finding these concerns legitimate, the Court enjoined enforcement until the system was operational.[290] We are mindful of the difficulties state and local governments face in designing software, all the more with the uncertainty of litigation that might change system requirements. Nonetheless, San Francisco's approach was imperiled by the unavailability of the required software, and the city eventually it had to collaborate with Airbnb to create a registration system.[291] If a regulation requires a government to receive or process information, the government must either be able to do so on the timetable contemplated by the regulation or be aware of its limitations.[292]

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287 *Compare* S.F., Cal., Ordinance 104-16 (June 7, 2016) *with* S.F., Cal., Ordinance 178-16 (August 2, 2016).

288 Airbnb San Francisco settlement agreement, *supra* note 147, pg. 1.

289 People v. Uber Techs., Inc., No. CGC-14-543120, 2016 WL 1532347 (Cal. Super. Mar. 2, 2016).

290 Temporary Restraining Order re Enforcement, Airbnb, Inc. v. City and Cty. of San Francisco, 217 F. Supp. 3d 1066 (N.D. Cal. Nov. 18, 2016) (No. 86).

291 Caroline O'Donovan, *Airbnb Just Settled Its Lawsuit Against San Francisco*, BUZZFEED (May 1, 2017), https://www.buzzfeed.com/carolineodonovan/airbnb-just-settled-its-lawsuit-against-san-francisco; Davey Alba, *Airbnb's San Francisco Deal Puts Storyline Over Bottom Line*, WIRED (May 4, 2017), https://www.wired.com/2017/05/airbnbs-san-francisco-deal-puts-storyline-bottom-line/.

292 *See* Abbey Stemler, The Myth of the Sharing Economy and Its Implications for Regulating Innovation, 197 EMORY L.J. 197, 234-235 (2017).

Finally, state and local governments usually need to be realistic about popular support of marketplaces, and popular opposition to restrictions on marketplaces. For example, when Cambridge, Massachusetts proposed to ban Uber in 2014, myriad residents spoke in opposition.[293] Airbnb mobilizes "citizen petitions" in response to unfavorable regulation, and Uber uses its own app to alert customers to regulatory threats. A skeptic might reject users' responses as the fruits of corporate astroturf, not users' independent evaluation.[294] Yet the popularity of Airbnb, Uber, and other online marketplaces is undeniable. A government seeking to regulate such marketplaces must confront their public support and in some way convince the public that such regulation is prudent. In this regard, Austin's experience regulating TNC services is instructive: In a referendum, citizens supported regulation, by all indications convinced that the proposed requirements (fingerprinting drivers, among other things) were appropriate and that Uber and Lyft's protests were overblown.[295] It appears to be crucial that Austin regulators did not overplay their hand. Had the proposed regulations contemplated a complete ban on TNCs, the referendum would have struggled to achieve a majority.

D. Policy in an era of large and growing marketplaces

The marketplaces bring both modern ecommerce and national vendors to commercial realms that had previously been solely local and offline. The marketplace operators are large and powerful, largely favoring operations without substantial regulation. And while there may be longstanding laws and regulations on the books, marketplace operators have found comfort in §230 which is sometimes taken to protect them from those obligations. This, we suggest, is a mistake. For one, marketplaces may develop a culture of lawbreaking if they know they're exempt from many laws.[296] Indeed, untouchable intermediaries not only facilitate bad behavior but are likely to disproportionately hurt the most vulnerable.[297] Moreover, these questions are too important to be left to tech elites unchecked by public policy or rule of law. Fortunately, §230 does not compel that result and indeed is better understood as envisioning precisely the opposite.

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293 Cambridge License Commission Hearing, In Re: License Commission General Hearing (June 17, 2014), http://www.cambridgema.gov/~/media/Files/licensecommission/meetingminutes/minutes2014/6172014licensing.pdf .

294 *See, e.g.,* Marc Levy, *'Airbnb' Citizens Petition Scorned As a Trick By Corporation To Trip Up City On Regulation*, CAMBRIDGE DAY (Mar. 21, 2017), http://www.cambridgeday.com/2017/03/21/airbnb-citizens-petition-scorned-as-a-trick-by-corporation-to-trip-up-city-on-regulation/ . *See also* Fitz Tepper, *Uber Launches 'De Blasio's Uber' Feature In NYC With 25-Minute Wait Times,* TECHCRUNCH (July 16, 2015), https://techcrunch.com/2015/07/16/uber-launches-de-blasios-uber-feature-in-nyc-with-25-minute-wait-times/ .

295 Richard Parker, Opinion, *How Austin Beat Uber*, N.Y. TIMES (May 12, 2016), https://www.nytimes.com/2016/05/12/opinion/how-austin-beat-uber.html?_r=0

296 Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARVARD BUS. REVIEW ONLINE (June 21, 2017), https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down.

297 *See, e.g.*, Jane Doe No. 1 v. Backpage.com, 817 F.3d 12 (distinctively hurting victims of sex trafficking); or, more mundanely, Hinton v. Amazon, 72 F. Supp. 3d 685, 687 (S.D. Miss. 2014) (distinctively hurting less sophisticated consumers who do not check for or recognize recalled merchandise).